KMK E–Discovery Symposium

Program Materials

Tuesday, September 17, 2013
Hilton Cincinnati Netherland Plaza

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- Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery
- The Enlightened Legal Hold: A New Approach to Legal Preservation Following the Pension Committee Opinion
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- Rules Committee Adopts "Package" of Discovery Amendments

- Rules of Procedure Public Comment Period for Amendments to Federal Rules of Civil Procedure Opens
- Can E-Discovery Violate Due Process? Part 1
- Can E-Discovery Violate Due Process? Part 2
- Key E-Discovery Precedent Case Law: 10 Toolkit Cases to Remember

Additional Resources Available Online

The following resources are available for download from our Symposium Event website:

http://www.kmklaw.com/news-events-220.html

- EEOC v. Original Honeybaked Ham Company of Georgia, Inc.
- Global Aerospace Inc. v. Landow Aviation, L.P.
- In re Seroquel Products Liability Litigation
- Micron Technology, Inc. v. Rambus Inc.
- Monique DaSilva Moore v. Publicis Groupe & MSL Group
- Morgan Stanley & Co. v. Coleman Holdings, Inc.
- Qualcomm Inc. v. Broadcom Corporation
- Shirley Williams v. Sprint/United Management Company
- The Pension Committee of The University of Montreal v. Banc of America Securities
- Zubulake v. Warburg LLC (I)
- Zubulake v. Warburg LLC (IV)
- Zubulake v. Warburg LLC (V)

The Sedona Conference Glossary: E-Discovery & Digital Information Management is available for free at:

https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary

Introduction

KMK E-Discovery Services Growth

- Historical background
  - KMK's E-Discovery Task Force (EDTF)
  - E-Discovery / Litigation Support Group (ED/LSG)
  - Business unit development
  - The KMK approach: Your value added services partner
- Introduction of EDTF & ED/LSG members
  - Bios found in CLE materials and at www.kmklaw.com

KMK E-Discovery Services Overview

- Information governance & risk management consulting
- Litigation readiness & litigation hold policy and procedure implementation
- Case-by-case budgeting & project management principles
- Electronic Discovery Reference Model (EDRM) best practices implementation

KMK E-Discovery Services Overview

- Electronically stored information (ESI) data mapping strategy & implementation
- Managed review services via fully-scalable, secure Review Center
- In-house early case assessment (ECA), electronic data discovery (EDD) processing, and full-scale electronic document productions
- Turnkey third party strategic partnership solutions

Session A – E-Discovery Services

Spotlight: Legal Project Management to Advanced Electronic Review Strategies

Joseph M. (Joe) Callow, Jr.
Partner
Keating Muething & Klekamp PLL

Stephanie M. Maw
E-Discovery / Litigation Support Director
Keating Muething & Klekamp PLL

Danielle M. D'Addesa
Partner
Keating Muething & Klekamp PLL

E-Discovery Project Budgeting & Litigation Management

- E-Discovery is likely the single greatest variable in litigation budget
- E-Discovery costs can be a contentious issue in corporate / IT / legal budgets
- E-Discovery field is constantly evolving
  - Best practices are changing
  - Counsels' and courts' knowledge improving
  - Defensible practices vary, proportional to case

E-Discovery Project Budgeting & Litigation Management

- Understanding your own litigation profile
  - Where is your data?
  - Is it accessible?
  - Do you need it, and what do you need it for?
  - How do your policies match your practices?
  - Are the tools in your toolkit scalable to the challenge?
  - Who needs to be in the inner circle?

E-Discovery Project Budgeting & Litigation Management

- Create a solution that can be used for more than a single matter
  - Repeatability
  - Defensibility
  - Consistency
- Key budget components
  - Price
  - Process
  - Technology

E-Discovery Project Budgeting & Litigation Management

- Budgeting principles in action
  - Define project scope early
  - In house vs. third party
  - Can’t review until you collect
  - Understanding the variable in the budgeting process
  - What is the process
  - Cut and control costs with a scalpel, not a sword
  - Evaluate and adjust as project proceeds

E-Discovery Project Budgeting & Litigation Management

- Cooperation
- Contingency planning
- Strategic planning
- Prepare to fight, defend what is reasonable
- Ask questions

E-Discovery Project Budgeting & Litigation Management

The KMK ED/LSG Difference: Value

- Developed with clients' needs at forefront
- Proven approach → tangible results → client cost savings → business value to client
  - Pre-litigation (information governance)
  - Multiple case coordination
  - Litigation counsel
  - E-Discovery lead counsel
  - E-Discovery co-counsel

Strategic & Defensible Litigation Holds: Best Practices Implementation

- *Current* preservation standard may be overly broad, but rules & case law are still our friends
  - "New" 2006 Preservation Rules: Fed. R. Civ. P. 16(b), 26(f), 37(e) & 37(f)
  - Identification of Triggering Events Under Gold Standard *Zubulake IV & V*
  - Preservation requirements are broader than Collection requirements and broader still than ultimate Production requirements: Not all that is preserved will be produced!

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Strategic & Defensible Litigation Holds: Best Practices Implementation

Policy objective: Transforming policy into process… and process into procedure

Litigation hold policies & procedures are generally deemed defensible and compliant if:

1. Good faith effort to conform to the rules
2. Existing & future policies are "reasonably comprehensive"
3. Rely on reasonableness and proportionality standards and thresholds (*See also Rules 26(b)(2)(B) and 26(b)(2)(C)*)

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Strategic & Defensible Litigation Holds: Best Practices Implementation

Policy objective: Transforming policy into process… and process into procedure

4. Identify, implement and enforce “consistent and repeatable processes” with litigation holds
5. Consistently documented in a transparent audit trail manner

Strategic & Defensible Litigation Holds: Best Practices Implementation

Tips from the trenches: Procedures that work

1. Engage critical stakeholders consistently from the onset and obtain genuine buy-in
2. Not all cases’ preservation requirements are the same; therefore, not all preservation hold procedures are the same
   a. Consider employing a soft (low risk) vs. medium (moderate risk) vs. hard (high risk) Preservation/Hold Policy & Procedure Model

Strategic & Defensible Litigation Holds: Best Practices Implementation

Tips from the trenches: Procedures that work

3. Develop clear reporting & compliance accountability framework
4. Implement *written* hold notices to custodians accompanied by required *written* acknowledgements, followed by *written* hold reminders to custodians

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Strategic & Defensible Litigation Holds: Best Practices Implementation

Tips from the trenches: Procedures that work

5. Policies & procedures must be practically implemented from *both a legal & technical standpoint*
   a. Do you have internal systems that can sufficiently preserve (and subsequently export for collection purposes) your ESI? What can third party E-Discovery outside counsel & E-Discovery technology provider partners offer?

Strategic & Defensible Litigation Holds: Best Practices Implementation

Tips from the trenches: Procedures that work

b. Who among IT, IS, Compliance, Counsel groups should be responsible for management and implementation of the hold?

c. Educate your custodians: Draft, test & implement ESI checklist to accompany new or revised policies & procedures

Strategic & Defensible Litigation Holds: Best Practices Implementation

- Consider Hybrid Preservation Technical Implementation Models
- Hybrid, cross-disciplinary E-Discovery group that manages what to keep in-house, what to outsource, and what outside counsel should be doing
- Appropriate re-use of serial litigant and key custodian ESI

Strategic & Defensible Litigation Holds: Best Practices Implementation

- Administration of dedicated preservation/ litigation hold IT/IS infrastructure, including:
  1. Dedicated litigation hold servers (Exchange & Lotus Notes)
  2. Dedicated secure, restricted access litigation file shares
  3. Dedicated virtual storage arrays & select use of cloud storage ESI repositories

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Strategic & Defensible Litigation Holds: Best Practices Implementation

4. Appropriate use of sequential (consistent and repeatable) static image snapshots of unstructured standard ESI sources
5. Appropriate use of sequential routine batch file log/reports in lieu of ESI exports from structured proprietary non-standard ESI sources
6. Appropriate use of statistical sampling populations from structured proprietary non-standard ESI sources

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Strategic & Defensible Litigation Holds: Best Practices Implementation

2013 Proposed E-Discovery Rules Amendments

Seek to….

- Narrow the scope of discovery, under Rule 26
- Adopt a uniform set of guidelines concerning sanctions when a party fails to preserve discoverable ESI, under Rule 37
- Tighten the framework governing responses to RFPDs, under Rule 34

Legal Project Management Principles & Advanced E-Review Strategies

KMK helps control costliest aspects of E-Discovery

- Manage physical & technical aspects of review process → reducing/eliminating your physical infrastructure costs & HR expenses
- Offer numerous products & fee structures; will advise on pros and cons of each
- Provide turnkey solution—legal counsel, project management & delivery of E-Discovery process
- Fully-scalable Review Center ensures consistent & timely delivery of electronic document review & production projects

Legal Project Management Principles & Advanced E-Review Strategies

- Project management principles & procedures
  - Customized document review templates
  - Customized document review protocols & training and project decision logs
  - Review and reviewer feedback
  - Early quality control/quality assurance sampling
  - Strategic ongoing project review supervision
  - Strategic quality control implementation

Legal Project Management Principles & Advanced E-Review Strategies

- Case management: Ongoing synthesis of dynamically changing case evolution, legal strategies, project management & translation of same into electronic review database technology employed to deliver real-time updates in comprehensive, efficient & cost-effective manner
- Project management best practices
  - Project milestones
  - Budget reporting & controls

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Audience Q&A for Session A

Please use available microphones

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Session B – E-Discovery Technology Update

KMK Featured Partner Spotlight: Ipro Tech, Inc.

Clarence Williams, III
E-Discovery / Litigation Support Technology Manager
Keating Muething & Klekamp PLL

Kim Taylor
President & Chief Operating Officer
Ipro Tech, Inc.

Building & Fortifying Your E-Discovery Framework to Withstand the Elements

KMK ED/LSG offers:

- Seasoned litigators & paralegals with substantive E-Discovery knowledge
- IT professionals with national reputations in E-Discovery, document management & litigation support
- Cutting-edge technologies from industry leaders
- Strategic partnerships with national vendors offering aggressively-negotiated fee structures
- Personalized guidance on best uses of KMK ED/LSG turnkey services vs. engaging national strategic partner

Building & Fortifying Your E-Discovery Framework To Withstand the Elements

Choosing your E-Discovery partners

- Get ahead of the E-Discovery learning curve
  - Appoint an E-Discovery guru at your organization; give that person the time & resources to get educated
- Build relationships with E-Discovery partners before you need them
  - Schedule in-person meetings or web demos
  - Understand their approach to E-Discovery process
  - Request pricing information in advance

Building & Fortifying Your E-Discovery Framework To Withstand the Elements

Choosing your E-Discovery partners

- Compare pricing information
- Conduct onsite operations tours with strategic partners
- Avoid “one stop shop” approach
- Check references

Building & Fortifying Your E-Discovery Framework to Withstand the Elements

Choosing your E-Discovery partners

- Make your vendor your *partner*
- Don't let the limitations of others limit you – understand the benefits & limitations of your particular team members
- Have a plan for scenarios that allow you to perform E-Discovery technology work in-house, know when you need to outsource, and when you can use a hybrid method

Dig DEEP

The Four Crucial Factors Determining a Successful Project

- **D**ata
- **E**nvironment
- **E**nd-User
- **P**roduct

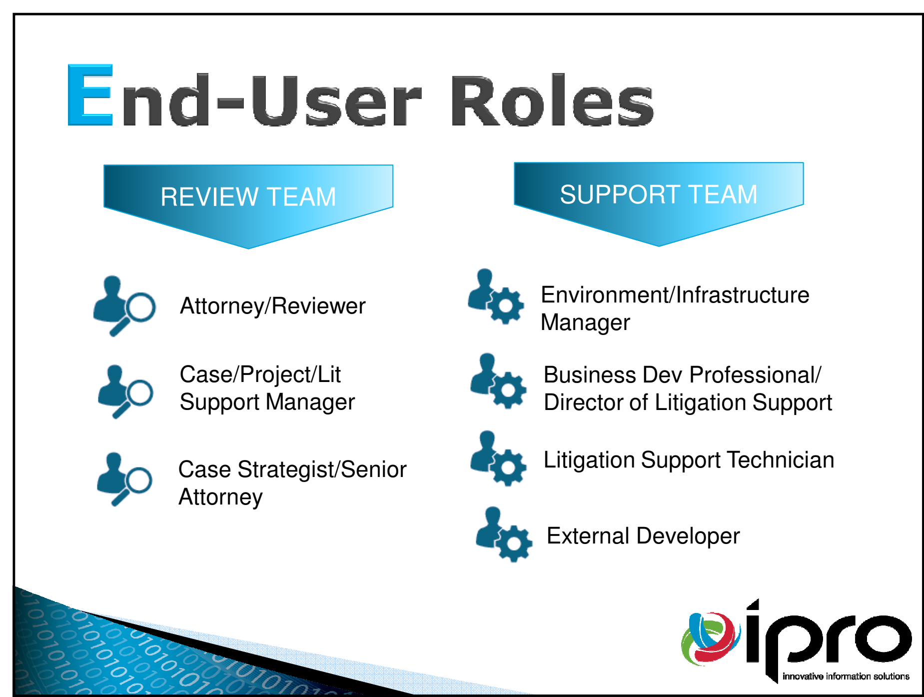
What are the questions you should be asking about all of them?

Data

- Where did it come from?
  - Network, social media, phone, etc.
  - Are there any chain of custody issues?
- How large is the data set?
  - Are we comfortable with this size?
- Why type of data is it?
  - Do we have the tools to process the many different data types?
  - Is there a chance for errors within it?
  - Does the data contain passwords?
  - Forensic needs?

End-User

- Who will be the ultimate end-user of the technology implemented?
- Have they been properly trained and/or certified?
- Is there a workflow in place they can reference?
- What is their primary job role?
- Are they following industry best practices?
- Are their methodology defensible?

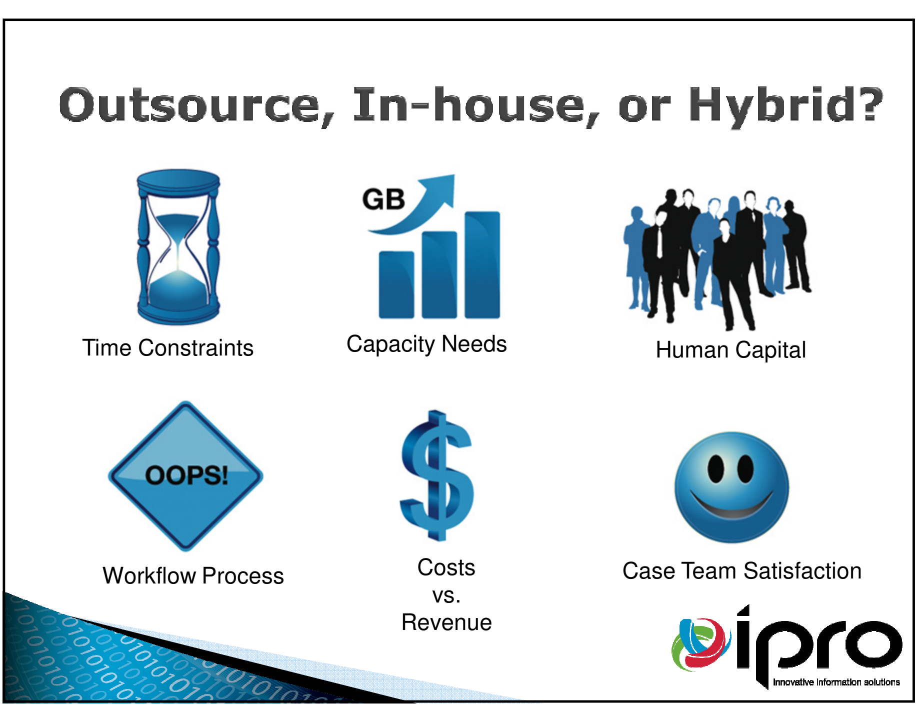


Environment

- How much storage/bandwidth do we need?
  - Should we host offsite at a data center?
  - What is the disaster recover plan?
- Do we have the staff required to maintain the environment?
  - IT, SQL, eDiscovery experts & litigation technology experts
  - Do we have backup personnel?
- Do we have enough capacity & speed
  - How do we manage time requirements for the ebbs and flows?
  - It can be difficult to maintain larger environments

Product

- Does the product contain the features and functionality we need?
- What are our licensing options? Can we easily scale up or down as needed?
- Is the product intuitive or does it require substantial training?
- How well does the product integrate with our current workflow?
- How can our software provider add value?


Outsource, In-house, or Hybrid?
GB
Time Constraints
Capacity Needs
Human Capital
OOPS!
Workflow Process
Costs
vs.
Revenue
Case Team Satisfaction
ipro
Innovative information solutions

Session B – E-Discovery Technology Update

KMK Featured Partner Spotlight: Fusion-io

Richard E. (Rich) Wills
Chief Information Officer
Keating Muething & Klekamp PLL

Dean Steadman
Senior Product Manager
Fusion-io

Data Storage Platforms for E-Discovery: A Solid State Approach

IT challenges of E-Discovery technology

- Understanding the unique nature of the E-Discovery process
- Providing a robust IT platform for differing E-Discovery tools
- Having a realistic view of storage needs, scalability & data structure necessary for E-Discovery technology tools
- Being engaged in the process from ingestion of ESI through production phase

Data Storage Platforms for E-Discovery: A Solid State Approach

Data storage infrastructure is critical to E-Discovery technology platform

- Large volume of data involved
- Data multiplies as it moves through E-Discovery technology tools
- Millions of files and document images involved
- Complex searching
- Simultaneous availability to large groups of people

Data Storage Platforms for E-Discovery: A Solid State Approach

Critical factors

- Capacity: Total storage volume to accommodate ingestion, staging, processing, review & production
- Scalability: Ability to add capacity over time without forklift upgrades
- Performance: Read/write capacity & speed to access, process & search large volumes of data measured in IOPS (input/output operations per second)
- Ability to provide performance to applications that need resources w/o degrading storage environment

Data Storage Platforms for E-Discovery: A Solid State Approach

Legacy storage environment

- 50 TB of storage capacity
- 30 rack units of space consumed
- ~5,000 IOPS total across storage platform

Shortfalls of legacy environment

- Approaching a need for more capacity (projected 1 year growth to near full capacity)
- IOPS deficiency – Estimated need for IOPS growth to 50,000 IOPS

Data Storage Platforms for E-Discovery: A Solid State Approach

Legacy storage options

- Add disk array/shelves to increase capacity
- Add large number of disks to increase IOPS
- Introduce solid state disk drives to take advantage of much faster performance
- Upgrade filer heads (processor & controller) to leverage increased performance & scalability

Data Storage Platforms for E-Discovery: A Solid State Approach

Key solution criteria

- 50,000 IOPS minimum
- 100 TB capacity with scalability to grow
- Ability to prioritize mission critical workloads over less critical workloads
- Shrink storage footprint if possible but not grow it exponentially
- Ease of storage management

Data Storage Platforms for E-Discovery: A Solid State Approach

Solutions considered

- Worked with all major brand traditional storage vendors to craft viable solutions
- Considered emerging "All Solid State" storage vendors
- Explored storage clustering technology to leverage a distributed storage environment
- Searched for emerging hybrid storage providers

Data Storage Platforms for E-Discovery: A Solid State Approach

Solution options: Traditional storage

- Adding disk to achieve IOPS requirement resulted in vast overbuying of storage capacity & large growth in footprint
- Introduction of solid state drives to achieve IOPS was cost prohibitive
- Upgrade of more powerful filer heads complicated & expensive

Data Storage Platforms for E-Discovery: A Solid State Approach

Solution options: Emerging "All Solid State" storage

- Capacity not as scalable as traditional storage & high $/GB
- Provided the needed IOPS but at moderate $/IOPS
- Capacity limitations without re-architecting environment or over-purchasing capacity & IOPS

Data Storage Platforms for E-Discovery: A Solid State Approach

Solution options: Storage clustering technology

- Highly scalable
- Added to storage footprint
- Added additional complexity of administration
- Cost prohibitive to meet criteria

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Data Storage Platforms for E-Discovery: A Solid State Approach

Solution options: Hybrid storage solution

- New to the market
- Emerging technology using proven solid state PCIe flash memory
- Offered lowest $/GB capacity & lowest $/IOPS
- Engineered from the ground up to allow prioritization of mission critical applications
- Reduction of storage footprint
- Simplified storage administration

Data Storage Platforms for E-Discovery: A Solid State Approach

Solution choice: Fusion-io ioControl Storage Array

- Hybrid storage leveraging high capacity Solid State PCIe technology (2.4 TB)
- Guaranteed IOPS floor of 150,000 IOPS
- Ability to guarantee sustained IOPS to mission critical apps w/o degrading overall storage performance
- Decreased storage footprint from 30U to 9U
- Automatic storage tiering
- Seamless scalability of capacity
- Ease of administration

FUSiON-iO
Hybrid Storage for eDiscovery
More Lawsuits Faster!
Dean Steadman, ioControl Product Manager
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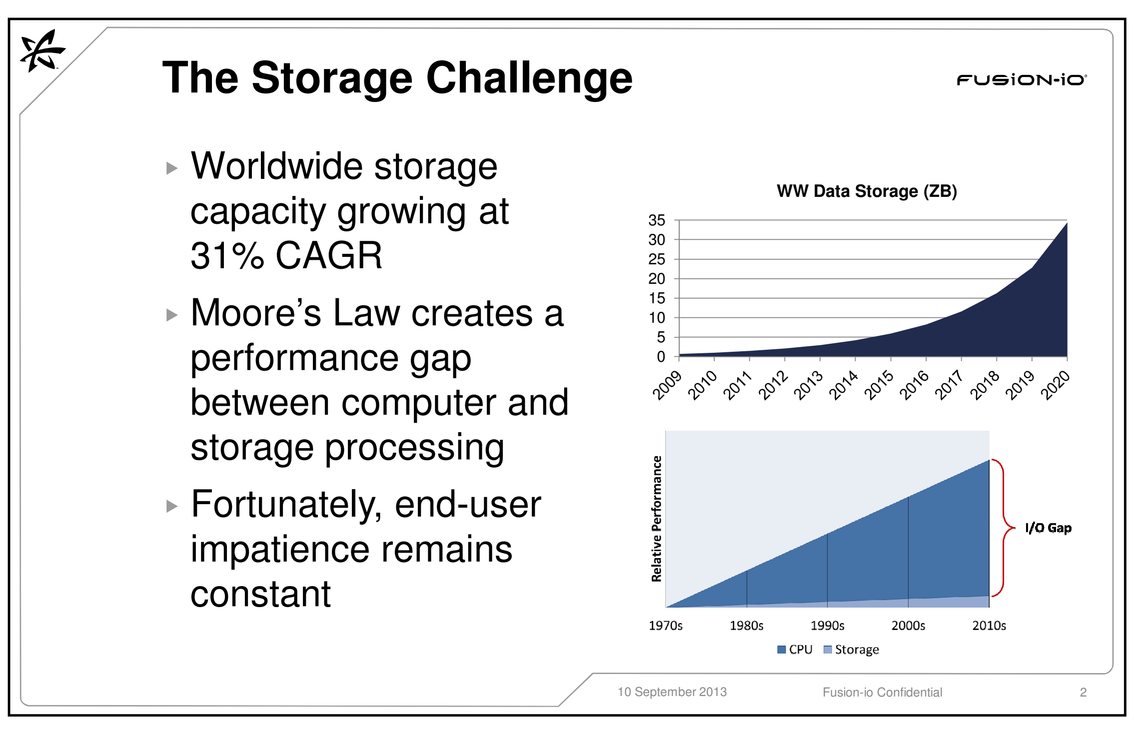
The Storage Challenge
FUSiON-iO
Worldwide storage capacity growing at 31% CAGR
Moore's Law creates a performance gap between computer and storage processing
Fortunately, end-user impatience remains constant
WW Data Storage (ZB)
35
30
25
20
15
10
5
0
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
Relative Performance
I/O Gap
1970s
1980s
1990s
2000s
2010s
CPU
Storage
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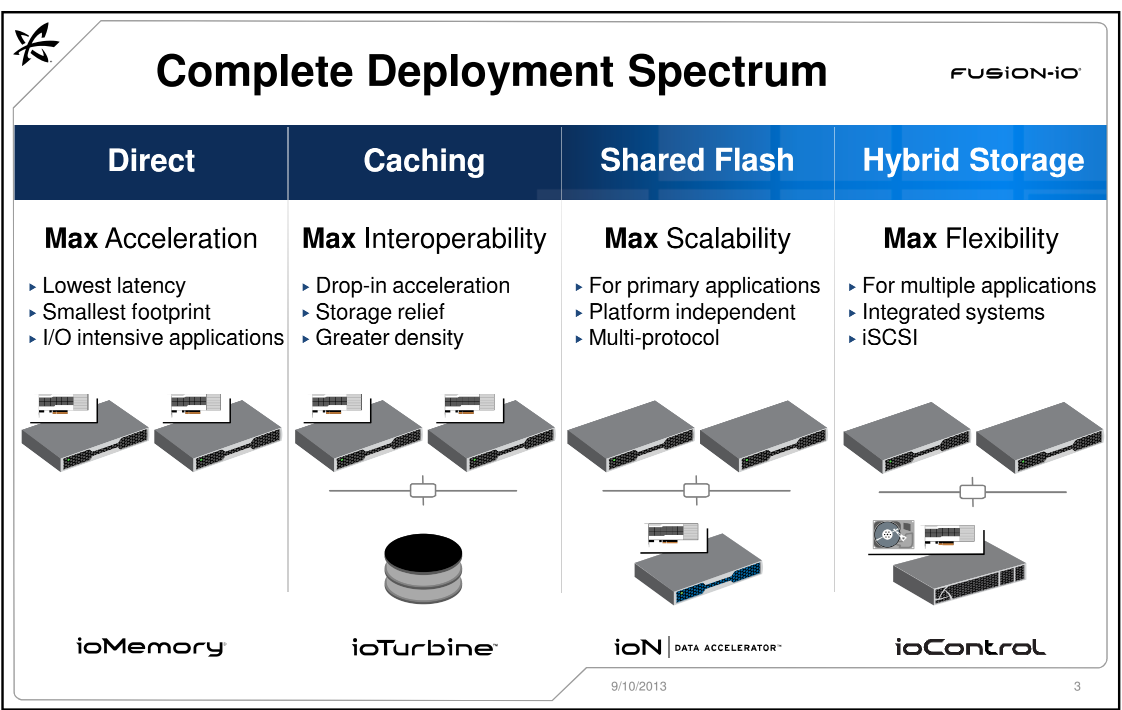
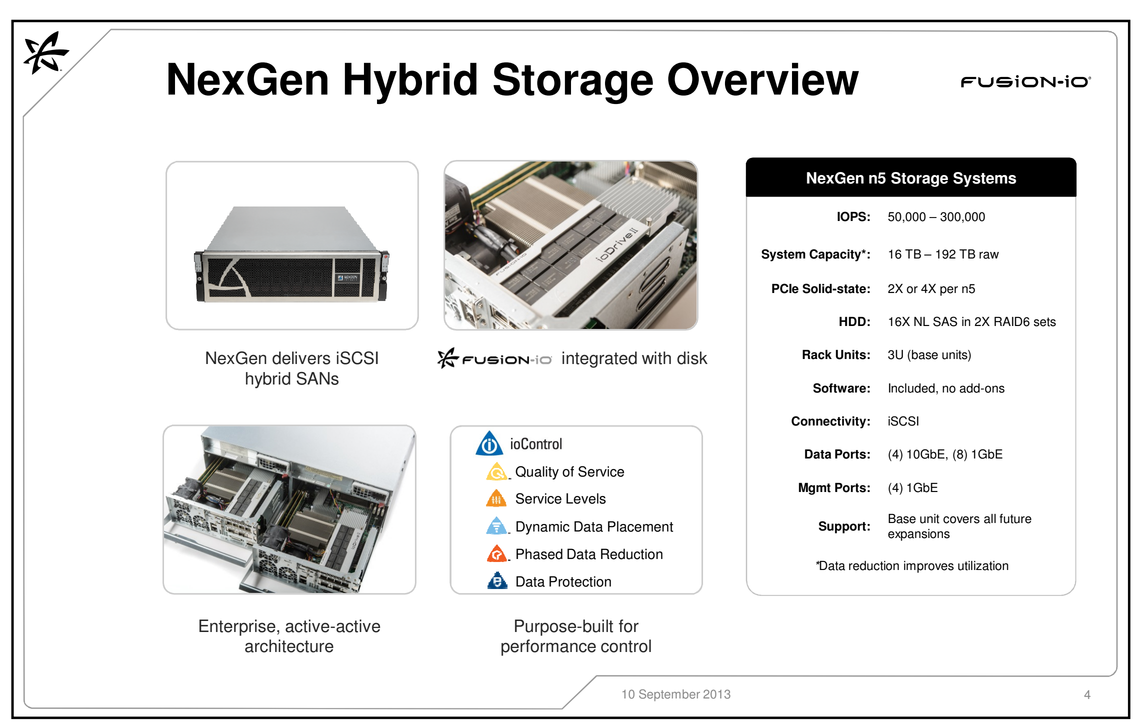
Fusion-io Confidential
2


Complete Deployment Spectrum
FUSION-iO
Direct
Caching
Shared Flash
Hybrid Storage
Max Acceleration
Lowest latency
Smallest footprint
I/O intensive applications
Max Interoperability
Drop-in acceleration
Storage relief
Greater density
Max Scalability
For primary applications
Platform independent
Multi-protocol
Max Flexibility
For multiple applications
Integrated systems
iSCSI
ioMemory
ioTurbine
ioN DATA ACCELERATOR
ioControl
9/10/2013
3


NexGen Hybrid Storage Overview
FUSION-iO
NexGen delivers iSCSI hybrid SANs
FUSION-iO integrated with disk
Enterprise, active-active architecture
ioControl
Quality of Service
Service Levels
Dynamic Data Placement
Phased Data Reduction
Data Protection
Purpose-built for performance control
NexGen n5 Storage Systems
IOPS: 50,000 – 300,000
System Capacity*: 16 TB – 192 TB raw
PCIe Solid-state: 2X or 4X per n5
HDD: 16X NL SAS in 2X RAID6 sets
Rack Units: 3U (base units)
Software: Included, no add-ons
Connectivity: iSCSI
Data Ports: (4) 10GbE, (8) 1GbE
Mgmt Ports: (4) 1GbE
Support: Base unit covers all future expansions
*Data reduction improves utilization
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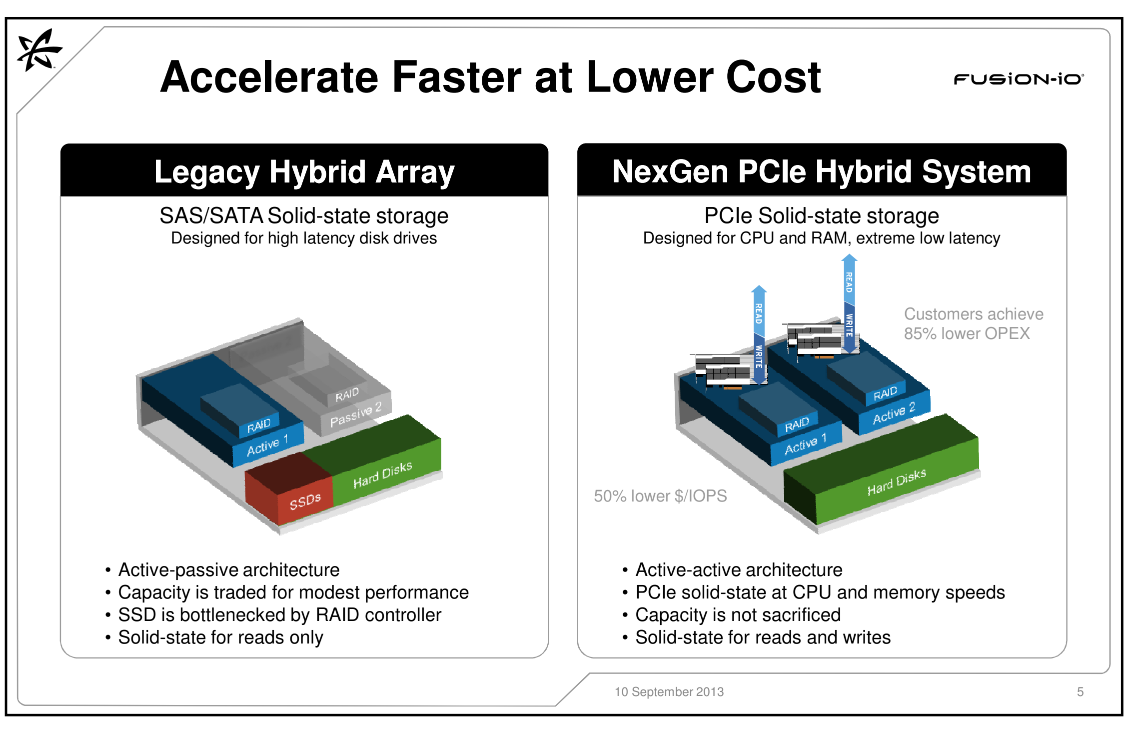
4


Accelerate Faster at Lower Cost
FUSiON-iO
Legacy Hybrid Array
SAS/SATA Solid-state storage
Designed for high latency disk drives
RAID
Passive 2
RAID
Active 1
SSDs
Hard Disks
• Active-passive architecture
• Capacity is traded for modest performance
• SSD is bottlenecked by RAID controller
• Solid-state for reads only
NexGen PCIe Hybrid System
PCIe Solid-state storage
Designed for CPU and RAM, extreme low latency
READ
WRITE
Customers achieve
85% lower OPEX
RAID
Active 2
RAID
Active 1
Hard Disks
50% lower $/IOPS
• Active-active architecture
• PCIe solid-state at CPU and memory speeds
• Capacity is not sacrificed
• Solid-state for reads and writes
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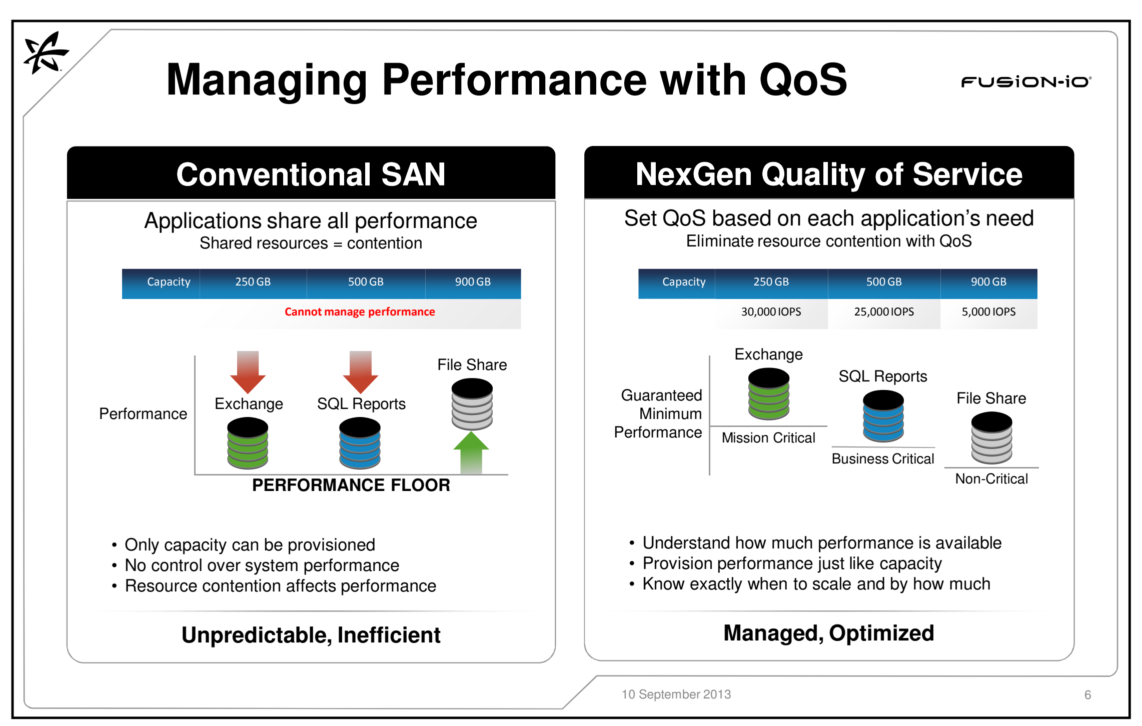
Managing Performance with QoS
FUSiON-iO
Conventional SAN
Applications share all performance
Shared resources = contention
Capacity
250 GB
500 GB
900 GB
Cannot manage performance
Performance
Exchange
SQL Reports
File Share
PERFORMANCE FLOOR
• Only capacity can be provisioned
• No control over system performance
• Resource contention affects performance
Unpredictable, Inefficient
NexGen Quality of Service
Set QoS based on each application's need
Eliminate resource contention with QoS
Capacity
250 GB
500 GB
900 GB
30,000 IOPS
25,000 IOPS
5,000 IOPS
Guaranteed
Minimum
Performance
Exchange
Mission Critical
SQL Reports
Business Critical
File Share
Non-Critical
• Understand how much performance is available
• Provision performance just like capacity
• Know exactly when to scale and by how much
Managed, Optimized
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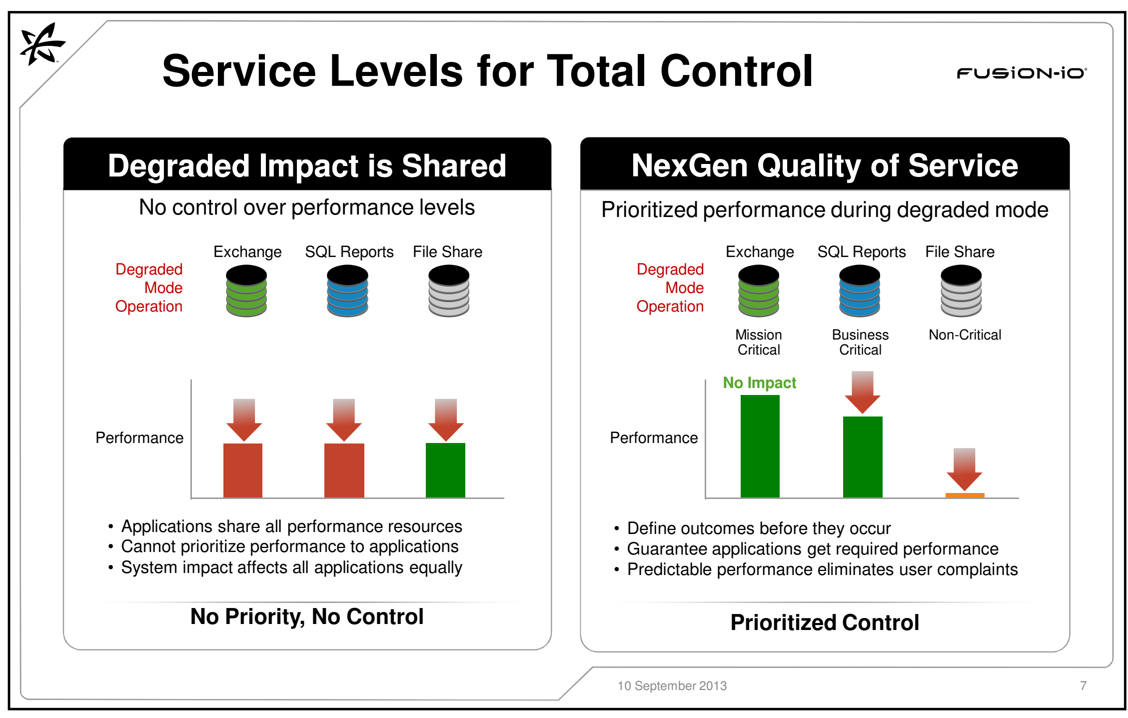
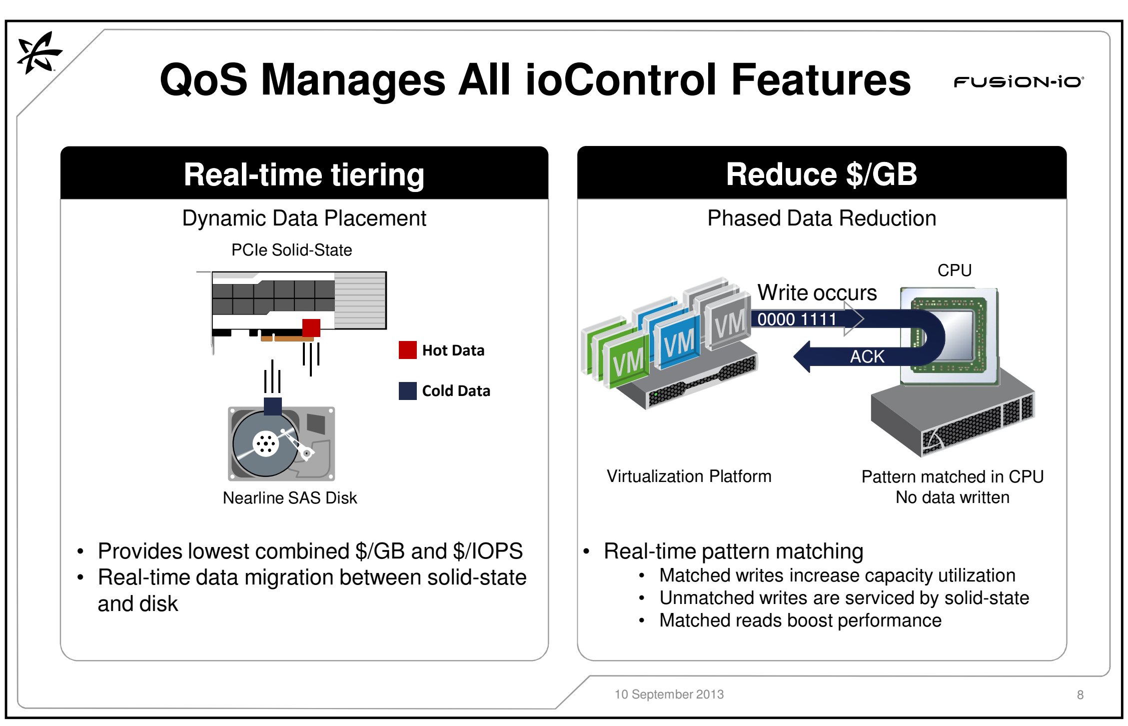
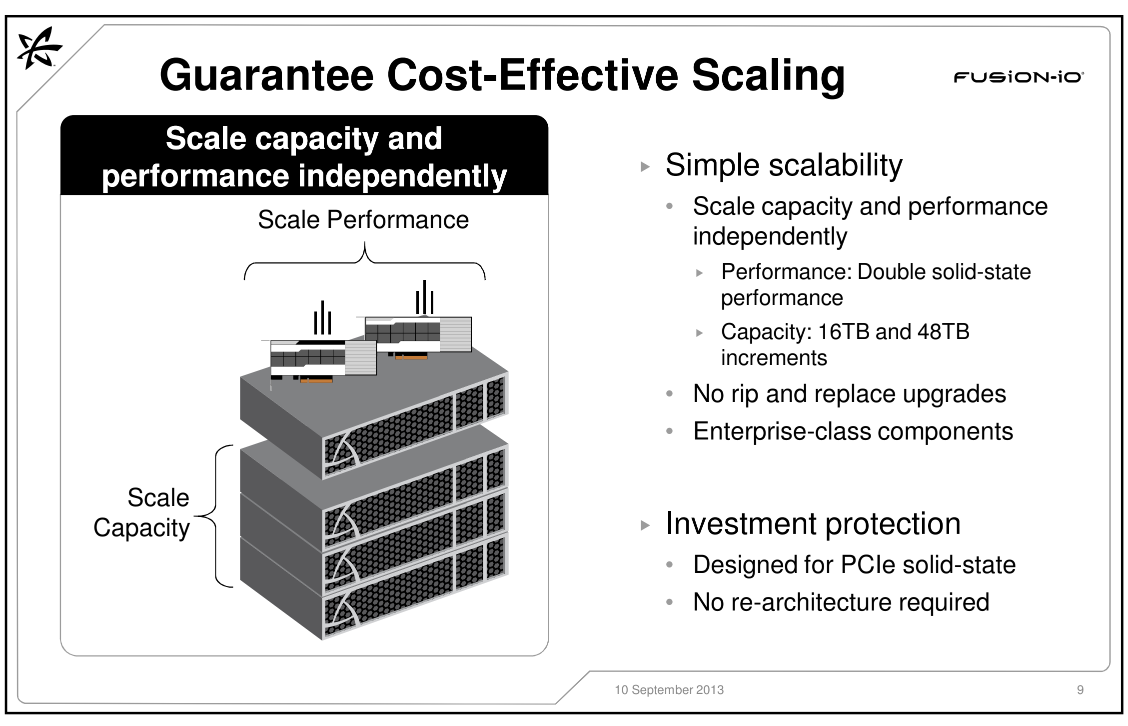
6


Service Levels for Total Control
FUSION-iO
Degraded Impact is Shared
No control over performance levels
Degraded Mode Operation
Exchange
SQL Reports
File Share
Performance
• Applications share all performance resources
• Cannot prioritize performance to applications
• System impact affects all applications equally
No Priority, No Control
NexGen Quality of Service
Prioritized performance during degraded mode
Degraded Mode Operation
Exchange
SQL Reports
File Share
Mission Critical
Business Critical
Non-Critical
No Impact
Performance
• Define outcomes before they occur
• Guarantee applications get required performance
• Predictable performance eliminates user complaints
Prioritized Control
10 September 2013
7


QoS Manages All ioControl Features
FUSION-iO
Real-time tiering
Dynamic Data Placement
PCIe Solid-State
Hot Data
Cold Data
Nearline SAS Disk
• Provides lowest combined $/GB and $/IOPS
• Real-time data migration between solid-state and disk
Reduce $/GB
Phased Data Reduction
CPU
Write occurs
0000 1111
ACK
VM
Virtualization Platform
Pattern matched in CPU
No data written
• Real-time pattern matching
• Matched writes increase capacity utilization
• Unmatched writes are serviced by solid-state
• Matched reads boost performance
10 September 2013
8


Guarantee Cost-Effective Scaling
FUSION-iO
Scale capacity and performance independently
Scale Performance
Scale Capacity
Simple scalability
Scale capacity and performance independently
Performance: Double solid-state performance
Capacity: 16TB and 48TB increments
No rip and replace upgrades
Enterprise-class components
Investment protection
Designed for PCIe solid-state
No re-architecture required
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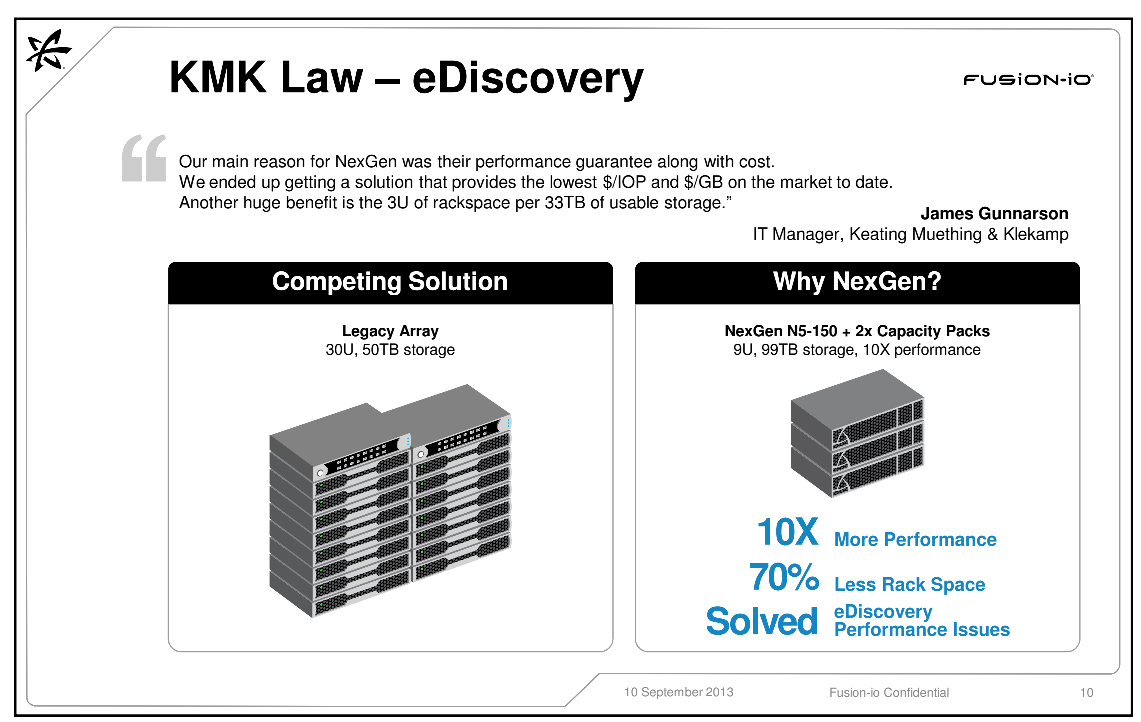
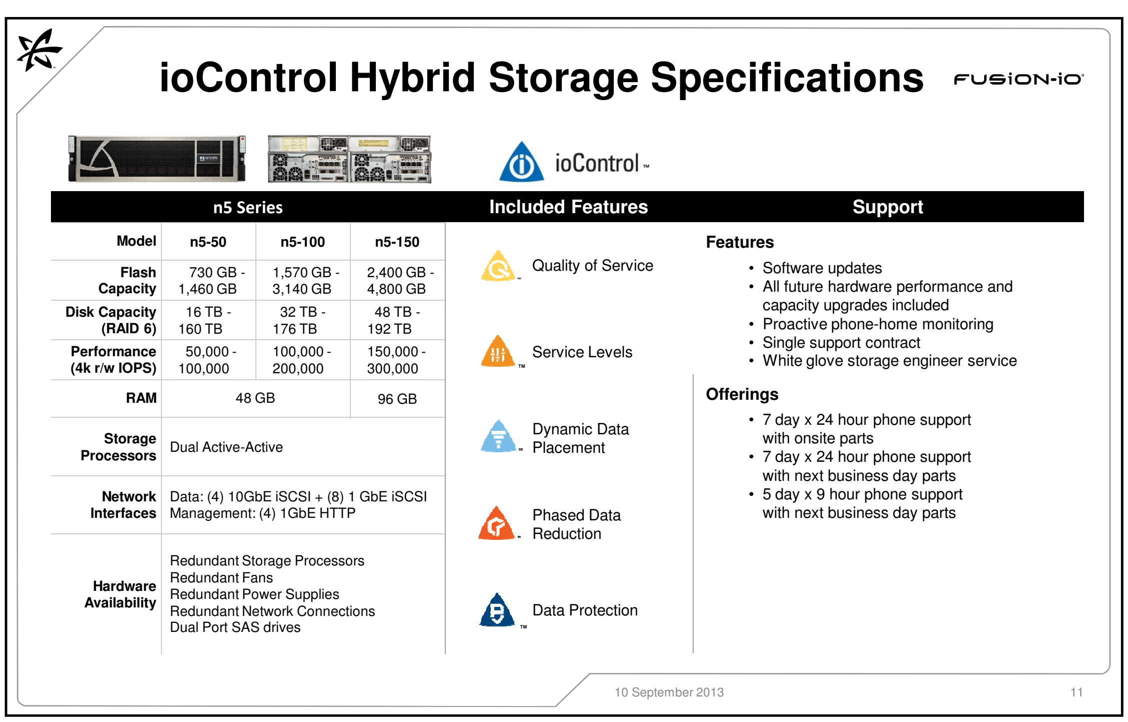

KMK Law – eDiscovery
FUSION-iO
Our main reason for NexGen was their performance guarantee along with cost.
We ended up getting a solution that provides the lowest $/IOP and $/GB on the market to date.
Another huge benefit is the 3U of rackspace per 33TB of usable storage."
James Gunnarson
IT Manager, Keating Muething & Klekamp
Competing Solution
Legacy Array
30U, 50TB storage
Why NexGen?
NexGen N5-150 + 2x Capacity Packs
9U, 99TB storage, 10X performance
10X More Performance
70% Less Rack Space
Solved eDiscovery Performance Issues
10 September 2013
Fusion-io Confidential
10


ioControl Hybrid Storage Specifications
FUSION-iO
ioControl
n5 Series
Included Features
Support
Model | n5-50 | n5-100 | n5-150
Flash Capacity | 730 GB - 1,460 GB | 1,570 GB - 3,140 GB | 2,400 GB - 4,800 GB
Disk Capacity (RAID 6) | 16 TB - 160 TB | 32 TB - 176 TB | 48 TB - 192 TB
Performance (4k r/w IOPS) | 50,000 - 100,000 | 100,000 - 200,000 | 150,000 - 300,000
RAM | 48 GB | 96 GB
Storage Processors | Dual Active-Active
Network Interfaces | Data: (4) 10GbE iSCSI + (8) 1 GbE iSCSI Management: (4) 1GbE HTTP
Hardware Availability | Redundant Storage Processors Redundant Fans Redundant Power Supplies Redundant Network Connections Dual Port SAS drives
Quality of Service
Service Levels
Dynamic Data Placement
Phased Data Reduction
Data Protection
Features
• Software updates
• All future hardware performance and capacity upgrades included
• Proactive phone-home monitoring
• Single support contract
• White glove storage engineer service
Offerings
• 7 day x 24 hour phone support with onsite parts
• 7 day x 24 hour phone support with next business day parts
• 5 day x 9 hour phone support with next business day parts
10 September 2013
11

THANK YOU
fusionio.com | REDEFINE WHAT'S POSSIBLE

KMK E-Discovery Symposium

Analytical Document Reviews – Leveraging Technology Case Studies

Three Review Projects

- *Predictive Coding*
- *Semi Automated Redactions: Killing India*
- *Deep Dive Reviews*

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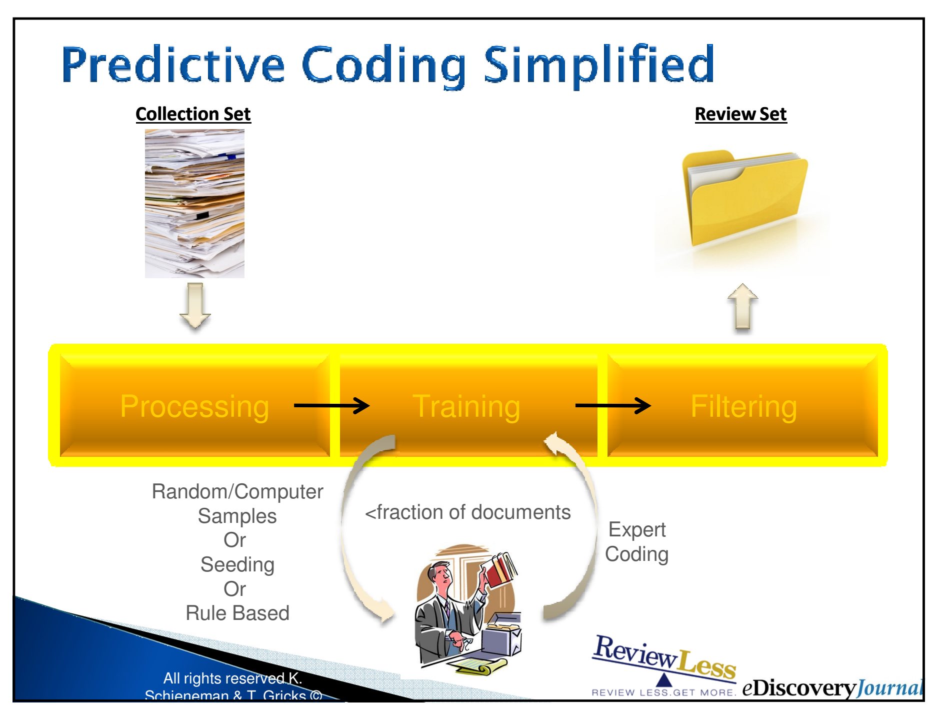

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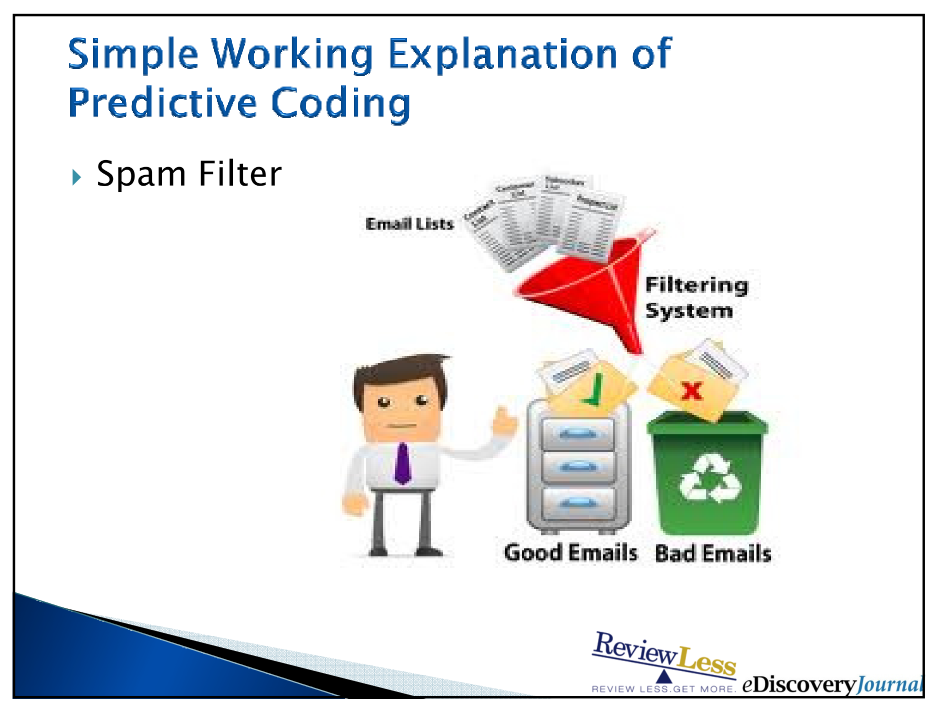

Guiding Principles for Doc Review in the Federal Rules

- Fed. R. Civ. P. 1
  - These rules … should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.
- Fed. R. Civ. P. 26(g)
  - Every … discovery … response … must be signed by at least one attorney of record … . By signing, an attorney … certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry … , it is consistent with these rules … .

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Guiding Principles from the Federal Rules

- Fed. R. Civ. P. 26(b)(2)(B)
- (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of ***undue burden or cost***….
  - Eg. Proportionality.

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Recent Cases

- *da Silva Moore v. Publicis Groupe* (S.D. of NY)
  - Agreed on predictive coding; disagreed on protocol
- *Global Aerospace v. Landow Aviation* (State Ct Virginia)
  - Judge permitted predictive coding over objection & production was made without objection to the opposing side. Parties shared null set. Production finished.
- *Kleen Products v. Packaging Corp.* (N.D. of IL)
  - Δ used keyword search; π wanted predictive coding. Parties elected to continue using key words.
- *In re Fosamax/Alendronate – (*State Court CA*)*
  - Pharma case in CA. Like Kleen products. Proportionality opinion.

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Recent Cases

- *In re Actos Products Liability Litigation* (La.)
  - Collaborative; transparent; stringent validation
- *EORHB, Inc. v. HOA Holdings LLC (*Delaware)
  - Judge *sua sponte* ordered predictive coding to be used.
- *In re Biomet M@a Magnum Hip Implant Products Liability Litigation* (ND Indiana)
  - Defendant runs key words under objection.
  - Plaintiffs wants Actos like "redo"
  - Sampling reveals about 2% richness & 1% being missed.
  - Court allows case to go forward as is.
  - Proportionality analysis.

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Global Aerospace

THE WALL STREET JOURNAL.

U.S. EDITION Tuesday, August 27, 2013 As of 5:08 PM EST

Home | World | U.S. | Business | Tech | Markets | Market Data | Your Money | Opinion

TOP STORIES IN BUSINESS

1 of 12 Next CEO's Job: Fixing Microsoft's Culture

2 of 12 Think You Can Drive a Bulldozer?

WSJ BLOGS

WSJ on the cases, trends and personalities of interest to the business community.

January 17, 2013, 4:44 PM

How a Computer Did the Work of Many Lawyers

Article | Comments (3)

SUBSCRIBER CONTENT PREVIEW

FOR FULL ACCESS: LOG IN OR SUBSCRIBE NOW - $1 A WEEK FOR 12 WEEKS

By Joe Palazzolo

We reported in June that a Virginia judge had approved the use of a computer program to perform a litigation task that otherwise would have been done by a bunch of lawyers. And now, several months later, we have the results.

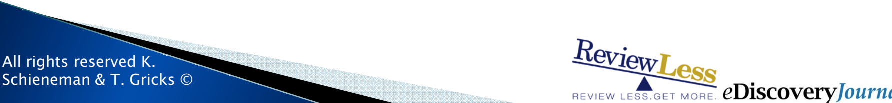
The case involves a company in litigation after the roofs of its hangers collapsed and crushed 14 private jets. Lawyers for the company determined that they would

Jeff Swensen for The Wall Street Journal

Thomas C. Gricks III

Predictive Coding Experiences

- Global Aerospace
  - Grew out of another project and work done to prepare.
  - Executed approach on Global Aerospace
  - Amlaw 20 law firm – most feared litigation shop contested our use of PC.
  - 2,000,000 records culled to 200,000 using predictive coding in about 2 weeks of time.
  - 5 attorney review of remainder.
  - Cost savings $1.5 million.
  - Production Accepted



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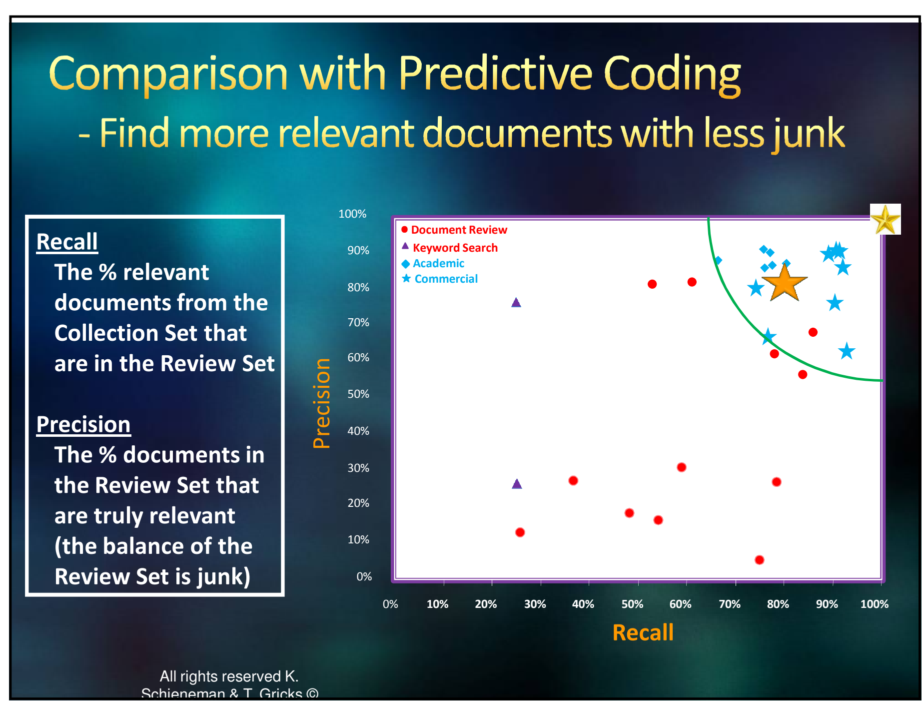

Moments of Heart Burn

- Processing time
- Images coded as non responsive
- Thumbnail data files
- What if the other side fought us
- Judge Chamberlin – fluctuating allotted time for argument (10 minutes to 50 minutes)
- Order drafted while predictive coding team is having a beer.

Cincinnati Thought Leadership Program on October 29th

- Held at KMK – seating for 72 attendees
- Sign up is at ediscoveryjournal.com under events
- National and local judges, expert facilitators join me to discuss predictive coding.
- Previous tour stops, Washington, DC; Chicago; Pittsburgh; Boston; Philadelphia & New York City.
- Current Participants
  - Judge Frank Maas, S.D. of NY
  - Three area law firms including KMK will have predictive coding facilitators participating in the presentation.

Garlock Industries Bankruptcy

THE WALL STREET JOURNAL.

U.S. EDITION Monday, August 19, 2013 As of 7:25 PM EDT

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TOP STORIES IN OPINION

1 of 12 Stephens: Target Assad

2 of 12 John H. Cochrane: The Danger of an All-Powerful Federal Reserve

3 of 12 Holder vs. Martin Luther King Jr.

The Problem Is Assad

REVIEW & OUTLOOK | Updated August 19, 2013, 7:25 p.m. ET

Exposing Asbestos Fraud

A federal judge helps the trial bar keep its claims evidence secret.

Article | Comments (34) | MORE IN OPINION »

Email | Print | Save

The good news about asbestos legal fraud is that there's a straightforward way to expose it. The bad news is that the judiciary too often remains the roadblock to transparency.

That's what has been happening in federal bankruptcy court in North Carolina in the case of Garlock Sealing Technologies. The gasket manufacturer never had more than peripheral involvement in the asbestos business, yet it was forced into bankruptcy in 2010 by a flood of frivolous claims.

Plaintiffs attorneys are now pushing federal Judge George Hodges to force Garlock to put some $1.3 billion into a bankruptcy trust for future asbestos claims. Garlock estimates its liability is closer to $125 million, but the trust gambit is a plaintiffs bar favorite to guarantee a perpetual payday. Garlock also says it has evidence that plaintiffs are "double-dipping"—filing claims with multiple bankruptcy trusts that blame non-Garlock products for their diseases, even as they pursue Garlock in court.

The tort bar is desperate to continue this scam by keeping trust claims hidden from the public. The plaintiffs attorneys argued to Judge Hodges that the information Garlock rooted out about their claims ought to remain "confidential." Judge Hodges agreed, dismissing Garlock's information as not "particularly sexy" or of "interest" to

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Garlock Industries Asbestos Bankruptcy

- 1.3 Million pages of court filings in 12 large asbestos litigations.
- Hired as Special Master.
- Redaction of over 412,000 Social Security Numbers.
- Ah Hah Moment – Appointment as Special Master.
- Visual Clustering Tool.
- All Star team of reviewers across country, 65% in Cincinnati plus Pittsburgh, Cleveland and San Diego. 21 hours of daily up time from a highly motivated review team.

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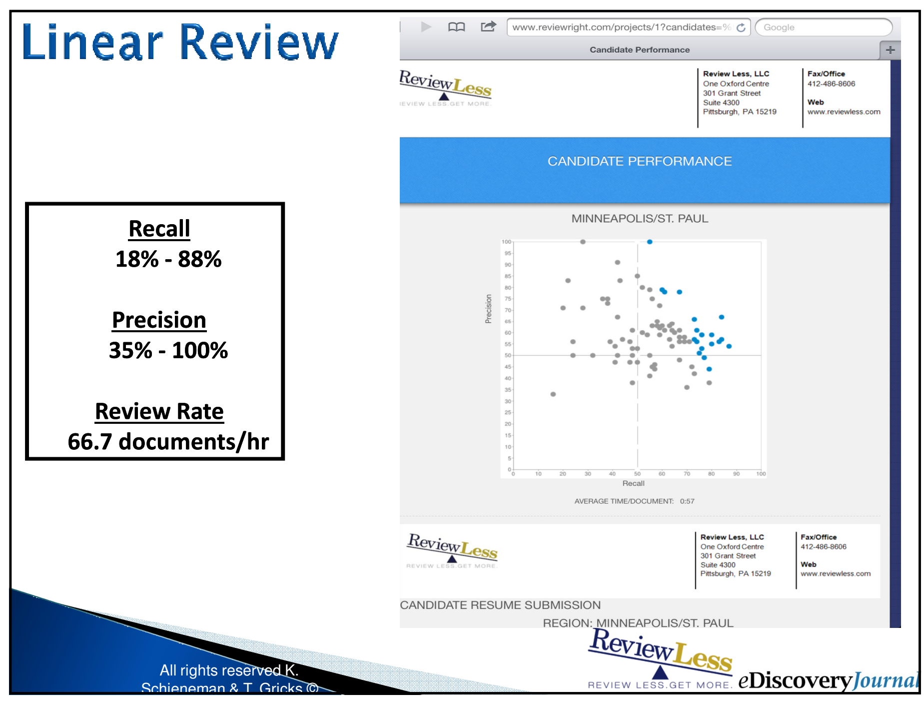
Linear Review

Recall
18% - 88%

Precision
35% - 100%

Review Rate
66.7 documents/hr



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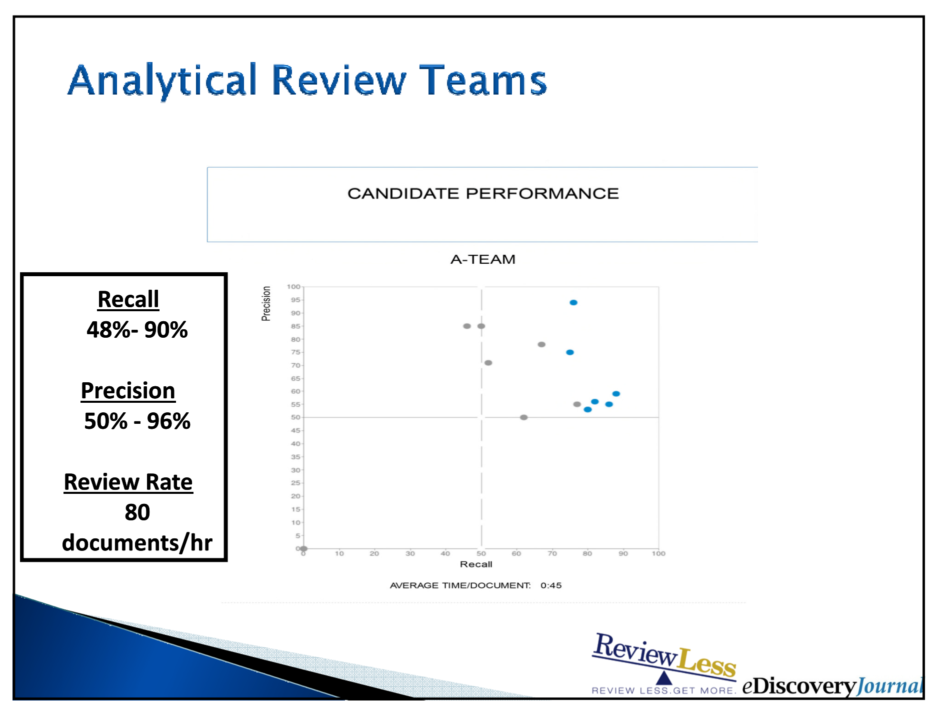

Garlock Industries Asbestos Bankruptcy

- Speed Metrics Achieved. We redacted 277 per hour compared to two offshore companies benchmarking 20 an hour.
- Cost estimates to off shore could have exceeded $725,000 with paralegals and $433,000 for offshore coders with 83 coders necessary to achieve in 31 days.
- We achieved review for under $55,000 with 11 coding attorneys.
- A huge success.

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Lessons Learned From Review Team

- Created an All Star Team culture.
- Let reviewers know it is a national project.
- Shared my personal risks with the team.
- Self policed.
- Internal Communications were outstanding.
- Supported each other in training.
- Shared work schedules to keep deployment at capacity.
- Were vested in the success of the project.
- Worked 7 days straight through 4th of July over 6 weeks.

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Moments of Heart Burn

- Months to load up data
- Couldn't auto redact because files weren't exact matches
- No idea how many SSN's to redact – Butch Cassidy
- I recommended this approach
- It could have been done the traditional way - $$$$'s
- 21 hours of up time meant supporting the team through multiple time zones.
- Reading the WSJ article on the way to Croatia for my 25th Anniversary trip while the project was in process.
- Drunk Driver hits lead lawyer's car 1 week before deadline.

Battle Between Medical Giants

- Injunctive Hearing.
- 375,000 documents from internal records.
  - No production.
- Needed to understand if documents supported us. 6 issues focused on.
- Five review lawyers used specialized clustering technology with time lines to hone in on key documents.
  - Review took 3 days.
  - Attorneys worked in DC, Upstate PA, Pgh and W.Va.
  - 20 page analysis took 5 days to write.
- Cost per Document: $.40

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Moments of Heart Burn

- Processing company and review tool creating exceptions.
- Finger pointing between the two.
- Trying to add data as we are trying to figure out the issue.
- Ran the tool on chopped up data because it didn't matter for the objective.
- Reviewed chopped data.

Final Thoughts

- *Tools exist today to improve what we do.*
- *Waiting for laws to embrace change is path most lawyers take.*
- *Lawyers get fired when they make mistakes.*
- *Clients need to change the culture of punishing lawyers for trying different approaches and reward them for taking some risks.*
- *Using technology to manage technology is just an obvious outcome.*
- *Expect some pain but the ROI is massive.*
- *Sanctions are unlikely.*

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Audience Q&A for Session B

Please use available microphones

Client Panelists:

Shannon H. Barrow
Vice President & Legal Counsel
Fifth Third Bank

Brian Hackney
Mercedes Benz of Cincinnati

James R. (Jim) Hubbard
Senior Vice President & Chief Legal Officer
Fifth Third Bank

Tom R. Shepherd
Information Security & Records Retention Officer
Farm Bureau Financial Group and
Farm Bureau Financial Services

KMK Panel Moderator:

Stephanie M. Maw
Director, E-Discovery / Litigation Support

KMK Panelists:

James E. (Jim) Burke, *Partner*

Joseph M. (Joe) Callow, Jr., *Partner*

Danielle M. D'Addesa, *Partner*

Amber M. Justice-Manning, *Associate*

Robert W. (Bob) Maxwell II, *Partner*

Audience Q&A for Session C

Please use available microphones

Thank You!

- Today's program has been approved for 4 hours of CLE credit in OH & KY (please return your forms to the registration table)
- Boxed lunches are available to enjoy here or to take as you depart
- The Sponsor Exhibit Area will be open following the Symposium

We sincerely thank our Sponsors:

James E. Burke

PARTNER

Keating Muething & Klekamp PLL
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Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6429
FAX: (513) 579-6457
jburke@kmklaw.com

PRACTICE AREAS

Commercial & Securities Litigation

Class Action Litigation

Appellate Law

Arbitration & Mediation

Financial Services Litigation

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Court of Appeals, Sixth Circuit

U.S. Court of Appeals, Seventh Circuit

U.S. Court of Appeals, Ninth Circuit

U.S. Court of Appeals, Eleventh Circuit

U.S. Supreme Court

U.S. Tax Court

EDUCATION

J.D., University of Cincinnati College of Law, 1978; *magna cum laude*; University of Cincinnati Law Review, Editorial Board, 1976-1978; Order of the Coif

B.A., Yale University, 1975

For 35 years, Jim Burke has helped clients develop sound litigation strategies and execute on those strategies successfully to resolve corporate disputes. Jim's practice focuses on complex corporate and commercial litigation, including both trial and appellate practice, in state and federal court. He has handled cases before courts in Ohio, Kentucky, California, New York, Illinois, Pennsylvania, Michigan, Georgia, Colorado and Delaware. He has significant experience in financial and transactional cases, commercial matters, class and derivative actions and actions arising under the federal securities laws. In 1997, Jim was inducted into the American College of Trial Lawyers, membership in which is extended by invitation only to "experienced trial lawyers who have demonstrated exceptional skill as advocates and whose career has been marked by the highest standards of ethical conduct, professionalism and civility."

AWARDS & RECOGNITIONS

- Named the "Cincinnati Best Lawyers' Securities Litigation Lawyer of the Year," 2014
- Named the "Cincinnati *Best Lawyers'* Bet-the-Company Litigator of the Year," 2013
- Named the "Cincinnati *Best Lawyers'* Securities Litigation Lawyer of the Year," 2012
- Named the "Cincinnati *Best Lawyers'* Bet-the-Company Litigator of the Year," 2011
- Listed in *The Best Lawyers in America*, one of 412 nationwide selected in category of "Bet the Company Litigation"
- Listed in *Chambers USA: America's Leading Business Lawyers*, 2004-2013
- Named to *Ohio Super Lawyers*, 2004-2013; Named one of the Top 10 lawyers in Ohio, 2008-2010; Named one of the Top 100 lawyers in Ohio, and one of the Top 50 lawyers in Cincinnati, 2008-2013
- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Named to *Cincy Leading Lawyers*, 2009-2013

James E. Burke (Continued)

NEWS

- Ten Keating Muething & Klekamp Attorneys Named Cincy Leading Lawyers by Cincy Magazine
- Keating Muething & Klekamp Named a 2013 Leading Law Firm by Chambers USA
- Forty-Six Keating Muething & Klekamp Attorneys Recognized in 2013 Ohio Super Lawyers and Ohio Rising Stars
- Five Keating Muething & Klekamp Attorneys Named Best Lawyers' 2013 Cincinnati Lawyers of the Year
- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- Four Keating Muething & Klekamp Attorneys Named Best Lawyers' 2012 Lawyers of the Year
- James E. Burke, Attorney with Keating Muething & Klekamp, Named 2011 "Cincinnati Best Lawyers Bet-the-Company Litigator of the Year"
- Keating Muething & Klekamp wins U.S. Court of Appeals Case for Worldwide Equipment against IRS
- KMK Wins Appellate Court Decision that Will Impact Treatment of IP Rights in Software License Agreements
- KMK Attorneys James E. Burke and Charles M. Miller Win Unanimous Ohio Supreme Court Ruling; KMK Protects Ohio Voters

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013
- Current Hot Issues in Electronic Discovery Law and Practice, June 18, 2009

MENTIONED & QUOTED

- A Straight Shooter, *Ohio Super Lawyers 2011*, January 2011

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association
- American College of Trial Lawyers
- Cincinnati Bar Association, Mid-Term Judicial Evaluation Committee
- Federal Bar Association
- Mediator for United States District Court for Southern District of Ohio
- National Institute of Trial Advocacy, Instructor and Cincinnati Steering Committee Member
- American Board of Trial Advocates
- Ohio State Bar Association
- Potter Stewart American Inn of Court, Barrister
- Supreme Court of Ohio, Commission on Continuing Legal Education, 1994-1995
- Leadership Cincinnati, Class XXVIII
- Jesuit Spiritual Center at Milford, Board of Trustees, 2006-present

Stephanie M. Maw

E-DISCOVERY / LITIGATION SUPPORT DIRECTOR

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smaw@kmklaw.com

PRACTICE AREAS

E-Discovery & Litigation Support Group (ED/LSG)

EDUCATION

M.P.P / J.D., Hamline University School of Law, 1994; *cum laude*

B.A., Hamline University, 1991; *cum laude*

Stephanie Maw administers the firm's E-Discovery and Litigation Support services, with a focus on E-Discovery strategy, compliance, and technology implementation. She is the Director of the Firm's E-Discovery/Litigation Support Group (ED/LSG), a cross-disciplinary group operated jointly between KMK's Litigation Practice Group and the Information Technology Group. Her role as KMK's E-Discovery Task Force Chair makes her uniquely suited to lead the firm's efforts to bridge the gap between counsel, information technology, information security, and business groups in formulating proactive, defensible, and cost-effective E-Discovery best-practices and solutions for clients.

Stephanie began her career in state government in 1988. After moving to the private sector, she spent the majority of her career working for three national law firms where she enjoyed wearing multiple professional services hats as a member of both Information Technology Departments and Litigation Practice Groups. Prior to the advent of E-Discovery, Stephanie was considered a pioneer in the strategic use and development of litigation databases in order to accurately and efficiently respond to the complex and time-sensitive demands of discovery during the lifecycle of large litigation matters, culminating in management and administration of the landmark *Tobacco Litigation* databases in 1998. After working as an independent litigation technology consultant where she developed relationships with several AmLaw 100 Firms, Stephanie joined Keating Muething & Klekamp in 2005, and, in 2007, she undertook the great privilege of building KMK's E-Discovery and Litigation Support services and emerging business unit.

E-DISCOVERY AREAS OF EXPERIENCE

- Litigation Readiness Planning & Matter Budgeting
- EDRM Model Best Practices Implementation
- E-Discovery Data Roadmapping
- Document Review Project Management
- External Technology Partner Resources
- Electronic Document Productions

Stephanie M. Maw (Continued)

REPRESENTATIVE KMK LITIGATION / E-DISCOVERY MATTERS

- Belcan Corporation
- Bush Truck Leasing
- Cincom Systems
- Cintas Corporation
- Duke Energy
- Fifth Third Bank
- Great American Insurance Company
- Paid Search Engine Technologies

REPRESENTATIVE NON-KMK LITIGATION / E-DISCOVERY MATTERS

- *Union Oil Company of California "Unocal" v. Atlantic Richfield Company, et al.:* Trial counsel in action for patent infringement of UNOCAL's patent on gasoline fuel, tried in the United States District Court for the Central District of California in Los Angeles, Wardlaw, Judge. Jury verdict in favor of UNOCAL on liability, October, 1997; judgment for five months accrued infringement in the amount of $92 million; November 1997, unenforceability phase tried to Court, December, 1997. (208 F.3d 989 (Fed. Cir. 2000)); *cert. denied*, 531 U.S. 1183 (2000)*
- *Fonar v. General Electric Co.*: Trial counsel in action for patent infringement of two magnetic resonance imaging patents, tried in United States District Court for The Eastern District of New York, Wexler, Judge. Jury Verdict May, 1995, $110,575,000, affirmed on appeal, United States Circuit Court of Appeals for the Federal Circuit February, 1997 in the amount of over $103 million. (902 F. Supp. 330 (E.D.N.Y. 1995); 107 F.3d 1543 (Fed. Cir. 1997); *cert. denied* 522 U.S. 908 (1997))*
- *State of Minnesota and Blue Cross and Blue Shield of Minnesota v. Phillip Morris Incorporated, et al. (1998)*;* Plaintiffs' counsel in 1998 landmark case whereby RKM&C reached a historic settlement in the State of Minnesota and Blue Cross and Blue Shield of Minnesota's lawsuit against the major cigarette manufacturers after 15 weeks of trial. The case was settled for $6.13 billion on behalf of the State of Minnesota and $469 million on behalf of Blue Cross and Blue Shield of Minnesota. The discovery obtained by the firm is currently being used by other states, private litigants and foreign countries. Former Surgeon General Dr. C. Everett Koop has called the Minnesota case one of the most significant public health achievements of the 20th century. *[Please see: www.rkmc.com for complete case history.]*
- Billable plaintiff and defense outside counsel legal team member, project manager or trial technologist on over 375 litigation matters

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013
- E-Discovery Essentials, Salmon P. Chase College of Law, Northern Kentucky University, April 3, 2013
- The Expanding Role of Search in E-Discovery, September 13, 2012
- Should Law Firms Outsource or Insource E-Discovery Tools?, March 9, 2010
- Current Hot Issues in Electronic Discovery Law and Practice, June 18, 2009
- E-Discovery Fundamentals, November 8, 2007

Stephanie M. Maw (Continued)

- Bits & Bytes: The Story to Be Told From Your Data, American Trial Lawyers Association Convention, 2000
- Successful Case Management: Making Your Litigation Database Your Best Friend, American Trial Lawyers Association Convention, 1996

Joseph M. Callow, Jr.

PARTNER

Keating Muething & Klekamp PLL
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The most difficult task as in-house counsel is locating and retaining an attorney that combines expertise, aggressiveness, responsiveness, cost effectiveness, and one who can communicate effectively with various levels of management. Joe and his complex litigation team possess all of those qualities and more when faced with retaining a firm and litigation team to best serve your organization. -- Chris Griffin, Director of Legal Affairs, Griffin Industries, Inc.

Joe Callow helps clients manage and reduce litigation risk and litigation costs. When litigation arises, he handles and coordinates cases on a national, regional, and local basis.

Joe primarily works on class action and complex commercial litigation. He has experience primarily in securities, ERISA, antitrust and general corporate and business litigation as well as in copyright infringement and intellectual property litigation; False Claims Act and qui tam litigation; product liability/tort litigation; and constitutional law.

Joe has represented Cincom Systems, Inc., Fifth Third Bank, Griffin Industries, LSI Industries, Inc., and other clients in litigation matters and has also represented Great American Advisors, Fifth Third Securities, Inc., and other clients in FINRA and AAA securities arbitrations.

Joe currently serves as Co-Practice Group Leader of the firm's Litigation Group. Joe frequently authors legal alerts and blog posts and presents CLE seminars on various litigation topics. He welcomes the opportunity to conduct seminars for clients and other organizations on litigation avoidance strategies and litigation related topics.

PRACTICE AREAS

Antitrust

ERISA Litigation Defense Team

Class Action Litigation

Commercial & Securities Litigation

Intellectual Property Litigation

False Claims Act & Qui Tam Litigation

Financial Services Litigation

Product Liability

Mass Tort

REPRESENTATIVE MATTERS

- Phi Kappa Tau v. Miami University, 2013 U.S. Dist. LEXIS 15030 (Feb. 4, 2013) (granting Defendant's motion to dismiss Plaintiffs' complaint with prejudice).
- Brooks v. Cincom Systems, Inc., Case No. 1:12-cv-115 (S.D. Ohio June 10, 2013) (granting Defendant's motion for summary judgment on Plaintiff's age discrimination claim).
- Local 295 et al. v. Fifth Third Bancorp, et al., and Dudenhoeffer, et al v. Fifth Third Bancorp, et al., Cons. Case No. 1:08-cv-421 (S.D. Ohio) (defending client in consolidated securities and ERISA "stock drop" class action litigation); see 2010 U.S. Dist. Lexis 131967 (Nov. 24, 2010) (granting Defendants' motion to dismiss ERISA claims); 731 F. Supp. 2d 689 (Aug. 10, 2010) (granting in part and denying in part Defendants' motion to dismiss in securities case); 2012 U.S. App. Lexis 18622 (6th Cir. Sept. 5, 2012).

Joseph M. Callow, Jr. (Continued)

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. District Court, Northern District of Ohio

U.S. Court of Appeals, Sixth Circuit

EDUCATION

J.D., University of Cincinnati College of Law, 1993; Order of the Coif; Law Review, Member 1991-1992 and Lead Article Editor, 1992-1993; Student Bar Association President, 1992-1993

B.A., Miami University, 1990; *cum laude*; college forensics; student government; peer advisor, Sigma Tau Gamma Fraternity

- In re Processed Egg Products Antitrust Litig., Case No. 2:08-md-02002 (MDL No. 2002) (E.D. Pa.) (currently defending client in antitrust class action litigation)
- LaWarre v. Fifth Third Bank and Fifth Third Securities, Inc., Case No. A0909076 (Hamilton County) (obtained summary judgment on all claim assets related to investment losses); 2012 Ohio 4016 (Ohio App.) (affirmed grant of summary judgment to Defendants).
- Green, et al. v. Griffin Industries, Inc., et al., Civ. Action No. 03CVS5048382F (State of Georgia, Fulton Cty., Sup. Ct.) (defended client in tort class action litigation)
- Cincom Systems, Inc. v. Novelis Corp., 581 F.3d 431 (6th Cir. Sept. 25, 2009) (affirmed district court decision finding Novelis Corp. infringed Cincom's copyrighted materials)
- Shirk et al. v. Fifth Third Bancorp et al., 2009 U.S. Dist. Lexis 90775 (S.D. Ohio Sept. 30, 2009) (summary judgment granted on ERISA excessive fees class action litigation); 71 Fed. R. Serv. 3d (Callaghan) 1199, 44 Employee Benefits Cas. (BNA) 2936 (Jan. 29, 2009) (summary judgment granted on ERISA "stock drop" class action litigation)
- Segal v. Fifth Third Bank N.A., 581 F.3d 305 (6th Cir. 2009) (affirmed dismissal of class action complaint affirmed based on SLUSA preemption)
- National Union Fire Ins. Co. v. Wuerth, et al., 2009 Ohio 3901 (S.D. Ohio July 29, 2009) (answering certified question from Sixth Circuit Court of Appeals)
- Exhaust Unlimited et al. v. Cintas Corp. et al., 223 F.R.D. 506 (S.D. Ill. 2004); 326 F. Supp. 2d 928 (S.D. Ill. 2004) (defended client in antitrust class action litigation; defeated class certification)

AWARDS & RECOGNITIONS

- Named the "Cincinnati *Best Lawyers'* Antitrust Litigation Lawyer of the Year," 2012
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*
- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Cincinnati Academy of Leadership for Lawyers (CALL), Class XI

NEWS

- Forty-Six Keating Muething & Klekamp Attorneys Recognized in 2013 Ohio Super Lawyers and Ohio Rising Stars
- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013

Joseph M. Callow, Jr. (Continued)

- Four Keating Muething & Klekamp Attorneys Named Best Lawyers' 2012 Lawyers of the Year
- KMK Wins Appellate Court Decision that Will Impact Treatment of IP Rights in Software License Agreements

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013
- Litigators Talking About Insurance and Stuff, Midwest Chapter of the Association of Insurance Compliance Professionals, April 18, 2013
- Ten Recent Decisions Every In-house Lawyer Should Know, 2012, 2011, 2010
- Emails – A Litigator's Best Friend and Worst Enemy on a Hard Drive Near You, 2010, 2008
- E-Discovery, 2007, 2006, 2005, 2004
- Fifty Minutes on Class Actions, 2007
- Taking and Defending Depositions, 2004

PUBLICATIONS

- The American Express Decision: Arbitration and Class Action Waivers, June 21, 2013
- 10 Ways to Reduce Litigation Costs, *The CBA Report*, January 2, 2008
- The Class Action Fairness Act of 2005: Overview and Analysis, *The Federal B*ar Vol. 52, May 2005
- An Overview of the Class Action Fairness Act of 2005, *The CBA Report*, May 2005
- Cut-Throat Competition in the Friendly Skies:, *Alaska Airlines v. United Airlines*, 948 f.2d 536 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603, 61 U. Cin. L. Rev. 681
- In Search of Library Horror Stories: an Examination of Research Critical to Public Address Events in Forensics, *National Forensic Journal*, Vol. 8:1, Spring 1990

MENTIONED & QUOTED

- Miami fraternity's $10M suit dismissed, *Cincinnati.com*, February 5, 2013
- Class Suit Alleging Bank Breached Duties Is Barred by SLUSA, Sixth Circuit Decides, *BNA Class Action Litigation Report*, November 13, 2009
- Court Tosses Fifth Third Workers' Fees Claim Filed Shortly After Limitations Period Expired, *BNA Pension and Benefits Daily*, October 6, 2009
- Employer Stock: Fifth Third's Retention of Employer Stock Wasn't a Fiduciary Breach, Court Decides, *BNA Pension and Benefits Daily*, March 3, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association
- Federal Bar Association
- Ohio State Bar Association
- Cincinnati Bar Association
- Seven Hills Middle School, Athletic Booster

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PRACTICE AREAS

ERISA Litigation Defense Team

E-Discovery & Litigation Support Group (ED/LSG)

False Claims Act & Qui Tam Litigation

Commercial & Securities Litigation

Class Action Litigation

Mass Tort

Product Liability

Personal Injury / Wrongful Death

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. District Court, Northern District of Ohio

U.S. Court of Appeals, Sixth Circuit

U.S. Court of Appeals, Seventh Circuit

Ohio Supreme Court

U.S. Supreme Court

EDUCATION

J.D., University of Cincinnati College of Law, 2003; Order of the Coif; Dean's Honor List (2000-2003); Memorial Prize for Advocacy; Law Review Student Articles Editor

Danielle D'Addesa is committed to building and maintaining solid client relationships and helps clients manage litigation risk and develop cost-efficient case management strategies to achieve successful resolutions.

Danielle's practice focuses on complex corporate and commercial litigation and appellate matters, including ERISA defense, securities law and class action litigation, regulatory investigations and False Claims Act/Qui Tam litigation. She has defended clients across the full spectrum of ERISA litigation, including breach of fiduciary duty, prohibited transaction, stock-drop and 401(k) plan fee litigation, as well as ERISA appellate litigation. Danielle is currently defending two ERISA litigation matters before the Seventh Circuit Court of Appeals and the Supreme Court of the United States.

Danielle has significant experience in E-Discovery management and consultation, advising clients and implementing defensible, cost-efficient strategies in all aspects of electronic discovery, including the preservation, collection, processing, review and production of electronically stored information. She has extensive experience managing large teams of litigation attorneys and paralegals on document reviews for large and complex, commercial litigation and regulatory investigation matters.

Danielle has litigation experience in federal and state courts throughout the country, and currently serves as a member of KMK's Ethics Committee.

REPRESENTATIVE MATTERS

- Currently representing and defending former executives and plan fiduciaries against ERISA breach of fiduciary duty claims seeking in excess of $100 million in federal court in Chicago
- Currently representing and defending public corporation and plan fiduciaries in ERISA stock-drop class action matter before the S.D. Ohio.
- Currently defending public corporation in regulatory investigation matters
- Currently prosecuting several Medicare, IRS and government contractor fraud litigation matters under the False Claims Act throughout the country

Danielle M. D'Addesa (Continued)

B.A., Rollins College, 1999;
summa cum laude

- Successfully defended public corporation and plan fiduciaries in ERISA stock-drop class action litigation
- Successfully defended public corporation and plan fiduciaries in ERISA 401(k) plan fee class action litigation
- Successfully prosecuted several False Claims Act/Qui Tam litigation matters relating to Medicare fraud and government contractor fraud, including resolution of Medicare fraud action for $65 million

AWARDS & RECOGNITIONS

- Named *Ohio Rising Star*, 2007
- 2013 Forty Under 40 Nominee

NEWS

- Keating Muething & Klekamp Elects Five New Partners

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013

PUBLICATIONS

- The Unconstitutional Interplay of California's Three Strikes Law and California Penal Code Section 666, 71 U. Cin. L. Rev. 1031 (2003)

MENTIONED & QUOTED

- Court Tosses Fifth Third Workers' Fees Claim Filed Shortly After Limitations Period Expired, *BNA Pension and Benefits Daily*, October 6, 2009
- Employer Stock: Fifth Third's Retention of Employer Stock Wasn't a Fiduciary Breach, Court Decides, *BNA Pension and Benefits Daily*, March 3, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association
- Cincinnati Bar Association
- Federal Bar Association
- Ohio State Bar Association
- Ohio Supreme Court Lawyer to Lawyer Mentoring Program

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PRACTICE AREAS

E-Discovery & Litigation Support Group (ED/LSG)

EDUCATION

University of Cincinnati, 1987-1992

Clarence Williams manages the firm's litigation support technology, with a focus on EDD processing, litigation document management systems and managing the firm's litigation support technology operations and development. His additional core responsibilities include data conversion, project management, building and monitoring third-party vendor relationships and delivery of electronic document production deliverables during the discovery phase of litigation. As a member of the Information Technology Group working exclusively in litigation, Clarence's role on KMK's E-Discovery Task Force makes him uniquely suited to participate in the firm's efforts to bridge the gap between counsel and Information Technology by helping the firm's litigation attorneys educate clients about proactive, compliant and cost-effective e-discovery strategies and implementation.

Clarence has more than 18 years experience in litigation support with technical specialties including document imaging, electronic document discovery, document coding and project management. Clarence has developed imaging workflow procedures that are currently recognized as industry best practices. He is also well-versed in various Litigation Support Software applications. During his career, Clarence has managed local and national litigation projects, totaling more than 100 million pages. Prior to joining Keating Muething & Klekamp in 2008, Clarence served as Operations Manager for one of the region's leaders in Litigation Support Services. Having begun his career in information technology with Arthur Andersen, Docuqest Technologies and Spectrum / Lason, he has a diverse imaging and electronic document discovery expertise. Clarence has worked on several high profile cases, all of which exceeded a million pages in discovery: breast implant litigation; Exxon merger; and the Enron litigation, to name a few.

PRESENTATIONS

- E-Discovery Processing 101
- Advantages and Disadvantages of Document Imaging

technical certifications

- Ringtail Legal 2005 Administrator
- IPRO Certified Trainer (ICT)

Clarence Williams III (Continued)

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013
- Current Hot Issues in Electronic Discovery Law and Practice, June 18, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Cancer Society Relay For Life
- March of Dimes
- CDC Act Against Aids

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EDUCATION

M.B.A., Arizona State University, W.P. Carey School of Business, 2013

B.L.S., Arizona State University, 2008

A.A., Paralegal Studies, Phoenix College, 1997

Kim Taylor is Ipro's President and COO and holds responsibility for managing the overall strategic growth and direction of the company. Prior to joining Ipro, Kim was co-founder and Chief Executive Officer of Lex Solutio for eight years. During his tenure as CEO, Lex Solutio was appointed by the Court to manage the data for the Enron litigation, which remains the largest document-intensive case in litigation history. Lex Solutio was acquired by Encore Discovery Solutions in 2003, and at the time of purchase had 750 employees with five locations and revenue of over $23 million. After a hiatus, Kim rejoined Encore Discovery Solutions as COO and helped develop the company into one of the top providers of electronic discovery and related services, eventually resulting in the sale of the company for $100 million to Epiq Systems.

He holds an Executive MBA from Arizona State University's W.P. School of Business, a Bachelor's Degree in liberal studies from Arizona State University, and a paralegal degree from Phoenix College, an ABA-approved program.

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EDUCATION

B.A., Michigan State University, 1985

Rich Wills serves as Chief Information Officer (CIO) at Keating Muething & Klekamp. As CIO he is responsible for the efficient and effective management of the information technology function including planning, organizing and directing the activities of the Information Technology Department. His responsibilities also include the development and oversight of technology related policies and procedures, formulation of strategic planning and implementation of technology initiatives as well as the budgeting and approval of technology related expenditures. He began his career with KMK as a PC Support Specialist and then held the position of Technical Services Manager. Prior to joining KMK, Rich spent 11 years in various management positions with Hyatt Hotels and Resorts.

SPEAKING ENGAGEMENTS

- KMK E-Discovery Symposium, Hilton Cincinnati Netherland Plaza, Pavillion Room, 4th Floor, September 17, 2013
- Current Hot Issues in Electronic Discovery Law and Practice, June 18, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Association of Legal Administrators
- International Legal Technology Association
- Cincinnati Aquatic Club, Board of Directors
- University of Dayton MIS Department, Advisory Board

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EDUCATION

Associate of Applied Science, Network Administration, Denver Technical College, 1999

Dean Steadman is a Senior Product Manager focused on storage solutions for virtualized environments. He has more than 20 years of experience designing, developing, deploying, supporting, and just plain breaking software. Dean's career spans several technology start-ups as well as working with traditional IT companies like Hewlett-Packard. His top priorities are hands-on time with technology and face time with customers and partners.

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EDUCATION

J.D., University of Pittsburgh School of Law, 1992; *cum laude*

B.B.A., Marketing, University of Massachusetts at Amherst – Isenberg School of Management, 1987

Exchange Student, The University of Hull, 1986

Karl Schieneman is a 14 year veteran of electronic discovery. He pioneered Midwest sourcing with his first legal staffing company Legal Network which staffed the majority of the Baycol litigation from Pittsburgh, Pennsylvania, from 2002 – 2006 with more than 200 contract lawyers, earning him an Ernst & Young Entrepreneur of the Year Award in 2004.

Over the past several years, Karl has dedicated much of his time to less labor intensive analytical reviews and predictive coding as the architect of Global Aerospace, the first predictive coding case where a protective order was successfully ordered by the court despite the opposition of other parties in the case, a deep dive review of 375,000 documents in only three days in litigation between two substantial medical insurance providers, and a mass redaction and production project as Special Master involving a dozen dormant asbestos cases comprising over 1.4 million pages accomplished in a tight timeframe of four weeks with a small team of reviewers by using new clustering and redacting software to be produced in the Garlock Sealing Technologies Asbestos related bankruptcy litigation.

In his spare time, Karl travels the country and has educated lawyers on how to more effectively use predictive coding and validate the results for eDJ Group where he is an adjunct analyst. He is known nationally for his education materials in E-Discovery including hosting more than 200 free ESIBytes podcasts with 150,000 downloads, creating the first E-Discovery board game called Discovery Land, and his numerous blog posts on predictive coding found at www.eDiscoveryJournal.com. He is also a frequent author and lecturer.

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Where the Money Goes

Understanding Litigant Expenditures for Producing Electronic Discovery

Nicholas M. Pace, Laura Zakaras

A RAND LAW, BUSINESS, AND REGULATION INSTITUTE

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Summary

Pretrial discovery procedures are designed to encourage an exchange of information that will help narrow the issues being litigated, eliminate surprise at trial, and achieve substantial justice. But, in recent years, claims have been made that the societal shift from paper documents to electronically stored information (ESI) has led to sharper increases in discovery costs than in the overall cost of litigation.

In response, the Federal Rules of Civil Procedure have been amended several times in the past five years, and most states have adopted or amended rules of procedure or evidence to address a range of challenges posed by e-discovery. This evolution in the rules is ongoing: The federal Advisory Committee on Civil Rules is currently exploring issues related to the costs of discovery and may well be on track to propose further amendments to the federal civil rules. Few other issues about the civil justice system in recent years have so focused the attention of policymakers and stakeholders.

Study Purpose and Approach

We hope this monograph will help inform the debate by addressing the following research questions:

- What are the costs associated with different phases of e-discovery production?
- How are these costs distributed across internal and external sources of labor, resources, and services?
- How can these costs be reduced without compromising the quality of the discovery process?
- What do litigants perceive to be the key challenges of preserving electronic information?

We chose a case-study method that identified eight very large companies that were willing, with our assurances of confidentiality, to provide in-depth information about e-discovery production expenses. The companies consisted of one each from the communications, electronics, energy, household care products, and insurance fields, and three from the pharmaceutical/biotechnology/medical device field. We asked participants to choose a minimum of five cases in which they produced data and electronic documents to another party as part of an e-discovery request. In the end, we received at least some reliable e-discovery production cost data for 57 cases, including traditional lawsuits and regulatory investigations.

We also collected information from extensive interviews with key legal personnel from these companies. Our interviews focused on how each company responds to new requests for

e-discovery, what steps it takes in anticipation of those requests, the nature and size of the company's information technology (IT) infrastructure, its document-retention policies and disaster-recovery and archiving practices, its litigation pressure and the types of cases in which it is involved, and what it finds to be the key challenges in this evolving e-discovery environment.

Our analysis is also informed by an extensive review of the legal and technical literature on e-discovery, with emphasis on the intersection of information-retrieval science and the law. We supplemented our data collection with additional interviews with representatives of participating companies, focusing on issues related to the preservation of information in anticipation of discovery demands in current or potential litigation.

Because the participating companies and cases do not constitute a representative sample of corporations and litigation, we cannot draw generalizations from our findings that apply to all corporate litigants or all discovery productions. However, the case-study approach provides a richly detailed account of the resources required by a diverse set of very large companies operating in different industries to comply with what they described as typical e-discovery requests. In what follows, we highlight our key findings.

Costs of Producing Electronic Documents

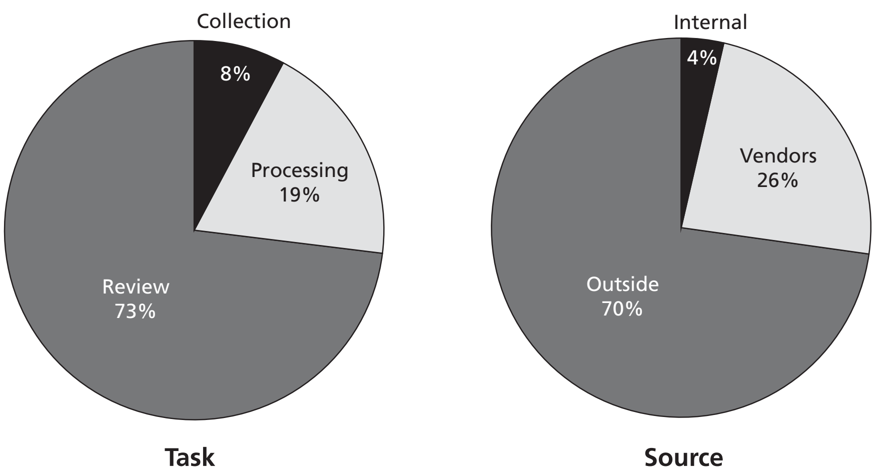
We organized the cost data we received into three tasks:

- *Collection* consists of locating potential sources of ESI following the receipt of a demand to produce electronic documents and data, and gathering ESI for further use in the e-discovery process, such as processing or review.
- *Processing* is reducing the volume of collected ESI through automated processing techniques, modifying it if necessary to forms more suitable for review, analysis, and other tasks.
- *Review* is evaluating digital information to identify relevant and responsive documents to produce, and privileged documents or confidential or sensitive information to withhold.

There were, of course, some gaps in the data. But the data were sufficiently complete to provide interesting insights about relative costs and level of effort across tasks. Figure S.1, for example, shows that the major cost component in our cases was the review of documents for relevance, responsiveness, and privilege (typically about 73 percent). Collection, an area on which policymakers have focused intensely in the past, consumed about 8 percent of expenditures for the cases in our study, while processing costs consumed about 19 percent in typical cases.

We also examined the costs of collection, processing, and review in terms of their sources: *internal*, such as law department counsel and IT department staff; *vendors*; and *outside counsel*. As might be expected because of their historical role in the review process, expenditures for the services of outside counsel consumed about 70 percent of total e-discovery production costs. Internal expenditures, even with adjustments made for underreporting, were generally around 4 percent of the total, while vendor expenditures were around 26 percent (Figure S.1). As Table S.1 shows, vendors played the dominant role in collection and processing, while review was largely the domain of outside counsel. The zero counts for internal processing and review do not mean that corporate resources were not consumed for these tasks, only that none of the

Figure S.1
Relative Costs of Producing Electronic Documents



NOTE: Values reflect median percentages for cases with complete data, adjusted to 100 percent.
RAND *MG1208-S.1*

Table S.1
Case Counts by the Primary Source of Expenditures for E-Discovery Tasks

Task	Internal	Vendor	Outside Counsel	Total Cases Reporting
Collection	6	31	5	42
Processing	0	42	2	44
Review	0	4	45	49

cases reporting complete information had internal expenditures for such activities that were greater than those for external entities, such as vendors or outside counsel.

The task breakdown in the table, however, appears likely to change in the future. Most of the companies whose representatives we interviewed expressed a commitment to taking on more e-discovery tasks themselves and outsourcing those that could be “commoditized.” Collection is a good example of this trend. Two of the eight companies were in the process of implementing an automated, cross-network collection tool in order to perform such services without the need for outside vendors, and others were anticipating moving in that direction. Although we found little evidence that the review process was moving in-house, the legal departments in the companies from which we interviewed representatives were taking greater control over at least the “first-pass” review to confirm relevance and responsiveness of documents, choosing vendors and specialized legal service law firms to perform such functions that were formerly delegated to outside counsel.

Reducing the Cost of Review

With more than half of our cases reporting that review consumed at least 70 percent of the total costs of document production, this single area is an obvious target for reducing e-discovery expenditures. We believe that many stakeholder complaints would diminish if expenditures for review were no more burdensome than those for either the collection or processing phase. Because review consumes about $0.73 of every dollar spent on ESI production, while collection and processing consume about $0.08 and $0.19, respectively, *review costs would have to be reduced by about three-quarters* in order to make those costs comparable to processing, the next most costly component of production. Choosing a 75-percent reduction in review expenditures as the desired target is an admittedly arbitrary decision, but more-modest cost savings are not likely to end criticisms from some quarters that the advent of e-discovery has caused an unacceptable increase in the costs of resolving large-scale disputes. To explore possible ways of achieving this target, we synthesized the methods that research on this topic has identified as promising for cutting review costs, both for the traditional approach of an "eyes-on" review of each document and for moving to a new paradigm that relies on computer-categorized review technology to examine documents for relevance, responsiveness, or privilege. We also summarize the literature on the relative quality of traditional review practices and computerized approaches to assess whether moving away from human review would compromise the quality of the process.

Significant Reduction in Current Labor Costs Is Unlikely

Companies are trying a variety of alternatives to the traditional use of outside law firms for most review tasks. In order to reduce the cost of review-related labor, they may hire temporary attorneys or use legal process outsourcing (LPO) companies with stables of contract attorneys. However, the rates currently paid to such project attorneys during large-scale reviews in the United States may well have bottomed out, with further reductions of any significant size unlikely. Another option that has been explored is the use of English-speaking local lawyers in such countries as India and the Philippines. Although such foreign outsourcing uses local attorneys who will work for much less than U.S. counsel, issues related to information security, oversight, maintaining attorney-client privilege, and logistics may limit the utility of offshore approaches for most litigation.

Increasing the Rate of Review Has Its Limits

The most-expansive claims regarding review speed is about 100 documents per hour, and this number assumes that reviewers have the strongest motivations and experience and are examining documents simple enough that a decision on relevance, responsiveness, privilege, or confidential information could be made in an average of 36 seconds. A trained "speed reader" can skim written materials at roughly 1,000 words per minute with about 50-percent comprehension. Therefore, even allocating zero time for bringing up a new document on the screen and zero time for contemplating a decision or the act of clicking the appropriate button to indicate a choice, a maximum of 600 words (about a page and a half) can be read in 36 seconds. Given the trade-off between reading speed and comprehension, especially in light of the complexity of documents subject to discovery in large-scale litigation, it is unrealistic to expect much room for improvement in the rates of unassisted human review.

Techniques for Grouping Documents Are Not the Answer

We describe three techniques that are increasingly used to organize documents—and, in some cases, "bulk-code" like documents—to streamline the review process:

- *Near-duplicate detection* groups together documents that contain mostly identical blocks of text or other information but that nevertheless differ in some minor way (any truly duplicate documents should have been removed during the processing phase).
- *Clustering* identifies the keywords and concepts in each document then groups documents by the degree to which they share keywords or concepts so that documents can be organized by topic rather than in random order to streamline the review.
- *Email threading* groups individual emails into single "conversations," sorting chronologically, and eliminating duplicate material.

These techniques organize material rather than reducing the number of documents in the review set. Commercial vendors of these services claim they can increase the rate of review to 200, 300, or even 500 documents per hour. However, given the physical limitations of reading and comprehension, better organization of the corpus of documents is not likely to account for such astonishing review rates unless decisions about individual documents can be applied to dozens or hundreds of similar items on a routine basis. Although some document sets may lend themselves to bulk coding in this manner, it is unlikely that these techniques would foster sufficiently dramatic improvements in review speed for most large-scale reviews.

Human Reviewers Are Highly Inconsistent

Just how accurate is the traditional approach in these days of computerized review tools flashing documents on screen before a first-year associate or contract lawyer at rates exceeding 50 documents per hour? Some rigorous studies addressing this issue found that human reviewers often disagree with one another when they review the same set of documents for relevance and responsiveness in large-scale reviews. In one study, for example, seven teams of attorneys, all trained in a similar manner and given the same instructions, examined 28,000 documents, clustered into 12,000 families involving similar topics, to judge whether the families were responsive to the facts of the case.[1] The seven teams differed significantly on the percentage of families determined to be responsive, ranging from a low of 23 percent to a high of 54 percent. As indicated by other studies discussed in this monograph, the high level of disagreement, corroborated by other studies discussed in the main text, is caused by human error in applying the criteria for inclusion, not a lack of clarity in the document's meaning or ambiguity in how the scope of the production demand should be interpreted.

Is Predictive Coding an Answer?

We believe that one way to achieve substantial savings in producing massive amounts of electronic information would be to let computers do the heavy lifting for review. Predictive coding is a type of computer-categorized review application that classifies documents according to how well they match the concepts and terms in sample documents. Such machine-learning techniques continually refine the computer's classifications with input from users, just as spam filters self-correct to increase the reliability of their future decisions about new email mes-

[1] Barnett and Godjevac, 2011.

sages, until the ambiguous ratings disappear. With predictive coding, humans (i.e., attorneys) initially examine samples of documents from the review set and make determinations about whether they are relevant, responsive, or privileged. Using those decisions, the software assigns scores to each document in the review set representing the probability that a document matches the desired characteristics. Additional samples of these new decisions are drawn and examined by the attorney reviewers, and the application refines the templates it uses to assign scores. The results of this iterative process are eventually stabilized. At that point, disagreement between the software's decisions and those of human reviewers should be minimized.

Because this is nascent technology, there is little research on how the accuracy of predictive coding compares with that of human review. The few studies that exist, however, generally suggest that predictive coding identifies at least as many documents of interest as traditional eyes-on review with about the same level of inconsistency, and there is some evidence to suggest that it can do better than that.

Not surprisingly, costs of predictive coding, even with the use of relatively experienced counsel for machine-learning tasks, are likely to be substantially lower than the costs of human review. It should be kept in mind that attorney review is still very much in play with predictive coding, but generally only for the smaller subset of documents that the application has judged to be potentially relevant, responsive, or privileged.[2] Because there is scant research on the issue, it is too early to confidently estimate the magnitude of any savings. Evidence, however, suggests the reduction in person-hours required to review a large-scale document production could be considerable. One study, for example, which did not report on cost savings but did report time savings, suggested that predictive coding of a document set previously reviewed in the traditional way would have saved about 80 percent in attorney review hours.[3] Although this estimate did not include the costs of the vendor's services, and the potential reduction in hours would be strongly influenced by the threshold probability scores used for determining potential matches, the savings are still likely to be considerable and meet the goal we set of a three-quarter reduction in review expenditures.

Barriers to the Use of Computer-Categorized Document Review

With such potential to reduce the costs of review without compromising quality, why is it that predictive coding and other computer-categorized document review techniques are not being embraced by litigants? None of the companies in our sample was using predictive coding for review purposes; at the end of 2011, we could find no evidence in the published record that any vendor, law firm, or litigant had used predictive coding in a publicized case that named the parties and court jurisdiction.

Some concerns are likely to pose barriers to the use of predictive coding, including whether it performs well in any of the following:

- identifying *all* potentially responsive documents while avoiding *any* overproduction

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[2] For example, one potential approach to computer-categorized document review would have the application identify documents likely to be relevant and responsive and then have attorneys examine only the identified set to confirm the decisions and to determine whether those documents contain privileged communications or sensitive information.

[3] Equivio, 2009a.

- identifying privileged or confidential information
- flagging “smoking guns” and other crucial documents
- classifying highly technical documents
- reviewing relatively small document sets.

Another barrier to widespread use could well be resistance to the idea from outside counsel, who would stand to lose a historical revenue stream. Outside counsel may also be reluctant to expose their clients to the risks of adopting an evolving technology. But perhaps most important is the absence of judicial guidance on the matter. At the time we conducted this study, there were simply no judicial decisions that squarely approved or disapproved of the use of predictive coding or similar computer-categorized techniques for review purposes. It is also true that many attorneys would be uncomfortable with the idea of being an early adopter when the potential downside risks appear to be so large. Few lawyers would want to be placed in the uncomfortable position of having to argue that a predictive-coding strategy reflects reasonable precautions taken to prevent inadvertent disclosure, overproduction, or underproduction, especially when no one else seems to be using it.

We propose that the best way to overcome these barriers and bring predictive coding into the mainstream is for innovative, public-spirited litigants to take bold steps by using this technology for large-scale e-discovery efforts and to proclaim its use in an open and transparent manner. The motivation for conducting successful public demonstrations of this promising technology would be to win judicial approvals in a variety of jurisdictions, which, in turn, could lead to the routine use of various computer-categorized techniques in large-scale reviews along with long-term cost savings for the civil justice system as a whole. Without organizational litigants making a contribution in this manner, many millions of dollars in litigation expenditures will be wasted each year until legal tradition catches up with modern technology.

Challenges of Preservation

Some important generalizations emerged from our inquiry into what corporate counsel consider to be the main challenges of preserving electronic information in anticipation of litigation.

Companies Are Not Tracking the Costs of Preservation

Most interviewees did not hesitate to confess that their preservation costs had not been systematically tracked in any way and that they were unclear as to how such tracking might be accomplished, though collecting useful metrics was generally asserted as an important future goal for the company.

Preservation Expenditures Are Said to Be Significant

All interviewees reported that preservation had evolved into a significant portion of their companies’ total e-discovery expenditures. Some of them believed that preserving information was now costing them more than producing e-discovery in the aggregate. The way in which organizations perceive the size of preservation expenditures relative to that of production appears to be related to steps taken (or not taken) to move away from ad hoc preservation strategies, the nature of their caseloads, and ongoing impacts on computing services and business practices.

There Are Complaints About the Absence of Clear Legal Authority

A key concern voiced by the interviewees was their uncertainty about what strategies are defensible ones for preservation duties. Determining the reasonable scope for a legal hold in terms of custodians, data locations, and volume was said to be a murky process at best, with strong incentives to overpreserve in the face of the risk for significant sanctions. Similar concerns were voiced about the process itself, with few concrete guideposts said to be available to provide litigants with a level of comfort when deciding not only what to preserve, but how.

The cause for such worries is the absence of controlling legal authority in this area. Although judicial decisions have addressed preservation scope and process, they act as legally binding precedent in only specific jurisdictions, or conflict with decisions rendered by other courts on the same issues. As a result, litigants reported that they were greatly concerned about not making defensible decisions involving preservation and about the looming potential of serious sanctions.

Recommendations

We propose three recommendations to address the complaints of excessive costs and uncertainty that emerged from our interviews.

Adopt Computer Categorization to Reduce the Costs of Review in Large-Scale E-Discovery Efforts

The increasing volume of digital records makes predictive coding and other computer-categorized review techniques not only a cost-effective option to help conduct review but the *only* reasonable way to handle large-scale production. Despite efforts to cull data as much as possible during processing, review sets in some cases may be impossible to examine thoroughly using humans, at least not in time frames that make sense during ongoing litigation. New court rules *might* move the process forward, but the best catalyst for more-widespread use of predictive coding would be well-publicized documentation of cases in which judges examined the results of actual computer-categorized reviews. It will be up to forward-thinking litigants to make that happen.

It should be noted that we believe that computer-categorized review techniques, such as predictive coding, have their greatest utility with production volumes that are at least as large as the cases in our sample.

Improve Tracking of Costs of Production and Preservation

There are many reasons to track discovery costs. Without such data, companies cannot develop strategies for dealing with massive data volumes, such as investing in automated legal-hold–compliance systems or advanced analytic software for early case assessment. A litigant also needs to be able to present a credible argument to a judge that a proposed discovery plan or request will result in unreasonably large expenditures. Finally, the need for better records may be strongest in the context of preservation, in which the absence of publicly reported data in this area frustrates rule-making efforts intended to address litigant complaints.

Bring Certainty to Legal Authority Concerning Preservation

Steps must be taken soon to address litigant concerns about complying with preservation duties. The absence of clear, unambiguous, and transjurisdictional legal authority is thwarting thoughtful preservation efforts, potentially leading to overpreservation at considerable cost; and creating uncertainty about proper scope, defensible processes, and sanctionable behavior.

The Enlightened Legal Hold

A New Approach to Legal Preservation Following the Pension Committee Opinion

By Brad Harris and Craig Ball

A Legal Hold **Pro**™ Signature Paper

August 2010

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Craig Ball has not been compensated for contributing to this article, is not affiliated with Zapproved, Inc. and offers no endorsement of its products or services.

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Zapproved is a Software-as-a-Service (SaaS) provider based in Portland, Ore., with a platform that adds accountability to business communications. Zapproved's first products focus on targeted compliance workflows that reduce liability risk in legal and regulatory compliance. The company is expanding its product line to create a suite of applications that address additional compliance issues and workplace collaboration.

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A Legal Hold Pro™ Signature Paper

The Enlightened Legal Hold

A New Approach to Data Preservation Following the Pension Committee Opinion

By Brad Harris and Craig Ball

The landmark *Pension Committee*[1] decision by U.S. District Court Judge Shira Scheindlin in January 2010 underscores the impact and import of legal holds as never before. Just weeks after issuance, the 89-page opinion had already been cited extensively[2] owing to its clarity and scholarship. It may prove to be a turning point as decisive — and contentious — in the jurisprudence of electronic discovery as Judge Scheindlin's other e-discovery milestone, *Zubulake v. UBS Warburg*.[3]

The response of the legal community to the *Pension Committee* opinion has been pronounced and varied – some embrace it while others argue it goes too far, imposing a near-impossible burden on litigants and counsel. Of course, poor evidence handling and avoidable spoliation impose their own worrisome burdens on our system of justice, burdens which the opinion seeks to address.

Despite its epic length, *Pension Committee* offers little that is groundbreaking. In its tone and its novel subtitling by the Court – "*Zubulake* Revisited: Six Years Later" – Judge Scheindlin reminds us that she is applying established standards, not announcing new ones. She reflects and recounts a growing frustration among federal judges at being forced to police the preservation of electronically stored information ("ESI") that is so much a part of modern litigation. She is bent on sending the clear message that judges don't want to waste time and squander resources on motion practice, depositions and reams of submissions growing out of inexcusable failures to properly preserve relevant ESI.

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[1] *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.,* Amended Order, Case No. 05 Civ. 9016 WL 184312 (SDNY Jan. 15, 2010)
[2] See *Rimkus Consulting Group Inc. v. Nickie G. Cammarata*, et al., 07-cv-00405 (SDTX Feb. 19, 2010)
[3] *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) "*Zubulake IV" and Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422 (S.D.N.Y. 2004) "Zubulake V"

The *Pension Committee* case and the numerous opinions that have followed (see sidebar, p.3) will surely serve as catalyst for changing the way organizations approach legal holds and in further polarizing attitudes about e-discovery between those who see e-discovery as an engine of truth and those who see it as a sideshow. The split is evident in the *Rimkus v. Cammarata* opinion from February 19, 2010. Judge Lee Rosenthal in the U.S. District Court for the Southern District of Texas wrote:

> "Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information." [4]

It remains to be seen whether the courts' frustration will diminish because litigants and counsel become more skilled at effectuating litigation holds, or because judges scale back discovery or choose not to treat preservation gaffes as spoliation.

If Judge Scheindlin is merely reiterating her 2004 *Zubulake*[5] holding in the *Pension Committee* decision, why are we still seeing so many allegations and instances of improper legal holds? Managing legal holds is a complicated problem afflicted by simple mistakes. It appears that there's less interest in understanding or perfecting the process than in getting "something" out that can be claimed as evidence that a legal hold was put in place.

Now is the time for enlightened legal holds, an age when counsel have the judgment to distinguish what must be preserved, the knowledge to negotiate and lucidly communicate the scope, and the skills and tools to select and instruct on reasonable and effective methods of preservation. Implementing a reasonable, defensible legal hold need not be a complex or overwhelming task. The standard is not perfection, but reasonableness and good faith coupled with competency.

The process demands a reasoned approach focused on clear goals. Legal holds should be crafted to preserve potentially responsive evidence, not simply ward off sanctions. *Success in the former assures success in the latter.*

All too often, we see half-hearted attempts at data preservation undertaken with little understanding of a client's information resources. A generic hold directive dispatched *en masse* to custodians carries high risks. Many will ignore it as incomprehensible or dismiss it as impractical. Worse, it may trigger absurd Herculean preservation efforts crippling productivity and budgets.

It is said that *"one only changes when the pain of staying the same is greater than the pain of change."* The *Pension Committee* decision tips the scales toward:

- *Higher standards* – practices once thought acceptable or perhaps merely negligent are concluded as sufficient to support sanctions.
- *Higher stakes* – equating an ineffective legal hold to gross negligence puts litigants at risk of the most severe sanctions, even dispositive sanction.

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[4] *Rimkus,* p.1
[5] *Zubulake*

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- *New vulnerabilities* – adversaries in litigation have greater incentive to challenge an opponent's preservation efforts when a flawed legal hold becomes a shortcut to victory.

Optimally, one's preservation process is so transparent as to be invisible; that is, it can freely be disclosed to an opponent to the point that objections will be flushed out while it is relatively cheap and easy to cure them.

We propose several organizing principles serving as a guide to those preparing and implementing legal holds in cases of all sizes and types, from run-of-the-mill disputes implicating a handful of key players, to bet-the-company battles involving thousands of custodians and systems.

2010 – The Year of the Legal Hold

On the Chinese calendar, 2010 is the Year of the Tiger. Based on the flood of court opinions, it is more like the Year of the Legal Hold! Following is a selected list of notable opinions relating to poor preservation practices.

Jan. 11 *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.,* 05 Civ. 9016 (SDNY Jan. 11, 2010) – The landmark opinion out of the Southern District of New York that strongly affirmed the expectations around the legal hold process by sanctioning plaintiffs as "grossly negligent" for failing to issue a written legal hold, among other preservation problems. Sanctions included special jury instructions and monetary sanctions, including costs and fees.

Jan. 28 *John B. v. Goetz*, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010) – In a class action against state agencies in Tennessee, another ruling cited shoddy preservation practices. The court ruled that state agencies were grossly negligent concluding that "even if the…litigation hold memorandum were distributed, there was not any implementation of its provisions" resulting in further extensive electronic discovery efforts.

Feb. 17 *Kwon v. Costco Wholesale Corp*., Civ. No. 08-00360, 2010 WL 571941, (D. Haw. Feb. 17, 2010) – A personal injury case in which the defendant failed to execute a legal hold resulting in destruction of a potentially relevant surveillance video. The court determined that the spoliation was not deliberate yet issued an adverse inference sanction which the court said would "deter defendant and others from allowing evidence to be destroyed."

Feb. 19 *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615-17 (S.D. Tex. Feb. 19, 2010) – Judge Rosenthal cited *Pension Committee* extensively. Even though there was willful destruction of evidence, a significant amount of the incriminating evidence was recovered by the plaintiff. The Court was unwilling to issue an adverse inference instruction and chose to present the facts as they are and allow the jury to determine the implications of the defendants' misconduct.

Mar. 15 *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009 (FM), 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010) – Judge Maas determined that negligence resulting in spoliation was sufficient for sanctions, not just a "culpable state of mind." The court issued a adverse inference instruction to the jury for "grossly negligent" actions that resulted in loss of relevant data.

Mar. 31 *Crown Castle USA, Inc. v. Fred A. Nudd Corp.,* 2010 U.S. Dist. LEXIS 32982, (W.D.N.Y. Mar. 31, 2010) – Defendant acted grossly negligently resulting in spoliation, including failure to issue a legal hold, cease back-up destruction, and to act in a timely manner. Despite a ruling of "gross negligence," the defendant avoided harsher sanctions because it was deemed to not have acted in bad faith and recovered most of the lost emails.

April 20 *Merck Eprova AG v. Gnosis S.p.A. et al., 07* Civ. 5898 (S.D.N.Y. Apr. 20, 2010) – Judge Sullivan issued a $25,000 fine and monetary sanctions for not issuing legal hold and other actions "to deter future misconduct…and to instill a modicum of respect for the judicial process" following the defendant's weak efforts to preserve information.

April 27 *Passlogix, Inc.v.2FA Technology LLC, et al.,* 2010 WL 1702216 (S.D.N.Y., April 27, 2010) – The breach of contract case resulted in a $10,000 fine. Bad behavior by the defendant resulted in spoliation due to a lack of a legal hold. The court said the "failure to preserve these written communications, in addition to [defendant's] overall failure to issue a written litigation holds notice, constitutes gross negligence."

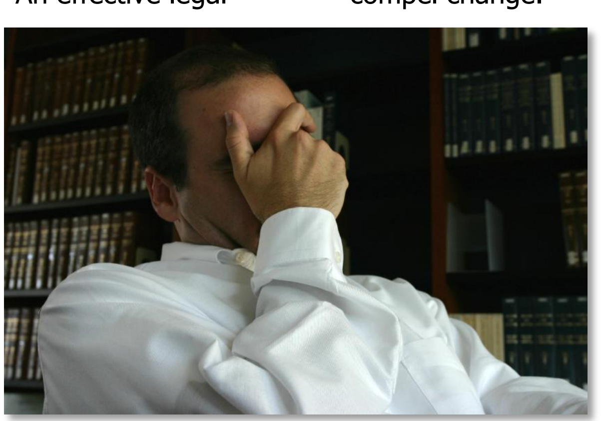
May 25 *Jones v. Bremen High School Dist. 228, 2010* WL 2106640 (N.D. Ill. May 25, 2010) – Judge Cox made a ruling of gross negligence following a failure to issue a timely legal hold, lack of collections supervision and a failure to suspend routine destruction of backup media. The judge determined sanctions were necessary because "defendant's attempts to preserve evidence were reckless and grossly negligent," including special jury instructions and monetary sanctions.

June 15 *Medcorp, Inc. v. Pinpoint Tech., Inc.,* 2010 WL 2500301 (D. Colo. June 15, 2010) – Plaintiff failed to prevent spoliation by implementing a legal hold leading to an adverse inference instruction and $89,000 in monetary sanctions.

The Five Deadly Sins of Legal Holds

Despite the call to action sounded by Judge Scheindlin in *Zubulake* and by other courts in dozens of subsequent opinions, the bar has been slow to change. Slow to the point of obstinacy. When so many costly, embarrassing failures trace their origins to slipshod legal holds, one marvels that attorneys aren't bound and determined to get legal holds right. Yet, many lawyers still imagine that a legal hold notice is just a memo or message larded with synonyms for "data" and "computer." An effective legal hold notice is not a communiqué. It's a *process*.

We see five common mistakes when it comes to legal holds. Let's call them "the Five Deadly Sins of Legal Holds." See if any sound familiar:



Sin 1 – Complacency

Newton's First Law defines inertia as the tendency of an object at rest to remain at rest, unless acted upon by a force. It's not that organizations don't acknowledge the need to improve their preservation processes, such as by dispatching better notices earlier and with better follow-up. Instead, the excuse most often proffered in defense of poor preservation efforts is having been too busy to do it right.

An object (here, an organization) fails to change unless acted upon by a force. That force often comes in the form of court-imposed sanctions like those imposed in the April 2010 opinion in *Passlogix, Inc. v. 2FA Tech* (S.D.N.Y. Apr. 27, 2010).[6] The absence of a written hold and demonstrated spoliation on the part of the defendant resulted in imposition of a $10,000 fine. Eschewing more severe sanctions, the Court nonetheless concluded that a fine was warranted to serve "the dual purposes of deterrence and punishment." An organization being acted upon by a force that will grow as irresistible as is required to compel change.

Sin 2 – Confusion

Ask an attorney about improving his or her legal hold processes, and you'll likely hear how hard it is to figure out who should be notified and how daunting it is to identify all the possible sources of relevant ESI that must be preserved. The lawyer may add that he or she simply doesn't have the computer savvy or the support staff to craft defensible legal hold notices, get them in the right hands, follow-up appropriately and issue periodic revisions and reminders.

One CEO will surely make certain that counsel gets the job done right next time. In *Merck Eprova v. Gnosis* (SDNY, April 20, 2010), the Court issued severe sanctions with frequent references to the *Pension Committee* opinion, finding that "there is no doubt that Defendants failed to issue a legal

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[6] *Passlogix, Inc.v.2FA Technology LLC, et al.,* 2010 WL 1702216 (S.D.N.Y., April 27, 2010)

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hold" and deemed "this failure…a clear case of gross negligence." The Court found unpersuasive the claim that Gnosis was a small company, deciding that was no excuse for the failure to issue a written legal hold and ensure proper compliance. The Court fined the defendants $25,000 plus costs, "both to deter future misconduct… and to instill in Defendants some modicum of respect for the judicial process." [7]

Sin 3 – Fear

Fear drives e-discovery in unproductive ways. Loathe to appear unskilled to clients or opponents, lawyers avoid delving into the unfamiliar so as not to risk revealing their confusion. Terrified of inadvertently producing privileged ESI, lawyers devote disproportionate resources to privilege review. Legal teams, too, are often paralyzed by fear of the unknown when implementing a legal hold. Fearful of omitting a key custodian or source of discoverable information, lawyers err on the side of too many and too much in framing legal hold efforts. Lawyers who over-preserve often seem more interested in protecting themselves than their clients; yet, over-preservation is its own, certain sanction because of the undue burden and costs that follow.

Overwhelmed by the volume and complexity of enterprise information systems, lawyers can forget that most cases are still about people. Counsel must identify, by name or role, the individuals whose communications and work product must be preserved. Certainly, it's harder to identify the right people than it is to broadcast a hold to an entire department or business unit, but the effort is always time well spent...and money saved. Moreover, a closely-targeted-and-tailored hold is a *personal* responsibility — one less easily dismissed as someone else's problem.

Then, there is fear of the ostrich variety. Hesitant to discover that a problem exists, lawyers fail to audit or otherwise track compliance with legal holds. But, a problem you don't know about is still a problem — just riskier and costlier to rectify over time. An effective legal hold isn't just an artful notice cast into the void; it's a notice proven effective by sound recordkeeping and diligent follow-up.

Sin 4 – Overconfidence

Where a surfeit of fear can paralyze a preservation effort, so, too, can overconfidence. Whether out of ignorance or an outsized trust of policies and systems, some lawyers fail to act based on a misplaced belief that a legal hold is unnecessary. The most common reasons cited are that there is nothing more that needs to be preserved because policy dictates they preserve everything, or there is nothing left to preserve because policy dictates it's already gone. Where ESI is concerned, the gap between policy and practice rivals the Grand Canyon in every enterprise and for every custodian.

A "we-preserve-everything" assumption is precarious. To actually "preserve everything" that may be potentially relevant is incredibly expensive, and extends far beyond the trivial cost of more or larger hard drives. The greatest costs flow from the management and search of "everything," whether in buying and maintaining active data storage devices (with their requisite power consumption,

[7] Merck Eprova AG v. Gnosis S.p.A. et al., 07 Civ. 5898 (S.D.N.Y. Apr. 20, 2010)

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maintenance and disaster recovery costs), paying to retain backup tapes (and systems and software to read them), or — most expensive of all — paying vendors and lawyers to process and review "everything."

Even organizations that believe they preserve everything usually don't. Is business data on home computer systems preserved? Is data on local hard drives, external storage devices, cell phones, voice mail systems, web repositories locked down? Is data from new and emerging social communication mediums such as instant messaging, FaceBook, Twitter and LinkedIn being identified and captured?

Never confuse what people are supposed to do with what they really do — an effective hold deals with what's *really* out there.

Sin 5 – Over Complication

Technology can be seductive. And some get so caught up in the systems, data and metadata that they lose sight of the content. "The perfect," Voltaire remarked, "is the enemy of the good." Avoiding "paralysis by analysis" means striking a balance between getting lost in the details and failing to get on with it.

There is no optimum technical solution that obviates the need for custodial judgment and skill, just as there is no optimum preservation mechanism predicated on custodial action alone.

Ironically, obsessing over the perfect preservation notice or mechanism can lead to spoliation by delaying preservation. To paraphrase Woody Allen, "80 percent of success in ESI preservation is just getting it done."

An Enlightened Approach to Legal Holds

Notifying an organization's data stewards of their need to preserve information is not all that difficult; but, it requires a thoughtful and reasoned approach. It definitely demands more than a form letter sent "to everyone in the Akron office telling them not to delete or change anything involving Consolidated Widgets."

A well-documented, closely-monitored and transparent process prompts those tasked to preserve information to understand their obligations and be more likely to respond in a careful and timely way. By applying such a process consistently (but not slavishly), costs and risks are mitigated and the predictability of outcomes improved. Such transparency, consistency and predictability build trust and, ultimately, defensibility without undue burden.

It is important to note what a legal hold is *not*. It is *not* just a letter, memo or email. It is *not* a rote exercise. It is *not* a perfect process. There is no "one size fits all" solution.

A legal hold is an organic, bespoke *process*.

Webster's defines "enlightenment" as "full comprehension of a situation." Applied to legal holds, we can say that, "*a legal hold is a series of communications, actions and restraints grounded on comprehension of how information is created, used and retained, and designed to ensure that potentially responsive information will be available in response to discovery in a reasonably usable form."*

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The Principles of Legal Hold Enlightenment

Let the end guide your beginning.

Know where you're going, then construct your legal hold to get there.

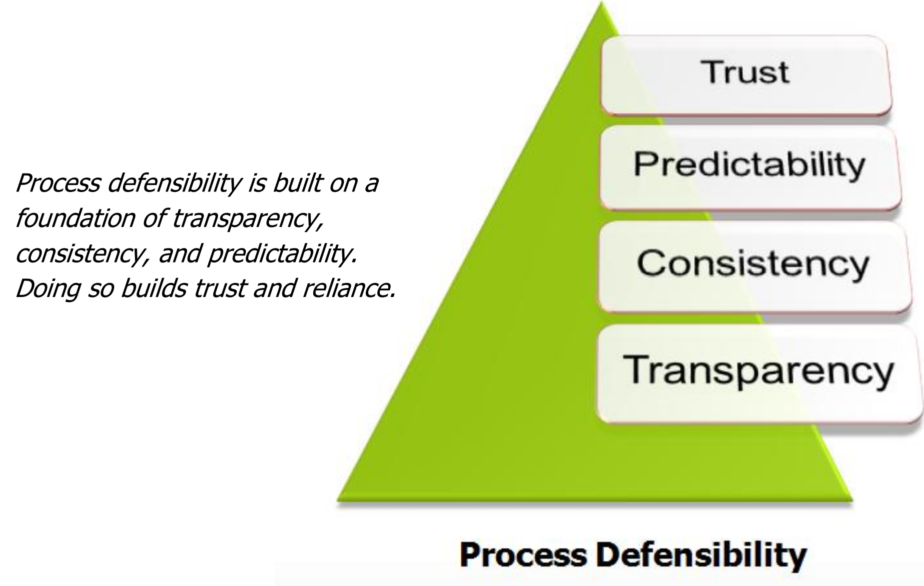
Every legal hold is as different as every case, with a unique complement of parties, witnesses, evidence, issues, intervals and outcomes. There is no "cookie cutter" approach or "perfect hold directive" that, used every time, will ensure the proper preservation of information. But, while the details change, the process — and particularly aspects that promote the integrity of process — should be consistent.

Begin the process by anticipating the evidence that your side will require and the other side will seek. Who are the most likely witnesses? What did they rely upon in decision making? What would they review to refresh their memories concerning key events and exchanges? What are the issues before the Court and the records that bear on them?

Anticipate as well the changes that are likely to occur between the times the preservation obligation attaches and the collection or processing of relevant data is performed. Employees leave or change positions. Systems are replaced and updated. Content is purged. Tapes are rotated. Hard drives fail.

In the cases where parties were sanctioned for failing to preserve ESI, the missing material is rarely something that wouldn't have been deemed relevant and material, if someone had only taken a moment to think ahead and anticipate foreseeable consequences.

At the core of successful preservation efforts lies a routine workflow. If you lack a consistent preservation protocol that those charged to implement it understand well (including third-parties with custody or control of your data), then put one in place. Keep it simple (e.g., checklists and spreadsheets to track progress) while encouraging repeatability and consistency.



Process defensibility is built on a foundation of transparency, consistency, and predictability. Doing so builds trust and reliance.

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Do the simple things well.

Have a process and execute it.

Legal holds can be complicated, but the reasons they fail are usually pretty simple. It's exceedingly rare for a party to be sanctioned for good faith, diligent efforts that have gone awry. The courts work with litigants who can show that they employed a reasonable process and exercised the discipline to execute it consistently. Demonstrating that you had the policies, procedures, tools, personnel and lines of communication in operation that were likely to promote sound preservation goes a long way to deflecting the evidence of bad faith at the heart of most sanctions.

To meet the threshold that courts expect, consider the following as key elements of a sound legal hold:

1. Issue timely, written legal hold directives;
2. Ensure custodians understand what's required and how to comply;
3. Follow up, e.g. audit trails, one-on-one interviews, supervised collection;
4. Provide for periodic updates and reminders;
5. Account for employee mobility and turnover;
6. Consider third-party custodians;
7. Thoroughly document actions and the bases for decisions;

When BIG is Too Big: The Hazards of Over-Preservation

The implications for an overly-broad or overly-inclusive hold notice:

- Business interruption caused by responding to and complying with hold instruction.
- Added storage expense (particularly if hold affects the routine rotation of backup tapes, or retention policies of database and archive applications that routinely purge aged or obsolete data).
- IT infrastructure impacts (e.g., responsiveness of search queries across broader data sets, time required to perform a routine backup for disaster recovery).
- Subsequent discovery cost and risk associated with retaining information beyond its useful life that would otherwise not be preserved (once retained, it can become subject to future preservation obligations).
- Total cost of discovery to collect, cull and review data that is preserved for each case.
- Risk of unintended actions (e.g., "just preserve everything forever" or misinterpreting the true scope and preserving the wrong data).
- Risk of inaction by recipients (e.g., "it's so broad, I can't possibly comply" or "someone else will take care of this" response).

Some cost factors to consider:

- Typical knowledge worker sends and receives between 100 and 200 emails a day (conservatively).
- Over one year, that amounts to nearly 40,000 emails or roughly 2 gigabytes of stored data.
- If 100 employees placed on hold for one year, could result in 200 gigabytes for email alone if retaining every email.
- If you have to collect and review for discovery, even with good search criterion that can eliminate 95 percent of the data, still results in 10 gigabytes and 200,000 emails to be reviewed.
- A conservative estimate of total cost to process, cull, review and produce is $1,500 per gigabyte collected resulting in $300,000 in discovery cost alone (just for the email!).

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8. Develop procedures, recordkeeping and training materials that leverage past preservation efforts; and
9. Remember that legal hold is a process, not simply a document.

Often, the process can be greatly aided using software tools designed to manage the legal hold. By automating routine preservation tasks, legal teams are less likely to overlook something and can better leverage past efforts by building a knowledge base detailing what has gone before.

Perfection is unattainable.

Know that spoliation occurs even when you do your best.

In *The Pension Committee* opinion, Judge Scheindlin observes:

> "Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." [8]

Implementing a legal hold is not about scooping up all of the ESI and responsive data and locking it in a vault; it's taking reasonable steps to assure that data will be there when needed.

[8] *Pension Committee,* p.2

Everything in moderation.

Don't over-preserve.

Over-preservation saddles litigants with a real, immediate cost that must be weighed against the potential for responsive information being lost. A hold notice goes too far when it compels an organization to "preserve everything." That's gross negligence, too – except the "sanction" is immediate and self-inflicted.

Memories are fleeting, writings are not.

Create a detailed written record of legal hold efforts.

Much has been said about Judge Scheindlin's emphasis on issuing a *written* legal hold. Indeed, she characterizes written hold notices as essential, and the failure to furnish same as gross negligence. Whether a defensible legal hold absolutely requires a written directive to custodians or not may be debated, but certainly the absence of such directive is a red flag absent a compelling justification for not doing so.

Document in detail the actions taken with respect to the hold. What was done and when? Who dictated the scope and why? Which custodians were notified, and what follow-up ensued? Cases often take years to resolve. Employees will forget, misremember, depart and die. Extensive, lucid documentation shows the court that you took your preservation duties seriously. Absent, incomplete or confusing documentation proves you didn't.

Clear, thorough documentation doesn't just happen. It has to be someone's responsibility. Be sure that a person "in-the-loop" with the skills to do the job well is tasked to serve as Boswell to the effort.

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Don't use a hammer to do the work of a saw.

Create targeted hold notifications for specific custodians.

When instructing employees, counsel must include clear and direct instructions to custodians to preserve records. Judge Scheindlin was critical of litigants that failed to do so, stating that their efforts did not "meet the standard for a litigation hold. It does not direct employees to preserve records – both paper and electronic." [9]

Weak or improper instructions are an indication of an attorney not understanding the purpose of a legal hold. In *Samsung v. Rambus*[10] the instructions were "to save all relevant documents." The Court said that this was the "sort of token effort [that] will hardly ever suffice." [11]

Consider different functional teams and tailor your hold notifications to their functions. A database administrator needs to know to archive back-up tapes for an enterprise resource planning software system, but if a sales manager received the same notice it would only lead to confusion.

Trust everyone...but cut the cards.

Understanding that "self-preservation" has two meanings.

Sometimes clients or employees lie.

Judge Scheindlin pointed out that counsel must direct and supervise custodians in the preservation and collection process. Organizations, too, must actively supervise collections by employees and contractors. Judge Scheindlin called out a failure to do so in *Pension Committee* when an "ill-equipped" employee handled "discovery obligations without supervision." [12] When preservation boils down to employees searching their own files for relevant material they become the sole arbiter of relevance – a task for which they are often ill-equipped or conflicted.

You don't post a fox to guard the henhouse. Counsel cannot ignore the potential for custodians to act in their self-interest and "overlook," alter or delete information that could compromise or embarrass them or the company.

The best hold notices fail if the persons charged to execute them won't do so fairly and honestly. When it's reasonable to anticipate a situation like this, consider alternatives that will minimize the potential for shenanigans, such as duplicating relevant data before the notice goes out or delegating the search and collection to someone not motivated to make information disappear.

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[9] *Pension Committee,* p.28

[10] *Samsung Eletronics Co., Ltd. V. Rambus, Inc.,* 439 F.Supp.2d 524, 565 (E.D.Va. 2006)

[11] Isaza, John and John Jablonski, *7 Steps for Legal Holds of ESI and Other Documents,* ARMA (2009), p.50

[12] Pension Committee, p.53

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Final Thoughts

The elements of a successful legal hold are straightforward and not difficult to execute; but, they demand organization, diligence, thought and care.

The Pension Committee opinion is a forceful reminder that the time to institute policies and procedures to meet legal hold obligations is *now*. In the time it will take you to identify key custodians, learn what data exist and where it resides, then formulate a means to identification or collection, the data you're bound to protect may disappear.

A good lawyer, like a skilled firefighter or EMT, is ready to roll. A good lawyer has a plan, and the process, people and tools to effectively execute it when needed.

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"Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution."

Judge Lee Rosenthal
Rimkus v. Cammarata
(S.D. Tex. Feb. 19, 2010)

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Spoliation Sanctions by Circuit

Adapted from the Appendix to U.S. Magistrate Judge Paul W. Grimm's *Victor Stanley II* opinion
Victor Stanley, Inc. v. Creative Pipe, Inc., et al. (D.MD, Sept. 9, 2010)

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
First Circuit	It is a duty to preserve potentially relevant evidence a party owns or controls and also a duty to notify the opposing party of evidence in the hands of third parties. *Velez v. Marriott PR Mgmt., Inc.,* 590 F. Supp. 2d 235, 258 (D.P.R. 2008).	This specific issue has not been addressed.	"The measure of the appropriate sanctions will depend on the severity of the prejudice suffered." *Velez v. Marriott PR Mgmt., Inc.,* 590 F. Supp. 2d 235, 259 (D.P.R. 2008). "[C]arelessness is enough for a district court to consider imposing sanctions." *Driggin v. Am. Sec. Alarm Co.,* 141 F. Supp. 2d 113, 123 (D. Me. 2000).	"severe prejudice or egregious conduct" *Driggin v. Am. Sec. Alarm Co.,* 141 F. Supp. 2d 113, 123 (D. Me. 2000).	"does not require bad faith or comparable bad motive" *Trull v. Volkswagen of Am., Inc.,* 187 F.3d 88, 95 (1st Cir. 1999); *Oxley v. Penobscot County,* No. CV-09-21-JAW, 2010 WL 3154975 (D. Me. 2010)	Whether relevance can be presumed has not been addressed.	When spoliation substantially denies a party the ability to support or defend the claim Velez v. Marriott PR Mgmt., Inc., 590 F. Supp. 2d 235, 259 (D.P.R. 2008).	Intentional spoliation; permissive adverse inference if the jury finds that the spoliator knew of the lawsuit and the documents' relevance when it destroyed them *Testa v. Wal-Mart Stores, Inc.,* 144 F.3d 173, 178 (1st Cir. 1998).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Second Circuit	Documents that are potentially relevant to likely litigation "are considered to be under a party's control," such that the party has a duty to preserve them, "when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." *In re NTL, Inc. Sec. Litig.,* 244 F.R.D. 179, 195 (S.D.N.Y. 2007). The duty extends to key players. *Zubulake v. UBS Warburg* LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).	Yes; specific actions, such as the failure "to issue a written litigation hold," constitute gross negligence per se. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010).	"[D]iscovery sanctions…may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 113 (2d Cir. 2002).	"'willfulness, bad faith, or fault on the part of the sanctioned party'" Dahoda v. John Deere Co., 216 Fed. App'x 124, 125, 2007 WL 491846, at *1 (2d Cir. 2007) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)).	Gross negligence *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 685 F. Supp. 2d 456, 478-79 (S.D.N.Y. 2010). Negligence *Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 108 (2d Cir. 2002). Intentional conduct *In re Terrorist Bombings of U.S. Embassies in East Africa,* 552 F.3d 93, 148 (2d Cir. 2008).	Bad faith or gross negligence *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010).	When spoliation substantially denies a party the ability to support or defend the claim *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 685 F. Supp. Sec. 2d 456, 479 (S.D.N.Y. 2010)	Grossly negligent conduct; permissible inference of "the relevance of the missing documents and resulting prejudice to the…Defendants. subject to the plaintiffs' ability to rebut the presumption to the satisfaction of the trier of fact." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010)

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Third Circuit	Potentially relevant evidence; "'it is essential that the evidence in question be within the party's control.'" *Canton v. Kmart Corp.,* No. 1:05-CV-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting *Brewer v. Quaker State Oil Refining Corp.,* 72 F.3d 326, 334 (3d Cir. 1995))	No; conduct is culpable if "party [with] notice that evidence is relevant to an action…either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions" *Canton v. Kmart Corp.,* No. 1:05-CV-143, 2009 WL 2058908, at *3 (D.V.I. July 13, 2009) (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.,* 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (emphasis added).	Bad faith *Bensel v. Allied Pilots Ass'n,* 263 F.R.D. 150, 152 (D.N.J. 2009).	The degree of fault is considered, and Dispositive sanctions "should only be imposed in the most extraordinary of see circumstances," *Mosaid Techs., Inc. v. Samsung Elecs. Co.,* 348 F. Supp. 2d 332, 335 (D.N.J. 2004), but a minimum degree of culpability has not been identified	Negligence *Canton v. Kmart Corp.,* No. 1:05-CV-143, 2009 WL 2058908, at *2-3 (D.V.I. July 13, 2009) Intentional conduct *Brewer v. Quaker State Oil Refining Corp.,* 72 F.3d 326, 334 (3d Cir. 1995)	Whether relevance can be presumed has not been addressed	Spoliation of evidence that would have helped a party's case *In re Hechinger Inv. Co. of Del., Inc.,* 489 F.3d 568, 579 (3d Cir. 2007)	Intentional spoliation; permissible inference *Mosaid Techs., Inc. v. Samsung Elecs. Co.,* 348 F. Supp. 2d 332, 334 (D.N.J. 2004)

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Fourth Circuit	Documents that are potentially relevant to likely litigation "are considered to be under a party's control," such that the party has a duty to preserve them, "when that party has 'the right, authority, or practical ability to obtain the documents from a non-party to the action.'" *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515 (D. Md. 2009) (citation omitted). It is also a duty to notify the opposing party of evidence in the hands of third parties. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). Duty extends to key players. *Goodman*, 632 F. Supp. 2d at 512	The U.S. District Court for the District of Maryland has quoted *Zubulake IV,* 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."). See *Sampson v. City of Cambridge,* No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008) (finding defendant's conduct negligent); *Pandora Jewelry, LLC v. Chamilia LLC* , No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008) (finding defendant's conduct grossly negligent); cf. *Goodman,* 632 F. Supp. 2d at 522 (stating that defendant, "much like the defendants in *Sampson* and *Pandora,* was clearly negligent" because it failed to implement a litigation hold, but also explaining why such action was negligent).	"only a showing of fault, with the degree of fault impacting the severity of sanctions" *Sampson v. City of Cambridge,* 251 F.R.D. 172, 179 (D. Md. 2008) (using "fault" to describe conduct ranging from bad faith destruction to ordinary negligence).	The court must "be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." *Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 593 (4th Cir. 2001).	The court "must only find that spoliator acted willfully in the destruction of evidence." *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 519 (D. Md. 2009).	Willful behavior *Sampson v. City of Cambridge,* 251 F.R.D. 172, 179 (D. Md. 2008).	When spoliation substantially denies a party the ability to support or defend the claim *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 519 (D. Md. 2009); *Sampson v. City of Cambridge,* F.R.D. 172, 180 (D. Md. 2008).	Willful spoliation; adverse jury instruction, but not the "series of fact-specific adverse jury instructions" that the plaintiff requested *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 523 (D. Md. 2009).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Fifth Circuit	Party with control over potentially relevant evidence has a duty to preserve it; scope includes evidence in possession of "employees likely to have relevant information, i.e., 'the key players'" *Tango Transp., LLC v. Transp. Int'l Pool, Inc.,* No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009)	No: "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done - or not done – was proportional to that case and consistent with clearly established applicable standards." *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).	"some degree of culpability" *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).	Bad faith (and prejudice) *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)	Bad faith *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010)	"The Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial." *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 617-18 (S.D. Tex. 2010)	When spoliation substantially denies a party the ability to support or defend the claim *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)	Willful spoliation; jury instruction would "ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation." *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 620, 646 (S.D. Tex. 2010).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Sixth Circuit	It is a duty to preserve potentially relevant evidence that a party owns or controls and to notify the opposing party of evidence in the hands of third parties. *Jain v. Memphis Shelby Airport Auth.,* No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010). Duty extends to key players *In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.,* No. 2:03-md-1565, 2009 WL 2169174, at *11 (S.D. Ohio July 16, 2009).	This specific issue has not been addressed. In *BancorpSouth Bank v. Herter,* 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009), the court quoted *Zubulake IV,* 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."), but it also analyzed the defendant's conduct to make the finding that it was "more than negligent."	Bad faith (intentional) destruction, gross negligence, or ordinary negligence *In re Global Technovations, Inc.,* 431 B.R. 739, 780 (Bankr. E.D. Mich. 2010) (equating intentional and bad faith conduct).	willfulness, bad faith, or fault *In re Global Technovations, Inc.,* 431 B.R. 739, 779 (Bankr. E.D. Mich. 2010) (using "fault" to describe conduct ranging from intentional conduct to ordinary negligence). Other cases in circuit define "fault" as objectively unreasonable behavior." E.g., *BancorpSouth Bank v. Herter,* 643 F. Supp. 2d 1041, 1060 (W.D. Tenn. v. 2009); *Jain v. Memphis Shelby Airport Auth.,* 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010).	Bad faith *In re Global Technovations, Inc.,* 431 B.R. 739, 782 (Bankr. E.D. Mich. 2010). Bad faith not required *Miller v. Home Depot USA, Inc.,* No. 3-08-0281, 2010 WL 373860, at *1 (M.D. Tenn. Jan. 28, 2010). Ordinary negligence *Jain v. Memphis Shelby Airport Auth.,* No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010); Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., No. 06-CV-13143, 2009 WL 998402, at *5-6 (E.D. Mich. Apr. 14, 2009).	"The spoliating party bears the burden of establishing lack of prejudice to the opposing party, a burden the Sixth Circuit has described as 'an uphill battle.'" *Jain v. Memphis Shelby Airport Auth.,* No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010).	When spoliation substantially denies a party the ability to support or defend the claim *Jain v. Memphis Shelby Airport Auth.,* No. 08-2119-STA-dkv, 2010 WL 711328, at *4 (W.D. Tenn. Feb. 25, 2010)	Unintentional conduct; permissible inference *Jain v. Memphis Shelby Airport Auth.,* No. 08-2119-STA-dkv, 2010 WL 711328, at *4-5 (W.D. Tenn. Feb. 25, 2010)

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Seventh Circuit	Duty to preserve potentially relevant evidence party has control over *Jones v. Bremen High Sch. Dist. 228,* No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010).	No: Breach is failure to act reasonably under the circumstances *Jones v. Bremen High Sch. Dist. 228,* No. 08-C-3548, 2010 WL 2106640, at *6-7 (N.D. Ill. May 25, 2010). "The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct." *Haynes v. Dart,* No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010)	Willfulness, bad faith, or fault *Jones v. Bremen High Sch. Dist. 228,* No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010). (stating that fault is based on the reasonableness of the party's conduct). Bad faith *BP Amoco Chemical Co. v. Flint Hills Resources, LLC,* No. 05 C 5, 2010 WL 1131660, at *24 (N.D. Ill. Mar. 25, 2010).	Willfulness, bad faith, or fault *In re Kmart Corp.,* 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (noting that fault, while based on reasonableness, is more than a "'slight error in judgment'") (citation omitted)	Bad faith *Faas v. Sears, Roebuck & Co.,* 532 F.3d 633, 644 (7th Cir. 2008).	Unintentional conduct is insufficient for presumption of relevance *In re Kmart Corp.,* 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007)	When spoliation substantially denies a party the ability to support or defend the claim *Krumwiede v. Brighton Assocs., L.L.C.,* No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006). When spoliation substantially denies a party the ability to support or defend the claim OR delays production of evidence *Jones v. Bremen High Sch. Dist. 228,* No. 08-C-3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010).	Grossly negligent conduct; jury instruction to inform the jury of the defendant's duty and breach thereof *Jones v. Bremen High Sch. Dist. 228,* No. 08-C-3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Eighth Circuit	Duty to preserve potentially relevant documents in party's possession *Dillon v. Nissan Motor Co.,* 986 F.2d 263, 267 (8th Cir. 1993).	Courts in the Eighth Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.	Bad faith *Wright v. City of Salisbury,* No. 2:07CV0056 AGF, 2010 WL 126011, at *2 (E.D. Mo. Apr. 6, 2010).	Bad faith *Johnson v. Avco Corp.,* No. 4:07CV 1695 CDP, 2010 WL 1329361, at *13 (E.D. Mo. 2010); *Menz v. New Holland N. Am., Inc.,* 440 F.3d 1002, 1006 (8th Cir. 2006).	Bad faith *Greyhound Lines, Inc. v. Wade,* 485 F.3d 1032, 1035 (8th Cir. 2007); *Menz v. New Holland N. Am., Inc.,* 440 F.3d 1002, 1006 (8th Cir. 2006); *Stevenson v. Union Pac. RR,* 354 F.3d 739, 747 (8th Cir. 2004) (bad faith required if spoliation happens pre-litigation) Bad faith is not required to sanction for "the ongoing destruction of records during litigation and discovery." *Stevenson,* 354 F.3d at 750; *MeccaTech, Inc. v. Kiser,* 2008 WL 6010937, at *8 (D. Neb. 2008) (same), adopted in part, No. 8:05CV570, 2009 WL 1152267 (D. Neb. Apr. 23, 2009).	This issue has not been addressed, but it has been stated that there is no presumption of irrelevance of intentionally destroyed documents. *Alexander v. Nat'l Farmers Org.,* 687 F.2d 1173, 1205 (8th Cir. 1982).	Destruction of evidence that "may have [been] helpful" *Dillon v. Nissan Motor Co.,* 986 F.2d 263, 268 (8th Cir. 1993). "irreparable injury to plaintiffs' claims" *Monsanto Co. v. Woods,* 250 F.R.D. 411, 414 (E.D. Mo. 2008).	"destruction was not 'willful' or malicious,'" but plaintiffs' counsel should have known to preserve the evidence; jury was instructed that "an adverse inference may be drawn from plaintiffs' failure to preserve the vehicle" *Bass v. Gen. Motors Corp.,* 929 F. Supp. 1287, 1290 (W.D. Mo. 1996), aff'd on this ground, 150 F.3d 842, 851 (8th Cir. 1998).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Ninth Circuit	Duty to preserve potentially relevant evidence in party's possession *Leon v. IDX Systems Corp.*, 2004 WL 5571412, at *3 (W.D. Wash. 2004), aff'd 464 F.3d 951 (9th Cir. 2006). Duty extends to key players. *Hous. Rights Ctr. v. Sterling* , 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005).	*In Hous. Rights, Ctr. v. Sterling,* 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005), the court quoted *Zubulake IV,* 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."), and found that defendants' "[d]estruction of documents during ongoing litigation was, at a minimum, negligent."	Bad faith not required *Dae Kon Kwon v. Costco Wholesale Corp.,* No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai'i 2010); *Carl Zeiss Vision Intern. GmbH v. Signet Armorlite, Inc.,* No. 07CV0894 MS(POR), 2010 WL 743792, at *15 (S.D. Cal. Mar. 1, 2010), amended on other grounds, 2010 WL 1626071 (S.D. Cal. Apr 21, 2010).	Willfulness, bad faith, or fault *Dae Kon Kwon v. Costco Wholesale Corp.,* No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai'i 2010) (requiring that party "engaged deliberately in deceptive practices") "'[D]isobedient conduct not shown to be outside the control of the litigant' is all that is required to demonstrate willfulness, bad faith, or fault." *Henry v. Gill Indus.,* 983 F.2d 943, 948 (9th Cir. 1993).	Bad faith or gross negligence *Karnazes v. County of San Mateo,* No. 09-0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010). Bad faith not required *Otsuka v. Polo Ralph Lauren Corp.,* No. C 07-02780 SI, 2010 WL 366653, at *3 (N.D. Cal. Jan. 25, 2010)	This issue has not been addressed	When spoliation substantially denies a party the ability to support or defend the claim *Henry v. Gill Indus.,* 983 F.2d 943, 948 (9th Cir. 1993).	The Court's research has not located case in which the court granted an adverse inference instruction and stated what the instruction would be.

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Tenth Circuit	Duty extends to key players *Pinstripe, Inc. v. Manpower, Inc.,* No. 07-CV-620-GKFPJC, 2009 WL 2252131, at *1 (N.D. Okla. July 29, 2009). A party with possession of potentially relevant evidence has a duty to preserve it; even if the party relinquishes ownership or custody, it must contact the new custodian to preserve the evidence. *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.,* 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998).	No. *Procter & Gamble Co. v. Haugen,* 427 F.3d 727, 739 n.8 (10th Cir. 2005) (stating that district court must consider Rule 26(b)(2)[(C)](iii), which requires the court to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit").	Bad faith not required *Hatfield v. WalMart Stores, Inc.,* 335 Fed. App'x 796, 804 (10th Cir. 2009). Negligence *Pipes v. UPS, Inc.,* No. CIV.A.07-1762, 2009 WL 2214990, at *1 (W.D. La. July 22, 2009).	"willfulness, bad faith, or [some] fault" *Procter & Gamble Co. v. Haugen,* 427 F.3d 727, 738 (10th Cir. 2005) (using language originally in *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958), which distinguished "fault" from a party's inability to act otherwise).	Bad faith *Turner v. Pub. Serv. Co. of Colo.,* 563 F.3d 1136, 1149 (10th Cir. 2009). Neither bad faith nor intentionality required *Hatfield v. Wal-Mart Stores, Inc.,* 335 Fed. App'x 796, 804 (10th Cir. 2009); *Schrieber v. Fed. Ex. Corp.,* No. 09-CV-128-JHP-PJC, 2010 WL 1078463 (N.D. Okla. March 18, 2010).	Although this specific issue has not been addressed, the court declined to "create a presumption in favor of spoliation whenever a moving party can prove that records that might have contained relevant evidence have been destroyed" *Crandall v. City & County of Denver, Colo.,* No. 05-CV-00242-MSK-MEH, 2006 WL 2683754, at *2 (D. Colo. Sept. 19, 2006).	Spoliation that impairs a party's ability to support a claim or defense. *Pinstripe, Inc. v. Manpower, Inc.,* No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009).	Bad faith; adverse inference instruction *Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC,* No. CIVA 06CV02206-JLK, 2009 WL 482603, at *13 (D. Colo. Feb. 25, 2009).

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Eleventh Circuit	Duty to preserve potentially relevant evidence that party has "access to and control over" *Nat'l Grange Mut. Ins. Co. v. Hearth & Home, Inc.,* No. CIV.A. 2:06CV54WCO, 2006 WL 5157694 at * 5 (N.D. Ga. Dec. 19, 2006).	Courts in the Eleventh Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.	Bad faith *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.,* No. 09-60351-CIV, 2010 WL 3368654, at *4 (S.D. Fla. Aug. 23, 2010). Degree of culpability is weighed against prejudice caused by spoliation *Flury v. Daimler Chrysler Corp.,* 427 F.3d 939, 945 (11th Cir. 2005*); Brown v. Chertoff,* 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008).	Bad faith *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.,* No. 09-60351-CIV, 2010 WL 3368654, at *12 (S.D. Fla. Aug. 23, 2010).	Bad faith *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.,* 318 F.3d 1284, 1294 (11th Cir. 2003); *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.,* No. 09-60351-CIV, 2010 WL 3368654, at *13 (S.D. Fla. Aug. 23, 2010).	This issue has not been addressed.	Spoliation of evidence that was not just relevant but "crucial" to a claim or defense *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.,* No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010).	Negligence; jury to be instructed that the destruction raises a rebuttable inference that the evidence supported plaintiff's claim *Brown v. Chertoff,* 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (but other courts in Eleventh Circuit will not order any sanctions without bad faith)

Circuit	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
D.C. Circuit	Duty to preserve potentially relevant evidence "within the ability of the defendant to produce it" *Friends for All Children v. Lockheed Aircraft Corp.,* 587 F. Supp. 180, 189 (D.D.C.), modified, 593 F. Supp. 388, (D.D.C.), aff'd, 746 F.2d 816 (D.C. Cir. 1984).	Courts in the D.C. Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.	Case law addresses specific sanctions, rather than sanctions generally.	Bad faith *Shepherd v. Am. Broad Cos.,* 62 F.3d 1469, 1477 (D.C. Cir. 1995); *D'Onofrio v. SFX Sports Group, Inc.,* No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010).	Negligent or deliberate *Mazloum v. D.C. Metro. Police Dep't,* 530 F. Supp. 2d 282, 292 (D.D.C. 2008); *More v. Snow,* 480 F. Supp. 2d 257, 274-75 (D.D.C. 2007); *D'Onofrio v. SFX Sports Group, Inc .,* No. 06-687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. Aug. 24, 2010) (not for mere negligence unless "the interests in righting the evidentiary balance and in the deterring of others trumps the lacuna that a logician would detect in the logic of giving such an instruction").	This issue has not been addressed.	Case law states that the spoliated evidence must have been relevant, i.e., information that would have supported a claim or defense, but it does not address prejudice.	"[A]ny adverse inference instruction grounded in negligence would be considerably weaker in both language and probative force than an instruction regarding deliberate destruction." *Mazloum v. D.C. Metro. Police Dep't,* 530 F. Supp. 2d 282, 293 (D.D.C. 2008).
Federal	"In reviewing sanction orders, [the Federal Circuit] applies the law of the regional circuit from which the case arose." *Monsanto Co. v. Ralph,* 382 F.3d 1374, 1380 (Fed. Cir. 2004). In *Consolidated Edison Co. of N.Y., Inc. v. United States,* 90 Fed. Cl. 228, 255 n.20 (Fed. Cl. 2009), the United States Court of Federal Claims observed that "the United States Court of Appeals for the Federal Circuit, has not definitively addressed whether a finding of bad faith is required before a court can find spoliation or impose an adverse inference or other sanction. Because many of the spoliation cases decided to date by the Federal Circuit have been patent cases in which the Federal Circuit applies the law of the relevant regional circuit, the Federal Circuit has not had the opportunity to announce a position binding on this court as to a possible 'bad faith' or other standard to trigger a spoliation of evidence sanction. Consequently, judges of the United States Court of Federal Claims have taken differing positions on the "bad faith" requirement. *Compare [United Med. Supply Co. v. United States,* 77 Fed Cl. 257, 268 (2007)] ('[A]n injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions.'), *with Columbia First Bank, FSB v. United States,* 54 Fed. Cl. 693, 703 (2002) (noting findings of bad faith are required before the court can determine that there was spoliation)." (Citation omitted.)								

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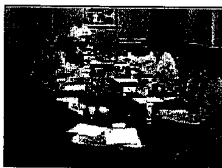
BNA INSIGHT

Bloomberg BNA eDiscovery Advisory Board Member Thomas Y. Allman reviews and critiques the actions taken by the Civil Rules Advisory Committee at its April 12 meeting.

Rules Committee Adopts 'Package' of Discovery Amendments



By Thomas Y. Allman

Mr. Allman is a former General Counsel and Chair Emeritus of Working Group 1 of the Sedona Conference® and the former Chair of the E-Discovery Committee of Lawyers for Civil Justice. *© 2013 Thomas Y. Allman.*

I. Introduction

On Friday, April 12, 2013, the Civil Rules Advisory Committee (the "Rules Committee") adopted a proposed replacement for Federal Rule of Civil Procedure 37(e) to complement other discovery proposals endorsed the previous day. Adoption of these amendments caps a multi-year effort by the Rules Committee begun at the Duke Litigation Review Conference in 2010, including Mini-Conferences held to review interim rule formulations. [1]

[1] *See* Thomas Allman, Federal Rule of Civil Procedure 37(e): Is Replacement or Modification the Answer?, (12 *DDEE* 19, 1/19/12) (describing alternative approaches discussed at 2011 Mini-Conference on preservation and spoliation). The Duke Subcommittee also conducted a conference at the same Dallas location in 2012 to discuss its alternative rules "sketches."

The resulting "package" of disparate proposals is the subject of this Memorandum. A "text only" version of each proposal—after action at the April Meeting—is reproduced in Appendix A and B, infra. p. 206. [2]

[2] The Proposals as initially presented to the meeting are found in the Agenda Book, April 11-12, 2013, at 77-104 ("Duke" rules) and 143-163 (Rule 37(e)); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf. (hereinafter "Agenda Book").

The package will be reviewed by the Standing Committee at its June 2013 Meeting, and, if approved, released for public comment this summer. Public Hearings are likely in November and December 2013.

The 2006 Amendments

Many of the proposals stem from perceived inadequacies in the 2006 Amendments which became effective in December 2006. [3] Those Amendments involved "technologically neutral" changes designed to

address some of the key e-discovery issues. A total of 31 states have also adopted provisions based in whole or in part on the Amendments. [4]

[3] Transmittal of Rules to Congress, 234 F.R.D. 219, 221-251 (2006).

[4] Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi (as of mid-2013), Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.

Much of the emphasis in 2006 was on "front-loading" Rules 26(f) and 16(b) to encourage party agreements and greater court participation.

However, Rules 26(b)(2)(B) and 37(f), now 37(e), introduced innovative provisions restricted to discovery of "electronically stored information" (ESI).

The Amendments failed to address the scope or onset of preservation obligations or the disproportionate costs of some e-discovery requests. Other deficiencies have since become evident.

II. The 2013 Proposals

Since the Duke Conference, the task of developing concrete proposals has been delegated to the Discovery Subcommittee (preservation and spoliation) and the Duke Subcommittee (the balance of the discovery topics). These separate "streams" of proposals merged into the "package" described in this Memorandum. The reader is cautioned, however, that all provisions are subject to further change as a result of the review at the Standing Committee Meeting in June 2013.

Among the outside groups which have actively monitored the process and submitted proposals for consideration has been Working Group 1 of the Sedona Conference® [5] and Lawyers for Civil Justice (LCJ). [6] Where relevant, the comments and proposals of each are referenced.

[5] Letter from Sedona Conference® (WG 1) to Hon. D. G. Campbell, October 3, 2012, at 1 (hereinafter "Sedona Proposals")(copy on file with author).

[6] Comment, Supporting Publication, LCJ, April 1, 2013, 13 (hereinafter "LCJ Proposals (Rule 37e"); copy at https://docs.google.com/file/d/0B2KR7hOpxE3DN0tnMm80aFNoSzg/edit?usp=sharing&pli=1 and Comment, "Producer Pays Default Rule," LCJ, April 1, 2013 ("LCJ Proposals II (Costs)"); copy at https://docs.google.com/file/d/0B2KR7hOpxE3DU2kzaHYwN1lyMmc/edit?usp=sharing&pli=1.

The reader is cautioned, however, that all provisions are subject to further change as a result of the review at the Standing Committee Meeting in June 2013.

1. Cooperation (Rule 1)

Rule 1 of the Federal Rules currently provides that the civil rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The rule does not include a "duty to cooperate," as proposals to that effect were rejected in former times. [7]

[7] Steven S. Gensler, Some Thoughts on the Lawyer's E-Volving Duties in Discovery, 36 N. Ky. L. Rev. 521, 547 (2009) (a 1978 proposal requiring cooperation was deleted "in light of objections that it was too broad").

Instead, the Rules require participation by counsel and parties in "good faith" in preparing discovery plans and attending case management conferences. [8]

[8] *See, e.g.*, Fed. R. Civ. P. 16(f); Fed. R. Civ. P. 37(f).

Many Local Rules and other initiatives specifically invoke cooperation as an aspirational standard, suggesting its importance as a best practice. The Northern District of California, for example, prefaces its recommended Model Order with the observation that "[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation covered by the Order]." [9]

[9] *See [Model] Stipulated Order, ¶ 2,* copy at http://www.cand.uscourts.gov/eDiscoveryGuidelines (scroll to Model Stipulated Order Re: the Discovery of Electronically Stored Information).

Local Rule 26.4 for the Southern and Eastern Districts of New York cautions, however, that cooperation of counsel must be "consistent with the interests of their clients." [10]

[10] E.D.N.Y. & S.D.N.Y. L.R. 26.4.

The 2013 Proposal

Prior to its Oct. 8, 2012 Mini-Conference at Dallas, the Duke Subcommittee was considering a requirement to amend Rule 1 to provide that the parties should "cooperate to achieve these ends." However, substantial opposition expressed by participants at the Mini-Conference ultimately convinced the Subcommittee to drop the reference.

Much of the opposition rested on concerns that the "cooperation is an open-ended concept" that, if included in rules, could lead to less cooperation and an increase in disputes in which parties accuse each other of "failing to cooperate." [11]

[11] Report to Standing Committee, December 5, 2012, 147 ("[t]his provision has been abandoned"), Agenda Book, January 3-4, 2013, 237, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf#pagemode=bookmarks.

The Committee agreed, instead, to amend the rule, specifying it is to be "employed by the court and the parties" to meet the goals set forth in Rule 1; cooperation is addressed in the Committee Note.

The proposed Note states that "most lawyers and parties cooperate" and that "effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure." [12]

[12] Agenda Book, at 88-89 (explanatory comment and draft Note).

This approach is consistent with the Sedona Conference® recommendation that the Committee Note emphasize that cooperative behavior does not conflict with an attorney's professional duties. [13]

[13] Sedona Proposals 1, ("[c]ooperation by attorneys to meet the scope and purpose of these Rules ... does not conflict with the attorney's professional duties to his or her client").

2. Timing (Rules 4, 26)

The current Rules on service of process (Rule 4(m)) and the timing of issuance of a scheduling order (Rule 26(b)(2)) are to be cut back, respectively, to 60 days and 90 days, in contrast with their current limits of 120 days for each.

Similarly, the Rule 26(d)(1) discovery moratorium will be cut back to allow early service of requests for production, with the response time running from the first Rule 26(f) conference.

The justification given for these changes is that they aim "directly" at the goal of promoting "early case management." The Department of Justice, however, has raised concerns about the accelerating issuance of the scheduling order. [14]

[14] Agenda Book, 77-80.

3. Preservation (Rules 16, 26(f))

In its "classic" form, [15] the common law duty to preserve in anticipation of reasonably foreseeable litigation is defined solely by case law.

[15] Surowiec v. Capital Title, 790 F. Supp.2d 997, 1006 (D. Ariz. May 4, 2011)("[o]nce a party knows that litigation is reasonably anticipated, the party owes a duty to the judicial system to ensure preservation of relevant evidence").

As noted at the time of the 2006 Amendments, the "difficulties of drafting a good rule [are] so great that there is no occasion even to consider the question whether preservation rule would be an authorized or wise exercise of Enabling Act authority." [16]

[16] Civil Rules Advisory Committee Minutes, April 14-15, 2005, at 39, copy available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.

Instead, the 2006 Amendments encouraged parties to address "issues about preserving discoverable information" in Rule 26(f) conferences. [17] However, the topic of preservation disputes was ignored in listing the required contents of discovery plans (Rule 26(f)(3)) and in the list of permitted contents of Rule 16(b) scheduling orders.

[17] Fed. R. Civ. P.26(f)(2).

At the 2010 Litigation Review Conference, these omissions were noted and suggestions for changes were made. [18]

[18] Thomas Y. Allman, Preservation and Spoliation Revisited: Is It Time for Additional Rulemaking?, Duke E-Discovery Panel Paper, 21 (April 9, 2010), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Thomas%20Allman,%20Preservation%20and%20Spoliation%20Revisited.pdf.

The 2013 Proposals

The 2013 Proposals address the omissions in Rules 16 and 26(f) by including "preservation" as a component of discovery plans and adding it to the list of permissible topics for scheduling orders. [19]

[19] The Committee Proposal also includes a discussion of possible FRE 502 agreements in both rules.

The Sedona Conference®, while supporting similar amendments, suggested that greater emphasis be given to promoting resolution of disputed preservation issues. [20]

[20] Sedona Proposals, Rule 16(a)(3), (b)(3)(B)(ii) & (iv)(adding need to include privacy agreements), (c); Rule 26(b)(1)(scope of preservation obligation); Rule 26(f)(2)(A); (f)(5) (report on open and remaining preservation issues).

Although the Committee declined to address directly the elements of preservation in rules, [21] the replacement for Rule 37(e) (discussed below in (7)) lists five factors for consideration in making retroactive determinations as to whether information "should have been preserved."

[21] A Panel on E-Discovery also recommended that the Rules Committee revisit the issue of defining the elements that a preservation rule might contain. Richard Marcus, Is Rulemaking a Cure for Preservation Headaches?, ABA Section on Litigation (2011).

The approach tracks a similar effort in the Ohio equivalent of [original] Rule 37(e), adopted in 2008. [22]

[22] Oh. Civ. R. Rule 37(f).

However, this author believes the listed factors are ambiguous, non-judgmental, and will not serve, in the preservation context, as a useful tool for in-house counsel trying to develop and implement a program based on known requirements. [23]

[23] LCJ suggests that the five factors belong in the Committee Notes given that they do not serve as a rule which is "intended to proscribe or authorize" conduct but as "checklist" of some of the issues involved. LCJ Proposals, at 8.

Both the Sedona Conference®and LCJ continue to advocate for inclusion of rules defining preservation

obligations and scope in the Federal Rules. [24]

[24] Sedona has suggested that the scope of the duty to preserve be defined in Rule 26(b)(1). Sedona Proposals, at 4 ("reasonable steps in good faith" subject to proportionality). LCJ argues for a "clear, bright-line standard to clarify the time at which a duty to preserve information is triggered." LCJ Proposals, at 6.

4. Proportionality (Rule 26)

Rule 26(b)(2)(C)(iii)—the "proportionality" portion of the current Rule 26—requires a court to limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit," considering "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

The 2006 Amendments made no attempt to emphasize or alter the (modest) role of proportionality, which in the pre-ESI context generated little interest. However, in the period since 2006, "proportionality" has emerged as the *de facto* discovery limitation of choice.

The proportionality doctrine also informs the duty to preserve, as reflected in *Pippins v. KPMG* and authoritative comments. [25]

[25] 279 F.R.D. 245 (S.D. N.Y. Feb. 3, 2012); Sedona Conference®Commentary On Proportionality In Electronic Discovery, 11 Sedona Conf. J. 289 (2010); *accord* Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 Rich. J. L. & Tech. 9, ¶ 26 (2007)("[J]ust as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions").

It may well be possible for the Committee Notes to emphasize the role of proportionality ... that [is] applicable to preservation of ESI.

A number of "proportionality-based" presumptive limitations have been included in local Rules, Guidelines, Model Orders and other initiatives, which may serve as a harbinger for national rulemaking. [26] The Seventh Circuit E-discovery Pilot Program [27] and the District of Delaware Default Standards, [28] for example, identify specific categories of ESI which need not be preserved, absent notice and discussion, given that they are typically not subject to discovery.

[26] Thomas Y. Allman, Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-discovery) Road, 19 Rich. J. L. & Tech. 8, ¶ 49 (2013)("[i]t would be preferable ... to adopt these presumptive limitations as a national rule").

[27] [Proposed] Standing Order, Seventh Circuit E-Discovery Pilot (listing six categories of ESI whose possible preservation or production must be raised "at the meet and confer or as soon thereafter as practicable"), copy at http://www.discoverypilot.com/ .

[28] D. Del. Default Standard for Discovery, at ¶ 1(c)(ii)(referring to App. A) (listing 13 categories of ESI which need not be preserved), copy at http://www.ded.uscourts.gov/court-info/local-rules-and-orders

The 2013 Proposals

The Committee adopted a recommendation that Rule 26(b)(1) be amended so that a party may "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case considering* [listing factors from Rule 26(b)(2)(C)(iii)]. *Information need not be admissible in evidence to be discoverable.*" (new material in italics). [29]

[29] LCJ endorses this approach but also suggests that a concept of "materiality" be included. *See LCJ Proposals*, 10 ("it is difficult to see why discovery should be allowed into matters that are immaterial to any party's claims or defenses").

The amended rule would also delete the reference to the discovery of material relevant to the subject matter for "good cause." As the draft Committee Note puts it, "[p]roportional discovery relevant to any party's claim or defense suffices." [30]

[30] Agenda Book, at 93 (Committee Note).

Rule 26(b)(2)(C) would be amended to speak of limiting the frequency or extent of discovery if it is "outside the scope permitted by Rule 26(b)(1)."

This approach also has appeal to states as well.Thus, effective on July 1, 2013, Minnesota Rule 26.02 (b) ("Scope and Limits") will provide that discovery is limited to "matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [listing factors]." [31]

[31] The relevant Minnesota Supreme Court Order is found at http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20Rls%20Amendments.pdf.

In contrast to the Sedona Proposals, however, the Committee has not recommended amending Rule 26 (b)(1) to relate proportionality to the scope of preservation. It may well be possible for the Committee Notes to emphasize the role of proportionality—and perhaps encourage use of presumptive limits in local rules or Guidelines—that are applicable to preservation of ESI.

5. Discovery Limits (Rules 30, etc.)

The Federal Rules impose presumptive numerical limits on the number and duration of oral depositions in Rule 30, with similar limits on the number of depositions that may be conducted by written questions under Rule 31.

In addition, a party is limited in the number of interrogatories which it may serve under Rule 33. A court may, by order, alter the limits. [32]

[32] Fed. R. Civ. P. 26(b)(2)(A)(also providing that the court may limit the number of requests for admissions under Rule 36).

As part of its review, the Duke Subcommittee seriously considered imposing numerical limits on the number of Rule 34 requests for production (although not on the requests under Rule 45). [33]

[33] Report to Standing Committee, December 5, 2012, at Agenda Book, January 3-4, 2013, 230-231.

In addition, the Subcommittee discussed limits on the number of Rule 36 requests for admissions.

The 2013 Proposals

At its meeting on April 11, 2013, the Committee agreed to lower the limits in Rules 30, 31, and 33 and to add limits on the numbers of requests for admissions in Rule 36. The Subcommittee proposal to limit requests for production in Rule 34 was dropped prior to the meeting. [34]

[34] Agenda Book, at 107 ("[t]he Subcommittee unanimously agreed to drop the draft provisions that would implement a presumptive limit on the number of Rule 34 requests" in part because "Rule 34 requests may be reduced to a preliminary role to identify subjects of inquiry").

Rule 26(b)(2)(A) was also amended to conform to the proposed changes.

The specific changes, as adopted, include:

- Rule 30: From 10 oral depositions to five, with a deposition limited to one day of six hours, down from seven hours;
- Rule 31: From 10 written depositions to five;
- Rule 33: From 25 interrogatories to 15; and
- Rule 36: A party may serve no more than 25 requests to admit, including all discrete subparts (except as to requests to admit the genuineness of any described document).

In addition, the Committee amended Rule 34 to require more specificity in the objections to Rule 34 requests, including a requirement that an objection state whether any responsive materials are being withheld on the basis of the objection. [35] It also clarified that Rule 37(a) authorizes motions to compel for both failures to permitting inspection and failures to produce. [36]

[35] Fed. R. Civ. P. 34 (b)(2)(B) & (C) .

[36] Fed. R. Civ. P. 37 (a)(3)(B)(iv).

6. Discovery Costs (Rule 26(c))

The U.S. Supreme Court acknowledged in *Oppenheimer Fund v. Sanders* that courts have authority to protect a party from "undue burden or expense" by conditioning discovery on payment of expenses under Rule 26(c). [37]

[37] Oppenheimer Fund v. Sanders, 437 U.S. 340, 358 (1978).

In *Zubulake v. UBS Warburg (Zubulake I)*, however, the court stated that only production from "inaccessible" sources of ESI is eligible for cost shifting. [38] The court also opined that a producing party should "*always* bear the cost of reviewing and producing electronic data (emphasis in original)." [39]

[38] Zubulake v. UBS Warburg (Zubulake I), 217 F.R.D. 309, 322 & 324 (S.D. N.Y. May 13, 2003).

[39] Zubulake v. UBS Warburg (Zubulake III), 216 F.R.D. 280, 290 (S.D. N.Y. July 24, 2003).

One of the primary reasons for convening the 2010 Duke Litigation Conference was a perception that there was a need to address excessive discovery costs. While a variety of useful techniques have emerged to address the issue—such as predictive coding (and other forms of TAR ["Technology Assisted Review"]) [40] and agreements under Rule of Evidence 502 [41] —a case can also be made that a "requester pays" regime has merit. [42]

[40] Joseph H. Looby [FTI], E-Discovery—Taking Predictive Coding Out of the Black Box, November, 2012, copy at http://www.fticonsulting.com/global2/critical-thinking/fti-journal/predictive-coding.aspx.

[41] Act of Sept. 19, 2008, PL 110-322, 122 Stat. 3537.

[42] *See* LCJ Proposals II (Costs), April 1, 2013, copy at https://docs.google.com/file/d/0B2KR7hOpxE3DU2kzaHYwN1lyMmc/edit?usp=sharing&pli=1.

Local Rules and Initiatives are moving in that direction. [43] Model Orders such as the one recommended for Patent Litigation by the Federal Circuit provide that "[c]osts will be shifted for disproportionate ESI production requests pursuant to [FRCP] 26." [44]

[43] Allman, Local Rules, Standing Orders, and Model Protocols, *supra*, 19 Rich. J. L. & Tech. 8, ¶ 55-58 (2013)(the provisions could be "fine-tuned" in order to "differentiate between costs related to core information and those which exceed presumptive limitations").

[44] Model Patent Order, at ¶ 3, copy at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf.

This tracks case law such as *Boeynaems v. LA Fitness Int'l*, [45] where a court ordered prepayment of the costs of disproportionate additional discovery, including "appropriately allocated" salaries of individuals employed by the defendant including "managers, in-house counsel, paralegals, computer technicians and others involved in the retrieval and production of Defendant's ESI." [46]

[45] 285 F.R.D. 331, 341 (E.D. Pa. 2012), (ordering cost shifting because plaintiffs had "already amassed, mostly at Defendant's expense, a very large set of documents").

[46] *Id.* at 342.

The 2013 Proposals

The Committee adopted a modest amendment to Rule 26(c) acknowledging that, for good cause, a court may protect a party from undue burden or expense by an "allocation of expenses" of disclosure or discovery.

The proposed Committee Note notes that "courts are coming to exercise this authority" and that the addition of "[e]xplicit recognition [of authority to act] will forestall the temptation some parties may feel to contest [it]." [47]

[47] Agenda Book, at 94 (Committee Note).

7. Spoliation Sanctions (Rule 37(e))

Rule 37(e), adopted in 2006, limits sanctions for the failure to preserve ESI when losses occur despite "routine, good-faith" operation of information systems.

A "safe harbor" for such losses was advocated because the threat of being branded as a "spoliator" had caused producing parties to "over-preserve."

The Committee adopted a standard based on "good faith" because of concerns that a negligence standard "would not be effective in preventing sanctions for merely inadvertent failures to preserve." [48]

[48] Allman, Federal Rule of Civil Procedure 37(e), *supra*, (12 *DDEE* 19, 5 (1/19/12)) (noting rejection of initial proposal to limit sanctions only if a party took reasonable steps after it knew or should have known of a duty to preserve—a "negligence" test).

Application of the rule has been uneven, with some courts refusing to apply it once a duty to preserve has attached, thereby negating the intended purpose of the rule.

Other courts have more appropriately applied it, in the absence of a showing of bad faith, to losses resulting from routine operation of information systems even after a duty to preserve attached. [49]

[49] In the absence of a finding of bad faith—the "antithesis of good faith"—the rule bars sanctions where losses occurred after a duty to preserve attaches. Point Blank v. Toyobo America, 2011 BL 332802 (S.D. Fla. April 5, 2011)(refusing sanctions, citing Rule 37(e), in the absence of proof that failure to institute litigation hold was undertaken in bad faith).

At the Duke Litigation Review Conference in 2010, one of the recommendations of the E-Discovery Panel was that "sanctions for noncompliance resulting in prejudice" should be specified, with distinctions drawn based on the "state of mind of the offender." [50]

[50] Elements of a Preservation Rule (2010), Duke Conference E-Discovery Panel (Hon. S. Scheindlin, Hon. J. Facciola and Mssrs. Allman, Barkett, Garrison, Joseph and Willoughby); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Elements%20of%20a%20Preservation%20Rule.pdf.

At the Dallas Mini-Conference in 2011, the Discovery Subcommittee proposed a "sanctions-only" approach under which the "good faith" standard would be replaced by affirmative requirements for a high threshold of culpability to authorize imposition of rule-based sanctions and an adverse inference. [51]

[51] Allman, Federal Rule of Civil Procedure 37(e), *supra*, 12 DDEE 19, 5 (1/19/12).

The Mini-Conference also developed a rich body of useful information on the causes and costs of "over-preservation." [52]

[52] *See* Conference Minutes, Sept. 9, 2011, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

The 2013 Proposals

After considerable study and discussion, the Rules Committee ultimately decided to concentrate on replacement of Rule 37(e) with a new rule emphasizing a uniform national culpability standard for

spoliation sanctions. The rule would apply to all forms of discoverable material lost through preservation failures.

Thus, Rule 37(e)(1)(B)(i) authorizes "sanctions" (those listed in Rule 37(b)(2)(A) or an "adverse-inference jury instruction") *only* if a failure to preserve has "caused substantial prejudice in the litigation and was willful or in bad faith."

Absent such findings, however, a court may still order "curative measures" or other remedial measures for failures to preserve.

This is believed to be preferable to existing Rule 37(e), [53] because it is more direct, applies to all types of preservation losses, and is more likely to encourage restraint in use of inherent authority. It may be necessary, however, to more precisely define the scope of "willful" conduct.

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[53] Rule 37(e) provides that, "absent exceptional circumstances," sanctions may not be imposed "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."

Connecticut bars sanctions "in the absence of a showing of intentional actions designed to avoid known preservation obligations." [54] Indeed, using that standard, existing Rule 37(e) could serve as a vehicle to achieve the same goals of national uniformity. [55]

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[54] Connecticut Practice Book, Ct. R. Super CT Civ, §13-14 (2012).

[55] *See* Thomas Y. Allman, Change in the FRCP: A Fourth Way, September 9, 2011, Paper Submitted to the Mini-Conference at DFW Airport, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman.pdf.

Planning Guidance

As noted earlier, the Rules Committee has rejected adoption of a "bright-line" preservation rule in the 2013 Proposals, opting, instead, for a list of factors for courts to consider in assessing sanctions.

It is argued that these factors, combined with the ban on sanctions absent prejudice and a showing of willfulness or bad faith, will enable decisions—including pre-litigation decisions—to be made with a reasonable prospect of avoiding being branded as a "spoliator."

The Sedona Conference®proposals continue to focus on good faith conduct, but require a showing of its absence, along with factors such as "material prejudice in its ability to prove or respond" to claims and defenses, prior to issuance of sanctions (which are defined). [56]

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[56] Sedona Proposals, at 10-12.

Exceptional Circumstances

As adopted at the April meeting, the ban on sanctions in Rule 37(e)(1)(B)(i) is inapplicable if a party is 'irreparably deprived" of the ability to present or defend against claims. This exception—in (B)(ii)—was prompted by the *Silvesteri* case, involving harsh sanctions imposed for loss of timely access by a manufacturer to a damaged automobile despite limited fault on the part of auto owner. [57]

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[57] Silvestri v. GM, 271 F.3d 583, 593 (4th Cir. Nov. 14, 2001)("even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case"). Current Rule 37(e) handles the issue by prefacing its text with the phrase "absent exceptional circumstances," as was pointed out at the Meeting.

Many questioned the fairness of imposing sanctions without any showing of fault. Accordingly, prompted by questions raised by the impact of "acts of god" like Hurricane Sandy, the draft of (B)(ii) released by the Discovery Subcommittee on March 22, 2013 added a requirement that a showing of "negligent or grossly negligent" conduct was required.

The Subcommittee also suggested publication of an alternative version of Rule 37(e) without the exception restricted to ESI. [58]

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[58] Agenda Book, at 160-161 (text) and 163 (related questions about the alternative). One

argument is that the problems of "irreparable deprivation" primarily involve losses of "tangible things" such as cars, stoves, lamps, etc.—not ESI.

The additional language in (B)(ii) on fault and the alternative version of the Rule were dropped by the Committee after discussions at the April 11-12 meeting. Inserting a lesser standard for sanctions from *Residential Funding* [59] into the rule as an alternative raised serious concerns that the exception might "swallow" the primary rule found in (B)(i). [60] The Committee concluded that the need for public comment could best be elicited by providing questions upon publication.

[59] Residential Funding v. DeGeorge, 306 F.3d 99, 107 (2nd Cir. Sept. 26, 2002)(a showing of "mere negligence" is sufficient to justify an adverse inference instruction).

[60] LCJ vigorously opposed inclusion of the language. *See* LCJ Proposals, at 3 ("absent willfulness and bad faith, there should be no sanction").

Conclusion

Some—but by no means all—of the deficiencies identified since the 2006 Amendments are addressed in the current package of proposals. For example, emphasizing the role of proportionality to help refocus discovery scope in Rule 26(b)(1) is a welcome development.

Moreover, by avoiding the creation of open-ended obligations like a duty to "cooperate" or a duty not to be "evasive," [61] the Committee has avoided traps for the unwary that would trigger ancillary litigation.

[61] Agenda Book, at 87 ("That proposal has been put aside in the face of concerns that 'evasive' is a malleable concept, and that malleability will invite satellite litigation").

[E]mphasizing the role of proportionality to help refocus discovery scope in Rule 26(b)(1) is a welcome development.

There remains a need, however, to move beyond "tinkering" and to use the preservation principle to identify the types of ESI which presumptively are not subject to discovery or preservation absent explicit notice and discussion.

At its March 2012 Meeting in Ann Arbor, for example, the Rules Committee was provided with an "informal" draft of amendment to Rule 26(b)(1) which would place "default limitations on discovery of [ESI]." [62]

[62] Memo, Adapting Rule 26(b)(1) for [ESI], Agenda Book, March 22-23, 2012, 274-276 (proposing, *inter alia*, that discovery "need not be provided" from nine sources of ESI, nor from "key custodians" and that search terms may be used); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.

Perhaps the most difficult issue is the efficacy of the replacement of Rule 37(e) by proposed Rule 37(e). It is problematic to assert that it will help reduce costly "over-preservation" by reassuring preservation planners given the broad (and perhaps unnecessary) "exception" in (B)(ii).

There are also substantial issues about the value of listing five arguably non-judgmental, vague, and ultimately limited "factors" which are susceptible to many meanings.

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13 DDEE 416

Rules of Procedure

Public Comment Period for Amendments To Federal Rules of Civil Procedure Opens

August 15 marks the opening of the public comment period for the proposed amendments to the Federal Rules of Civil Procedure.

The Judicial Conference Standing Committee on Rules of Practice and Procedure June 3 approved the proposed amendments to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37, along with a modification to the proposed previous amendment to Fed. R. Civ. P. 37(e).

The proposed changes are known as the "Duke Civil Litigation Conference Rules Package," and are largely the product of an Advisory Committee meeting held at Duke University School of Law in 2010 (13 DDEE 280, 6/6/13).

New Approach to Sanctions

The changes to Rule 37(e) under consideration are of particular interest to the eDiscovery community because the rule concerns sanctionable behavior and "curative measures" that the court may take in the event that discoverable electronically stored information is destroyed or lost. The proposed Rule requires that the decision to impose sanctions for prelitigation preservation duty violations must be predicated on a finding of "willful or bad faith" misconduct and "substantial prejudice," but provides an exception for instances of "irreparable" prejudice. It also lists "factors" for consideration by the courts in their application of the Rule.

The proposal was prompted, in part, by the absence of uniformity in the circuits' approaches to resolving allegations of spoliation.

"This situation is unfair," Chair Emeritus of Working Group 1 of the Sedona Conference® Thomas Y. Allman wrote in an Aug. 1 BNA Insight. "Exposure to spoliation sanctions and being labeled as a 'spoliator' should not vary depending upon where the particular jurist reviewing the conduct is located."

The Existing Text

In its current form, Rule 37(e) provides:

"(e) Failure to Provide 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."

According to Allman, the rule is deliberately self-limiting, in that it applies only to rule-based sanctions, leaving it open to courts to assess prelitigation preservation conduct by use of inherent powers (13 DDEE 389, 8/1/13).

The Proposal

"Proposed Rule 37(e)(1) spells out the requisite culpability and prejudice which must be shown before

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any of the sanctions listed in Rule 37(b)(2)(A) (or an 'adverse-inference jury instruction') may be imposed for a failure to preserve discoverable information," Allman explained. "Proposed Rule 37(e)(1)(A) also authorizes remedial relief—in contrast to 'sanctions'—for any failure to preserve."

Allman observed that the proposed Rule 37(e) alleviates some of the disunity concerns by addressing root causes of preservation irregularity by reassuring parties making preservation decisions that they will be treated fairly and uniformly across circuits, thereby granting a 'de facto safe harbor' to those that act proportionately and reasonably.

Next Steps

Comments on the proposed amendments can be submitted by email to Rules_Comments@ao.uscourts.gov, or by U.S. mail to the following address:

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544.

The incoming comments will be publicly posted at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments/civil-rules-comments.aspx.

Public hearings on the comments are tentatively scheduled for Nov. 7, 2013, in Washington, D.C. and Jan. 9, 2014 in Phoenix, Ariz.; a third hearing will be held in late Jan. or early Feb. 2014 at an as yet unnamed location.

For More Information

The announcement regarding the publication of the rules amendment and public comment period is available at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx and is a Key Document on the eDiscovery Resource Center.

Advisor's Note: Is Proposed Rule 37(e)(1)(B)(i) Fatally Flawed?

Ronald J. Hedges writes:

"Thomas Y. Allman, in his recent summary of proposed Federal Rule of Civil Procedure 37(e)(1)(B)(i), wrote eloquently of the desirability of a uniform standard for the imposition of sanctions in civil litigation across the federal courts and of the utility of the proposed rule.

Certainly, any person or entity which litigates in the federal courts across the United States faces varying standards, even leaving aside the varying standards among the states, where the vast majority of civil litigation is conducted. This leads, at least arguably, to over preservation of electronically stored information (ESI).

However, proposed Rule may suffer from one fatal defect: unconstitutionality.

The Rules Enabling Act, 28 U.S.C. Sec. 2072, gives the Supreme Court the power to "prescribe general rules of practice and procedure and rules of evidence in the United States district courts ... and the courts of appeals," provided that, "such rules [do] not abridge, enlarge or modify any substantive right." Sections 2072 (a)-(b).

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A procedural rule does not run afoul of the statutory limitation merely because it, "affects a litigant's rights; most procedural rules do." *Shady Grove Ortho. Assocs. v. Allstate Ins. Co.,* 130 S.Ct. 1431, 1442 (2010) (Scalia, J., plurality opinion).

As Justice Scalia explained. "[w]hat matters is what the rule itself *regulates*: If it governs only 'the manner and the means' by which the litigants' rights are enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." (*Mississippi Pub. Corp. v. Murphee*, 326 U.S. 438, 446 (1946)). (The distinction between procedural and substantive rules gained visibility several years ago when, after Federal Rule of Evidence 502 made its way through the rule-making process, it had to be affirmatively enacted into law by Act of Congress).

Does proposed Rule 37(e)(1)(B)(i), by purporting to regulate prelitigation conduct and to define substantive standards for the imposition of sanctions, cross the line from being "procedural" to "substantive?" Will Congress and the President have the final say on whether proposed Rule 37(e)(1)(B)(i) is ultimately enacted into law?"

Your comments are invited. Send them care of ceoannou@bna.com, for consideration by the author of this Note, ***Ronald J. Hedges, Chairman of the Bloomberg BNA eDiscovery Advisory Board****.*

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Can E-Discovery Violate Due Process? Part 1

John Beisner, Jessica Miller, Jordan Schwartz

Law Technology News

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The escalating cost of discovery in U.S. commercial litigation has garnered a lot of attention in recent years as requests for electronic discovery have spiraled out of control, with some defendants having to pay hundreds of thousands — or even millions — of dollars to respond to discovery requests in civil litigation. As one report succinctly put it: "[o]ur discovery system is broken."[1]

The federal Advisory Committee on Civil Rules (Committee) is currently contemplating a series of discovery-related changes to the Federal Rules of Civil Procedure. In the main, these changes would advance several proposals stemming from the 2010 Duke Conference on U.S. Civil Litigation that are aimed at reducing the costs and delays associated with unfettered discovery. The Committee would also establish clearer standards for imposing curative measures and sanctions when electronically stored information is lost.

While the reasons offered by the Committee in support of these changes are largely normative in nature, there is another — even more fundamental — justification for the changes: current discovery rules impose substantial burdens that pose a significant threat to defendants' due process rights. Under the current producer-pays discovery system, a plaintiff can propound broad and costly discovery requests on a defendant well before there is any finding of liability. Requiring a defendant to spend thousands (if not millions) of dollars on discovery without any financial contribution from the plaintiff under these circumstances may infringe the defendant's due process rights.

This article, in two parts, examines whether the proposed changes to the governing discovery rules sufficiently account for due process rights and what other steps should be taken to rein in discovery abuse.

THE ADVISORY COMMITTEE PROPOSALS

The Committee is currently considering two major discovery-related changes to the Federal Rules of Civil Procedure. The first is a comprehensive set of discovery rule changes emanating from the 2010 Duke Conference on U.S. Civil Litigation that would promote the "principal aspirations" of "cooperation, proportionality, and early hands-on case management" to reduce the cost and delay inherent in complex civil discovery.[2] The second is an amendment to Rule 37(e), which governs electronically stored information. The amendment, if enacted, would establish clearer standards for the imposition of curative measures when discoverable information is lost.[3]

Duke Conference Rules Package. The first component of the Committee's proposals is based on the 2010 Duke Conference on U.S. Civil Litigation, which addressed a number of problems plaguing the federal civil discovery regime, not the least of which is the lack of proportionality under the current system. In 1983, Rule 26(b)(2)(C)(iii) was adopted to enforce proportionality of discovery, providing that "[o]n motion or on

its own, the court must limit the frequency or extent of discovery ... if it determines that ... (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[4] However, "[a]s both judges and commentators have noted, this proportionality requirement has not proven to be an effective limitation on the scope or costs of discovery," with many courts simply giving lip service to this particular rule.[5] As one leading civil procedure treatise notes, "[w]hatever the theoretical possibilities," the proportionality rule "created only a ripple in the caselaw"; "no radical shift has occurred."[6] In light of Rule 26(b)'s ineffectiveness at promoting meaningful proportionality in civil discovery, scholars and courts alike have advocated changes to the rule that would provide clearer standards for reducing the burden on the party bearing the cost of responding to discovery requests.

One such change is the proposal under consideration by the Committee that would add some teeth to Rule 26. Specifically, Rule 26 would be amended to provide that discovery may be obtained *only* if it is "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[7] The Committee is considering the following proportionality changes to the discovery rules as well:

- Limiting discovery to "claims and defenses" as identified in the pleadings.
- Reducing the presumptive limit on the number of depositions from 10 to 5.
- Reducing the presumptive duration of each deposition to one day of 6 hours from the current 7-hour limit that often spans two days.
- Reducing the presumptive limit on the number of interrogatories (including subparts) to 15 from the current 25.
- Limiting the presumptive number of admission requests to 25, exempting document authentication requests.[8]

Rule 37(e) Amendment. The second proposal is an amendment to Rule 37(e), which governs sanctions for failing to preserve electronically stored information. The current rule provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[9] The current rule has not proven to be entirely effective, as "electronic discovery has become a prime tool used offensively by litigants, with sanctions motions turning into their own minilitigations."[10] The Committee is cognizant of this trend, recognizing that Rule 37(e) has "not been sufficiently effective" in reducing "preservation sanction risks."[11] In response to this concern, the Committee has proposed an amendment to Rule 37(e) focusing more on curative measures (such as permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information) and clarifying when sanctions for failure to preserve electronically stored information are appropriate.[12]

THE PROPOSALS DON'T GO FAR ENOUGH

Efforts by the Committee to reform the current civil discovery rules are laudable, but they are not sufficient to rein in the costs and burdens inherent in complex civil discovery. Most importantly, while mandating that all discovery be proportional to "the needs of the case, [considering] the amount in controversy, ... the importance of the issues at stake in the action" will likely reduce the overall scope of discovery in certain cases, such a requirement still does not address a fundamental shortcoming of our current civil discovery system — namely, that the producer of discovery generally bears all of the costs associated with production.[13] "In many instances, these costs will no doubt be substantial, particularly when the requesting party seeks production of electronically stored information that must first be restored or reformatted by the producing party."[14] This is particularly troubling given the dramatic growth in electronic discovery costs over

the past several years in U.S. commercial litigation. *Law Technology News* has reported that the total cost of electronic discovery rose from $2 billion in 2006 to $2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually over the next few years.[15] In a more recent case study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled $1.8 million per case.[16]

The reality for most civil litigation is that the defendants' obligation to bear these exorbitant discovery costs incentivizes plaintiffs to serve burdensome discovery requests on defendants with zero downside risk to themselves. As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."[17] And because defendants seek to avoid these exorbitant costs, discovery is all too often used as a weapon to coerce settlement of claims, regardless of their merit.[18]

The "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (ACTL-IAALS Report), by the American College of Trial Lawyers & Institute for the Advancement of the American Legal System, found unsurprisingly that cases of "questionable merit ... are settled rather than tried because it costs too much to litigate them."[19] Even the Supreme Court has recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial."[20]

See part 2.

::::ENDNOTES::::

1. Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (ACTL-IAALS Report), at 9 (PDF).

2. Duke Conference Rules Package, at 77, Apr. 11-12, 2013 (PDF).

3. Advisory Committee on Civil Rules, Rule 37(e) Proposal, at 143, Apr. 11-12, 2013 (PDF).

4. Fed. R. Civ. P. 26(b)(2)(C)(iii).

5. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 780-81 (2011) (footnotes omitted).

6. 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2008.1, at 121 (2d ed. Supp. 2008); *see also* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 127 (2005) ("[T]he proportionality principle of Rule 26(b)(2) ... is not being utilized by judges[.]"); Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 349 (2000) (describing the proportionality requirement of Rule 26(b)(2) as "seldom-used"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 162-63 (1999) (characterizing proportionality rule as "something of a dud").

7. Duke Conference Rules Package, at 83, Apr. 11-12, 2013.

8. *Id.* at 84-87.

9. Fed. R. Civ. P. 37(e).

10. Danielle M. Kays, *Reasons to "Friend" Electronic Discovery Law*, 32 Franchise L.J. 35, 36 (2012).

11. Advisory Committee on Civil Rules, at 122, Nov. 1-2, 2012 (PDF).

12. *See* Advisory Committee on Civil Rules, at 143, Apr. 11-12, 2013; Advisory Committee on Civil Rules, at 122-24, Nov. 1-2, 2012.

13 *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

14. Redish & McNamara, *supra* note 5, at 788.

15. George Socha & Tom Gelbmann, *Climbing Back: Revenue Climbing Back for EDD Industry*, Law Tech. News (Aug. 1, 2010).

16. *See* Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, 17 (2012).

17. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

18. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 549 (2010) ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

19. *See* Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *supra* note 1, at 2.

20. *Twombly*, 550 U.S. at 558-59.

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Can E-Discovery Violate Due Process? Part 2

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Editors note: This story continues from Part 1.

The rule that a defendant bears all of the costs of responding to the other side's discovery requests also implicates important constitutional issues. Specifically, forcing a defendant to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability arguably infringes the defendant's right to due process. The due process clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[21] A defendant's bank accounts fall squarely within the category of property protected by this provision, as the Supreme Court has recognized.[22] Such property cannot be deprived "except pursuant to constitutionally adequate procedures"[23] — for example, "notice and opportunity for hearing."[24]

While courts have not yet addressed whether the current producer-pays discovery system raises due process concerns, some commentators have recognized that "impos[ing] the nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process" because it requires payment "without even a preliminary judicial finding of wrongdoing."[25] This is particularly so when one considers that failure to comply with discovery obligations can result in a finding of contempt of court under Rule 37.[26]

This conclusion, though perhaps novel, follows naturally from well-established Supreme Court precedent holding that deprivation of a property interest, based merely on a plaintiff's ability to make out a facially valid complaint, carries too great a risk of erroneous deprivation to comport with due process. For example, in *Connecticut v. Doehr*, the claimant sought an attachment of defendant's home to secure payment of a judgment he hoped to obtain on a civil assault complaint against the defendant.[27] The Supreme Court held that the state statute's provision for a prompt post-attachment hearing did not satisfy the requirements of due process because the statute did not otherwise provide adequate safeguards against an erroneous deprivation. According to the Court, "[p]ermitting a court to [take away a property interest] merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would [impermissibly] permit the deprivation of the defendant's property when the claim would fail to convince a jury [or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute."[28]

Similarly, in *Fuentes v. Shevin*, the Supreme Court struck down laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin.[29] The Florida and Pennsylvania statutes at issue in *Fuentes* permitted any person to file an *ex parte* application for a pre-judgment writ of

replevin as long as she posted a security bond. Neither statute required notice to be given to the other side, and neither statute provided the possessor with a pre-seizure opportunity to be heard.[30] The Supreme Court invalidated the laws on due process grounds, reasoning that while "the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ ... those requirements are hardly a substitute for a prior hearing"; "they test no more than the strength of the applicant's own belief in his rights."[31] Instead, the court must "examine the support for the plaintiff's position" and "hear both sides" before depriving the defendant of a property interest.[32]

These principles apply in spades to the civil discovery context where a plaintiff's unilateral allegation of fault is all that is necessary to force a defendant to spend enormous sums responding to discovery requests. Indeed, the due process concerns are arguably more acute in this context because, unlike applications for writs of replevin, there is not even a requirement that a plaintiff place a security bond before engaging discovery. While it is true that a plaintiff must first plead a *plausible* claim for relief to proceed down the path to discovery, as set forth in *Twombly* and *Iqbal*,[33] most lawyers can tailor a client's complaint to conform to the requirements of these decisions even if the case is meritless. Moreover, the fact that a defendant is provided with some sort of judicial hearing before a court rules on a motion to dismiss or for judgment on the pleadings is beside the point.[34] After all, "the sine qua non of a due process hearing is the ability of the judge to make a 'realistic assessment concerning the likelihood of an action's success'", whereas "[t]he evaluation of a complaint ... occurs before the parties have had the opportunity to gather or present information in support of their claims."[35] As a result, "the adjudication of a motion to dismiss is not a constitutionally adequate hearing" to safeguard a defendant's right to due process before being deprived of property.[36]

Particularly given the serious due process concerns raised by the current producer-pays discovery regime, the Committee should go a step further and consider additional amendments to the federal rules. One solution is to establish a general rule that each party pays the costs of the discovery it requests, subject to adjustments by the court.[37]As one professor explained in supporting this approach: "placing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."[38] Some of the factors a court might consider include whether the party from whom the discovery is sought retained information in a manner that makes retrieval particularly expensive or cumbersome, failed to provide relevant information during initial disclosures, thereby drawing out discovery, or otherwise drove up the price of discovery through its litigation strategies. Such an approach would help ensure that discovery is used to obtain legitimately needed information and that neither side uses discovery as a strategic ploy. In addition, it would protect a defendant's due process rights by ensuring that a defendant is not forced to spend huge amounts of money producing discovery even though no court has ever found that it engaged in improper conduct. Finally, such an approach would facilitate greater and more direct court involvement in discovery, which is a principal purpose behind the Duke Conference Rules Package amendments, by giving courts a very direct role in balancing the burdens of discovery between the parties.

A more modest step would be to expand cost shifting for electronic discovery, since that is one of the driving forces behind abusive and expensive discovery requests. While some courts have sanctioned cost-shifting for electronic discovery in their courtrooms, the rules currently do not *require* that courts consider cost-shifting when overseeing discovery.[39] An amendment mandating that courts consider the use of cost-shifting when a party seeks electronic discovery would place the onus of burdensome discovery requests on the party making the requests, reducing the prospect for the impermissible deprivation of property without due process and encouraging requests that are more narrowly tailored to obtaining relevant evidence. Moreover, because cost-shifting is largely guided by a checkerboard of nebulous standards that vary from court to court, the Committee should consider establishing clearer guidelines for the practice. A sensible starting point for these guidelines are the seven factors enunciated by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the

resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[40] In addition, the American Bar Association has also articulated sixteen factors a court should apply when considering cost shifting.[41] Incorporating the *Zubulake* and ABA factors — several of which overlap — into the civil discovery rules would mark a significant advancement over prior efforts to curtail abusive and costly discovery.

In sum, the Committee's efforts to reform the rules governing civil discovery are welcome news for defendants seeking relief from onerous and costly discovery. However, the proposals currently under consideration do not address due process problems with our producer-pays system. Thus, the Committee should go one step further and impose at least some of the burdens of discovery on the party making the request to help mitigate abusive discovery and, in the process, guarantee that a defendant's constitutionally protected property interests are not deprived without due process of law.

::::ENDNOTES::::

21. U.S. Const. amend. V.

22. *See N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (bank account is "surely a form of property").

23. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

24. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

25. Redish & McNamara*, supra* note 5, at 807-08.

26. *See id.* at 806 (citing Fed. R. Civ. P. 37).

27. *Connecticut v. Doehr*, 501 U.S. 1, 5 (1991).

28. *Id.* at 13-14.

29. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

30. *Id.* at 69.

31. *Id.* at 83.

32. *Id.*

33. *See Twombly*, 550 U.S. at 563 n.8 (courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct"), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

34. *See* Redish & McNamara, *supra* note 5, at 809-10.

35. *Id.* at 810 (quoting *Doehr*, 501 U.S. at 14).

36. *Id.*

37. *See* Lawyers for Civil Justice, Comment to the Civil Rules Advisory Committee and the Discovery Subcommittee: *The Un-American Rule: How the Current "Producer Pays" Default Rule Incentivizes Inefficient Discovery, Invites Abusive Litigation Conduct and Impedes Merits-Based Resolutions of Disputes*, at 6, Apr. 1, 2013.

38. Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 Fla. L. Rev. 885, 894 (2012).

39. James Pooley & Vicki Huang, *Multi-National Patent Litigation: Management of Discovery and Settlement*

Issues and the Role of the Judiciary, 22 Fordham Intell. Prop. Media & Ent. L.J. 45, 55 (2011) (courts have "discretion to shift a portion of the costs onto the requesting party to protect the responder from 'undue burden or expense'") (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

40. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

41. See ABA Section of Litig., Civil Discovery Standards (2004) (PDF). These factors include: "A. The burden and expense of the discovery, considering among other factors the total cost of production ... compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product ... ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; ... J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; ... O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]" *Id.* at Standards 29b.iv.A-P.

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Key E-Discovery Precedent Case Law:
10 Toolkit Cases To Remember

1. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*)

    a. Key Precedent

        i. Scope of Legal Hold

        ii. Preservation

        iii. Accessibility

        iv. Undue Burden or Cost: Adoption of the 7-Part Balancing Test:

            a) Specifically tailored

            b) Availability from other sources

            c) Total cost vs. amount in controversy

            d) Total cost vs. resources available to each party

            e) Relative ability to control costs and incentive to do so

            f) Importance of issues at stake

            g) Relative benefits of obtaining the information

2. Columbia Pictures v. Bunnel, 2007 U.S. Dist. LEXIS 63620 (C. D. Ca. Aug. 24, 2007

    a. Expanding the Definition of ESI

3. Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc., 2007 WL 837221 (Fla. App. Ct., Mar. 21, 2007) **and** Qualcomm v. Broadcomm, Case No. 05cv1958-B, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008)

    a. Sanctions

4. Cache De Poudre Feed, LLC v. Land O' Lakes, Inc., 2007 WL 684001 (D. Colo. Mar. 2, 2007)

    a. Litigation Hold

5. In Re Seroquel Products Liability Litigation, 2007 WL 2412946 (M.D. Fla. Aug. 21, 2007)

a. Sanctions

6. Phoenix Four, Inc. v Strategic Resources Corp., 2006 US Dist. Lexis 32211 (S.D.N.Y. May 23, 2006)

7. Williams v. Sprint United Management Co., 2006 WL 3691604 **and** Kentucky Speedway, LLC v. Nascar, Inc., 2006 U.S. Dist. Lexis 92028 (E.D. Ky. Dec. 18, 2006)

a. Form of Production

8. Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007)

a. Admissibility

9. Peskoff v. Faber, 2007 WL 530096 (D.D.C. Feb. 21, 2007)

a. Cost Shifting; Application of *Zubulake* 7-Part Test

10. Ameriwood Industries, Inc. v. Liberman, 2007 WL 685623 (E.D. Mo.)

a. Requirement of search term sampling