Preservation and Proportionality

Perspectives on Lowering the Burden of Preserving Data in Civil Litigation

Edited by Brad Harris and Ron Hedges

A Legal Hold Pro™ Signature Paper

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Preservation and Proportionality

Perspectives on Lowering the Burden of Preserving Data in Civil Litigation

Introduction

By Brad Harris and Ron Hedges

The spotlight has turned to the issue of proportionality as it may be applied to the preservation of potentially relevant information. The post-*Pension Committee* world has moved beyond asking "if" litigants need to preserve information to a focus on "how."

One need look no further than the testimony before the Dallas mini-conference in September and followed shortly thereafter by the debate stirred by the *Pippins v. KPMG*[1] opinion. Litigants are struggling to balance the increasing demands of preservation being driven by the exponential increase in electronically stored information (ESI) and the perceived rise in sanctions for spoliation.

In order to control the increasing cost and "monumental inefficiency"[2] that can result from traditional approaches to data preservation, the stakeholders in the U.S. legal system are searching for a solution founded on the principles of both reasonableness and proportionality as embodied in the Federal Rules of Civil Procedure.

The goal of this paper is to explore options for providing more objective "guideposts" for litigants facing the uncertainty of future discovery demands.

THREE COST DRIVERS FOR PRESERVATION

It is clear that the cost of discovery and specifically the cost of preservation continue to escalate. The drivers of this cost can be attributed to at least three key factors as described below.

The increasing amount and complexity of ESI

As the cost of electronic storage continues to plummet, the amount of ESI we can retain continues to rise exponentially. Where we retain information is also becoming far more diverse, moving for example from our traditional computer hard drives and corporate servers, to mobile devices and cloud-based storage. How we create information is also constantly evolving, including communication mediums and how we interact with one another. With such technology innovation, the opportunity to create and retain an ever-increasing diversity and

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[1] *Pippins v. KPMG LLP*, No. 11 Civ. 0377 (CM)(JLC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011).
[2] Minutes of the Mini-Conference on Preservation and Sanctions, Dallas, Texas, September 9, 2011.

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sheer volume of data will continue to drive unprecedented challenges when we are faced with a duty to preserve.

The threat of sanction motions becoming all too real

As litigants become more ESI-savvy and the proliferation of "potentially relevant" data sources grow, the threat of sanction motions will also continue to escalate. Effort taken to appropriately identify and react to a preservation obligation will undoubtedly be scrutinized, and missteps will be used against a litigant irrespective of the true merits of a case. Courts are also losing patience when they perceive that ostensibly reasonable actions, such as implementing an effective legal hold notification process or suspending auto-deletion programs, are found lacking and data lost.

Once started, it's hard to stop

The cost and burden of preservation is exacerbated because, once started, it is often difficult to stop preserving data and return to normal retention practices. The threat of "preserving everything forever" becoming business-as-usual is all too real, especially when dealing with multiple and overlapping legal holds coupled with poorly-defined or uncertain scope.

The impact of overly-broad preservation is compounded when data is collected and multiple copies retained.. When preservation becomes reliant on journaling every email, imaging every hard drive and pulling every back-up tape, the likelihood of knowing what can be deleted later on becomes infinitesimally small.

THE SEARCH FOR RATIONALITY FOR LITIGANTS

Organizations are struggling with how to reduce costs without incurring undue risk. What steps are reasonable when faced with a duty to preserve information for discovery? Should the principles of proportionality apply to good faith efforts to preserve ESI?

Although opinions vary, there were four key conclusions that can be drawn from the contributing authors.

Amendments to the rules of civil procedure may or may not be the answer

There have been calls for amendments to the Federal Rules of Civil Procedure to provide greater clarity and consistency with regards to a litigant's preservation obligations. Proposed changes would seek to provide greater certainty with regards to when a triggering event occurs, how to define and limit the scope of preservation, and when the duty can be lifted. They would seek greater consistency among jurisdictions, especially when considering how and when sanctions should be applied by the courts. And they would clearly articulate that the principles of proportionality upon which the Federal Rules are predicated (Rule 1) should apply equally to the duty to preserve.

Despite the call for greater "guideposts" when it comes to preservation, there is also recognition that rule changes may not be the answer. It can be extremely challenging to apply "bright lines" in every case (such as defining what constitutes a triggering event or limiting the scope of preservation, especially when addressing pre-litigation obligations). Some fear the inevitable unintended consequences that such lines may yield. Others question if rule changes are necessary given that the Rules already embody the principle of proportionality in both Rule 1 and Rule 26(b)(2)(C). Rule changes take a long time to address and changes might become obsolete due to the rapid evolution of technology.

Litigants must seek ways to minimize the cost and risk of preservation

Intelligent preservation strategies should seek ways to reasonably limit the cost and burden of preservation and subsequent discovery costs. The scope of preservation, either initially or over the life of a hold, can be limited by subject matter, the number and types of data sources, the types of information and how it is stored, and the timeframe over which the preservation duty applies.

Organizations must challenge traditional tactics for preservation. Gone are the days of the "scorched earth" response that sought to copy every bit and byte of data, or retain every back-up tape that might apply. Such tactics can quickly become radically expensive and burdensome, and increasingly impossible to achieve as "potentially relevant" data can exist in so many places. The

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process of creating and managing redundant copies of data for preservation incurs not only direct costs, but indirect costs for later culling and review (and can become subject to unrelated holds). And as stated earlier, once such preservation is started, it's hard to get rid of the stuff and return to normal retention practices.

When considering ways to limit the cost of preservation, it is critical to consider such tactics in the context of the total cost of discovery. The cost to preserve information is always far less than the cost to collect, review and produce the data (therefore, a strategy of broader preservation is generally sound). Actions should be balanced against the risk of sanctions and other court-imposed remedial actions (e.g., the cost of preserving too few sources). And Counsel should to their homework and document their decisions regarding reasonableness, good faith and proportionality.

If you haven't done so already, get to know your data

It is vital that litigants to get to know their data. Attorneys should be asking questions about how data is created and retained. They should seek the knowledge of experts within an organization. They should create and assemble their ready-action teams (aka litigation hold committees or discovery response teams) and call upon them when developing a preservation response plan. And they should capture knowledge gained, whether proactively in the form of "data mapping" or in response to each duty to preserve data.

Organizations should also seek the guidance and expertise of records management professionals and apply sound information governance principles to the extent possible. Done well, information governance can help control the proliferation of unnecessary or unwanted data that represents no value to the organization. With less data retained, the cost and burden of preservation is equally reduced. At a minimum, such information governance initiatives can help the organization to better understand its data, including what, where and why ESI is being created and retained. Such knowledge is invaluable when defining and articulating a scope of preservation.

Counsel should demand and defend proportionality at every step

Throughout all of the contributed essays is a common theme – attorneys must strive for and defend proportionality decisions whenever responding to a duty to preserve. Proportionality is a core tenet of achieving the "just, speedy and inexpensive" resolution of issues.

Effectively applying proportionality demands consistency, collaboration, and, in some instances, a court order. A well-reasoned and understood process that is consistently applied is always the easiest strategy to defend. By establishing a dialogue with opponents regarding preservation strategies, litigants may facilitate collaboration or, at the very least, create a stronger negotiating position. And they shouldn't be hesitant to seek protective orders when agreement cannot be reached and preservation decisions become subject to later challenge.

The fact is this debate is far from settled. This paper should prove enlightening and help shape the discussion by representing a variety of viewpoints. We would like to sincerely thank all those who contributed their time and brainpower to this stimulating project.

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‘Proportionality’ Under the Federal Rules: An Overview

By Ron Hedges

The concept of proportionality underlies the Federal Rules of Civil Procedure (“Rules”). Proportionality may be explicit in some of the Rules, but is implied throughout. Proportionality addresses litigation conduct, including making and responding to discovery requests, ethical behavior, and the award of sanctions.

Rule 1

Rule 1 provides that the Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” The words, “and administered,” were added in 1993. The revision was intended to, “recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.

As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.” Advisory Committee Note to 1993 Amendment to Rule 1 (emphasis added). Rule 1 thus imposes an obligation on the Bench and the Bar to take affirmative steps to resolve litigation in a “proportional” manner, taking into consideration fairness and costs.

Rule 26(b)(1)

This Rule establishes the scope of discovery in federal civil litigation. In a sense, it bifurcates discovery. First, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Second, for good cause shown, “the court may order discovery of any matter relevant to the subject matter involved in the action.”

That bifurcation is an invitation to courts and attorneys to strive for proportionality in discovery by limiting the subjects of discovery. However, under either standard, Rule 26(b)(1) explicitly recognizes proportionality: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” Rule 26(b)(2)(C) is the “proportionality rule.”

Rule 26(b)(2)(B)

This Rule, adopted as part of the electronic discovery amendments in 2006, again makes explicit reference to the proportionality rule. Rule 26(b)(2)(B), building on the *Zubulake* decisions, established the concept of ”not reasonably accessible” sources of electronically stored information or “ESI.” In the first instance, discovery may not be had from sources of ESI that are not reasonably accessible “because of undue burden or cost.” However, assuming that undue burden or cost is shown, “the court may nevertheless order discovery from such sources if the requesting party shows good cause, *considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”* (emphasis added).

Again, proportionality operates on several levels in this Rule. First, considerations of cost and delay make certain sources of ESI presumptively not subject to discovery, thus conserving party resources. Second, if a court finds good cause to allow discovery from such sources, the court looks to the proportionality rule to determine what discovery should be had and under what conditions.

Rule 26(b)(2)(C)

This is the proportionality rule. Unfortunately, as has been observed on more than one occasion, it may be the most underutilized of the Rules: “The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.” *GAP Report to 2000 Amendment to Rule 26(b)(1).* Presumably, as the Bench and the Bar confronts issues of, among other things, the volume and complexity of electronic discovery, the Rule will be featured more often in arguments and rulings.

Rule 26(b)(2)(C) provides that, on a party’s motion or *on its own initiative,* “the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines” that one or more of three conditions are met. These conditions are:

- “the discovery sought is unreasonably cumulative or duplicative, or can be

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obtained from some other source that is more convenient, less burdensome, or less expensive." Rule 26(b)(2)(C)(i).
- "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." Rule 26(b)(2)(C)(ii).
- "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Rule 26(b)(2)(C)(iii).

Each of these conditions calls for some analysis of proportionality.

Rule 26(c)

Rule 26(c) addresses protective orders. Again, in a sense, it addresses proportionality at several levels. First, the Rule provides that no motion may be made unless the moving party certifies that it has "in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action." Rule 26(c) thus attempts to conserve the resources of the parties and the courts and further the goals of Rule 1.

Assuming a motion is made, Rule 26(c) provides that, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Among other things, Rule 26(c) orders may, for example, bar Rule 26(a)(1) disclosures or discovery, specify the time and place of discovery, and forbid discovery into certain matters. Rule 26(c) thus affords considerable discretion to judges to, in effect, impose proportionality on parties.

Rule 26(g)

Rule 26(g) is the discovery counterpart of Rule 11, both of which address the effect of attorneys' signatures. Rule 26(g)(1) provides that every disclosure, "and every discovery request, response, or objection must be signed by at least one attorney of record… ." Moreover, "[b]y signing, an attorney … certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry" certain implied representations are correct. One of these representations is that discovery requests, responses, or objections are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(g)(B)(iii).

The 1983 Advisory Committee Note explains the purpose of this Rule. It "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37." Moreover, Rule 26(g) "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." It provides "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection." *Advisory Committee Note to 1983 Amendment to Rule 26(g).*

As with the Rules described here, Rule 26(g) addresses proportionality on several levels. First, it is self-executing: it requires an attorney to "stop and think" before engaging in an act related to discovery and affixing his signature to a document. Second, it empowers courts to address whether discovery requests, responses, or objections are intended to increase cost and delay or are unreasonably burdensome or expensive, taking into account factors similar to those described in the proportionality rule. *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008), demonstrates the potential utility of Rule 26(g) to achieve proportionality.

For a broader discussion of proportionality in civil litigation, see The Sedona Conference® Commentary on Proportionality in Electronic Discovery, available at www.thesedonaconference.org

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2011 Case Law
Proportionality, Preservation and Spoliation

The following list of cases provides a sampling of opinions issued in 2011 where proportionality was a factor in determining the scope of preservation and/or discovery.

McNulty v. Reddy Ice Holdings, Inc., **2011 WL 116892 (E.D. Mich. Jan. 13, 2011)**
Defendant sought a court order specifying conditions for discovery (including a reasonable list of search terms) due to the massive amount of data that had been preserved; the court required both parties to meet and confer in good faith to negotiate a reasonable scope.

United States ex rel. McBride v. Halliburton Co., 2011 WL 208301 (D.D.C. Jan. 24, 2011)
Plaintiff requested additional production of emails from an expanded list of custodians, despite significant production that had already been completed. The court determined that the plaintiff had failed to demonstrate that missing emails were crucial, and that additional discovery was not warranted.

Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc., 2011 WL 1125493 (W.D.N.Y. Mar. 21, 2011)
Plaintiff sought disclosure of emails, despite the defendant's argument that the information being requested was not relevant, responsive or readily accessible. Despite considerable expense, the court asserted that the requested emails were relevant, that the defendant had a duty to identify not readily accessible sources in its discovery response, and granted the motion to compel.

Wood v. Capital One Servs., LLC, 2011 WL 2154279 (N.D.N.Y. Apr. 15, 2011)
The defendants sought protective orders against extensive discovery, invoking the rule of proportionality as set forth in Rule 26(b)(2)(c). The court agreed, determining marginal relevance was far outweighed by the burden of responding given the exceedingly modest amount at stake.

Surowiec v. Capital Title Agency, Inc., 2011 WL 1671925 (D. Ariz. May 4, 2011)
Finding gross negligence for inadequate preservation efforts and discovery misconduct, including failing to issue a timely litigation hold and suspend routine document destruction when the defendant should have reasonably anticipated litigation, the court imposed monetary sanctions and an adverse inference instruction.

Gaalla v. Citizens Medical Ctr., 2011 WL 2115670 (S.D. Tex. May 27, 2011)
Plaintiffs sought sanctions in response to the defendant's failure to preserve disaster recovery backup tapes. The court ruled against sanctions, finding that preservation efforts were reasonable, including issuing a timely litigation hold, making timely snapshots of relevant email accounts and instituting journaling.

E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., 2011 WL 1597528 (E.D. Va. Apr. 27, 2011)
Despite a claim by the plaintiff that critical information was lost, the court denied sanctions for willful spoliation, citing that a defendant's duty to preserve is not absolute, but must only be reasonable and proportional to the circumstances.

Pippins v. KPMG LLP, No. 11 Civ. 0377 (CM)(JLC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011)
KPMG sought a protective order to limit the scope of its preservation obligation or to shift a portion of its preservation costs to plaintiffs. In response, the court chose to exclude to apply a "proportionality test" to preservation and denied the protective order. *See following page for more detail.*

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Pippins v. KPMG Focuses on Proportionality

This case involves the treatment of exempt employees under the Federal Fair Labor Standards Act and New York State Labor Law. The defendant sought a protective order to limit the scope of its preservation efforts, advocating a proportionality test as outlined in FRCP Rule 26(b)(2)(C). The two parties had failed to reach agreement as to what was reasonable to preserve, and the defendant had sought a protective order to limit the burden of preserving computer hard drives at considerable expense for thousands of former employees who might fall within a potential nationwide FLSA collective.

The court denied the motion, failing to rule on the potential material relevance of the information retained on employee hard drives, nor if ongoing preservation would be duplicative of other discovery materials being preserved.

Amicus Brief filed for Case 1:11-cv-00377-CM-JLC Pippins v. KPMG LLP Order

On November 4, 2011, attorneys for the U.S. Chamber of Commerce submitted an *amicus* brief in support of the defendants in the *Pippins* v. *KPMG* case, citing the Magistrate's Judge's order as having profound significance to businesses in America. The brief argues that the judge made two errors of law:

> *First, he held that the duty to preserve electronically stored information was not limited by any test of proportionality. Second, he held that every member of the proposed plaintiff class or collective action was a "key player" for purposes of discovery and the retention of electronic information. Both holdings are wrong, unprecedented, and—if affirmed here and followed by other courts—would be highly detrimental to the conduct of civil litigation under the Federal Rules. [p. 2]*

After effectively arguing against the finding of the court, the brief concludes:

> *In disregarding the proportionality principle and in treating every potential class or collective action member as a "key player," the Magistrate Judge set a dangerous precedent. … More significantly, however, because of the threat of sanctions, a decision—like the Magistrate Judge's—that overstates the duty of preservation will effectively become the law. For in the absence of controlling authority, parties and their counsel have no way to know in advance what standard a court will ultimately apply, and in an overabundance of caution, they may feel obligated to follow the broadest standard of preservation adopted by any court. [p. 9]*

See Appendix to read the *amicus* brief in its entirety.

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Perspectives on Preservation and Proportionality

The opinions expressed in the following commentaries are solely those of the individual author and should not be attributed to his/her firm or its clients. The comments should not be construed as legal advice or opinion and are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation.

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Proportionality Shouldn't Reward Incompetence

By Craig Ball

Litigants have been ignoring e-discovery obligations with impunity for so long they've come to think of it as an entitlement. Protected from predators, few have evolved. But now that opponents and courts are waking to this failure, those who've failed to adapt are feeling exposed. They don't like it, and they want protection. They call it "proportionality."

Proportionality sounds wholesome and virtuous, like "patriotism" or "faith." But it may be something else altogether.

We are barely out of the starting blocks in the evolution of e-discovery. It's just too soon to give lawyers and their clients another reason to defer acquiring genuine e-discovery expertise.

The much-ballyhooed "rise in sanctions" is designed to mislead. The solid metrics we have on spoliation prove that the sanctions risk for negligent non-preservation remains miniscule (.00675% per a 2011 report from the Federal Judicial Center). Put simply: In the United States, you are more likely to be hit by lightning than to be sanctioned for non-preservation of ESI.

More significant than the piddling increase in the frequency of sanctions is the consistency of the circumstances under which courts are imposing sanctions. Litigants are not being sanctioned for diligent, good faith efforts gone awry. As always, the overwhelming majority of e-discovery sanctions decisions turn on venal acts like intentional destruction of evidence and contemptuous disregard of discovery obligations. Sanctions continue to be a response to really bad behavior.

So let's tell it like it is: The claim that diligent, responsible litigants are being sanctioned for innocent e-discovery errors is hogwash.

Why, then, are litigants so irrationally terrified of court-imposed sanctions that they elect to sanction *themselves* by embracing monumental inefficiency in preservation instead of making sensible, defensible choices?

Most would say, "We are over preserving because the plaintiffs demand it and we are afraid of being sanctioned if we guess wrong and fail to preserve something."

There are two ways to deal with monumental inefficiency: become more efficient or accept the inefficiency. To achieve the former, you reward efficiency and penalize inefficiency. You're relegated to the latter when you shield the inefficient from the consequences of their failure. To the extent "proportionality" is a byword for "let us err with impunity," it's too soon in the evolution of e-discovery to be so resigned to incompetence. If anything, we need *more* sanctions for incompetence, not more safe harbors.

It's the Plaintiff's Fault!

Absent a court order, the scope of preservation is determined solely by the party with care, custody or control of the electronically stored information. An opponent can *demand* any scope of preservation, just as an opponent can *demand* any amount in money damages. An outsize demand for damages doesn't establish the true value of a case anymore than an outsize demand for preservation establishes the proper scope of preservation. In each instance, parties must make an assessment based on facts, experience and risk tolerance, and the other side's demands have little, if any, sway.

"The plaintiff wanted more" wouldn't justify a decision to overpay to settle a case, yet, that's the justification frequently offered for over-preservation. The plaintiff *always* wants more--that's why there's a lawsuit. But a plaintiff's preservation demand doesn't define or enlarge the preservation duty. Not one bit. At best, a preservation demand fixes the latest date on which the common law duty attaches and undercuts claims of innocent oblivion to sources of relevant ESI.

It's not the plaintiff's fault.

But What If We Guess Wrong?

Litigants shouldn't guess wrong—not because they can't be *wrong* but because they *shouldn't be guessing*. They should be making reasoned *judgments* based on reliable intelligence. It's the absence of reliable intelligence and the paucity of sound judgment that account for the vast over-

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preservation seen. "Keep it if it might contain something relevant" is lazy lawyer advice. Instead, when you *know* what you have, you can make efficient and defensible choices. "Knowing" means understanding how to investigate, search and interpret ESI.

Pure Heart, Empty Head

Grafting proportionality onto preservation, we must be vigilant to demand a high level of diligence, expertise and accountability from those deciding what to keep and what to discard. A pure heart should not be a sanctions shield if it serves an empty head. Until counsel and clients demonstrate that they can capably and cost-effectively identify, manage and search ESI, they will reliably misjudge the cost and burden of preservation. Sanctions for failure to preserve shouldn't turn on a defendant's subjective (and inherently partisan) assessment of a case's importance or value, but on an objective expert standard.

Moreover, a proportionality inquiry shouldn't reward incompetence. If high cost or burden is driven by subpar management of ESI, courts should assess the burden and cost measured against the proper information management practices that *should* have been employed and give no quarter to chaos.

Can Rule 26(b)(2)(C) Help?

The duty to preserve evidence doesn't flow from the rules of procedure. It's a common law duty. Discovery, by contrast, is a creature of statute. It's a right afforded and bounded by the rules of procedure. This is no trivial distinction. The Federal Rules of Civil Procedure may not abridge substantive common law rights without a congressional mandate. Thus, it's improper to extend the reach of the Rules to limit substantive rights absent a clear statement of intent by Congress.

The proportionality language in Rule 26(b)(2)(C) is a limitation on discovery "otherwise allowed under these rules or by local rules," not an abridgement of common law obligations. Further, the language of the Rule is expressly geared to the Court reining in requests for discovery in pending litigation where the interests of all parties can be presented and weighed. It's a rule designed to protect one party from the oppressive conduct of another. Nothing in the Rule suggests that it was intended to limit pre-suit obligations or to insulate a party from the consequences of the party's own failure to preserve relevant evidence.

Clearly, Rule 26(b)(2)(C) can't be pressed into service as a safe harbor for botched preservation, but it can prove instructive to courts weighing sanctions for failure to preserve relevant evidence. Though the standards for imposition of spoliation sanctions vary across the circuits, all assess the reasonableness of the respondent's conduct and the harm flowing from the alleged spoliation. In arguing the reasonableness of their conduct, a party may seek to demonstrate that the burden or expense of the preservation outweighed the likely benefit of the data not preserved 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. In seeking to mitigate the alleged harm, litigants can show that the evidence not preserved can be obtained from a source more convenient, less burdensome, or less expensive than the source not preserved.

Mom and Apple Pie

If proportionality is code for "don't hold us responsible for our own bad decisions," beware. But if it signifies that counsel must become adept at understanding client data and managing risk, fantastic! If it means that judges, too, will learn to navigate digital evidence and undertake to intervene early and aggressively to keep discovery focused and affordable, then proportionality really is mom and apple pie!

Craig Ball *of Austin is a Board Certified trial lawyer, certified computer forensic examiner and electronic evidence expert. He's dedicated his globetrotting career to teaching the bench and bar about forensic technology and trial tactics. After decades trying lawsuits, Craig now limits his practice solely to serving as a court-appointed special master and consultant in computer forensics and electronic discovery, and to publishing and lecturing on computer forensics, emerging technologies, digital persuasion and electronic discovery. Craig writes the award-winning "Ball in Your Court" column on electronic discovery for Law Technology News and is the author of numerous articles on e-discovery and computer forensics, many available at www.craigball.com.*

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Effective Education Will Lead to Proportionality

By Kevin F. Brady, Connolly Bove Lodge & Hutz LLP

Litigants are struggling to manage the increasing demands of preservation due to three reasons: volume, costs and risk of sanctions. By all accounts, traditional approaches to data preservation and proportionality are not working. Why? For many litigants it is the lack of understanding of the rules, the data and the technology. For many lawyers giving advice to clients, it is the lack of understanding of the data and the technology that leads to an inability to meaningfully discuss proportionality in the area of preservation.

Companies need and want guidance to know how they should operate. Corporations doing business nationally and internationally are faced with multiple state and federal law standards. Sometimes there can be different standards within a state or a federal district. This forces the company into a Catch-22 situation – does it wait to see where the litigation is going forward and preserve to that standard (which can be problematic if you are forced into a *Pension Committee* situation where the case is moved from one jurisdiction to another) or does it just determine the most stringent requirements and act according to those standards and possibly waste tremendous amounts of resources and time?

Companies want to know what the business and legal risks are that are associated with various business actions. They do not have that now with respect to preservation and spoliation. They are not in business to waste the resources of their shareholders, and if they do, then they won't be in business for long.

While these stakeholders search for a solution grounded in reasonableness and proportionality, those concepts alone will not provide the answer because they are already part of the problem. Reasonableness and proportionality are principles that are already contained in the rules starting with FRCP 1 and 26. The failure is in the implementation, and the solution lies in more structure and specific benchmarks in a rule whether it is in FRCP 26 or 37. There also needs to be uniformity in the application of the preservation and proportionality analysis and that only comes with two things: more guidance in the rules and enforcement of the rules.

For companies, the concepts of reasonableness and proportionality must start with the records management process. There needs to be an effective and efficient records management process in place that can quickly transition to a preservation process when the duty to preserve is triggered. This is a major first step on the path of reasonableness and proportionality. Companies waste time and resources waiting to implement their preservation process until they see where the litigation will occur and what the law of that jurisdiction is.

In Delaware for example, home of the majority of the Fortune 500 companies, process is paramount in terms of determining the reasonableness of a company's actions or inactions. Companies are given guidance in two ways. First, there is the Delaware General Corporation Law which provides specific instruction for companies to perform certain functions. The statutory guidance is supplemented with a significant body of case law to provide more guideposts for companies to measure the reasonableness of their actions.

While this is not a perfect system, it is working and the proof is in how many companies are Delaware corporations or LLCs. But even that would not be enough for the current problems with preservation and proportionality. In addition to more specific rules and case law, we need effective education of all constituents – lawyers, judges, and clients.

We have had the e-discovery changes to the FRCP for five years and by all accounts, a majority of the affected constituents have yet to really grasp the importance of the rule changes or their ramifications. What we need is *effective* education with incentives for all constituents to engage in meaningful discussion which can lead to proportionality. It is only when both sides are educated in the law and informed as to the nuances of the data and technology that they are dealing with in their particular case, will there be any hope

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for real and meaningful discussion of reasonableness and proportionality.

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Improved Records Management Reduces ESI for a More Proportional Response

By Eugenia Brumm, Ph.D., CRM, FAI, Huron Consulting

Rule 26 (b)(2)(C), referred to as the "proportionality rule" was crafted to limit the scope and extent of discovery because of the "large volume of ESI and associated expenses, now typical in litigation."[3] With exceptionally large volumes, difficulties arise in identifying, locating and preserving "core relevant" information because large volumes of information are created, used, and maintained to satisfy business operations—not to respond to e-discovery requests. Compounding problems, many organizations have trouble retrieving relevant information in a timely manner even for daily needs. Stories abound from those who have performed valiant workarounds to locate and retrieve data that resides in multiple locations, formats and systems, exists in multiple versions, and lacks any sort of naming convention. Ultimately, an unnecessary burden is placed on the participants in the e-discovery process, who must create logic and order out of a morass of information.

However, these issues can be minimized by ensuring that a solid records and information management (RIM) program is proactively in place. Recognizing the impact that managing information has on the e-discovery process, the Electronic Discovery Reference Model (EDRM) places "information management" at the forefront, with a constant role throughout the e-discovery workflow. However, the EDRM initiative views RIM mainly from a risk mitigation and decreased volume perspective through records retention and disposition. Although retention and disposition do reduce volume, RIM Program components can have a profound impact on e-discovery processes in additional ways:

1. By identifying information to create and capture – Addressing records creation and determining which information truly needs to be captured reduces volume, while simultaneously ensuring that necessary information is indeed captured, thus reducing the possibility of information gaps.

2. By defining the form and structure for information and the technologies to use – This ensures that information is entered into the appropriate system, that it retains its integrity, and that the discovery team can rely on information within systems.

3. By creating and managing metadata – Describing a resource with metadata allows it to be understood by both humans and machines, promoting interoperability. RIM metadata is critical to the success of an e-discovery initiative, enabling identification of the information and, thus, a laser-like search for information by predefined parameters. This reduces the volume that is collected.

4. By organizing information – A comprehensive RIM program includes the development of an

[3] "The Sedona Conference® Commentary on Proportionality in Electronic Discovery," *The Sedona Conference Journal*, Vol 11, p. 293.

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information organizing architecture, a term that is used here to define the practices and activities focused on developing standardized organizing schema with terminologies to support usability and retrievability in the digital landscape. This architecture is critical for daily business operations and for the e-discovery process:

- It helps define the basic organization for unstructured information
- It paves the way for better implementation of existing content systems and better organization of network folder structures
- It prevents the over-collection of information during e-discovery

5. By developing retention requirements and implementing destruction/expungement of information – This ensures that records are retained only for as long as needed or required. This RIM program component, often emphasized in e-discovery literature, reduces volume prior to e-discovery, and, if it is routinely implemented in the normal course of business, supports "defensible disposal," as an important end goal.

6. By addressing the stages of information – Transitory information, drafts, ephemeral and social notes are addressed, with procedures and mechanisms designed to ensure their quick demise once they have served their intended purpose. Short-lived information comprises a large percentage of ESI that does not serve a business or regulatory purpose.

The concept of proportionality is well-intentioned and should be applied when discovery is protracted or requests are excessive. The large volumes of ESI, however, can be reduced by effective records and information management, thus limiting the instances in which proportionality must be exercised.

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Rule 1 Should Guide Us

By David Cohen, Reed Smith LLP

The Federal Rules of Civil Procedure start with Rule 1: [these rules] "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The principles of just, speedy and inexpensive are the timeless standards that transcend technology and serve to guide the evolution of our civil litigation system. The idea of proportionality is implied by these standards; standards that apply to all parties and should be interpreted broadly to apply from the point litigation can be reasonably anticipated.

As a practical matter, however, these high-minded ideals often collide with reality. Litigation adversaries, particularly where they do not have a lot of their own documents to produce, may demand "everything" in discovery and strategically use discovery to burden their opponent or create a claim for sanctions. When litigation strikes, many lawyers advise their clients to "keep everything" to minimize the risk of sanctions. It is not always easy to predict what every judge will find relevant and discoverable.

When considering the scope of preservation, real world companies need to take into account the bigger picture, including the monetary implications of a preservation strategy. One starts with understanding there is risk if you don't preserve very, very broadly. Yet we need to look for

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reasonable places to draw the lines, which requires honesty, hard thinking, and often sampling, to determine where the **relevant** information is to be found. In the end, it often requires judgment on the part of the organization – as outside counsel, it is our job is to guide them to make reasoned and defensible decisions.

Certainly a challenge in all of this is never being able to foresee all the possible outcomes. There is always that risk of ending up embroiled in a case where a judge might disagree with the client's or attorneys' good faith judgment. No one wants to be the victim of a sanctions opinion, or a reproof from the court, so those concerns tend to drive the “save everything” approach.

When developing a preservation strategy with a client, several approaches can help as the case develops. The first recommendation is to do a good job tracking exactly what are the costs of broader preservation efforts. It is important to document the decisions and assess the trade-offs – how much will storing back-up tapes cost or how many man-hours are used to implement and maintain a legal hold by each recipient. This information is invaluable in negotiating a narrower scope of discovery, and much more powerful than simply purporting that it “costs too much!”

Another important consideration is assessing relevancy. Regardless of cost or burden, if information is potentially relevant to disputed issues, we have an obligation to preserve it. When making culling decisions, we can employ sampling techniques in order to test the data and determine whether our judgments are sound with regard to where the relevant information can or cannot be found. We need to be able to defend our decisions to exclude data – for example, reviewing a random selection from what our search terms didn’t “hit” and showing none contained any relevant information to any disputed issues in the case. A similar approach can apply to preservation efforts, but there the risks can be even greater because there is no way to “undo” decisions not to preserve.

We are seeing increasing enlightenment among attorneys and judges about the importance of proportionality and taking reasonable measures to promote the quick and efficient resolution of disputes between parties. I would like to see the Rules made clearer that the concept of proportionality extends to preservation efforts. While I know those efforts are underway, it takes a long time to get rules developed and enacted. Meanwhile, it is important to continue stressing e-discovery cooperation between parties, as well as continuing vigorous conversations so that everyone involved in civil litigation becomes better informed, and we can reduce the potential for disputes about what is or is not deemed reasonable and proportional.

David Cohen *has more than 25 years of commercial litigation experience in a variety of subject matters. He serves as special e-discovery counsel in many cases, represents companies in complex litigation matters and also counsels clients on records management and litigation readiness issues.He has been involved in setting up the E-Discovery Special Masters program in the U.S. District Court for the Western District of Pennsylvania, and he has served as a court-appointed E-Discovery Special Master in that jurisdiction. David has authored numerous legal publications and is a frequent presenter at continuing legal education seminars regarding e-discovery, technology and litigation tactics.*

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Cooperation and Information Standardization in Healthcare Can Show a Path to Proportionality

By Dr. Richard Esham, CPSI

I am not an attorney, but a physician who still works in the healthcare industry but now with a company providing critical software for running hospitals, so my perspective will undoubtedly be unique among this esteemed group. While I do not purport that the healthcare community has magically decoded the challenges faced regarding proportionality, it may be that some lessons can be learned.

In our world the shift from paper to digital has been embraced. The storage of electronic records is so much more economical than the huge warehouses that we used to have to maintain to retain all of the medical records for years. It was an absolute nightmare to store it. The shift to electronic health records has been crucial to the success of local, regional, and national goals to improve patient safety, improve the quality and efficiency of patient care, and reduce healthcare delivery costs.

Perhaps the frustration I sense among those involved with civil litigation stems from a loss of perspective and a nostalgic view of an "all paper" world, when life was seemingly simpler. However, having everything readily accessible should make for having the pertinent information when needed – not to mention the economic and societal benefits.

The healthcare industry has been so sensitized to preservation, maybe more than any other industry, that it's just taken as a matter of course that we are going to preserve information. And when I say preserve it, I mean preserving all of it. The real issue that comes up is at what point we are able to dispose of the information. Naturally, we tend to err on the side of retaining records for 7, 10, 15 or more years. We do have guidelines so that we can manage "down" that information as needed, a process that we've evolved over years and with which I see many organizations outside of healthcare still struggle.

As you might expect, requests for production of information are commonplace in our industry. We have migrated to a format called the Continuity of Care Document, or CCD, as the format we typically use to provide clinically relevant information between providers. This is also the type of information we would provide upon a legal subpoena. We can produce all or part of the CCD upon request for patients, and often do. In essence, this consistency offers us a path to proportionality because the required information is in one place, in a standardized format and the record provides a detailed audit trail.

Among the healthcare community, there is generally a spirit of cooperation and willingness to exchange information, given the right permissions to do so. Unlike the adversarial relationship in the legal world, we are generally working toward a common goal of patient care. This spirit of cooperation ensures that information is readily accessible. Perhaps the legal community could take a cue from this to make the transfer of information smoother, focusing on the goal of improving our judicial system.

While the healthcare industry has its imperfections, we do handle, retain and produce information better and more efficiently than most industries. We start with a disciplined culture of capturing information in patient medical records that is consistent, with severe penalties for not doing so. We embrace the digital storage of information and see it as a great benefit rather than a burden. We have developed policies for records management to responsibly dispose of information assets. We have a standardized way to maintain and share records which lowers the burden of production. Perhaps some of the areas where we have learned will inspire attorneys and judges to lower the preservation burden and manage information in a way that embraces proportionality.

Dr. Richard Esham, *Corporate Medical Director of CPSI, a leading provider of healthcare information solutions for community hospitals with over 650 client hospitals in 45 states and the District of Columbia. Dr. Esham spent 16 years as a practicing internist before spending the next 10 years as a professor at the University of South Alabama School of Medicine. He joined CPSI in 2003 and works closely with hospitals in modernizing their information management systems.*

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Proportionality Isn't the Challenge, Operationalizing It Is

By Maura R. Grossman, Wachtell, Lipton, Rosen & Katz[†]

It is difficult to fathom that Federal Rule of Civil Procedure 26(b)(2)(C)—which requires the court to "limit the frequency or extent of discovery" if "the burden or expense of the proposed discovery outweighs its likely benefit"—does not apply to something as inextricably intertwined with discovery as the preservation of ESI. Indeed, the *Manual for Complex Litigation (Fourth)* recognizes that "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations."[4] "Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens," courts must carefully consider "the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burden."[5] "Efforts should be made to "minimiz[e] cost and intrusiveness and the downtime of the computers involved."[6] And preservation orders should "exclude specified categories of documents or data whose cost of preservation outweighs substantially their relevance in the litigation, particularly … if there are alternative sources for the information."[7] Given the rampant explosion of ESI, if the Federal Rules are to have any chance at being "administered to secure the just, speedy, and inexpensive determination of every action and proceeding,"[8] then preservation of that information *must* be restricted to what is proportional.

But putting proportionality into practice can be extremely challenging. The challenges arise because preservation decisions are often made unilaterally—before a suit has ever been filed—when choices about the triggering event and the scope of preservation may later be subject to 20/20 hindsight. It comes as no surprise, then, that many organizations end up saving far more than they should due to fear of spoliation sanctions and the ensuing reputational damage.

Another significant challenge to the application of the proportionality principle is that such application is predicated on the ability to evaluate intangible or hard-to-quantify factors such as "reasonably calculated," "likely benefit," "burden," "expense," and "importance." If one compares the application of the proportionality principle to the application of a speed limit, it is easy to see the problem. Imagine, for a moment, driving down the highway and seeing a sign that said: "Don't drive any faster than is reasonably necessary, considering the importance of your timely arrival, the risk to yourself and others, and the cost of fuel."[9] Applying that instruction would require the interpretation of numerous intangible factors, making compliance hard to predict and enforcement problematic, at best. Given sparse guidance in the case law on the topic of proportionality—particularly in the realm of preservation—it is unclear how one would define or quantify the constraining factors, let alone what arbitrary constraints might be imposed, or the degree to which those constraints might impact the conduct of e-discovery.[10]

Proportionality in preservation also can pose challenges due to the misalignment of expectations between the parties to a case. Early in the litigation, a requesting party may send an omnibus preservation letter demanding that the producing party save everything under the sun ("and a pony," as Chief Magistrate Judge Paul W. Grimm has been known to say). In the requesting party's mind, if any of those items turn up missing, they have grounds

† *The views expressed herein are solely those of the author and should not be attributed to her firm or its clients.*

[4] Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 11.442, at 73 (2004).
[5] *Id.*
[6] *Id.*
[7] *Id.* § 11.442, at 74.
[8] Fed. R. Civ. P. 1

[9] *See* Maura R. Grossman and Gordon V. Cormack, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 Sedona Conference J. 89, 102 (2011).
[10] *Id.*

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for a spoliation motion. Yet in practice, we all know that such boilerplate requests are routinely excessive and unwarranted.

The most appropriate response under these circumstances may be for the responding party to explain what preservation actions it intends to take, and why they are reasonable and proportional, offering to have a meet-and-confer if the proposed plan is deemed to be insufficient. Collaboration then ensues—or not. Regardless, by doing this, the producing party has thereby placed itself in a better position and put the onus back on the requesting party to justify its excessive and disproportional demands.

Identifying and preserving ESI for a limited number of "key players" rarely poses any significant issues, but the costs begin mounting quickly when a company has thousands of custodians all over the world and no centralized means for preserving or collecting the data. And of course, the most significant costs lie in the subsequent review of the ESI, although the application of advanced search technology is beginning to provide some relief in this regard.[11] Even if technology-assisted review (a.k.a. "predictive coding") can significantly decrease *review* costs, these tools still provide little relief when it comes to *preservation*.[12]

Proportionality considerations also need to factor in hidden costs, such as the cost of disrupting an organization's business operations due to preservation efforts. The hard costs of processing data are well documented, but business interruption is much harder to quantify and argue before the court. Yet these hidden costs can be substantial.

Many of the stakeholders in the civil litigation community understand the potential benefit of applying the proportionality principle, but the realities of business operations, the evolution of ESI, and the challenges outlined above continue to undermine this goal. Because available guidance is thin, ultimately parties are left to make decisions based on the available information at the time—and revisit and revise those decisions, as necessary, as the case evolves—hoping that these decisions will later withstand scrutiny.

The recent Dallas Mini-Conference,[13] and other forums such as The Sedona Conference®, are invaluable for soliciting input and having a healthy dialogue about the proportionality crisis. But in the end, litigants need to be able to implement a reasonable, proportional legal hold process that will ensure that relevant ESI is not in jeopardy of being lost, but they also need a basis for having confidence that reasonable and good-faith decisions will not later be second guessed. We already have the rules at our disposal to do this,[14] now all we need is cooperation by the parties and support from a well-informed and engaged judiciary to move us closer to a more balanced system that achieves the mandate of Federal Rule 1.

Maura R. Grossman *is Counsel at Wachtell Lipton, where she advises the firm and its clients on legal, technical, and strategic issues involving electronic discovery and information management, both in the U.S. and abroad. Maura is co-chair of the E-Discovery Working Group advising the New York State Unified Court System, a coordinator of the Legal Track of the National Institute of Standards and Technology's Text Retrieval Conference ("TREC"), and a member of the Steering Committee of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production. Maura is an adjunct faculty member at Rutgers School of Law –Newark and Columbia Law School. She also serves on the advisory boards of BNA's Digital Discovery and E-Evidence Report and the Georgetown University Law Center's Advanced E-Discovery Institute.*

[11] *See* Maura R. Grossman and Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

[12] *See* Thomas Y. Allman, Jason R. Baron & Maura R. Grossman, *Preservation, Search Technology & Rulemaking*, Submission to the Civil Rules Discovery Subcommittee for the September 9, 2011 Mini-Conference at DFW Airport (Sept. 7, 2011), at 10, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman,%20Jason%20Baron,%20and%20Maura%20Grossman.pdf.

[13] *See* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[14] *See* Fed. R. Civ. P. 1, 26(b)(2)(B), 26(b)(2)(C), 26(f), and 26(g).

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Raising the Bar on Proportionality?

By John Jablonski, Goldberg Segalla LLP

Proportionality is in vogue, despite being more or less ignored since its introduction into the Federal Rules of Civil Procedure in 1983. E-discovery commentators – including The Sedona Conference™ – argue that more aggressive use of Rule 26(b)(2)(C) is the prescription for the current costly preservation and e-discovery ills of the American justice system. "Take two 26-b-2-C's and call me in the morning." Unfortunately, the proportionality rule has not withstood its clinical trials in the age of exponentially expanding ESI. So long as the focus remains on preserving all *potentially* relevant ESI, stronger medicine is needed.

A stark example of the shortcomings of proportionality can be seen in a recent case out of the Southern District of NY (*Pippins v KPMG*, 2011 WL 4701849*)*. In *Pippins*, the defendant appears to have been caught between a rock and a hard place. The rock is its self-imposed preservation efforts, undertaken early (perhaps as an easy solution at $600.00 a pop for protection – only to see the costs escalate to $1.5 million over time) and a hard place (inability to negotiate a reasonable sample of the data being preserved coupled with potential spoliation sanctions following any unilateral action).

Despite doing exactly what commentators have urged – seeking relief from the court when faced with costly and burdensome preservation – the defendant is stuck. Here, the problems facing the American justice system are made strikingly clear. Rather than making hard choices, courts are reluctant to narrow the scope of preservation because the current paradigm is broken. Focusing on saving all *potentially* relevant information, regardless of cost must stop. Until the paradigm shifts and courts begin focusing on what is material and necessary, proportionality will not be the answer. In *Pippins*, proportionality was not the answer with the court declining the invitation to apply proportionality to preservation.

Absent clear authority and guidance district courts will continue to be constrained by the current "better to be safe than sorry" preserve everything mentality. Some may argue *Pippins* is an anomaly. The case, from my perspective, merely solidifies the seemingly high bar against applying proportionality to preservation and it certainly makes it more difficult for the next corporation seeking to avoid huge preservation costs

For a litigant that is not trying to play games, proportionality should prevail in the right case, saving countless litigants from costly over-preservation. From my clients' perspective (mostly fortune 500 companies), this case simply underscores what is wrong with preservation analysis in most courts today. From *Zubulake* to the present, the focus in spoliation cases has been on what is missing, rather than what remains. The focus should be on whether sufficient evidence exists to afford a fair opportunity to make a case. With the volume of ESI expanding rapidly into the clouds and social networking, the loss of a few emails or a laptop in the sea of other information should be the least of our worries. Unfortunately, it almost always is grounds for some sort of sanction.

Very soon all litigants will be facing the costly preservation problems facing larger corporations now. Some simple math: by owning one iPhone™, one iPad™ and one laptop computer, a single *pro* se litigant may own, need to preserve, and struggle with electronic discovery of the equivalent of 27,072 banker boxes containing approximately 135 *million* pages of information.[15] A small "mom and pop" business using just one entry level server, two iPhones™ and two laptop computers is faced with approximately nine times the storage capacity of the single *pro se* litigant. These devices together store

[15] Owning a 64 GB iPhone™, 64 GB iPad™ and a laptop containing a 1 TB hard drive, equals a total of 1,128 GB of potentially relevant information. Microsoft's August 29, 2011 letter to the Civil Rules Advisory Committee equates 1 GB of data with 24 banker boxes. Multiplying 24 banker boxes by 1,128 GB of data equals 27,072 banker boxes. Assuming 5,000 unstapled pages fit into a banker box, this amount of ESI is equivalent to 135,360,000 pages of potentially relevant ESI.

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the equivalent of 243,072 banker boxes containing approximately 1.2 *billion* pages of information.[16]

In the end, the court did the safe thing *pursuant to existing case law* and maintained the status quo. For proportionality proponents the case is a disappointing one. From my perspective it is disappointing in two ways: (1) the need to preserve all potentially relevant ESI, regardless of cost, trumped the court's ability to trim the scope of costly preservation; and (2) this case will be held up by some to argue that proportionality in preservation is frowned upon by courts and exercised in the rarest of circumstances. Until someone makes a good case for proportionality in preservation before a proactive court or appropriate rules amendments are enacted, over-preservation will continue at great expense with seemingly little benefit.

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[16] One small company owning two 64 GB iPhones™, two laptop computers containing a 1 TB hard drive each, and an entry level small business server holding 8 TB of data, equals a total of 10,128 GB of potentially relevant information. Using Microsoft's figures this amount of ESI is equivalent to 1,215,360,000 pages of potentially relevant ESI.

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Some Observations Regarding Preservation and Proportionality

By Tom Kelly, K&L Gates LLP

I am a litigator who now focuses on electronic discovery. I work in the e-Discovery Analysis and Technology ("e-DAT") group, which assists litigators within K&L Gates LLP as well as those in other law firms in the preservation, collection, review and production of electronic and hard-copy documents. As such, we encounter, on a regular basis, the issues that parties face regarding the costs of preservation and the risks of failures to preserve ESI.

Obviously, the willful destruction of ESI for the purpose of preventing the use of information in litigation is intolerable and needs to be strongly and effectively sanctioned. However, I believe that, in recent years, some parties and lawyers have sometimes misused the legitimate concern for preservation of relevant materials by deliberately making overbroad and unduly burdensome demands regarding the preservation of a party's ESI that are not justified by the claims and defenses in the underlying litigation. These demands appear to have been used to implement a number of strategies. For example, any failure to fully comply with a demand can become the basis for motions practice, in which the objective is not really the "missing" ESI (the relevance of which may be tentative at best under the current, broad scope of preservation), but the monetary sanctions that may accrue to the objecting party; in such a case, the "failure to preserve" becomes a hidden cause of action, which may prove more lucrative than the underlying claim itself. Even if the motions practice does not result in much by way of monetary sanctions, it can still be an effective way to poison the court against the other party. And there is also the possibility that a spoliation instruction will be ordered as a sanction. Again, the point of getting a discovery order authorizing such an instruction may not be so much for its use at trial as it may be for its *in terrorem* effect in inducing a settlement.

This is not to say that there are not meritorious motions regarding preservation. To the contrary, the reported cases certainly demonstrate that some parties do not adhere to their preservation obligations in regard to legitimate preservation requests and requirements. But the temptation to try to take tactical advantage of the failure-to-preserve motion is a real problem, somewhat reminiscent of the heyday of the Rule 11 motions practice of some years ago. And so long as there is great uncertainty -- as there is now -- as to what information is properly subject to the preservation obligations, the misuse of such motions practice will continue.

I therefore support efforts to argue for, and articulate, more definite and objective standards regarding the duty to preserve ESI. Just as there are now limitations on the number of depositions and interrogatories (subject to expansion for good cause), even though it is possible that relevant evidence might have been uncovered with more depositions and more interrogatories, so too there must be temporal and scope limitations on the preservation and production of ESI, even though it may occasionally mean that otherwise relevant evidence will not have been preserved.

***Tom Kelly** is a litigator at K&L Gates in Seattle who has represented clients in a broad range of complex litigation, including commercial disputes, class action cases, employment law litigation, trust and estates litigation, defense of professional liability claims, and litigation involving municipalities. Tom is a member of the firm's e-Discovery Analysis and Technology (e-DAT) group. This group uses systematic processes and advanced technology to provide efficient and cost-effective discovery and document review legal services, especially with regard to electronic documents. Tom also serves as an assistant general counsel for the firm, providing legal advice to lawyers in the firm's Pacific Northwest offices regarding conflicts and ethics issues.*

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In Shaping Proportionality, Bright Lines May Not Be the Answer

By Browning Marean, DLA Piper

There is no question that preservation and proportionality is a subject that stirs fear, uncertainty and doubt. In today's judicial environment there are more pitfalls in this area than in most others that we face. When you look at an organization of any size, there are so many possible points of preservation failure that the uncertainty is driving up the costs and burden of doing so.

One of the real problems is a lack of effective information management. Someone once said, "We're all information managers now, the problem is most of us don't know it." Companies have by and large not devoted the resources to putting together nor followed robust records retention policies, so in some respects they are living with the consequences of this inattention.

There's another layer in which technology is moving at such a rate that just when we think we have mastered locking down data in Word documents and emails, new exotic platforms emerge. Data sources like Twitter and Sharepoint are dynamic and difficult to capture and control.

From my own experience, once the need for preservation arises and one goes about finding key custodians and relevant documents, the "90-10 Rule" comes into effect (or perhaps the "99-10 Rule"). Ninety nine percent of the relevant data is generally found in 10 or less custodians. So when initiating a litigation hold, start by going to those 10 or so and put a hold on their records. Then make an inquiry as to whether or not there is anyone else in the 'long tail' of people that may be involved in the issue which might require further preservation.

Manage your cost and burden by focusing on the key custodians first, then do a risk calculus on how much further you need to go based on your understanding of the case, the players involved, and whether you sense that your opponents are interested in pursuing a rational preservation order or using e-discovery as a tool for extortion.

Another recommendation I routinely make is to establish a formal litigation hold committee. Get the right folks together and keep a good database of threats that require litigation holds, and just as importantly, those that do not. The job of this committee is to assess the threats, make reasoned decisions, and keep an audit trail.

In addition to such thoughtful analysis, there have been suggestions to seek changes to the rules to provide brighter lines. Some proposals suggest controlling the cost of preservation by setting an arbitrary limit on the number of custodians or data sources in discovery. While I can understand the desirability of having a bright line to hold on to, I am immediately reminded of what satirist Ambrose Bierce wrote in *The Devil's Dictionary* (1906):

> Lawyer (n.)- One skilled in circumvention of the law.

I am always concerned when setting out a number of bright line tests as one of the alternatives people are considering. Lawyers will sit down and figure out ways to subvert, get around, game or whatever else because their case does not quite "fit those rules."

Chief Judge Randall R. Rader of the Federal Circuit has recently been advocating reforms that are specific to patent litigation which address controlling and managing increasing discovery costs. According to his comments, he estimates that only one page of every 10,000 is produced in court.

On September 27, Judge Rader announced that the Federal Circuit Advisory Council unanimously adopted a new "Model Order Limiting E-Discovery in Patent Cases" designed to serve as a starting point to streamline and reduce e-discovery costs by emphasizing production limits. The new Model Order phases in production based on presumptively limiting the number of custodians, search terms and timeframes (including limiting requests to five custodians and five search terms per party; absent a joint agreement to modify these limits).

While this approach may not be ideally suited for other forms of civil litigation, I appreciate the incremental approach and the requirement for a

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party to show cause to go beyond such limits. Doing so may provide a reasonable starting point for a proportionality discussion going forward.

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The Advantage of Transparency in Determining Preservation Efforts

By Ariana Tadler, Milberg LLP

A great deal of dialogue and debate currently centers on preservation issues. The volume of the conversation has increased dramatically based on the recent outcries of corporations concerning the costs and challenges huge data generators face in complying with what they contend are burdensome preservation obligations under the current Federal Rules and case law. But the issue is whether the allegedly crippling costs and burdens associated with preservation are really necessary, or are the corporations overreacting to a handful of cases in which truly bad actors faced severe sanctions for willfully and deliberately destroying evidence. The reality is that there are no recent cases in which courts have imposed severe sanctions on litigants who have made reasonable preservation efforts and been forthcoming about the process. This is what many are calling the "fact vs. fear" dilemma.

The longstanding and well-established law is that everyone -- from the largest multinational corporations to individuals -- has an obligation to take good-faith, reasonable steps to preserve documents and information likely to be relevant to pending or anticipated litigation. It is not only acceptable but incumbent upon parties to discuss the scope of preservation early on to prevent disputes later and to work to curb costs. Transparent discussion about existing data and systems, and about how to streamline getting the most important information to one's opponent on a prioritized basis can achieve these goals. The Sedona Conference's Cooperation Proclamation and various pilot programs around the country contemplate this very type of transparent and cooperative dialogue.

I believe that, as officers of the Court, attorneys have a duty to engage in that discussion -- indeed it is consistent with the precepts set forth in Federal Rule 1, i.e. that the rules are intended to "secure the just, speedy, and inexpensive determination of every action and proceeding." As counsel, one is not only supposed to be giving clients advice specific to their litigation strategy and legal rights, but also regarding the *efficient* pursuit and protection of those rights.

Proportionality as it relates to managing discovery costs *can* play a role in the discussion. But it would be unfair -- in fact unjust -- to presume that proportionality is to be assessed exclusively based on the monetary value placed on a case by a producing party. Cases certainly have value in terms of potential damages, but, of course, the opinions

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held by opposing sides in a litigation tend to differ dramatically -- and, more importantly, the Federal Rules require that the assessment of proportionality -- that is, whether the likely benefit of requested discovery outweighs the burden and expense it may impose -- include consideration of non-monetary factors, such as the importance of the requested discovery in resolving the issues in the case, the parties' resources, and the importance of the issues at stake in the action. Indeed, many cases have intrinsic societal value and serve as a deterrent to set or preserve standards and preclude future misconduct. Examples of social value considerations are civil and human rights cases, as well as cases that contain measures for non-monetary relief.

Once a duty to preserve has attached, an attorney should consult with his client immediately not only to assess the types and locations of information potentially subject to preservation, but also to initiate a transparent conversation with opposing counsel in an effort to reach some agreement as to the expected scope of preservation. Transparency from the outset builds credibility with both opposing counsel and the court. If the other side is willing to engage in such dialogue, efforts and agreements can be memorialized in letters or a report to the court. Those efforts will save counsel, their clients, and the court a great deal of time and money. Simply put, cooperation lends itself to productive and cost-effective case management and judicial economy.

Positive personal experience suggests that creative and cooperative application of the current rules is the key that will enable parties to streamline litigation, and will reduce costs to litigants, ameliorate the fear factor, and ensure the efficient use of the court's resources. Education can go a long way in helping to achieve these goals. Pilot programs now underway are helping to facilitate them as well. For example, the Seventh Circuit is now completing Phase II of its project and reports to date speak of its success. The Southern District of New York is in the process of implementing a new pilot program for complex cases that includes a protocol identifying particular issues, including preservation, to be addressed at the outset of litigation. Such an approach promotes transparency and keeps the focus of the litigation on the merits, rather than on distractions surrounding data preservation and sanctions.

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Citations:

- Tadler, Ariana J. and Henry J. Kelston, "Court Programs Working Toward Normalcy in E-Discovery," New York Law Journal, Oct. 3, 2011.
- Millberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not In Our Rules", The Federal Courts Law Review, Vol. 4, Issue 2, 2011.

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Pippins v. KPMG Highlights the Need for Proportionality and Reasonableness Standards

By Jeane Thomas, Crowell & Moring LLP

The recent opinion in *Pippins v. KPMG* out of the Southern District of New York is a timely reminder of why we need to make progress on reigning in the scope and cost of preservation obligations. Like any case, any number of factual nuances that had some influence on the court may not have made their way into the opinion, so my thoughts are drawn solely from what was included in the Judge Cott's opinion from October 7, 2011 (2011 WL 4701849).

Essentially *Pippins* rejects the principle of proportionality as applied to preservation requirements. The court considered the obligation of KPMG to preserve the hard drives of thousands of employees who fell within the scope of a *potential* FLSA collective and/or *putative* New York state class action. Judge Cott ruled that KPMG must preserve the hard drives because it had not demonstrated that they did not contain relevant and non-duplicative ESI, even though the class had not yet been certified and KPMG established that it had already incurred more than $1.5 million to preserve a portion of the putative class's hard drives, a cost that would increasingly continue to mount. In doing so, the court rejected any application of a "proportionality standard" as "too amorphous to provide much comfort."

From my perspective, this opinion clearly illustrates how plaintiffs, in this case a handful of individuals, can impose millions of dollars in costs upon a company merely by filing a complaint – entirely without regard for whether the claims have any merit or whether a class will ever be certified. Further, it highlights the need for some kind of reasonableness and/or proportionality standard that courts should apply to the preservation obligation itself.

As a practical matter, in the absence of national uniformity or standards, decisions like *Pippins* become the "floor" as to which litigants have to comply, often before they even know in which jurisdiction they may end up potentially litigating such issues. This leads to over-preservation, which can have enormous cost implications and other risks, and can create very significant and, in my view, unwarranted leverage in the litigation. Particularly in the world we live in today where companies retain vast amounts of electronically stored information, it simply should not be the case that the filing of a lawsuit – or even threatened filing – triggers an obligation to preserve every bit and byte of data that *might* be relevant to the claims or defenses under the broadest theories of the potential scope of the case.

In addressing ongoing preservation obligations, one of the best opportunities to reduce burden and expense is the Rule 26(f) "meet and confer" conference. The two sides should get together to discuss, among other things, what is and is not reasonable to preserve given the scope of the claims and the universe of discoverable information. Even in the early stages of the litigation, parties should be able to present their views on issues such as date cut-offs, relevant custodians, more or less accessible sources of ESI, and how to handle backup and disaster recover media. In my experience, you often can get some sort of relief through negotiation with your adversary. If you can't reach agreement, then you go to the court as KPMG did after trying to get plaintiffs to agree to limit preservation to a sampling of data from the hard drives.

Of course, prior to the meet and confer and ability to ask the court for a ruling, preservation decisions are unilateral and there is a tendency to preserve broadly to reduce concerns about spoliation claims after the fact. Accordingly, organizations need a thoughtful and reasoned strategy for how to respond to preservation obligations, although there are always a range of options with different cost and burden impact, and every case involves making judgment calls along the way.

I am not advocating for a rule that specifies in great detail what needs to be preserved, what doesn't need to be preserved and under what circumstances. However, I do believe we need some

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guidance that codifies the general principle of proportionality and reasonableness with respect to preservation. In my view, that guidance should stipulate the types of factors the courts should consider, or even must consider, in determining whether preservation is handled properly and what sanctions may apply under different circumstances. Even if such guidance results in different jurisdictions having differing views on what is reasonable and what is proportional, we need to move quickly away from the current situation where the fear of spoliation sanctions motivates decisions to over-preserve, and toward a more rational approach applying proportionality and reasonableness to avoid the clearly onerous alternative.

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Manage ESI Dangers with Targeted Collections

By Dave Walton, Cozen O'Connor

Over the past several years, courts have issued numerous decisions on sanctions for spoliation exclusively involving electronically stored information (ESI) issues. According to a Duke Law Journal article from spring 2011, 188 different federal district court judges have issued written decisions on e-discovery sanctions, and another 111 federal magistrate judges have written opinions. These numbers do not include 2010, which all commentators agree was a banner year for e-discovery spoliation sanctions.

It seems like every day we read about a new decision on this issue. As a result, there is a growing sentiment among clients and lawyers alike for preservation and over-collection. "Better to be careful than sorry" is the mantra. As a result, data management costs consume litigation budgets in the blink of an eye. Clients are being forced to settle cases because the ESI costs alone make it too expensive to fight. And, all the while, everyone lives in fear of the next big "spoliation" case.

Is this the end of litigation as we know it? No. Like it always does, the pendulum is swinging back. The future is targeted collections. Preservation is cheap; collection and review is incredibly expensive. Smart clients and lawyers will learn how to use targeted collections as the key to bringing sanity back to their litigation practices.

Normally, the typical ESI production works as follows: Clients receive notice of potential litigation. At this point clients must retain all potentially relevant data. However, they are faced with determining the difficult question of what is potentially relevant in many cases where there isn't even a lawsuit yet. So, they do what any other logical person would do; they cast a wide net to preserve as much as possible.

The next step is to figure out what you need to collect from this broad, massive data set. Once the material is collected, it needs to be processed so it can be further filtered and then ultimately gathered into a review set. This data is then reviewed by counsel for privilege and responsiveness. This step is extremely expensive. Search terms are used to pull documents from the collection set into the review set. The problem is that search terms typically return more than 80 percent false positives.

Moreover, the average gigabyte of data contains about 75,000 pages. Assuming the average review time for an attorney is 200 pages per hour, the

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review of one GB (i.e., 75,000 pages) can take over 300 hours. Assuming an associate bills at $250 per hour, this means it costs over $78,000 to review one GB of information. This is virtually untenable for clients.

Vendors have tried to address this problem by developing new products. One new line of products is based on the concept of predictive coding. This is based on a complicated array of mathematical algorisms that literally predict how documents should be coded as responsive, privileged, etc. But not every case justifies the use for predictive coding. The tools are expensive, and they work best on very large document cases where you have a large data set from which you can hone the predictive capabilities of the tool. Theoretically, the bigger the sample, the better the tool can accurately predict.

While predictive coding has a ton of potential, it is not for every case. The vast majority of cases involve data amounts that make ESI a challenge but are not enough to justify the expense of using predictive coding or other tools. The best way to control ESI costs is to preserve broad but collect small.

Think of the ESI process as a funnel. Collection is at the top. If you put less information into the funnel before you filter and cull it, the smaller review set will ultimately be. It's simple math, less in/less out.

But what is "targeted collection" and how do you do it? The basis for targeted collections is already at the front of rules. Rule 26(b)(2)(C) is the rule of proportionality. It has been in the federal rules since the early 80s. A very small amount of lawyers, however, use this rule when trying to control the discovery costs.

It's important to remember that when dealing with ESI, the courts expect parties and their counsel to be reasonable but not perfect. After identifying the key sources of information, you must figure out the most efficient way to collect them. Sometimes it makes sense to conduct stage discovery, where all of the key information is preserved but only the information for the most important individuals and sources is collected first. This means that the most important information gets reviewed and produced first. This helps the argument that the other, less relevant sources of ESI are cumulative of what's already been turned over to the other side.

Targeted collections have another advantage. Trials are becoming increasingly rare in this legal environment. But, if you have ever tried a case, you quickly realize that you need to be able to keep your key documents to a maximum of 10 to 20. No more than that. If you use more than that, the jury's eyes will become glazed over. Targeted collections help you maintain your focus on finding those key documents that are going to help your case. It is easy to become so buried in an avalanche of ESI that the key documents that help you win your case are missed and fall quietly through the cracks.

E-discovery is not going to end the world as we know it. The key is going to be the ability to get those cases to trial without going bankrupt due to ESI costs. Lawyers need to think outside of the box and avoid the "preserve, collect and review everything" mantra that benefits only the e-discovery vendors. Counsel must realize that ESI is a strategic element of every case and one of the key strategic tools you have for resolving ESI issues is targeted collections. Learn the process and love it. Your defense team and judges will be happy that you did.

Editor's Note: *This contribution was adapted from an article by the same title that originally appeared in The Legal Intelligencer, October 25, 2011.*

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It's Time to Clarify via Amended Rules that Proportionality Must Apply to Preservation

By Paul Weiner, Littler Mendelson, P.C.

The Discovery Subcommittee of the Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure is in the process of deciding whether amendments to the Federal Rules of Civil Procedure are necessary to specifically address e-Discovery preservation and sanctions issues. While there are many aspects to the amendments that the Discovery Subcommittee is considering, one area that cries out for clarification is that the concept of proportionality should apply to preservation.

The good news is that each of the three general categories of rulemaking approaches developed by the Discovery Subcommittee contains explicit language that would apply proportionality to preservation (brackets and other punctuation in original):

- *Category 1* – Under the heading "Scope of Duty to Preserve," new Rule 26.1(c) states that once a duty to preserve discoverable information has been triggered, a person must "take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}."
- *Category 2* – Under the heading "Scope of Duty to Preserve," new Rule 26.1(c) states that once a duty to preserve discoverable information has been triggered, a person must "take actions reasonable under the circumstances to preserve [discoverable information] in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}."
- *Category 3* – Under the heading, "Failure to Preserve Discoverable Information; Remedies," amended Rule 37 (g)(3)(E) states that when determining whether a party failed to preserve discoverable information that reasonably should have been preserved and whether the failure was willful or in bad faith, the court should consider, among other things, "the proportionality of the preservation efforts to any anticipated or ongoing litigation."

The bad news is that some are objecting to amending the rules claiming that objective studies conclude spoliation is not as big a problem as claimed, or that the rules already contain sufficient protections that are not being properly applied by litigants and the courts in practice.

Those opposed to amending the rules place great weight on reports that concluded actual motions alleging spoliation are rare when compared to the total number of lawsuits filed in federal courts. *See, e.g.*, *Federal Judicial Center "Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases" Report to the Judicial Conference Advisory Committee on Civil Rules*, July 2011 (available at www.uscourts.gov). Yet, such reports (and the arguments against amending the rules which hinge upon them) fail to take into account that costly and burdensome preservation activities are taking place in an overwhelming number of matters that never make their way into a federal court lawsuit.

By way of example only, the following information was reported to the Discovery Subcommittee in advance of the mini-conference

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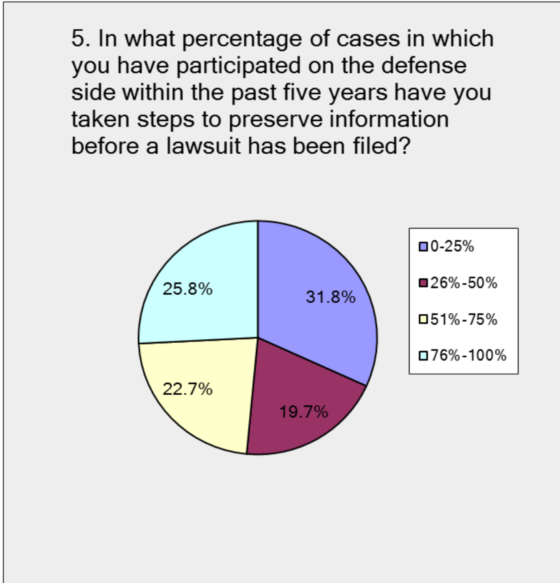

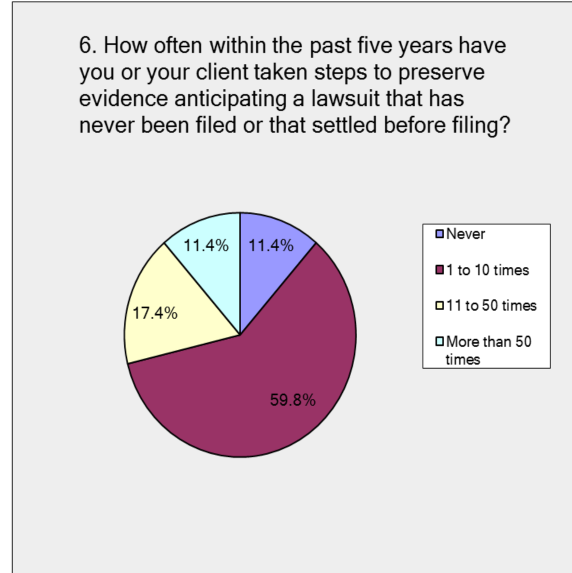

that was held in Dallas, Texas on September 9, 2011[17]:

- A Fortune 10 company currently monitors 14,805 separate custodian legal holds, and that "*only about one-third of the 14,805 litigation holds at present relate to active litigation.*" Thus, the "vast majority" of data that is preserved (which was approximated to be over 48 million pages of documents per case) is done so based on a triggering event other than the filing of an actual lawsuit. *See August 31, 2011 letter to Honorable David G. Campbell from Microsoft*, p. 3 (*emphasis* in original).
- As set forth in the pie charts at the top of this page, respondents to a Sedona Conference® survey on preservation reported that they preserve information before lawsuits are filed in the vast majority of their cases, as well as in a significant amount of their cases that were never filed or were settled before a lawsuit was filed. S*ee The Sedona Conference Working Group 1 Membership Survey on Preservation and Sanctions*, August 3-15, 2011, pp. 3-4.
- While they are difficult to specifically quantify, preservation costs (both direct and indirect – such as the costs of IT staff time, law department attorney and paralegal time, and other employees' time, like the effort required by custodians to comply with legal hold notices) at large companies "overwhelmed" production costs, especially in situations where no complaint is ever filed. Indeed, "[o]ne company reported that a third of its IT department's email resources were now dedicated to preserved information ... with staff dedicated to little else but managing preservation chores; such personnel costs were in addition to recent or anticipated multi-million dollar outlays for centralized legal hold applications ...." *See September 7, 2011 Letter to Honorable David G. Campbell from The RAND Corporation for Civil Justice*, pp. 2, 3 and 6.

Indeed, a very recent case demonstrates that the inability to apply principles of proportionality when preservation decisions are being made can have a particularly crippling impact in asymmetrical litigation, where there is one named or representative (in the class or Fair Labor Standards Act context) plaintiff, on the one hand, and a large-company defendant, on the other hand. *See Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2011 U.S. Dist. LEXIS 116427 (S.D.N.Y. Oct. 7, 2011) (requiring corporate defendant to preserve 9,000 computer hard drives based upon the *allegations of two named-plaintiffs*, before any type of NY state Rule 23 class or

[17] All of the cited materials are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx (last visited November 1, 2011).

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nationwide FLSA collective action had been certified in any manner, or a single additional FLSA plaintiff had signed a consent form to opt into the case and despite that fact that preservation costs could easily "swallow the amount at stake" in the litigation).

An argument against amending the rules to incorporate the concept of proportionality into preservation premised on a claim that the rules already contain sufficient protections also falls short. While the current rules do contain proportionality provisions that can be used to limit "the frequency or extent of discovery," *see* Fed. R. Civ. P. 26(b)(2)(C)(iii) (whether courts are, in practice, actually applying such provisions is a discussion for another article), there is *nothing* in the current federal rules that specifically applies the concept of proportionality to preservation.

Moreover, while at least two leading jurists have held that the concepts of "reasonableness and proportionality" should be implied into preservation activities, especially in the sanctions context,[18] other leading jurists have held that litigants should not rely upon principles of proportionality in the preservation context until there is a rule change.[19]

Thus, like many other areas in e-Discovery, litigants are left – at best – with a patchwork of inconsistent standards not only among different circuits,[20] but also among different judges within the same circuit,[21] which places unfair preservation burdens on large, data-producing parties. In essence, the lack of clarity and inconsistent application of proportionality in the preservation context means that large, data-producing entities are stuck with a Hobson's dilemma: either waste huge sums of money, time and resources over-

[18] *See, e.g.*, *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (Rosenthal, J.) ("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," *citing The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production* 17 cmt. 2.b. (2007) ("Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.")) (*emphasis* in original) and *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269, F.R.D. 497, 522 – 523 (D. Md. 2010) (Grimm, J.) ("[T]he permissible scope of discovery as set forth in Rule 26(b) includes a proportionality component of sorts with respect to discovery of ESI ... Put another way, 'the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation." Although, with few exceptions, such as the recent and highly instructive *Rimkus* decision, courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case ..."). *See also Proportionality in the Post-Hoc Analysis of Pre-litigation Preservation Decisions*, 7 U. Balt. L. Rev. 381 (2008) (Grimm, *et al.*) (suggesting that proportionality is an important consideration that should be applied to pre-litigation preservation activities) and *The 7th Circuit e-Discovery Pilot Program*, Principal No. 2.03(a) (pre-litigation preservation demands must be proportional to the amount at stake in the case).

[19] *See, e.g., Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010) (Francis, J.) (In the context of preservation, the proportionality standard "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle. Until a more precise definition is created by rule, a party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches,'" *citing Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 281 (S.D.N.Y. 2003) *("Zubulake IV")*). *See also Pippins,* 2011 U.S. Dist. LEXIS 116427 *4 ("KPMG seeks to reconcile its duty to preserve discovery material with the burden of that preservation by advocating a proportionality test. This test, in effect, blends the protections afforded by Rule 26(b)(2), 'which permits the court to limit discovery if the burden or expense of production outweighs its potential benefits,' and Rule 26(c), 'which permits the issuance of protective orders, including by shifting the cost of unduly burdensome or expensive production.' ... [Yet,] 'until a more precise definition is created by rule,' prudence favors retaining all relevant materials").

[20] *Compare, Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, *LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (Scheindlin, J.) (in the Second Circuit, the severe sanction of an adverse inference instruction may be appropriate in some cases involving the negligent destruction of evidence) *with Rimkus,* 688 F. Supp. 2d at 613 ("In the Fifth Circuit and others, negligent as opposed to intentional 'bad faith' destruction of evidence is not sufficient to give an adverse inference instruction .... The circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.").

[21] *Compare Pension Committee*, 685 F. Supp. 2d 456, 467 ("Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner") *with Orbit One*, 271 F.R.D. at 440 ("The implication of *Pension Committee*, then appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there has been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee*, then I respectfully disagree.")

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preserving to avoid the potential for claims of spoliation (and all of the costs, distractions and stigma, as well as potentially significant or even case-terminating sanctions, associated with such claims), or take a chance that if a lawsuit is eventually filed the individual judge in whatever district and jurisdiction the case lands will retrospectively apply the concept of proportionality long after preservation decisions were made.

The bottom line is that no one should object to applying the concept of proportionality – which in essence boils down to the simple proposition that if a case is worth $100,000, a party should not have to spend more than $100,000, or anything close to that amount, on *any* phase of the case – to preservation, consistent with Rule 1's overarching mandate of securing "the just, speedy and inexpensive determination of every action and proceeding."

Paul Weiner *serves as National e-Discovery Counsel for Littler Mendelson, P.C., the* largest U.S.-based law firm exclusively devoted to representing management in employment and labor law matters *worldwide. In this capacity, he and his Team of e-Discovery lawyers and litigation support professionals provide focused guidance and expertise on electronic discovery to the Firm's 800+ lawyers located in 50 offices across the U.S., and the firm's clients. Paul is a nationally-recognized thought leader in the area of electronic discovery, and has lectured and published extensively in the field. His work has served to educate lawyers, judges and business people about the technical and legal issues governing electronic discovery, was cited by the landmark* Zubulake IV *opinion, and is referenced in the Federal Judicial Center's database on significant cases and articles. Paul has also served as a Court-Appointed e-Discovery Special Master for the United States District Court for the Eastern District of Pennsylvania, and is on the inaugural roster of e-Discovery Special Masters for the United States District Court for the Western District of Pennsylvania. Paul is also extremely active in the community, the bar and pro bono organizations, including the Temple American Inn of Court and breastcancer.org. More information about Paul's experience and credentials can be found at* www.littler.com*.*

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APPENDIX: U.S. CHAMBER OF COMMERCE AMICUS BRIEF IN PIPPINS V. KPMG

Following is a reprint of the amicus *brief submitted on Nov.4, 2011 on behalf of* Amicus Curiae *Chamber of Commerce of the United States, by George T. Conway III and Maura R. Grossman of Wachtell, Lipton, Rosen & Katz, and Of Counsel, Robin S. Conrad and Kate Comerford Todd of the National Chamber Litigation Center, Inc.*

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber is greatly concerned with the rising cost of litigation, particularly the cost of class action litigation, and its effect on the productivity of American businesses. It has submitted *amicus* briefs in numerous cases involving class action issues, including recently in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). Although the vast majority of the Chamber's *amicus* briefs are filed in the Supreme Court of the United States, the federal Courts of Appeals, and state supreme courts, the Chamber will file an *amicus* brief in a federal District Court when the court faces a case presenting issues of exceptional importance.

This is such a case. The Magistrate Judge's order in this case raises issues of profound significance to businesses in America. In recent years, there has been a veritable explosion of electronically stored information in American commerce. Virtually every enterprise is heavily reliant on information technology today. Virtually every employee uses a company-owned desktop, or laptop, or tablet, or smart phone, or all of the above, all creating documents and generating data, often in multiple copies, frequently replicated and backed up, over and over again.

Many employees send and receive hundreds of emails a day, many with attachments, with the result that companies accumulate many millions of such messages a year. Even cell phones today have storage measuring in the gigabytes; the desktops, hundreds of gigabytes; the servers, terabytes. One gigabyte equals roughly 500,000 typewritten pages; one terabyte, 500,000,000—half a *billion*. If 2,500 pages fit in a banker's box, a terabyte would fill *200,000* such boxes.

The Magistrate Judge's opinion reached an unprecedented conclusion here: that, faced with an uncertified class or collective action alleging that employees were not properly compensated for overtime, KPMG, at considerable expense, has to rip out and retain every single hard drive from every computer that any member of the putative class or collective may have used before leaving the company. This KPMG must do, said the Judge, even though there is a database that directly recorded the employees' hours, and even though virtually all of the data on the hard drives would be irrelevant to the case.

The Magistrate Judge made two errors of law that led to this novel conclusion. First, he held that the duty to preserve electronically stored information was not limited by any test of proportionality. Second, he held that every member of the proposed plaintiff class or collective action was a "key player" for purposes of discovery and the retention of electronic information. Both holdings are wrong, unprecedented, and—if affirmed here and followed by other courts—would be highly detrimental to the conduct of civil litigation under the Federal Rules.

ARGUMENT

THE MAGISTRATE JUDGE ERRED IN ORDERING KPMG TO PRESERVE THE HARD DRIVES OF THOUSANDS OF ITS FORMER AND DEPARTING EMPLOYEES.

A. The Magistrate Judge erred in refusing to apply a proportionality standard.

The Magistrate Judge held that the generally applicable "proportionality" test for discovery—which requires courts to "limit the frequency or extent of discovery" if "the burden or expense of the proposed discovery

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outweighs its likely benefit," FED. R. CIV. P. 26(b)(2)(C), does not apply to the preservation of electronically stored information. *See* Oct. 11 Order at 10, 14-15. Rejecting "the application of a proportionality test as it relates to preservation," *id.* at 14, the Judge emphasized "that this is a dispute about preservation, not production," *id.* at 15.

That distinction is wrong—and dangerous. In rejecting the proportionality test for preservation, the Judge ignored the well-recognized burden of preserving electronic records today. The *Manual for Complex Litigation (Fourth)*, for example, commends precisely the opposite of what the Judge ordered here. The *Manual* recognizes that the scope of data preservation must be carefully limited to what is proportional, as "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operation." Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 11.442, at 73 (2004). "Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens," courts must carefully consider "the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burden." *Id.* Efforts should be made to "minimiz[e] cost and intrusiveness and the downtime of the computers involved." *Id.* And preservation orders should "*exclude* specified categories of documents or data whose cost of preservation *outweighs* substantially their relevance in the litigation, *particularly … if there are alternative sources for the information*." *Id.* § 11.442, at 74 (emphasis added).

As the *Manual* recognizes, there may be relevant needles buried in many electronic haystacks, but it may not be worth keeping all the haystacks to hunt for all the needles. That is because the amount of electronic information that accumulates in modern enterprises is immense:

> Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering. … A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes…
>
> Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or from third parties.

Id. § 11.446, at 77-78.

In explaining the scope of the problem a few years ago to the Civil Rules Advisory Committee, one corporate in-house counsel testified that his global company, half of whose employees were in the United States, "generate[d] 5.2 million emails a day," had "65,000 desktop computers … and 30,000 laptop computers," each with a typical storage capacity of "40 gigabytes, … the equivalent of 20 million typewritten pages"; the company also had "between 15,000 and 20,000 blackberries and PDAs around the world," "7,000 servers worldwide, 4,000 of them in the U.S.," "one thousand to 2,000 networks worldwide, about half of those in the U.S.," "3,000 databases, 2,000 of those in the U.S." He summarized: "Our total storage of information that we now have is 800 terabytes, 500 terabytes in the U.S. … 500 terabytes equals 250 billion pages." Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing Before the Committee on Rules of Practice & Procedure, 36-38 (2005) (statement of Chuck Beach, Exxon Mobil Corp.), *available at http://1.usa.gov/ubzdUT.*

And a very recent letter to the Committee from in-house lawyers at Microsoft Corporation detailed how "[t]he burden of over-preservation grows heavier by the day," and is becoming "a significant drag on innovation and productivity":

> Unfortunately, with almost every new and useful technological advance, conflicting and ambiguous case law on the duty to preserve creates additional burdens. This is a significant drag on innovation and productivity. …
>
> Today, for preservation purposes alone, Microsoft *collects*, on average, 17.5 GB from each custodian in litigation (which is equivalent to over 430 banker boxes of documents per custodian). … Based on a current snap-shot, the company currently monitors 14,805 separate custodian legal holds in 329 separate

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> matters. In other words, Microsoft currently places an average of 45 custodians on hold for each matter (or a total of 787.5 GB). This corresponds to nearly 20,000 banker boxes of documents per matter. Thus, the company is effectively preserving several warehouses of documents at any one point in time.

Letter from David M. Howard et al., to Hon. David G. Campbell, at 1-3 (Aug. 31, 2011), *available at* http://1.usa.gov/vFoIeH.

As one commentator has explained, the costs of electronic discovery "threaten to drive all but the largest cases out of the system" by "'dominat[ing] the underlying stakes in dispute'":

> [T]he volume of information, including electronically stored information, is growing at a rate of 30 percent annually. The growing cache of electronic information drives up costs, as companies are forced to cull through ever-larger stockpiles of data to identify responsive documents. … [E]xpenditures for the collection and processing of electronic documents in the United States will reach $4.7 billion in 2010, an increase of 15 percent over the prior year. Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege ….
>
> The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system. A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery "could dominate the underlying stakes in dispute." But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking under the strain.

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 567 (2010) (footnotes and citations omitted).

Given this explosion of electronic information, if the Federal Rules of Civil Procedure are to have any chance at being "administered to secure the just, speedy, and inexpensive determination of every action and proceeding," FED. R. CIV. P. 1, then preservation of that information must be restricted to what is proportional. Indeed, the application of the proportionality principle to preservation follows from the existence of that principle under the discovery rules. For the duty to preserve turns upon what is discoverable under Rule 26: "Generally, the duty to preserve extends to documents or tangible things … by or to individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'" *Rimkus Consulting Grp.* v. *Cammarata*, 688 F. Supp. 2d 598, 612-13 (S.D. Tex. 2010). "Descriptions of the scope of the common-law duty to preserve are virtually coextensive with the scope of discovery." Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 BALT. L. REV. 381, 395 & n.61 (2008) (citing authorities).

The scope of discovery, in turn, is expressly limited by the proportionality principle: Rule 26(b)(2)(C) provides that discovery "*must*" be limited to what is proportional from a cost-benefit standpoint, viewed in light of the size of the case, the importance of the discovery, and the availability of alternative sources of information:

> On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules … if …
>
>> the discovery … can be obtained from some other source that is more convenient, less burdensome, or less expensive; … or …
>>
>> 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.

FED. R. CIV. P. 26(b)(2)(C) (emphasis added).

As a result, "[a] corporation, upon recognizing the threat of litigation, need not preserve every shred of paper, every e-mail or electronic document, and every backup tape." *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) (quoting *Consol. Aluminum Corp.* v. *Alcoa,*

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Inc., 244 F.R.D. 335, 339 (M.D. La. 2006) (citation and internal quotation marks omitted)). Instead, "[w]hether preservation … 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*, 688 F. Supp. 2d at 613 (emphasis in original). "Electronic discovery burdens should be proportional to the amount in controversy or the nature of the case," because "[o]therwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation." *The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production* 17 cmt. 2.b. (2007), *quoted in Rimkus*, 688 F. Supp. 2d at 613 n.8.[22]

B. The Magistrate Judge erred in holding that every potential class or collective action member is a "key player."

The Magistrate Judge's mistaken repudiation of the proportionality principle was compounded by a second, equally significant, error. The Judge held that KPMG had to retain hard drives of "*each and every Audit Associate*"—meaning thousands of former employees, with the number ever increasing as more personnel depart—because each such former employee "is a potential plaintiff and thus could be found to be a '*key player*'" as that phrase was used in Judge Scheindlin's widely cited opinion in "*Zubulake IV*," *Zubulake* v. *UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Oct. 11 Order at 9 (emphasis added).

This holding lacks foundation in precedent and logic. To begin with, it twists the "key players" concept beyond recognition. As the Magistrate Judge acknowledged, *Zubulake IV* used the phrase as shorthand for the people whom parties must identify in their mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1)(A)(i): "each individual *likely* to have discoverable information … that the *disclosing party may use to support its claims or defenses*, unless the use would be solely for impeachment." FED. R. CIV. P. 26(a)(1)(A)(i) (emphasis added; quoted in part in Oct. 11 Order at 9); *see Zubulake IV*, 220 F.R.D. 218 & n.25 (citing and quoting FED. R. CIV. P. 26(a)(1)(A)(i)). The rule requires production of a *witness* list. It "requires all parties … early in the case to exchange information regarding potential *witnesses*"—"persons who … might reasonably be expected to be deposed or called as a witness." FED. R. CIV. P. 26 Advisory Committee Note to 1993 Amendments (emphasis added).[23] This provision serves to "*focus* the discovery" and to "achieve[]" "savings in time and expense" by "accelerat[ing] the exchange of *basic* information about the case and … eliminat[ing] … paper work." *Id.* (emphasis added).

"Key players" thus could not, and does not, embrace every member of a putative class of thousands. If a party—even a party to a class action—produced a Rule 26(a)(1)(A)(i) witness list bearing thousands, or even hundreds, of names, that party would almost certainly be sanctioned. For no one could in good faith say that she may call such a large group to testify at a trial, even a huge trial; and certainly a list so long would not serve Rule 26(a)(1)(A)'s purpose of focusing discovery and reducing expense. Not surprisingly, when Judge Scheindlin in

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[22] *Accord*, *e.g.*, *Victor Stanley*, *Inc.* v. *Creative Pipe*, *Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010) (The duty to preserve "is neither absolute, nor intended to cripple organizations. … [T]he scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation." (internal citations and quotation marks omitted)); *Kay Beer Distrib.*, *Inc.* v. *Energy Brands*, *Inc.*, No. 07-1068, 2009 WL 1649592, at *4 (E.D. Wis. June 10, 2009) ("mere possibility of locating some needle in the haystack of ESI … does not warrant the expense [defendant] would incur in reviewing it"); *S. Capitol Enters.*, *Inc.* v. *Conseco Servs.*, *L.L.C.*, No. 04-705-JJB-SCR, 2008 WL 472427, at *2 (M.D. La. Oct. 24, 2008) ("the likely benefit … is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data."); *Mancia* v. *Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (noting "concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each").

[23] *Accord*, *e.g.*, *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004) (Rule 26(a)(1)(A) requires identification of "each potential *witness*"; emphasis added); *McDermott* v. *Liberty Mar. Corp.*, No. 08 Civ. 1503 (KAM), 2011 WL 2650200, at *3 (E.D.N.Y. July 6, 2011) (noting party's obligation to "disclos[e] *witnesses*" under rule; emphasis added); *Ventra* v. *United States*, 121 F. Supp. 2d 326, 330 (S.D.N.Y. 2000) (rule "requires parties to disclose *witnesses*"; emphasis added); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.22[4][a][i] (3d ed. 2011) (rule "requir[es] the parties to disclose the identities of their prospective witnesses early in the litigation … to assist the other parties in deciding whom they wish to depose").

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Zubulake IV first used the words "key players," she was actually referring to a group of *five* people. *See* 220 F.R.D. at 218 ("Chapin, Hardisty, Tong, Datta and Clarke"). In fact, in a later opinion she described as "*Zubulake* Revisited: Six Years Later," Judge Scheindlin herself distinguished between "*all* those employees who had any involvement with the issues raised in the litigation" and "*just* the key players." *Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (emphasis added). And other cases invoking her "key players" concept have likewise used it to describe similarly select groups.[24] The cases even say that "key players" ordinarily are witnesses who are so significant that counsel has a duty to personally *"interview"* each of them, *Williams* v. *New York City Transit Auth.*, No. 10 Civ. 0882 (ENV), 2011 WL 5024280, at *4 (E.D.N.Y. Oct. 19, 2011) (citation omitted), an obligation that would be entirely infeasible if those witnesses could number in the thousands.

In addition to misapprehending the case law upon which it relied, the Magistrate Judge's "key players" holding irreconcilably conflicts with the proper status of an absent class member under Rule 23, and of a member of an FSLA collective, if such a class or collective is properly certified. Put bluntly: no absent member of a properly certified class or non-party to a properly certified collective action should be a "key player." Under the FLSA, employees who sue may represent "other employees" only if they are "similarly situated." 29 U.S.C. § 216(b). Under Rule 23(a)(3), "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Indeed, the very "premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff[s], so go the claims of the class." *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). And for a Rule 23(b)(3) class like the New York class proposed here, the "the questions of law or fact common to class members [must] predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

In short, no one should be key, because all should be alike. If there are absent class or collective action members who are key players, then there shouldn't be a class or collective action, or they shouldn't be in it. At the very least, in contrast to what the Magistrate Judge held, certainly *not every* class or collective action member can be deemed "key."

* * *

In disregarding the proportionality principle and in treating every potential class or collective action member as a "key player," the Magistrate Judge set a dangerous precedent. Although it contradicts other authority, his decision, if not overturned, would exert an inordinate influence on how practitioners perceive the law. Every decision on the subject of discovery is important, because courts so sparsely write about it, as discovery disputes tend to be fact-bound and often settled. More significantly, however, because of the threat of sanctions, a decision—like the Magistrate Judge's—that *overstates* the duty of *preservation* will effectively *become* the law. For in the absence of controlling authority, parties and their counsel have no way to know in advance what standard a court will ultimately apply, and in an overabundance of caution, they may feel obligated to follow the broadest standard of preservation adopted by any court. It is imperative that this Court overturn the Magistrate Judge's decision and correct its errors of law.

CONCLUSION

It is respectfully submitted that the Court should set aside the Magistrate Judge's October 11, 2011 Order.

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[24] *See, e.g.*, *E.I DuPont de Nemours and Co.* v. *Kolon Indus., Inc.*, No. 3:09-cv-58, 2011 WL 2966862, at *4-18 (E.D. Va. July 21, 2011) (six employees); *E.I. DuPont de Nemours and Co.* v. *Kolon Indus., Inc.*, No.3:09cv58, 2011 WL 1597528, at *13 (E.D. Va. Apr. 27, 2011) (four former employees); *Siani* v. *SUNY Farmingdale*, No. CV09-407 (JFB) (WDW), 2010 WL 3170664, at *7 (E.D.N.Y. Aug. 10, 2010) (five employees); *Crown Castle USA Inc.* v. *Fred A. Nudd Corp.*, No. 05-cv-6163T, 2010 WL 1286366, at *10 (Mar. 31, 2010), *report and recommendation adopted*, 2010 WL 4027780 (W.D.N.Y. Oct. 14, 2010) (five employees).

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