

NOTE

ANOTHER STEP IN THE EVOLUTION OF E-DISCOVERY: AMENDMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE YET AGAIN?

*Julia M. Ong**

| | | |
|------|---|-----|
| I. | INTRODUCTION | 405 |
| II. | E-DISCOVERY UNDER THE 2006 RULES | 408 |
| | A. <i>ESI in the Workplace</i> | 408 |
| | B. <i>Impetus for the 2006 Amendments</i> | 410 |
| | C. <i>Impact of the 2006 Amendments on E-Discovery</i> | 414 |
| | i. Rule 26(a)(1)(A)(ii) and 26(f) | 414 |
| | ii. Rule 26(b)(2) | 415 |
| | iii. Rule 37(e) | 416 |
| III. | VARIOUS RESPONSES TO E-DISCOVERY CONCERNS: SIGNALING A NEED FOR UNIFORMITY AND GUIDANCE IN THE 2006 RULES | 418 |
| | A. <i>Seventh Circuit Pilot Program</i> | 419 |
| | B. <i>District courts</i> | 422 |
| | C. <i>The Sedona Conference</i> | 424 |
| | D. <i>Conference of Chief Justices</i> | 425 |
| IV. | USING BEISNER'S PROPOSALS TO AMEND THE RULES ON E-DISCOVERY | 426 |
| | A. <i>Conscious Cost-Shifting</i> | 427 |
| | B. <i>Defining the Duty to Preserve</i> | 429 |
| | i. Early efforts to confer on ESI matters | 429 |
| | ii. Providing explicit guidelines for litigation holds | 430 |
| | C. <i>Broadening the Safe Harbor Provision</i> | 432 |
| V. | CONCLUSION | 433 |

* J.D., Boston University School of Law, Class of 2012; B.A. *summa cum laude*, Philosophy, Boston University College of Arts and Sciences, 2008.

I. INTRODUCTION

Since 1970, the Federal Rules of Civil Procedure have recognized electronic data as part of “documents” which are discoverable under Federal Rules of Civil Procedure 34.¹ However, discovery of electronic documents (“e-discovery”) differs greatly from discovery of paper documents, both qualitatively and quantitatively.² E-discovery has a substantial influence on the litigation process, particularly because of the costs and burdens associated with the immense amount of information that can be stored in a digital format known as electronic data, or electronically stored information (“ESI”).³ Additionally, e-discovery “includes more transitory forms [of information] that were never found in the pre-electronic world,” such as e-mail messages.⁴

The RAND Institute for Civil Justice conducted a study on the legal and economic implications of e-discovery in order to help inform policy in this area.⁵ The study involved a four-step process in which researchers conducted interviews with plaintiff and defense attorneys, IT personnel, and in-house counsel for a number of large corporations.⁶ The study pointed out that although the capacity for technology to store more data has rapidly advanced,

¹ See FED. R. CIV. P. 34 advisory committee’s note (1970 Amendment) (“The inclusive description of ‘documents’ is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations . . .”).

² The Sedona ConferenceSM, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2003 THE SEDONA CONF. WORKING GROUP SERIES 3-6, available at <http://www.thosedonconference.org/dltForm?did=SedonaPrinciples200303.pdf> [hereinafter *Best Practices*]; Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1844 (2008).

³ See Marcus, *supra* note 2, at 1844; Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 67, 74 (2004) (stating that “litigation between two large corporate parties can generate the equivalent of more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space”); SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, *THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE IN A NUTSHELL 3* (2009) (discussing the growth of digital information and finding that from 2004 to 2007 “the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte).” During this time period, “the global data set grew from five exabytes (five billion gigabytes) in 2003 to 161 exabytes in 2006. It is estimated that in 2007 the amount of information created and replicated globally surpassed 255 exabytes.”).

⁴ See JAMES N. DERTOUZOS, NICHOLAS M. PACE & ROBERT H. ANDERSON, RAND INST. FOR CIVIL JUSTICE, *THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 1* (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf (“A 2002 estimate put the number of e-mails sent worldwide at over 30 billion and predicted that the number would double by 2006.”).

⁵ *Id.*

⁶ *Id.* at 2.

the producing party must still review each document individually for privilege and relevance concerns before turning it over to the requesting party.⁷ Thus, those interviewed in the study “indicated that as much as 75 to 90 percent of additional costs attributable to e-discovery are due to increases in attorney billings for this ‘eyes-on’ review of electronic documents.”⁸

The extremely high expenses “associated with electronic discovery are so excessive that, regardless of a case’s merits, settlement is often the most fiscally prudent course.”⁹ Courts also recognize other significant costs related to e-discovery and the potential disadvantages it poses to parties who cannot afford to pay for discovery; ultimately it results in an unfair judicial system where discovery is “about how much of the truth the parties can afford to disinter.”¹⁰ These concerns about the costs associated with e-discovery, which stem from the differences between paper and e-discovery, led the Supreme Court to approve the 2006 amendments to the Federal Rules of Civil Procedure.¹¹ Although the Federal Rules of Civil Procedure that relate to e-discovery have been amended subsequently, the critical changes introduced by the 2006 Amendments are still in effect. Consequently, this Note refers generally to all versions of the rules subsequent to the 2006 Amendments as the “2006 Rules.”

Many commentators question whether these amendments have been effective in ameliorating the initial concerns regarding e-discovery’s impact on litigation costs.¹² Typically, once litigation is foreseeable, a company will institute a “litigation hold” to preserve relevant documents. A litigation hold suspends a party’s routine document retention and/or destruction policies when the party reasonably anticipates litigation.¹³ An underlying justification for a litigation hold is to prevent spoliation, which is defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”¹⁴

⁷ *Id.* at 2-3.

⁸ *Id.* at 3.

⁹ John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 550 (2010).

¹⁰ *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002).

¹¹ See Marcus, *supra* note 2, at 1845; Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13, 13 (2006), available at <http://law.richmond.edu/jolt/v12i4/article13.pdf>.

¹² See, e.g., Allman, *supra* note 11; Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 SEDONA CONF. J. 191 (2010); Daniel R. Murray, Timothy J. Chorvat & Chad E. Bell, *Discovery in a Digital Age: Electronically Stored Information and the New Amendments to the Federal Rules of Civil Procedure*, 39 UCC L. J. 509 (2007); Marcus, *supra* note 2.

¹³ *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

¹⁴ *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK’S LAW DICTIONARY 1401 (6th ed. 1990)).

One issue the 2006 Rules leave unresolved is when the duty to preserve is triggered for a proper litigation hold.¹⁵ The lack of clarity in the 2006 Rules leaves open the potential for *ex post* judicial interpretation of the following issues: (1) when the duty to preserve was triggered, (2) if and when spoliation has occurred, and (3) the proper sanctions for breach of the duty to preserve.¹⁶ As a result, parties who may be subject to litigation and e-discovery requests do not know for certain when to implement a litigation hold and thus are vulnerable to spoliation attacks because of their failure to preserve ESI.¹⁷

The ambiguity in the 2006 Rules has also led to abuses of the sanction process because requesting parties may take advantage of difficulties and costs associated with cataloguing “[t]he sheer volume of electronic documents created by modern businesses.”¹⁸ A requesting party may seek e-discovery in the hope that the producing party cannot meet the request, in which case the court would likely order a monetary sanction against the producing party for spoliation.¹⁹ If the producing party is a large organization that cannot guarantee the retention of all possible data, it may fear the possibility of spoliation claims and thus be forced to “settle frivolous cases” with the opposing party.²⁰ Sanctions for spoliation may include monetary awards, adverse jury inferences, striking pleadings in whole or in part, staying further proceedings, or dismissing the action.²¹

Further, even if a requesting party does not force a settlement, parties have found other ways to tie up courts’ resources. For instance, spoliation motions have become a common source of disputes because of the “inconsistencies among the circuits and the rigid requirements [regarding preservation] imposed by some courts.”²² For example, in *Qualcomm, Inc. v. Broadcom Corp.*, after the trial concluded, Broadcom raised an oral motion for sanctions against

¹⁵ See Allman, *supra* note 11, at 9-10; Janet Walker & Garry D. Watson, *New Trends in Procedural Law: New Technologies and the Civil Litigation Process*, 31 HASTINGS INT’L & COMP. L. REV. 251, 266 (2008) (commenting that the amended rules fail to address the exact point in which a party is obligated to implement a litigation hold and retain backup tapes); The Sedona Conference®, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 267 (2010) [hereinafter *Commentary on Legal Holds*].

¹⁶ See, e.g., *Zubulake v. UBS Warburg LLC (Zubulake II)*, 230 F.R.D. 290, 291-92 (S.D.N.Y. 2003); *Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *5-8 (N.D. Ill. May 25, 2010); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec. LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13 (S.D.N.Y. 2010).

¹⁷ See *Commentary on Legal Holds, supra* note 15, at 267-69.

¹⁸ Beisner, *supra* note 9, at 568.

¹⁹ *Id.* at 570-71.

²⁰ *Id.* at 571.

²¹ See FED. R. CIV. P. 37(b)(2)(A)(i)-(vi) & (d)(3).

²² Thomas Y. Allman, *Preservation Rulemaking after the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 221 (2010).

Qualcomm asserting that Broadcom had requested key documents before trial during discovery and Qualcomm's counsel failed to identify such key e-mails until after the trial had begun.²³ The court granted Broadcom's sanction motion and ordered Qualcomm to pay over \$8.5 million dollars, finding that Qualcomm's failure to produce the key documents when requested had "significantly increased the scope, complexity and length of the litigation and justify[d] a significant monetary award."²⁴

Despite the 2006 Amendments' attempt to resolve e-discovery issues, the core concerns of what constitutes proper action prior to and during litigation involving e-discovery remain unresolved.²⁵ The Judicial Conference's Advisory Committee for the Federal Rules of Civil Procedure ("Advisory Committee") should amend the 2006 Rules in the near future in order to provide practitioners, judges, and potential litigants with clear guidelines to e-discovery rules that will promote efficiency and equity in the judicial system.²⁶ Part II of this Note delineates the substantive changes created by the 2006 Amendments and addresses the issues that the Amendments leave unresolved. Part III examines the ways in which various courts and influential organizations, such as The Sedona Conference, have attempted to fill in the gaps in the 2006 Amendments. Part IV analyzes another proposal and critique to the 2006 Amendments, while positing that the future amendments should include explicit guidelines to inject clarity into the e-discovery procedures.

II. E-DISCOVERY UNDER THE 2006 RULES

A. *ESI in the Workplace*

In order to understand the effect of the 2006 Amendments on e-discovery, one must first understand the basic terms and technology. A hypothetical of the life cycle of e-discovery in a typical large firm will illustrate these concepts. Usually, it begins with the creation or receipt of data, which is then used or sent in the course of the firm's day-to-day business.²⁷ After usage, the record is typically filed and stored in some form, which later can be either retained or destroyed depending on the company's data management system.²⁸ Usually the data that has been retained is then archived for preservation purposes.²⁹ If the company faces litigation, collecting the preserved data to

²³ No. 05cv1958-B (BLM), 2008 WL 66932, at *1 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

²⁴ *Id.* at *17.

²⁵ DERTOUZOS, *supra* note 4, at 7.

²⁶ *See id.* (describing how lack of appellate review for e-discovery cases could lead to inefficiencies and potential inequities).

²⁷ *See* RALPH C. LOSEY, INTRODUCTION TO E-DISCOVERY: NEW CASES, IDEAS, AND TECHNIQUES 2 (2009) for a helpful diagram of the "e-Discovery Life Cycle."

²⁸ *See id.*

²⁹ *See id.*

process and reviewing such information to determine whether production is necessary contribute significantly to the cost of litigation.³⁰ Once the company is aware of potential litigation, it would likely issue a litigation hold.³¹ There is ample opportunity for data to be destroyed, however, either after a litigation hold has been issued or leading up to its issuance; data destruction can happen either unintentionally via the company's automatic process of deleting archived data or intentionally due to an employee deleting potentially incriminating evidence.³²

The analysis of whether production of ESI is unduly burdensome turns in part on "whether [data] is kept in an *accessible or inaccessible* format"³³ The court in *Zubulake v. UBS Warburg LLC (Zubulake I)* discussed these categories of data from most accessible to least accessible: (1) active, online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented, or damaged data.³⁴ Active, online data includes information stored on computer hard drives that is producible in seconds.³⁵ Near-line data includes information on optical disks and magnetic tapes. Such data can be produced within a couple of minutes to a couple of seconds, depending on whether the data is already in a readable device.³⁶ Offline storage/archives is different from near-line data in that the magnetic tapes or optical disks are physically stored elsewhere, typically in an off-site storage facility. Consequently, the accessibility of offline storage/archives depends on the accessibility of the storage facility; retrieval time can range from minutes to days.³⁷

Backup tapes are more difficult to produce than the previously mentioned categories because the data on backup tapes is not organized for ready retrieval of individual documents; rather, the entire tape needs to be reviewed in order to obtain particular files.³⁸ The most inaccessible category of electronic data includes erased, fragmented or damaged data because it involves "significant processing."³⁹ Under *Zubulake I*, the first three categories are considered accessible, and the last two are deemed inaccessible data because they involve restoration and manipulation in order for the information to be usable.⁴⁰

The importance of the distinction between accessible and inaccessible data arises when a court must consider whether cost-shifting is appropriate and

³⁰ *See id.*

³¹ *See id.* at 340-41.

³² *See id.* at 6-9.

³³ *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

³⁴ *Id.* at 318-20.

³⁵ *Id.* at 318 (stating that active online data can be accessed in milliseconds).

³⁶ *Id.* at 318-19.

³⁷ *Id.* at 319.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 319-20.

determine which party should bear the cost of production.⁴¹ The Supreme Court in *Oppenheimer Fund, Inc. v. Sanders* stated that the presumption under the discovery rules is that the producing party bears the cost of complying with a discovery request.⁴² The producing party, however, can request that the court consider shifting the cost of production to the requesting party under Fed. Rule Civ. Pro. 26(c) if the request is unduly burdensome.⁴³ This appeal by producing parties to the court to shift the cost back on the requesting party frequently arises in e-discovery litigation because of the amount of possible producible data and the potentially exorbitant production expense.⁴⁴

E-mails, which are primarily sought-after in discovery disputes, can be stored in any of the above-mentioned categories.⁴⁵ Depending on how a company runs its operation systems and manages its data storage, the producing party can find relevant e-mails on an employee's computer hard-drive as active data, on optical disks as archived data, and/or on tapes as stored backup data.⁴⁶ If the pertinent data that the requesting party seeks falls in the "inaccessible" category, courts have ordered the producing party to restore and produce responsive documents from a small sample of the inaccessible data to help inform the courts in the cost-shifting analysis.⁴⁷ In addition to requiring data sampling, a court will also generally ask the producing party to file with the court a sworn certification of the time and expense involved in restoring the sample of inaccessible data.⁴⁸ Such information allows the court to ground its cost-shifting analysis in facts and not mere "guesswork."⁴⁹

B. *Impetus for the 2006 Amendments*

Prior to 2006, courts and legal scholars were aware of the unique issues that ESI and e-discovery raised.⁵⁰ Significantly, in 2002, The Sedona Conference formed Working Group One ("Sedona Working Group"), a committee whose

⁴¹ See Vlad Vainberg, *When Should Discovery Come With a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1534-35 (2010).

⁴² 437 U.S. 340, 358 (1978).

⁴³ *Id.*

⁴⁴ See Marcus, *supra* note 2, at 1844; Walker, *supra* note 15, at 265; SCHEINDLIN, *supra* note 3, at 3.

⁴⁵ See *Zubulake I*, 217 F.R.D. at 320 (defendant maintained its e-mails in active, archived, and backup data).

⁴⁶ See *id.*

⁴⁷ *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001); *Zubulake I*, 217 F.R.D. at 323-24.

⁴⁸ *McPeek*, 202 F.R.D. at 35; *Zubulake I*, 217 F.R.D. at 324.

⁴⁹ *Zubulake I*, 217 F.R.D. at 324.

⁵⁰ See, e.g., Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 201-03 (2008); *McPeek*, 202 F.R.D. at 33 (when discussing whether all backup tapes need to be restored the court noted that no controlling authority addressed the issue thus far).

mission is to “develop principles and best practice recommendations for electronic document retention and production in civil litigation.”⁵¹ The Sedona Working Group put forth “The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production” (“Best Practices”).⁵² In Best Practices, the Sedona Working Group argued for the need to adopt reasonable standards for e-discovery, pointing out the unique differences between e-discovery and paper discovery.⁵³ Additionally, the Sedona Working Group stressed the importance of balancing the needs and costs of e-discovery, coordinating internal efforts to preserve documents, and promoting early discussions between parties about potential e-discovery materials.⁵⁴ Best Practices directly influenced the formulation of the 2006 Amendments.⁵⁵

Two months after the publication of Best Practices, in the seminal Southern District of New York case *Zubulake v. UBS Warburg LLC*, the Honorable Judge Shira A. Scheindlin⁵⁶ cited to the Best Practices in distinguishing between accessible and inaccessible ESI.⁵⁷ Judge Scheindlin wrote five separate opinions in the *Zubulake* case, four of which addressed e-discovery related issues.⁵⁸ The underlying lawsuit in the *Zubulake* case involved a Title VII action in which the plaintiff alleged gender discrimination, failure to promote, and retaliation claims.⁵⁹ Importantly, the *Zubulake* decisions dealt with discovery disputes in which the plaintiff argued that the defendant, UBS, failed to provide and locate key e-mails exchanged among UBS employees regarding the plaintiff’s employment discrimination claims.⁶⁰

Prior to *Zubulake*, Judge James Francis articulated an eight-factor cost-shifting test in *Rowe Entertainment, Inc. v. William Morris Agency Inc.* which was considered the “gold standard” for courts resolving electronic discovery

⁵¹ The Sedona Conference®, Working Group Series, <http://www.thesedonaconference.org/wgs> (last visited Apr. 7, 2011).

⁵² *Best Practices*, *supra* note 2.

⁵³ *Id.* at 3-8.

⁵⁴ *Id.* at 14-16.

⁵⁵ See The Sedona Conference, Frequently Asked Questions, <https://thesedonaconference.org/faq> (last visited Apr. 7, 2011) (explaining how the Advisory Committee’s Discovery Subcommittee relied on the Best Practices as a reason to amend the Federal Rules of Civil Procedure in this area).

⁵⁶ Judge Scheindlin is acknowledged as an expert in electronic discovery. *Adjunct Faculty Information*, FORDHAM UNIVERSITY SCHOOL OF LAW, <http://law.fordham.edu/faculty/2896.htm> (last visited Apr. 9, 2011).

⁵⁷ *Zubulake I*, 217 F.R.D. at 320 n.61.

⁵⁸ *Zubulake I*; *Zubulake II*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake II* did not involve e-discovery related issues.

⁵⁹ *Zubulake I*, 217 F.R.D. at 312.

⁶⁰ *Id.* at 312-13.

disputes.⁶¹ In *Zubulake I*, Judge Scheindlin criticized the *Rowe* test as being incomplete and unfairly balanced in favor of cost-shifting.⁶² Judge Scheindlin, however, insisted upon maintaining the presumption that the producing party is responsible for the cost of production.⁶³ To formulate a “neutral” cost-shifting analysis, Judge Scheindlin in *Zubulake I* established a new seven-factor test for determining whether cost-shifting is appropriate, placing an emphasis on whether the request is important enough “in comparison to the cost of production.”⁶⁴ The seven factors include (1) the extent to which the request is specifically tailored to discover relevant information, (2) the availability of such information from other sources, (3) the total cost of production, compared to the amount in controversy, (4) the total cost of production, compared to the resources available to each party, (5) the relative ability of each party to control costs and its incentive to do so, (6) the importance of the issues at stake in the litigation, and (7) the relative benefits to the parties of obtaining the information.⁶⁵ The major difference between the *Zubulake I* test and the *Rowe* test is that the *Rowe* test favors shifting the cost from the producing party to the requesting party, whereas the *Zubulake I* test attempts to maintain a neutral cost-shifting analysis.⁶⁶

Zubulake III demonstrated the balancing of costs between the requesting and producing parties. In *Zubulake III*, the plaintiff moved to compel UBS to produce all remaining backup e-mails at UBS’s expense.⁶⁷ UBS argued in response that the plaintiff should bear the cost incurred in restoring and producing the remaining backup tapes.⁶⁸ After balancing UBS’s expenses with the rights of litigants to pursue meritorious claims, the court held that the plaintiff would pay one quarter of the restoration costs.⁶⁹ The cost of production of those documents once they were restored, however, fell on the

⁶¹ 205 F.R.D. 421, 429 (S.D.N.Y. 2002); *Zubulake I*, 217 F.R.D. at 320. The eight-factors laid out in *Rowe* by Judge Francis included: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. *Rowe*, 205 F.R.D. at 429.

⁶² *Zubulake I*, 217 F.R.D. at 321.

⁶³ *Id.* at 320.

⁶⁴ *Id.* at 323.

⁶⁵ *Id.*

⁶⁶ See Vainberg, *supra* note 41, at 1543-44 (finding that many of the *Rowe* factors, particularly the first and second, “tipped the scales” to shift the cost from the producing party to the requesting party); *Zubulake I*, 217 F.R.D. at 320 (Judge Scheindlin urged the cost-shifting analysis to remain “neutral”).

⁶⁷ *Zubulake III*, 216 F.R.D. at 281-82.

⁶⁸ *Id.*

⁶⁹ *Id.* at 291.

2012] ANOTHER STEP IN THE EVOLUTION OF E-DISCOVERY 413

producing party, UBS.⁷⁰ During the restoration process, the plaintiff discovered that certain backup tapes were missing, including one that contained certain e-mails useful to the plaintiff's case and not available in any other form.⁷¹ As a result, the plaintiff sought "sanctions against UBS for its failure to preserve the missing backup tapes and deleted e-mails."⁷²

Zubulake IV addressed the legal issues involved in spoliation claims: what constitutes spoliation, when the duty to preserve is triggered, the scope of preservation, what constitutes a proper litigation hold, and what the range of possible sanctions is.⁷³ Finally, in *Zubulake V*, the court expanded on the discussion of proper litigation holds after the plaintiff moved to sanction UBS for its failure to produce relevant information and for its tardy production of such material.⁷⁴ The court placed a heavy responsibility on the producing party's counsel once a litigation hold was imposed and stated that the producing party's counsel "must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched"; merely notifying employees of a litigation hold is insufficient.⁷⁵

The *Zubulake* decisions were the first comprehensive cases to address pressing e-discovery issues such as the duty to preserve.⁷⁶ These important decisions, particularly the seven-factor test for proper cost-shifting analysis in *Zubulake I*, also affected the formulation of the 2006 Amendments.⁷⁷ Judge Scheindlin's presence on the Advisory Committee in 2006 likely had significant influence; three of the seven *Zubulake* factors were included in the Advisory Committee's Note to amended Rule 26.⁷⁸ The three *Zubulake* factors included in the Advisory Committee's Note were (1) the quantity of information available from other and more easily accessed sources, (2) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, and (3) the importance of the issues at stake in the litigation.⁷⁹

⁷⁰ *Id.* at 289-92.

⁷¹ *Zubulake IV*, 220 F.R.D. at 215.

⁷² *Id.*

⁷³ *Id.* at 216-22.

⁷⁴ *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).

⁷⁵ *Id.* at 432.

⁷⁶ *Zubulake v. UBS Warburg, KROLL ONTRACK*, <http://www.krollontrack.co.uk/zubulake/> (last visited Aug. 14, 2012). See also Paul J. Martinek, "Zubulake" Decisions Raise Expectations For E-Records, COMPLIANCE WEEK, Nov. 15, 2005, http://www.pss-systems.com/news/ComplianceWeek_051115.pdf.

⁷⁷ See Vainberg, *supra* note 41, at 1557.

⁷⁸ *Id.* at 1560; FED. R. CIV. P. 26 advisory committee's note (2006 Amendment); FED. R. CIV. P. 26(b)(2)(B).

⁷⁹ FED. R. CIV. P. 26 advisory committee's note (2006 Amendment).

C. *Impact of the 2006 Amendments on E-Discovery*

In 2006, the United States Supreme Court approved the recommendations of the Advisory Committee to establish better guidelines for the e-discovery process, and the recommendations went into effect on December 1, 2006.⁸⁰ The rules related to e-discovery issues that were altered by the 2006 Amendments are Rules 26(a)(1)(A)(ii), 26(f), 26(b)(2)(B) and 37.

i. Rule 26(a)(1)(A)(ii) and 26(f)

2006-Amended Rule 26(a)(1)(A)(ii) lists what a party *must* initially disclose to opposing counsel, and explicitly includes the phrase “electronically stored information” which is in the producing party’s “possession, custody, or control and may use to support its claims or defenses”⁸¹ The Advisory Committee’s Notes to the 2006 Amendments state that the term “electronically stored information” is intended to have the same broad meaning as in Rule 34(a), which makes clear that “documents” include “electronic data compilations.”⁸² Thus, the 2006 Amendments did not alter or broaden the scope of discovery.⁸³

2006-Amended Rule 26(f) specifically requires that parties “must confer as soon as practicable” in order to discuss “the possibilities for promptly settling or resolving the case; . . . discuss any issues about preserving discoverable information; and develop a proposed discovery plan.”⁸⁴ 2006-Amended Rules 26(a)(1)(A)(ii) and 26(f) both promote early disclosure in the litigation process, requiring that both parties address e-discovery matters as soon as practicable and disclose e-discoverable documents in the initial phase of discovery.⁸⁵ The Advisory Committee stressed early communication in order to come up with a reasonable discovery plan, but rejected a blanket preservation order because it recognized that requiring one “may be prohibitively expensive and unduly burdensome.”⁸⁶

⁸⁰ K&L Gates, *E-Discovery Amendments to the Federal Rules of Civil Procedure Go into Effect Today*, ELECTRONIC DISCOVERY LAW, Dec. 1, 2006, <http://www.ediscoverylaw.com/2006/12/articles/news-updates/ediscovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/>.

⁸¹ FED. R. CIV. P. 26(a)(1)(A)(ii).

⁸² FED. R. CIV. P. 26 advisory committee’s note (2006 Amendment); FED. R. CIV. P. 34 advisory committee’s note (1970 Amendment) (“The inclusive description of ‘documents’ is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations . . .”).

⁸³ James Berriman, Chief Executive Officer, Evidox Corp., Lecture at A One-Day Comprehensive Ediscovery Workshop, in Boston, Mass. (Apr. 9, 2011) [hereinafter Berriman Lecture] (notes on file with author).

⁸⁴ FED. R. CIV. P. 26(f).

⁸⁵ *Id.*; FED. R. CIV. P. 26(a)(1)(A)(ii).

⁸⁶ Allman, *supra* note 11, at 13 (citation omitted).

ii. Rule 26(b)(2)

Prior to the 2006 Amendments, Rule 26(b)(2) included a proportionality test which ordered courts to limit discovery under certain circumstances.⁸⁷ The circumstances included whether the discovery sought was unreasonably duplicative, whether other less expensive or burdensome sources existed, whether the requesting party already had ample opportunity to obtain the information sought, or whether the burdens of discovery outweighed its likely benefits.⁸⁸ However, the pre-2006 rules did not explicitly address the complications involved in the proportionality test when analyzing ESI, which include more costly measures to store and backup data.⁸⁹

2006-Amended Rule 26(b)(2) addresses the issue of cost of ESI by requiring that parties need only search and produce from “reasonably accessible” sources of ESI, but the producing party must identify and provide information to opposing counsel about those sources that it regards as “not reasonably accessible.”⁹⁰ This amendment creates a two-tiered system by which the 2006 Rules distinguish between “reasonably accessible” data (the first tier) and “not reasonably accessible” data (the second tier).⁹¹ The two-tiered system considers inaccessible data to be “presumptively undiscoverable,” but a party may still be required to produce effectively inaccessible data if the requesting party shows good cause.⁹² 2006-Amended Rule 26(b)(2) does not categorize or give illustrations of what constitutes “not reasonably accessible” data; the Advisory Committee’s Note only hints that such data involves “burdens and costs [that] may make the information . . . not reasonably accessible,” which provides little meaningful guidance to the parties.⁹³

The Advisory Committee’s Note does, however, provide seven factors to consider in determining whether the requesting party has established good cause to overcome the presumption that the “not reasonably accessible” ESI is undiscoverable.⁹⁴ Noticeably, the Advisory Committee left out a factor

⁸⁷ FED. R. CIV. P. 26(b)(2) (2005). Subsequent to 2006, this proportionality test can be found at FED. R. CIV. P. 26(b)(2)(C).

⁸⁸ *Id.*

⁸⁹ *See Zubulake I*, 217 F.R.D. at 316 (stating that application of the pre-2006 discovery rules proved to be “particularly complicated where electronic data is sought because otherwise discoverable evidence is often only available from expensive-to-restore backup media”).

⁹⁰ FED. R. CIV. P. 26(b)(2)(B).

⁹¹ Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(b)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?*, 13 RICH. J.L. & TECH 12, 1-2 (2007), available at <http://law.richmond.edu/jolt/v13i3/article12.pdf>.

⁹² Vainberg, *supra* note 41, at 1557; FED. R. CIV. P. 26(b)(2)(B).

⁹³ FED. R. CIV. P. 26 advisory committee’s note (2006 Amendment).

⁹⁴ *Id.* (listing the seven factors, which include: “(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but

included in both the *Zubulake* and *Rowe* tests: the relative ability of each party to control costs and the relative benefits to the parties of obtaining the information.⁹⁵ The Advisory Committee's failure to include this factor raises the question of whether the Advisory Committee's criteria for establishing "good cause" were "intended to guide cost-shifting determinations."⁹⁶ Due to this uncertainty, some courts use the factors *only* to determine whether good cause has been established by the requesting party to order inaccessible data from the producing party, while other courts have used these factors in their cost-shifting analysis as well.⁹⁷

The good cause showing, however, is still subject to the limitations of the proportionality test, which pre-dates the 2006 Amendments and is currently codified as Rule 26(b)(2)(C).⁹⁸ Thus, even if a requesting party establishes good cause, a court may limit the extent of discovery if it determines that any of the three conditions stated in Rule 26(b)(2)(C) exists: (1) if the discovery sought was unreasonably duplicative or if other less expensive or burdensome sources existed; (2) if the requesting party already had ample opportunity to obtain the information sought; or (3) if the burdens of discovery outweighed its likely benefit.⁹⁹

iii. Rule 37(e)

Lastly, 2006-Amended Rule 37(e) addresses what courts may do when a party has failed to provide ESI.¹⁰⁰ 2006-Amended Rule 37(e) provides a compromised safe harbor under which rule-based sanctions will not apply to losses of ESI from "routine, good faith" operations of computer systems "[a]bsent exceptional circumstances."¹⁰¹ The Advisory Committee's Note defines "routine operations" to include "the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems."¹⁰² Though 2006-Amended Rule 37(e) appears to give protection to parties who inadvertently destroy ESI, the drafters intended for this rule to apply only when the data was

is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive, information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.").

⁹⁵ Vainberg, *supra* note 41, at 1560.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1561.

⁹⁸ *See supra* note 87.

⁹⁹ *Id.*

¹⁰⁰ This was amended in 2006 as Rule 37(f) and subsequently renumbered as Rule 37(e).

¹⁰¹ FED. R. CIV. P. 37(e).

¹⁰² FED. R. CIV. P. 37 advisory committee's note (2006 Amendment).

lost as part of routine, good faith operations.¹⁰³

The Advisory Committee's Note also incorporates the "litigation hold" concept as defined in *Zubulake IV*, under which the duty to preserve is triggered once the party reasonably anticipates litigation.¹⁰⁴ 2006-Amended Rule 37(e) itself, however, fails to explicitly address what data the producing party must preserve and in what manner, and what responsibility attaches to the parties.¹⁰⁵ Aside from the Advisory Committee's Note's attempt to define what constitutes "good faith," 2006-Amended Rule 37(e) fails to set out a clear guideline for when a party has acted negligently or with enough culpability to warrant a finding of spoliation. Consequently, courts have inconsistently applied the sanctions provision.¹⁰⁶

One of the reasons for the inconsistencies among the circuits is that courts continue to cite to their inherent powers to protect the integrity of the judicial process as authority to implement sanctions instead of solely relying on the specific provisions of Rule 37.¹⁰⁷ In particular, 2006-Amended Rule 37(e) instructs courts that "[a]bsent exceptional circumstances, [courts] may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."¹⁰⁸ However, "[i]f a party . . . fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may . . . require that party . . . to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure."¹⁰⁹ The inconsistency of applying these provisions raises the concern that courts are not principally imposing sanctions based on the "specific and targeted provisions of Rule 37."¹¹⁰

Some critics of the safe-harbor provision suggest that the provision would not apply in the absence of a court-issued discovery order or when judges exercise their inherent powers to manage cases.¹¹¹ As one critic points out, if the judge exercises his inherent power, "the assessment and impact of the sanctions imposed depends in large part on the perceived blameworthiness of

¹⁰³ Murray et al., *supra* note 12, at 523.

¹⁰⁴ See FED. R. CIV. P. 37 advisory committee's note (2006 Amendment); *Zubulake IV*, 220 F.R.D. at 218.

¹⁰⁵ Beisner, *supra* note 9, at 583-84.

¹⁰⁶ See discussion *infra* Part IV.C.

¹⁰⁷ See Allman, *supra* note 11, at 20; see also *Nucor Corp. v. Bell*, 251 F.R.D. 191, 194 (D.S.C. 2008) ("The court's ability to impose sanctions . . . stems from its 'inherent power to control the judicial process and litigation.'") (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)); *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995).

¹⁰⁸ FED. R. CIV. P. 37(e).

¹⁰⁹ *Id.* at 37(f).

¹¹⁰ Allman, *supra* note 22, at 224.

¹¹¹ DERTOUZOS, *supra* note 4, at 11.

the spoliating party, and on the degree of prejudice to the opposing party.”¹¹² These factors are not explicitly drawn from the rule. There is also speculation that despite this attempt to protect a party who loses data while acting in good faith, parties are nevertheless unprotected from sanction motions because the courts have placed immense burdens and responsibilities on parties to preserve ESI.¹¹³

III. VARIOUS RESPONSES TO E-DISCOVERY CONCERNS: SIGNALING A NEED FOR UNIFORMITY AND GUIDANCE IN THE 2006 RULES

The requirement to preserve electronic data at the outset of litigation or when a party reasonably expects litigation can impose immense costs on the producing party.¹¹⁴ The costs are primarily associated with preservation – not only in the expensive technology to preserve ESI and sift through relevant ESI, but also in the exorbitant monetary sanctions a court may impose either through adverse jury instructions or reimbursement expenses.¹¹⁵ The 2006 Rules fail to address these enormous costs associated with preservation. For example, they do not explicitly state when the duty to preserve arises, what needs to be preserved, and what actions are worthy of sanctions in order to provide a reliable guideline for violation of this duty.¹¹⁶ Because preservation of ESI is a complex issue that requires clear guidelines, the lack of specificity in the 2006 Rules regarding preservation of ESI has a significant effect on potential litigants and their expected duties.¹¹⁷ Consequently, various federal

¹¹² Carole S. Gailor, *In-depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIMONIAL LAW. 71, 84 (2010).

¹¹³ DERTOUZOS, *supra* note 4, at 11-12.

¹¹⁴ For an overview of the management of electronic records and how it affects e-discovery, see LOSEY, *supra* note 27, at 2.

¹¹⁵ See Sylvia Hsieh, *E-Discovery: Business Is Booming and Lawyers Are Getting in On the Trend*, LAWYERS USA, Mar. 13, 2006 (reporting that due to Morgan Stanley’s failure to implement a proper litigation hold, the adverse jury inference cost Morgan Stanley \$1.6 billion dollars). See also *Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *17 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

¹¹⁶ See AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 14 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> [hereinafter ACTL Report] (reporting that legal practitioners find Rule 26(b)(2) inadequate because “[t]he interplay among ‘undue cost and burden,’ ‘reasonably accessible,’ ‘routine good faith operation,’ and ‘good cause[]’ . . . presents traps for even the most well-intentioned litigant”).

¹¹⁷ See Thomas Y. Allman, *Managing Preservation Obligations after the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, 5-6 (2007), available at

courts and research institutions have taken it upon themselves to initiate clearer guidelines in this area. Further, although the Federal Rules of Civil Procedure do not have any bearing on state courts, the Conference of Chief Justices (“CCJ”), an organization comprised of the highest judicial officers in each of the fifty states, as well as in the District of Columbia and the Commonwealth of Puerto Rico, also addressed parallel ESI-related issues occurring on the state level.¹¹⁸ These various actions and commentaries by the federal courts and research institutions indicate that the 2006 Amendments failed to provide meaningful clarity and uniformity, thus signaling a need for amending the federal rules related to e-discovery yet again.

A. Seventh Circuit Pilot Program

The federal courts are attempting to resolve the e-discovery issues on a circuit-wide basis.¹¹⁹ The Seventh Circuit implemented a pilot program (“Pilot Program”) in October 2009 to “reduce the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of electronically stored information (‘ESI’) in today’s electronic world.”¹²⁰ The Pilot Program incorporated eleven principles relating to the discovery of ESI into a standing order (“Standing Order”).¹²¹

The impetus for the Pilot Program stemmed largely from the influential

<http://law.richmond.edu/jolt/v13i3/article9.pdf> (ESI may be fleetingly available because of dynamic nature of electronic data and fact that routine business practices involve constantly cleaning up data to free up storage without any “intent to impede the preservation of potential evidence for use in discovery”; additionally, because some information, such as metadata and embedded data, is not ordinarily visible to users, there is a stronger risk of corrupting that information intentionally or inadvertently).

¹¹⁸ See *infra* note 185.

¹¹⁹ See Jason Krause, *Piloting E-Discovery Rules in the 7th Circuit*, LAW.COM, Jul. 26, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463869031> for a description of such an effort by the Seventh Circuit.

¹²⁰ SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, PHASE ONE: OCTOBER 1, 2009 -MAY 1, 2010 7 (2009), available at <http://www.insd.uscourts.gov/News/7thphase%20one.pdf> [hereinafter PILOT PROGRAM].

¹²¹ *Id.* at 11-24 (eleven principles include: (1) the purpose which is to “secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of [ESI] without [c]ourt intervention”; (2) cooperation; (3) discovery proportionality; (4) duty to meet and confer on discovery and to identify disputes for early resolution; (5) e-discovery liaison(s); (6) preservation requests and orders; (7) scope of preservation; (8) identification of ESI; (9) production format; (10) familiarization of judges, counsel and parties with e-discovery provisions of Federal Rules of Civil Procedure and any applicable state rules, Advisory Committee Report on the 2006 Amendments to the Rules, and these Principles; and (11) judges, attorneys and parties to litigation should consult additional materials providing education information regarding the discovery of ESI, including The Sedona Conference publications).

findings of the Sedona Conference Cooperation Proclamation (“Sedona Proclamation”) and the Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System at the University of Denver (“ACTL Report”).¹²² The Sedona Proclamation emphasized that the lack of information sharing, open dialogue between the parties, and proper training in technology has significantly contributed to the rising costs of pre-trial discovery and burdens the judicial system as a result.¹²³ The Sedona Proclamation launched a national effort to “promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery” and to “refocus litigation toward the substantive resolution of legal disputes.”¹²⁴ The Pilot Program supported this effort. Likewise, the ACTL Report proposed various principles to address the rising costs associated with e-discovery.¹²⁵ Among these principles were proportionality in e-discovery, early and ongoing communications between parties, and active participation by the presiding judge to be informed about the technology.¹²⁶

The Seventh Circuit’s Standing Order explicitly directs attorneys to familiarize themselves with how their clients store data in order to better facilitate the discussions during the meet-and-confer conferences.¹²⁷ Additionally, the Pilot Program requires an “e-discovery liaison” to be designated by all parties to the litigation to ensure that each party has an individual who is knowledgeable about the party’s e-discovery efforts and operational systems in order to comprehensively answer and address any issues that arise during the meet-and-confer discussions.¹²⁸ Most notably, the Standing Order explicitly lists what categories of ESI are *not* discoverable unless a party requests such ESI at the outset of the meet-and-confer discussion.¹²⁹ The Standing Order is significantly different in this regard from

¹²² *Id.* at 7.

¹²³ See The Sedona Conference®, *The Sedona Conference Cooperation Proclamation*, 2008 THE SEDONA CONF. WORKING GROUP SERIES 1.

¹²⁴ *Id.*

¹²⁵ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF 2010 CONFERENCE ON CIVIL LITIGATION AT DUKE LAW SCHOOL 1 (2010), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

¹²⁶ *Id.* at 7-17.

¹²⁷ PILOT PROGRAM, *supra* note 119, at 19.

¹²⁸ *Id.* at 19-20.

¹²⁹ *Id.* at 21-22 (“The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable: (1) ‘deleted,’ ‘slack,’ ‘fragmented,’ or ‘unallocated’ data on hard drives; (2) random access memory (RAM) or other ephemeral data; (3) on-line access data such as

the 2006 Rules, which fail to state any such categorical exclusion. This enumeration of categories is an attempt by the Pilot Program to mitigate preservation costs, since the presumptively undiscoverable categories include duplicative data that may be accessible elsewhere and “other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.”¹³⁰

During Phase One of the Pilot Program, thirteen federal court judges implemented the Standing Order in ninety-three selected civil cases.¹³¹ Following Phase One, the participating attorneys and judges evaluated the Pilot Program by completing a survey.¹³² The response from the judges reflected the general success of Phase One, as over ninety percent of the judges agreed that the principles integrated into the Standing Order allowed parties to resolve discovery disputes more effectively before coming to court.¹³³ Only forty-three percent of the attorneys, however, found that the principles increased the fairness of the discovery process, compared to fifty-five percent who felt that “the principles had no effect on fairness.”¹³⁴

The results of the Pilot Program were made available during the May 2010 Civil Litigation Review Conference for the Civil Rules Advisory Committee at Duke University (“Duke Conference”).¹³⁵ The Duke Conference’s primary goal was to “explore the current costs of civil litigation, particularly discovery and e-discovery, to discuss possible solutions.”¹³⁶ In addition to reviewing numerous scholarly papers and research survey results, attendees of the Duke Conference “considered the result of the [ACTL Report.]”¹³⁷ The authors of the ACTL Report unanimously recommended that the proposed principles,¹³⁸ which addressed e-discovery issues “be made the subject of public comment, discussion, debate and refinement.”¹³⁹ As a result of the Duke Conference, the

temporary internet files, history, cache, cookies, etc.; (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.”).

¹³⁰ *Id.* at 22.

¹³¹ Correy Stephenson, *7th Circuit’s Electronic Discovery Pilot Program Releases Results*, LAWYERS USA, May 19, 2010, available at <http://www.allbusiness.com/legal/trial-procedure-pretrial-discovery-electronic/14555993-1.html>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ John G. Koeltl, *Progress in the Spirit of Rule 1 Special Symposium Issue: 2010 Civil Litigation Review Conference: Introduction*, 60 DUKE L.J. 537, 542 (2010).

¹³⁶ Allman, *supra* note 22, at 217 (quoting Memorandum from Hon. John G. Koeltl to participants in the 2010 Conference (Aug. 4, 2009)).

¹³⁷ Koeltl, *supra* note 135, at 539.

¹³⁸ See *supra* notes 124-25.

¹³⁹ ACTL Report, *supra* note 116, at 3.

attendees reached a general consensus that amendments need to be made to the Federal Rules of Civil Procedure to specifically address the outstanding issues concerning e-discovery.¹⁴⁰

B. District courts

Due to the failure of the 2006 Rules to directly address proper litigation holds, courts have had to address this issue and set proper standards on a case-by-case basis. Several district courts have reached similar standards, albeit through independent reasoning, regarding when the duty to preserve arises, what constitutes as spoliation, and what the appropriate sanctions are. As district court opinions, however, these cases cannot uniformly bind the federal courts the way the Federal Rules of Civil Procedure can. This is another reason why the Advisory Committee should amend the Rules to provide all federal courts with uniform guidelines for e-discovery issues.

One recent district court case that has been influential on e-discovery standards is *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities LLC* (“*Pension Committee*”).¹⁴¹ In *Pension Committee*, Judge Scheindlin cited to the *Zubulake* opinions rather than the Federal Rules of Civil Procedure as authority for establishing the legal standards for sanctioning parties in spoliation claims and when preservation duties are triggered.¹⁴² The opinion addresses the issue of whether a party’s failure to issue a written litigation hold within its company warrants sanctions for spoliation.¹⁴³ *Pension Committee* defined when a party’s culpability in the context of discovery reaches the levels of negligent, grossly negligent and willful.¹⁴⁴ Although *Pension Committee* provides a very useful “‘how-to’ manual setting forth key principles relating to [e-discovery issues],” it is not binding on other courts outside the Southern District of New York.¹⁴⁵

Further, four years after the release of the 2006 Amendments, Judge Scheindlin did not cite to Fed. R. Civ. P. 37 as authority to impose sanctions,

¹⁴⁰ Koeltl, *supra* note 135, at 542-45.

¹⁴¹ 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

¹⁴² See *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec.*, 685 F. Supp. 2d 456, 461-62, 464-65, 467-68, 470-71, 473, 477 (S.D.N.Y. 2010). Judge Scheindlin titled the *Pension Committee* opinion “*Zubulake Revisited: Six Years Later.*” *Id.* at 461.

¹⁴³ *Id.* at 463.

¹⁴⁴ *Id.* at 463-65 (stating that failure to preserve relevant evidence constitutes negligent behavior, “failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information,” and requires “intentional destruction of relevant records . . . after the duty to preserve has attached” is an example of willful behavior).

¹⁴⁵ Michael Hoenig, “*Pension Committee*” *Clarifies E-Discovery Requirements*, LAW TECHNOLOGY NEWS, Feb. 23, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202444109380&slret urn=1&hbxlogin=1>.

which shows how courts are not principally following one set of criteria for imposing sanctions. Rather, Judge Scheindlin reaffirmed that a court's authority to impose sanctions for spoliation comes from "a court's inherent power to control the judicial process and litigation . . ."¹⁴⁶ Judge Scheindlin cautioned, however, that courts should consider all of the facts before concluding that a party has violated its duty to preserve and reiterated the cost concerns relating to sanction motions, both to parties and to the judicial system.¹⁴⁷ Ultimately, Judge Scheindlin found that after the duty to preserve has attached, failure to issue a written litigation hold supported a finding of gross negligence.¹⁴⁸

After *Pension Committee*, Judge Cox of the Northern District of Illinois addressed the issue of when a duty to preserve arises and the proper sanctions for any such violations in *Jones v. Bremen High School District 228*.¹⁴⁹ The *Bremen* decision was particularly noteworthy because Judge Cox cited neither *Zubulake* nor *Pension Committee*.¹⁵⁰ Instead, Judge Cox held, independently of both Judge Scheindlin's decisions and the Federal Rules of Civil Procedure but with similar effect, that a duty to preserve evidence "arises when a reasonable party would anticipate litigation."¹⁵¹ Further, Judge Cox held that sanctions for spoliation are appropriate when the party seeking discovery has established the following elements: "(1) that there was a duty to preserve the specific documents and/or evidence, (2) that duty was breached, (3) that the other party was harmed by the breach, and (4) that the breach was caused by the breaching party's willfulness, bad faith, or fault."¹⁵² The difference between Judge Cox's and Judge Scheindlin's standards for implementing sanctions, though subtle, reflects how courts are not principally applying Rule 37(e).¹⁵³

¹⁴⁶ *Pension Committee*, 685 F.Supp.2d at 465.

¹⁴⁷ *Id.* at 471-72.

¹⁴⁸ *Id.* at 471 (listing other failures in behavior that would warrant a finding of gross negligence once the duty to preserve has attached: "to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those key players is not obtainable from readily accessible sources").

¹⁴⁹ No. 08 C 3548, 2010 WL 2106640, at *5-6, *8 (N.D. Ill. May 25, 2010).

¹⁵⁰ Brad Harris, *Northern District of Illinois Makes Its Own Way with Opinion Echoing Need for Strong Legal Holds*, LEGAL HOLD PRO TRACKER BLOG, (June 10, 2010), <http://blog.legalholdpro.com/2010/06/10/northern-district-of-illinois-makes-its-own-way-with-opinion-echoing-need-for-strong-legal-holds/>.

¹⁵¹ *Bremen*, 2010 WL 2106640, at *5.

¹⁵² *Id.*

¹⁵³ See discussion *supra* Part II.C.iii.

C. *The Sedona Conference*

The Sedona Conference published two articles immediately following the Duke Conference reiterating its support to amend the Federal Rules of Civil Procedure and to address the proper guidelines for preservation: “Preservation Rulemaking After the 2010 Duke Conference,” and “The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process.”¹⁵⁴ Thomas Allman’s “Preservation Rulemaking After the 2010 Duke Conference” sums up the key results of the 2010 Duke Conference and highlights the consensus among the attendees regarding the need for clearer guidance on preservation obligations, particularly explicit guidance for what steps to take prior to any discussion of potential litigation.¹⁵⁵ One of the topics of concern during the Duke Conference was the rising cost of e-discovery, but nobody proposed any successful remedies other than reiterating the recommendation put forth by the Lawyers for Civil Justice: to have each party incur its own cost of discovery.¹⁵⁶

Related to preservation concerns, the Duke Conference also addressed the rising growth in spoliation claims and the issues surrounding Rule 37(e).¹⁵⁷ The Duke Conference believed that the Rule needs clarification on what sanctions may be imposed when a party destroys ESI after the duty to preserve has been triggered.¹⁵⁸ Additionally, the source of authority to impose such sanctions must uniformly flow from Rule 37(e); otherwise, courts may act inconsistently and impose sanctions in the absence of “egregious conduct.”¹⁵⁹

In the second article published by the Sedona Conference, “The Sedona Conference Commentary on Legal Holds: The Trigger & The Process” (“Commentary”), the Sedona Working Group set out “practical guidelines for determining when the duty to preserve relevant information arises” and the preservation obligations of a party once a litigation hold is in place.¹⁶⁰ The Commentary states that the duty to preserve arises “when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.”¹⁶¹ This determination should “be based on a good faith and reasonable evaluation of relevant facts and circumstances.”¹⁶² Compared to the 2006 Amendments, the Commentary provides an additional layer of clarity by attempting to define when a duty to preserve arises. A clear

¹⁵⁴ Allman, *supra* note 22; *Commentary on Legal Holds*, *supra* note 15.

¹⁵⁵ Allman, *supra* note 22, at 217-22.

¹⁵⁶ *Id.* at 220.

¹⁵⁷ *Id.* at 221 (noting that some federal courts “have concluded that Rule 37(e) is inapplicable if a preservation duty existed at the time of the loss at issue, regardless of the culpability involved”).

¹⁵⁸ *Id.* at 221-22.

¹⁵⁹ *Id.* at 224, 226-28.

¹⁶⁰ *Commentary on Legal Holds*, *supra* note 15, at 269.

¹⁶¹ *Id.*

¹⁶² *Id.* at 270.

definition of when a duty to preserve arises is crucial for parties, especially in light of the possibility of sanctions if the parties fail to properly place a litigation hold.

D. Conference of Chief Justices

On the state level, the CCJ¹⁶³ established a Working Group (“Working Group”) in 2004 “to develop a reference document to assist state courts in considering issues related to electronic discovery.”¹⁶⁴ The Working Group prepared the Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (“CCJ Guidelines”), which the CCJ approved on August 2, 2006.¹⁶⁵ The CCJ Guidelines drew from a wide array of sources and worked off of the principles established in Best Practices, the pre-2006 Rules, state discovery laws, and the ABA Civil Discovery Standards.¹⁶⁶ The CCJ Guidelines, which were issued prior to the release of the 2006 amendments, have no bearing on federal courts. Nonetheless, a comparative analysis of the CCJ Guidelines and the 2006 Rules reveals the potential strengths and weaknesses of the 2006 Rules.

The CCJ Guidelines and 2006 Rules have many similarities. Like the 2006 Rules, the CCJ Guidelines place emphasis on coordinated efforts by the parties prior to and during litigation to effectively move along the discovery process through pre-conference orders and initial discovery conferences.¹⁶⁷ Additionally, the CCJ Guidelines include similar language to 2006-Amended Rule 37(e) and state that “[a]bsent exceptional circumstances, a judge should impose sanctions because of the destruction of [ESI] only if . . . the destruction of the material is not the result of the routine, good faith operation of an electronic information system.”¹⁶⁸ Such similarities suggest that several elements of the 2006 Rules are grounded in widely-shared policy concerns.

By contrast, the differences between the CCJ Guidelines and the 2006 Rules shed insight into the deficiencies of the 2006 Rules. The CCJ Guidelines differ from the 2006 Rules in that they place a greater emphasis on the costs concerns of e-discovery. For example, when discussing the scope of e-discovery, the

¹⁶³ The CCJ was found in 1949. The purpose of the CCJ is to “discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.” CONFERENCE OF CHIEF JUSTICES, ABOUT CJJ SECTION, <http://ccj.ncsc.dni.us/about.html> (last visited Mar. 12, 2012).

¹⁶⁴ RICHARD VAN DUIZEND, CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vii (2006), available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf> [hereinafter CONFERENCE OF CHIEF JUSTICES].

¹⁶⁵ *Id.* at ix.

¹⁶⁶ *Id.*, at 1-6.

¹⁶⁷ *Id.* at 2-4.

¹⁶⁸ *Id.* at 10.

CCJ Guidelines encourage courts to consider the cost of production compared to the amount in controversy and the resources of each party compared to the total cost of production. Both of these factors were discussed in *Zubulake I* but omitted from the Advisory Committee's Notes to the 2006 Amendment.¹⁶⁹ Further, the CCJ Guidelines state that cost-shifting should only occur when the sought-after ESI is located on inaccessible data and sampling is insufficient.¹⁷⁰ The CCJ Guidelines' emphasis on cost concerns is a nod to the *Zubulake* decisions and Best Practices, whose respective authors, Judge Scheindlin and The Sedona Conference, focused on the financial burdens of e-discovery and how parties can mitigate the costs.¹⁷¹

IV. USING BEISNER'S PROPOSALS TO AMEND THE RULES ON E-DISCOVERY

In addition to the measures taken by various courts and institutional organizations to address the deficiencies in the 2006 Rules, legal scholars have also commented and offered several remedies to the issues. The amount of criticism and commentary from legal scholarship about the deficiencies in the 2006 Rules is another indicator that the Advisory Committee should, and most likely will, amend the Rules. In a recent article, "Discovering A Better Way: The Need For Effective Civil Litigation Reform," drafted on behalf of the U.S. Chamber Institute for Legal Reform, John H. Beisner found the 2006 Rules to be flawed.¹⁷² This section of the Note critiques "Discovering A Better Way" and uses some of Beisner's suggestions to propose a series of changes to the rules relating to e-discovery.

Beisner claimed that the "unfettered discovery" process in the United States poses significant harm to the civil litigation process and offered pragmatic solutions.¹⁷³ To address this potential problem, Beisner proposed five areas for reform in the Rules to "address the root causes of discovery in the United States," "diminish incentives for engaging in discovery abuse," and "increase court involvement in preventing potentially abusive discovery."¹⁷⁴ Three of these proposals bear directly on e-discovery: (1) an altered cost-shifting regime that automatically places the cost of production of inaccessible ESI on the requesting party, (2) mandatory "electronic data" conferences to define the scope of discovery, and (3) broadening of the safe-harbor provisions.¹⁷⁵ This

¹⁶⁹ Compare *id.* at 5 with FED. R. CIV. P. 26 advisory committee's note (2006 Amendment).

¹⁷⁰ CONFERENCE OF CHIEF JUSTICES, *supra* note 138, at 7; see discussion *supra* Part II.A and *infra* Part IV.A.

¹⁷¹ CONFERENCE OF CHIEF JUSTICES, *supra* note 138, at 5-7 (referring to both sources in comments).

¹⁷² Beisner, *supra* note 9, at 582-84.

¹⁷³ *Id.* at 547-48.

¹⁷⁴ *Id.* at 584.

¹⁷⁵ *Id.* at 584-94.

Note argues (1) that Beisner's cost-shifting regime should not be adopted by the Federal Rules of Civil Procedure; (2) that Beisner's mandatory "electronic data" conferences should be incorporated into the Federal Rules along with other changes that give litigants better notice concerning their duties to preserve ESI; and (3) that the safe harbor provision of the Federal Rules should be clarified and given a broader interpretation than Beisner has proposed.

A. *Conscious Cost-Shifting*

One of the main cost concerns about e-discovery during litigation is the question of which party bears the costs.¹⁷⁶ Beisner strongly favors a cost-shifting rule that automatically places the cost of production on the requesting party when the requesting party seeks inaccessible ESI, which Beisner based on the rule used by Texas state courts.¹⁷⁷ Under the Texas Rules of Civil Procedure if a producing party is required to retrieve inaccessible data, the "requesting party [must] pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."¹⁷⁸

Although Beisner cited the seven-factor test from *Zubulake I* as the starting point for setting up guidelines for cost-shifting in e-discovery, Beisner's proposal is more extreme than the *Zubulake I* test.¹⁷⁹ *Zubulake I* marked a modest deviation from the presumption that the producing party should bear the cost of discovery.¹⁸⁰ Under the *Zubulake I* test the cost of discovery may shift to the requesting party if the information the requesting party sought was kept in an inaccessible format.¹⁸¹ To decide whether costs should be shifted in any given case, the *Zubulake I* court supported the use of data sampling.¹⁸² If the results of the data sampling reflected no relevant information, the requesting party would likely bear the cost of production.¹⁸³ If, however, the data sampling resulted in relevant information from the inaccessible data, the court may, as it did in *Zubulake III*, place the substantial cost of production on

¹⁷⁶ See Howard L. Speight & Lisa C. Kelly, *Electronic Discovery: Not Your Father's Discovery*, 37 ST. MARY'S L.J. 119, 144 (2005) (noting that corporate counsel are so concerned about who incurs the costs of e-discovery that they usually settle a case in order to avoid incurring the costs).

¹⁷⁷ Beisner, *supra* note 9, at 586.

¹⁷⁸ TEX. R. CIV. P. 196.4.

¹⁷⁹ See Beisner, *supra* note 9., at 585-86.

¹⁸⁰ *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (Judge Scheindlin intended to steer away from the *Rowe* factors, which tended to shift the cost of discovery to the requesting party).

¹⁸¹ *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003).

¹⁸² See *supra* notes 47-49 and accompanying text.

¹⁸³ Cf. *Zubulake III*, 216 F.R.D. at 287 (noting that because the result of the data sampling resulted in discovering relevant e-mails, the marginal utility of restoration was potentially high and thus weighed against shifting the cost from the producing party to the requesting party).

the producing party.¹⁸⁴ The main focus of the *Zubulake I* analysis concerned the undue burdens or costs placed on the parties. In contrast, under Beisner's proposal, if the ESI is in an inaccessible format, the cost of production automatically shifts to the requesting party; the court does not investigate whether the information being sought is actually relevant.¹⁸⁵ Thus, in the context of inaccessible ESI, Beisner's proposal entirely abandons the presumption that the producing party should bear the cost of discovery. Beisner's proposal to automatically place the burden on the requesting party whenever it requests inaccessible ESI would be unduly harsh on requesting parties in light of the analysis in *Zubulake III*. Though there is merit to the notion that the requesting party is in the best position to determine cost-effectiveness, the requesting party has no control over whether the requested ESI is in the form of inaccessible or accessible data. The requesting party can only closely tailor its discovery request to control cost.¹⁸⁶ It would be unfair to place the costs automatically on the requesting party whenever it asks for inaccessible data because the requesting party has no control over how the producing party chose to store its ESI, and such information may be highly relevant and unavailable through any other source. For a more balanced approach, the court should engage in a cost-shifting analysis once the requesting party has shown that it has exhausted possibilities to maintain and minimize the cost of discovery. Thus, when ESI in inaccessible format is sought, the rules should explicitly require courts to have the producing party undergo data sampling before shifting the cost to the requesting party. The proposal should adopt the same principles stated in the CCJ Guidelines for cost-shifting and be incorporated under Fed. R. Civ. P. 26(b)(2)(B) to explicitly provide guidance for all parties on what to do when inaccessible data is sought.¹⁸⁷

The e-discovery rules also need to implement a cost-conscious element that requires a party to manage ESI pre-litigation in a way that benefits both the party storing the information and any future adversaries who may request such ESI. The rules should include an additional subsection under Fed. R. Civ. P. 26(b) that lists the cost factors from *Zubulake I*, particularly the factors focusing on the relative ability of each party to control costs and the relative benefits to the parties of obtaining the information, because without the cost-conscious factors, a court cannot properly assess who should bear the costs.

¹⁸⁴ *Id.* at 287, 291.

¹⁸⁵ Compare TEX. R. CIV. P. 196.4 (ordering the requesting party to pay for the retrieval and production of inaccessible ESI) with *Zubulake I*, 217 F.R.D. at 320 (stating that when data is inaccessible, such as e-mails stored on backup tapes, cost-shifting is appropriate to consider).

¹⁸⁶ See *Zubulake III*, 216 F.R.D. at 288 (finding that the requesting party had done all that was in her control to minimize the cost of production by making a targeted discovery request, and the results of the sampling had not allowed her to cut back on the requests).

¹⁸⁷ See CONFERENCE OF CHIEF JUSTICES, *supra* note 138, at 7.

B. Defining the Duty to Preserve

i. Early efforts to confer on ESI matters

Costs associated with pre-trial discovery have continued to rise due to the growth in potentially discoverable ESI.¹⁸⁸ A large part of the costs is due to the parties' lack of knowledge and ability to properly manage ESI, which can ultimately lead to spoliation sanctions.¹⁸⁹ Because pretrial conferences usually "do not take place until several months after a case has been filed," defendants may, while waiting for a pretrial conference to discuss preservation concerns, over-retain or under-preserve documents, which could lead to high monetary sanctions.¹⁹⁰

Beisner proposed to amend the Rules to require an electronic-data conference to be held well before a pretrial conference under Federal Rule of Civil Procedure 16(a).¹⁹¹ Holding a special electronic-data conference soon after litigation has been initiated would help defendants avoid retention costs and sanctions due to spoliation. Mandating such a conference in every case involving e-discovery would impose an additional cost on the courts' resources. In light of how much waste is involved with spoliation claims, however, any additional costs to the courts' resources in implementing an electronic-data conference are marginal compared to the benefit of clarifying the preservation obligations early on.¹⁹² Thus, Beisner's proposal on an electronic-data conference should be integrated into the e-discovery rules under Fed. Rule Civ. P. 26(f).

Additionally, the e-discovery rules should provide an illustrative form for parties to follow when they are creating a discovery plan. This form would be similar to the other illustrative civil rules forms that the current Rules provide for, such as the templates for various pleadings.¹⁹³ This suggestion is based on the Proposed Joint Ediscovery Protocol ("Protocol") put forth by Evidox, which provides ediscovery services, to "govern the collection, processing, and production of [ESI]" in the relevant litigation.¹⁹⁴ Having this document will

¹⁸⁸ CONFERENCE OF CHIEF JUSTICES, *supra* note 164, at v; Handout from James Berriman, Chief Executive Officer, Evidox Corp., to participants at A One-Day Comprehensive Ediscovery Workshop, *The Attorney Controls the Cost of Ediscovery* (Apr. 9, 2011) [hereinafter Berriman Handout I] (on file with author) ("The primary driver of the cost of ediscovery (as with any discovery) is the size of the review set.").

¹⁸⁹ Berriman Lecture, *supra* note 83.

¹⁹⁰ Beisner, *supra* note 9, at 588-89.

¹⁹¹ *Id.* at 588.

¹⁹² See Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec., 685 F. Supp. 2d 456, 471-72 & n.56 (highlighting the monetary expense that sanction motions entail, both for courts and parties, as well the cost to the integrity of the courts because it "divert[s] court time from other important duties – namely deciding cases on the merits.").

¹⁹³ See FED. R. CIV. P. 84 and Appendix of Forms.

¹⁹⁴ Handout from James Berriman, Chief Executive Officer, Evidox Corp., to participants

clarify what parties can expect from one another. This form will force parties to disclose early in the litigation how they intend to create initial production and thus define the scope of the preservation.¹⁹⁵ Further, this “open box approach,” in which parties reveal to one another how they intend to cull the data, is essential in e-discovery litigation because it circumscribes the discovery requests.¹⁹⁶ Given the expansive potential of discovery of ESI, this restriction is critical.¹⁹⁷

This “open-box approach” also has an effect on the likelihood of sanctions. For example, imagine a case in which two parties, A and B, create a Protocol in which the parties agree that A will preserve all e-mails on the relevant custodian’s mail server going forward from the date the Protocol is created until the conclusion of the case as well twelve months prior to the date of the Protocol. Then, during discovery B decides that it wants e-mails dating fourteen months prior to the date of the Protocol, which is outside the agreed-upon preservation period. Because the parties established on the record through a Protocol what they were bound to preserve, B will likely have a harder time prevailing on a motion for sanctions because it failed to object to the preservation scope during the time of drafting the Protocol.¹⁹⁸ The e-discovery rules should include a template similar to the Protocol to assist parties in clearly defining the process of preservation in their dispute and protect themselves from possible sanction motions.

ii. Providing explicit guidelines for litigation holds

The most gaping unresolved issue with the 2006 Rules is the lack of clarity regarding litigation holds. Legal scholars who acknowledge the weaknesses in the 2006 Rules, and attempt to structure a better framework, still end up cautioning that the proposals they put forth are simply guidelines.¹⁹⁹ This attitude reflects an understanding that discovery involves fact-specific issues which cannot be neatly summed up into a set of strict rules. Further, because technology is continually advancing, the Proposed Amendments must be

at A One-Day Comprehensive Ediscovery Workshop, *Proposed Joint Ediscovery Protocol* (Apr. 9, 2011) [hereinafter Berriman Handout II] (on file with author).

¹⁹⁵ Berriman Handout I, *supra* note 186, at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Berriman Lecture, *supra* note 83.

¹⁹⁹ See *Commentary on Legal Holds*, *supra* note 15, at 269 (explicitly stating that the “Guidelines are not intended and should not be used as an all-encompassing ‘checklist’ or set of rules that are followed mechanically.”); CONFERENCE OF CHIEF JUSTICES, *supra* note 138, at vii (CCJ’s “Guidelines should not be treated as model rules that can simply be plugged into a state’s procedural scheme.”); *Zubulake I*, 217 F.R.D. at 322-23 (urging courts to resist the temptation to treat the seven-factor cost-shifting test as a “check-list, resolving the issue in favor of whichever column has the most checks.”).

flexible enough to account for potential changes in technology.²⁰⁰

Despite the fact that no set of proposed amendments is able to encompass all possible factors or unknown technology, there is still room for clarification in the Rules to provide better guidance, particularly with regard to litigation holds. For example, the text of the 2006 Rules does not clearly state when the duty to preserve is triggered, and there is no uniform guideline to which all parties should adhere.²⁰¹ The amendments proposed here establish the much needed clarity by listing a set of triggering situations in which a party should reasonably anticipate litigation. For example, the e-discovery rules should explicitly state under Rule 37(e), “a party reasonably anticipates litigation when: (1) the party has received a letter of intent to begin litigation (i.e., demand letter); (2) the party itself is contemplating initiating litigation; (3) the party itself has taken concrete action to initiate litigation; or (4) a triggering event has occurred that would likely put a reasonable party on notice that litigation may ensue.” Situation four is intended to be a catch-all provision to include any of the numerous triggering events that would put a party on reasonable notice to institute a litigation hold.

This proposed amendment makes clear to parties when the duty to preserve arises under Fed. Rule Civ. P. 37(e) for purposes of safe harbor and sanction concerns; consequently, if none of these situations occur, the party does not have an obligation to preserve ESI. This clarification will reduce the burden on future potential defendants to over-preserve ESI because it firmly establishes when the party’s duty to preserve is triggered, rather than forcing the party to speculate when it should reasonably anticipate litigation.

This proposed amendment may disadvantage potential plaintiffs because it would allow potential defendants to destroy documents that would potentially be relevant to a future litigation until a triggering event occurs. Thus, the proposed amendment would encourage a potential plaintiff to communicate with a potential defendant about its intent to initiate litigation if the former wants to ensure retention of such documents.

This proposed amendment does not assist in a situation in which the relevant documents were created and destroyed well before a potential plaintiff realized he should initiate proceedings against a potential defendant. In this scenario, the potential defendant would be allowed an affirmative defense under the safe-harbor provision because the destruction of those relevant documents was presumably done out of a routine, good-faith business operation since none of the triggering events existed. Otherwise, the onus would be too great on potential defendants to over-preserve and retain documents out of fear that

²⁰⁰ See Hirt, *supra* note 91, at 4 (describing how the Advisory Committee understood the “difficulties in accessing electronic information [because technology will likely change over time]”).

²⁰¹ The only mention of when a litigation hold arises in the 2006 Rules is found in the Advisory Committee’s Note to Rule 37(e).

plaintiffs would bring spoliation claims.²⁰²

Further, the e-discovery rules should explicitly list which categories of ESI would be considered “not reasonably accessible” under Fed. Rule Civ. P. 26(b)(2)(B).²⁰³ This list could be taken directly from the Seventh Circuit’s Standing Order, which included forms of ESI that fall under the inaccessible categories listed in *Zubulake I*.²⁰⁴ Having a distinct list of what constitutes “not reasonably accessible” ESI would provide parties with a guideline for what data a party would *not* be responsible for producing, unless the requesting party showed good cause.

C. Broadening the Safe Harbor Provision

Lastly, Beisner criticized the ineffectiveness of 2006-Amended Rule 37(e), the safe harbor provision, and argued that this Rule fails to insulate a party who, through good faith but not routine operation, destroyed documents.²⁰⁵ In particular, Beisner argued that the language of Rule 37(e) is unclear as to whether the sanctions would apply when a party “fails to suspend a deleting or overwriting program that routinely rids the company’s information system of data that are not reasonably accessible.”²⁰⁶ Beisner proposed to limit sanctions for spoliation “only when a party has intentionally destroyed evidence or has been demonstrably reckless in failing to preserve [ESI].”²⁰⁷

Beisner’s position on sanctions closely reflects the approach articulated by Working Group One in Best Practices.²⁰⁸ In Best Practices, Working Group One proposed that sanctions “should only be considered . . . if [there was a] clear duty to preserve [and] it is found that there was an intentional or reckless failure to preserve and produce relevant” ESI.²⁰⁹ Both standards are strict because they require intentional, demonstrably reckless, or willful behavior on the part of the producing party.²¹⁰

²⁰² See Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 4 (2007) (comments of Lee H. Rosenthal, J., United States District Court for the Southern District of Texas) (“It is hard to overstate the importance and the degree of anxiety generated by electronic discovery in the world today. It is not just in the world of big business; it is in the world of organizations generally, large data producers.”).

²⁰³ FED. R. CIV. P. 26(b)(2)(B).

²⁰⁴ PILOT PROGRAM, *supra* note 119, at 15.

²⁰⁵ Beisner, *supra* note 9, at 590-91; *cf.* FED. R. CIV. P. 37(e) (“Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”).

²⁰⁶ Beisner, *supra* note 9, at 591.

²⁰⁷ *Id.* at 590.

²⁰⁸ *Best Practices*, *supra* note 2, at 39.

²⁰⁹ *Id.*

²¹⁰ Beisner, *supra* note 9, at 590; *Best Practices*, *supra* note 2, at 39.

The problem with such a stringent rule is that it fails to account for a situation in which a duty to preserve existed and the party *unintentionally* destroyed the relevant ESI. Under the Advisory Committee's Note to the 2006 Amendment to Rule 37(e), part of the good faith analysis is determining what a party did to comply with its duty to preserve.²¹¹ Consequently, several courts have interpreted the language in the Advisory Committee's Note as a mandatory duty upon parties to implement proper litigation holds once the duty to preserve has arisen, and if a party fails to do so, sanctions will be imposed regardless of whether destruction of ESI was intentional.²¹² Some courts, however, follow the Beisner and Best Practices approach, applying sanctions only when the requesting party established that the producing party intentionally destroyed the ESI.²¹³

The e-discovery rules should include an additional subsection under Rule 37(e) incorporating a "uniform standard to address when sanction[s] may be imposed for the deletion of ESI after a duty to preserve ESI has attached."²¹⁴ The e-discovery rules, however, should not be as stringent as the positions taken by Beisner and Best Practices but rather should adopt language similar to the CCJ Guidelines. According to the CCJ Guidelines, sanctions should only be imposed when three conditions have been met: (1) "[t]here was a legal obligation to preserve [ESI] at the time it was destroyed;" (2) "[t]he destruction of [ESI] was not the result of the routine, good faith operation of an electronic information system; and (3) "[t]he destroyed [ESI] was subject to production under the applicable state standard for discovery."²¹⁵ This language should be added to Rule 37(e) because it provides "greater guidance to courts and litigants" for when sanctions should and will be imposed.²¹⁶

V. CONCLUSION

The actions taken by the federal courts and the institutional organizations, as well as the numerous criticisms from legal scholars on the effectiveness of the 2006 Rules, signal that change to these rules is necessary in the near future. In particular, the Sedona Working Group's strong position to amend the Rules indicates that such a change is probable because the participants in the Sedona

²¹¹ FED. R. CIV. P. 37 advisory committee's note (2006 Amendment).

²¹² See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529-30 (D. Md. 2010), for a discussion on how some courts do not require bad faith but "merely that there be a showing of fault."

²¹³ See *Jones v. Bremen High Sch.* Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *8 (N.D. Ill. May 25, 2010) (stating that the final factor in determining whether sanctions are appropriate rested on "whether the defendant acted willfully, acted in bad faith, or is merely at fault").

²¹⁴ Allman, *supra* note 22, at 221 (quoting the ABA Special Committee's suggestion at the 2010 Duke Conference).

²¹⁵ CONFERENCE OF CHIEF JUSTICES, *supra* note 164, at 10.

²¹⁶ *Id.* at 11.

Working Group were influential in drafting the 2006 Rules.²¹⁷ Not only is it likely that the Advisory Committee will soon amend the Rules, the Rules need to be amended in order to restore an efficient and fair judicial system. Specifically, the Proposed Amendments must (1) guide the federal courts on how to undergo a proper cost-shifting analysis when determining which party will bear the cost of production, (2) clarify when the duty to preserve is triggered while explicitly informing parties what ESI must be preserved once the duty exists, and (3) adopt the CCJ Guidelines' three-part test before imposing sanctions.

²¹⁷ The Sedona Conference®, Frequently Asked Questions, <https://thesedonaconference.org/faq> (last visited Aug. 14, 2012).

Copyright of Journal of Science & Technology Law is the property of Boston University, School of Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.