

# FOURTH CIVIL JUSTICE REFORM SUMMIT

## CREATING THE JUST, SPEEDY, AND INEXPENSIVE COURTS OF TOMORROW

FEBRUARY 25-26, 2016 | DENVER, COLORADO

### MATERIALS

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## FEDERAL PROJECTS AND RULES UPDATE: EXPERIENCES, EMPIRICAL RESEARCH, AND EXPECTATIONS MATERIALS

- Pilot Project Regarding Case Management Techniques for Complex Civil Cases (Oct. 2011)
- Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Nov. 2011)
- Southern District of New York, In re: Counseled Employment Discrimination Cases Assigned to Mediation by Automatic Referral, Second Amended Standing Administrative Order (M10-468)
- Emery G. Lee III & Jason A. Cantone, Fed. Judicial Ctr., Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (2015)
- 7<sup>th</sup> Circuit Electronic Discovery Committee Principles and Standing Order
- 7<sup>th</sup> Circuit Electronic Discovery Pilot Program Report on Phase Two (without appendices)
- John M. Barkett, The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America (2011)
- Memo from Civil Rules Pilot Project Subcommittee to Standing Committee regarding possible pilot projects (Dec. 12, 2015), *excerpted from* Committee on Rules of Practice and Procedure Agenda Book (Jan. 2016)
- Southern District of New York Local Civil Rule 83.10. Plan for Certain §1983 Cases Against the City of New York (Southern District Only)

**REPORT OF THE  
JUDICIAL IMPROVEMENTS COMMITTEE  
PILOT PROJECT REGARDING CASE MANAGEMENT  
TECHNIQUES FOR COMPLEX CIVIL CASES**

**October 2011**

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## **PREFACE**

Beginning in early 2011, the Judicial Improvements Committee of the Southern District of New York (“JIC”),<sup>1</sup> chaired by Judge Shira A. Scheindlin, began to consider a pilot project to improve the quality of judicial case management. The impetus for this project was the “Duke Conference” sponsored by the Judicial Conference Advisory Committee on Civil Rules. Judge John G. Koeltl, a member of the Advisory Committee, was Chair of the Planning Committee for the Duke Conference. The JIC decided to focus on complex cases and to develop procedures that would be implemented by the judges of the Court for an eighteen-month trial period. To assist in this effort the Chair of the JIC appointed an Advisory Committee of experienced attorneys, representing a broad diversity of the bar to develop proposals. The Advisory Committee, joined by members of the JIC, formed four subcommittees to consider and recommend best practices for the management of complex civil cases. Each of the four subcommittees submitted a report to the JIC which was adopted in substance by the JIC. The JIC then presented its proposal to the Board of Judges. On September 28, the Board of Judges approved the proposal, albeit with some suggestions for implementing the final version of the pilot project. The following report is the pilot project that the Court has adopted. It will take effect on November 1, 2011. The Court is deeply grateful to all of the JIC Members and Advisory Committee members who worked so hard to bring this project to fruition.

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<sup>1</sup> The members of the Judicial Improvements Committee include: Judge Denise Cote, Judge Thomas Griesa, Judge Kenneth Karas, Judge John Koeltl, Judge Victor Marrero, Judge Shira Scheindlin, Judge Sidney Stein, Judge Robert Sweet, Judge James Cott, Judge Theodore Katz, Judge Henry Pitman and Judge Lisa Smith.

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## **SUBCOMMITTEE ROSTERS**

### **Initial Pretrial Case Management Subcommittee**

Co-Chairs:

Amy Schulman, Paul Saunders

Committee Members:

Judge John Koeltl, Judge Sidney Stein, Judge Henry Pitman, John Boston, Marilyn Kunstler, Sara Moss, Andrew Schilling, Penny Shane, Kent Stauffer, Sam Abernethy

Also participating:

Judge Shira Scheindlin

### **Discovery Subcommittee**

Co-Chairs:

Greg Joseph, Debra Raskin

Committee Members:

Judge Thomas Griesa, Judge James Cott, Judge Lisa Smith, Jim Batson, Steven Bennett, Mei Lin Kwan-Gett, Maura Grossman, Jon Pines, Theodore Rogers, Scott Rosenberg, Kent Stauffer, Ariana Tadler

Also participating:

Judge Shira Scheindlin

### **Motions Subcommittee**

Co Chairs:

Susan Saltzstein, James Bernard

Committee Members:

Judge Victor Marrero, Judge Robert Sweet, Gregg Kanter, Tai Park, Guy Struve, Dale Cendali, Susanna Buerger, Melanie Cyganowski, Lorna Schofield

Also participating:

Judge Shira Scheindlin

### **Final Pretrial Conference Subcommittee**

Co-Chairs:

Steve Susman, Mary Kay Vyskocil

Committee Members:

Judge Denise Cote, Judge Kenneth Karas, Judge Theodore Katz, Vernon Broderick, Peter Wang, Guy Struve, Andrew Schilling, Paul Saunders

Also participating:

Judge Shira Scheindlin

## **I. Initial Pretrial Case Management Procedures**

- A. Initial Report of Parties before Pretrial Conference.** No later than 7 days before the initial pretrial conference, the parties shall file an Initial Report that includes the following:
1. The parties' positions on the applicable topics of the "Initial Pretrial Conference Checklist" (*see* Exhibit A, annexed hereto) including whether initial disclosures pursuant to Rule 26(a)(1) should be made in whole or in part and whether there is some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures.
  2. The parties' proposed schedule for fact and expert discovery including:
    - a. Any recommendations for limiting the production of documents, including electronically stored information.
    - b. Any recommendations for limiting depositions, whether by numbers or days of depositions,<sup>2</sup> and by the elimination of expert depositions.
    - c. A protocol and schedule for electronic discovery, including a brief description of any disputes regarding the scope of electronic discovery.
    - d. Whether the parties recommend that expert discovery precede or follow any summary judgment practice.
    - e. Whether the parties agree to allow depositions preceding trial of trial witnesses not already deposed.
  3. Whether the parties propose to engage in settlement discussions or mediation and, if so, when would be the best time to do so. The parties should also identify what discovery should precede such discussions.
- B. Pretrial Conference Procedures.** The Court shall make its best effort to hold an in-person, initial pretrial conference within 45 days of service on any defendant of the complaint. If the Government is a defendant, the Court shall make its best effort to schedule the initial conference within 60 days of service. If a motion to dismiss is pending, the Court may consider postponing the initial pretrial conference until the motion is decided.

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<sup>2</sup> Note: In some complex cases the parties have limited depositions by agreeing on a maximum number of days a party may depose witnesses. The party may use those days to take two half-day or one full-day deposition per witness.

1. Lead counsel for each party must attend.
2. The Court should address the contents of the Initial Report and the applicable topics contained in the “Initial Pretrial Conference Checklist” (*see* attached Exhibit A) with the parties.
3. The parties shall provide the Court with a concise overview of the essential issues in the case and the importance of discovery in resolving those issues so that the Court can make a proportionality assessment and limit the scope of discovery as it deems appropriate. The Court may also wish to consider the possibility of phased or staged discovery.
4. The Court should consider setting a deadline for any amendments to the pleadings and joinder of additional parties.
5. The Court should set a schedule for the completion of fact discovery, the filing of the Joint Preliminary Trial Report, the Case Management Conference (*see* Final Pretrial Conference Procedures), and the exchange of expert reports. If appropriate, the Court should also consider setting dates for the filing of dispositive motions and the filing of the Joint Final Trial Report.
6. If appropriate, the Court should set a trial-ready date or a trial date contingent on the resolution of dispositive motions.
7. If appropriate, the Court should schedule any motion for class certification and associated discovery.
8. The Court should consider setting a maximum limit for any adjournment requests, both as to length and number, whether or not the parties jointly request an adjournment.
9. If the parties agree, the Court should confirm that prior to trial the parties will be permitted to depose any trial witnesses who were not deposed prior to the filing of the Joint Final Pretrial Report. If the parties cannot agree on this procedure, the Court should consider whether to issue such an order.
10. The District Judge shall advise the parties if it will be referring the case to a Magistrate Judge and, if so, for what purposes. If the District Judge makes such a referral for the purpose of pretrial supervision (as opposed to settlement or the disposition of dispositive motions), the District Judge and the Magistrate Judge are encouraged to communicate and coordinate regarding the pretrial progress of the case.

11. The Court shall determine whether and when additional pretrial conferences should be held to address the issues raised in items 4 through 8 above.

## **II. Discovery Procedures**

**A. Stay of Certain Discovery upon Service of Dispositive Motion.** Unless the Court orders otherwise, following service of a motion to dismiss pursuant to Rule 12(b)(6) or 12(c) (if made immediately after the filing of an answer) of the Federal Rules of Civil Procedure, discovery of documents, electronically stored information and tangible things may proceed pursuant to Rule 34 but all other discovery with respect to any claim that is the subject of the motion is stayed pending the Court's decision on the motion.

**B. Discovery Disputes Not Involving Assertion of Privilege or Work Product.** Unless the Court determines otherwise, any discovery dispute — other than a dispute arising in the course of a deposition or involving invocation of a privilege or work product protection — will be submitted to the Court by letter as follows:

1. The movant will submit to the Court, in a manner permitted by the Judge's Individual Practices, and to opposing counsel by hand delivery, fax or email, a letter of not more than 3 single-spaced pages setting forth its position and certifying that the movant has in good faith conferred or attempted to confer with the party or person failing to make discovery in an effort to obtain it without court action. All disputes that the movant intends to raise at that time must be submitted in a *single* letter.
2. The responding party or person may submit a responsive letter of no more than 3 single-spaced pages within 3 business days with a copy to opposing counsel.
3. If the Court permits a reply, it should not exceed 2 single-spaced pages and should be submitted within 2 business days of the responding letter.
4. The Court will make its best effort to render a decision no later than fourteen days from its receipt of the final letter. The Court may resolve the dispute prior to its receipt of the responsive letter if it has otherwise provided the person or party an opportunity to be heard.

**C. *In Camera* Sampling of Assertions of Privilege.** A party or person who raises a question as to the assertion of a privilege or work product protection with respect to documents (including electronically stored information) may request a ruling from the Court as follows:

1. The requesting party or person will submit to the Court, in a manner permitted by the Judge's Individual Practices, and to opposing counsel by hand delivery, fax or email, a letter of not more than 3 single-spaced pages (a) setting forth its position, (b) certifying that it has in good faith conferred with the opposing party or person in an effort to resolve the issues without court action, and (c) indicating whether there is consent to *in camera* inspection.
2. If the requestor is the party or person invoking privilege or work product protection, it may attach to its letter to the Court no more than 5 representative documents that are the subject of its request. The documents are to be attached only to the copy of the letter directed to the Court, for *in camera* review, and not to the copy of the letter directed to the opposing party or person.
3. Any opposing party or person may submit a responsive letter of no more than 3 single-spaced pages within 3 business days with a copy to opposing counsel.
4. If the Court permits a reply, it should not exceed 2 single-spaced pages and should be submitted within 2 business days of the responding letter.
5. Unless the Court requires a more extensive submission, within fourteen days from its receipt of the responsive letter or, if later, its receipt of the documents, the Court will make its best effort to determine whether the submitted documents must be produced. The Court may issue its decision prior to its receipt of the responsive letter if it has otherwise provided any opposing party or person an opportunity to be heard.

**D. Documents Presumptively Not to Be Logged on Privilege Log.** The following documents presumptively need not be included on a privilege log:

1. Communications exclusively between a party and its trial counsel.
2. Work product created by trial counsel, or by an agent of trial counsel other than a party, after commencement of the action.<sup>3</sup>
3. Internal communications within (a) a law firm, (b) a legal assistance organization, (c) a governmental law office or (d) a legal department of a corporation or of another organization.
4. In a patent infringement action, documents authored by trial counsel for an alleged infringer even if the infringer is relying on the opinion of other counsel to defend a claim of willful infringement.<sup>4</sup>

**E. Privilege Log Descriptions of Email Threads.** For purposes of creation of a privilege log, a party need include only one entry on the log to identify withheld emails that constitute an uninterrupted dialogue between or among individuals; provided, however, that disclosure must be made that the e-mails are part of an uninterrupted dialogue. Moreover, the beginning and ending dates and times (as noted on the emails) of the dialogue and the number of emails within the dialogue must be disclosed, in addition to other requisite privilege log disclosure, including the names of all of the recipients of the communications.

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See D. Conn. Local Rule 26(e) (“This rule requires preparation of a privilege log with respect to all documents \*\*\* except the following: \*\*\* the work product material created after commencement of the action”). D. Colo. Local Rule 26.1(g)(3)(c), S.D. Fla. Local Rules Gen Rule 26.1(g)(3)(C), E.D. Okla. Local Rule 26.2(b), and N.D. Okla. Local Rule 26.2(b) are substantively identical D. Conn. Local Rule 26(e). Note that this proposal is more limited than these local rules because it does not exempt from logging documents created by the client at counsel’s suggestion, to avoid abuse.

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See *In re Seagate Tech.*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (reliance on opinion of counsel does not waive the privilege or work product protection of trial counsel on the same subject matter); N.D. Cal. Local Patent Rule 3-7(c) (“Serve a privilege log identifying any other documents, except those authored by counsel acting solely as trial counsel, relating to the subject matter of the advice which the party is withholding on the grounds of attorney-client privilege or work product protection.”). D.N.J. Local Patent Rule 3.8(c), E.D. Mo. Local Patent Rule 3-9(c), W.D. Wash. Local Patent Rule 140, S.D. Tex. Patent Rule 3-8, E.D. Tex. L. Patent Rule 3-7(b), D. Idaho L. Patent Rule 3.8, S.D. Cal. Local Patent Rule 3.8(b) and other local patent rules are substantively identical to N.D. Cal. Local Patent Rule 3-7(c).



- F. Requests for Admission.** Unless otherwise stipulated or ordered by the Court, a party may serve on any other party no more than 50 requests for admission pursuant to Federal Rule of Civil Procedure 36(a)(1)(A); no such request for admission may exceed 25 words in length; except that no limit is imposed on requests for admission made pursuant to Rule 36(a)(1)(B) relating to the genuineness of any described documents.
- G. Subpoenaed Material.** Unless the Court orders otherwise, whenever documents, electronically stored information, or tangible things are obtained in response to a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure, the party responsible for issuing and serving the subpoena shall promptly produce them to, or make them available for inspection and copying by, all parties to the action.
- H. Joint Electronic Discovery Submission.** A joint electronic discovery submission and proposed Order is annexed as Exhibit B. Among other things, it includes a checklist of electronic discovery issues to be addressed at the Rule 26(f) conference.
- I. Revised Order of Reference to Magistrate Judge.** A revised form of Order of Reference to Magistrate Judge is annexed as Exhibit C. Among other things, it provides that in the case of urgent discovery disputes — *e.g.*, in mid-deposition — litigants may approach the assigned Magistrate Judge when the District Judge is unavailable.

## **Motion Procedures**

### **A. Pre-Motion Conferences.**

1. Pre-motion conferences should be held for all motions **except** motions for reconsideration, motions for a new trial, and motions *in limine*. For discovery disputes, see the procedures set forth at Part II. B, *supra*.
2. A party intending to file a motion governed by the preceding paragraph (other than Rule 12(b) motions) must request by letter no longer than 3 single-spaced pages, a pre-motion conference in advance of filing any such motion. The moving party's letter shall be submitted at least 7 business days prior to a proposed or scheduled conference date, or at any time if no such date has been proposed or scheduled. Within 3 business days of receipt of the letter, each opposing party may submit a written response of no more than 3 single-spaced pages in length. No further letters will be accepted by the Court. The Court will, as soon as possible thereafter, hold the pre-motion conference.
3. The filing of a pre-motion letter shall automatically stay the time by which the motion must be made. In the event the law imposes a filing deadline, the requirement of a pre-motion letter and conference will not apply, unless the Court extends the deadline for filing a motion.
4. Motions pursuant to Rule 12(b) are subject to a different procedure. The Court may consider one of the following options: (a) Not requiring a pre-motion conference; (b) requiring the parties to exchange letters (with or without a copy to the court) **prior to** filing a motion to dismiss, addressing any deficiencies in the complaint, in the hope that such deficiencies might be cured by the filing of an amended complaint; or (c) holding a conference **after** the motion is made at which the plaintiff will be given an opportunity to either amend the complaint or oppose the motion. If plaintiff does not choose to amend, the plaintiff shall be given no further opportunity to amend the complaint to address the issues raised by the pending motion. In the event there is no amendment, the Court will determine whether any discovery shall proceed during the pendency of the motion. The time for opposing the Rule 12(b) motion will be stayed until the conference, at which time the Court will schedule the further briefing of the motion.

- B. Page Length for Motions.** No memorandum of law in support of or in opposition to a motion may exceed 25 pages (double-spaced). Any memorandum in excess of 10 double-spaced pages shall also include a table of contents and table of authorities. Reply memoranda may not exceed 10 pages.

Any party may request additional pages by seeking leave of the Court after having sought the consent of the adverse party or parties.

- C. Oral Argument.** Oral arguments should be held where practicable and in the Court's view useful, on all substantive motions, unless the parties agree otherwise. Five calendar days in advance of oral argument, the Court should consider notifying the parties of those issues of particular concern.
- D. 56.1 Statements (Statement of Material Fact).** At the request of the parties, and if approved by the Court, no Local Rule 56.1 Statement shall be filed in connection with motions made pursuant to Rule 56 of the Federal Rules of Civil Procedure. If the Court requires that the parties file Rule 56.1 statements, such statements shall not exceed 20 pages per party.

#### **IV. Final Pretrial Conference Procedures**

**A. Joint Preliminary Trial Report on Close of Fact Discovery.** Within 14 days after the completion of fact discovery, the parties shall file a Joint Preliminary Trial Report, unless the Court concludes that such a report is not necessary in a particular case, which shall include the following:

1. The full caption of the action.
2. The name, address, telephone number, fax number and email address of each principal member of the trial team, and an identification of each party's lead trial counsel.
3. A brief statement identifying the basis for subject matter jurisdiction, and, if that jurisdiction is disputed, the reasons therefore.
4. A list of each claim and defense that will be tried and a list of any claims and defenses asserted in the pleadings that are not to be tried.
5. An identification of the governing law for each claim and defense that will be tried and a brief description of any dispute regarding choice of law.
6. The number of days currently estimated for trial and whether the case is to be tried with or without a jury.
7. A statement indicating whether all parties have consented to trial by a magistrate judge, without identifying which parties do or do not consent.
8. A brief description of any summary judgment motion a party intends to file, including a statement identifying whether expert testimony will be offered in support of the motion.

**B. Case Management Conference Procedure.** Within 14 days of the filing of the Joint Preliminary Trial Report, the Court should make its best effort to hold a Case Management Conference to discuss the contents of the Joint Preliminary Trial Report and to finalize the schedule for the remainder of the litigation.

1. Lead trial counsel for each party must attend.
2. The parties should be prepared to discuss the substance of any summary judgment motion any party intends to file. During the

conference, the Court will determine whether any existing schedule should be modified, including whether the period for summary judgment motions will precede or follow expert disclosures and discovery.

3. If it has not already done so, the Court should set a schedule for expert disclosures and discovery, the briefing of any summary judgment motions, the briefing of any *Daubert* motions, the date for the filing of the Joint Final Trial Report and a firm trial date.
  - a. In the event summary judgment motions will be filed, the Court should consider providing the parties with its best estimate of the date by which it expects to render a decision on the motions and should advise the parties whether there will be a further opportunity for settlement discussions or mediation following the decision. The date that the Court selects during the Case Management Conference for the filing of the Joint Final Trial Report shall be no earlier than 28 days following the Court's decision on the summary judgment motions. Similarly, the firm trial date set by the Court at the Case Management Conference shall be no earlier than 8 weeks following the Court's decision on summary judgment motions.
4. The Court shall encourage (and, in appropriate cases, may order) the parties to participate in settlement discussions or mediation before a forum and by a date chosen by the Court based on its consultations with the parties during the conference. Such settlement discussions or mediation efforts shall not stay the schedule for the completion of the litigation.

**C. Joint Final Trial Report.** On the date set at the Case Management Conference, but in any event not later than 28 days preceding the date set for the commencement of the trial, the parties shall file a Joint Final Trial Report, unless the Court concludes that such a report is not necessary in a particular case, which shall include the following:

1. In the event that there has been a ruling on summary judgment motions, a list of any claims and defenses from the Joint Preliminary Trial Report that the parties had intended to try but that they will no longer try.
2. A list by each party of its trial witnesses that it, in good faith, presently expects to present. The list shall indicate whether the

witness will testify in person or by deposition, and the general subject matter areas of the witness's testimony. In the event that any such witness has not been deposed, and provided the Court has previously approved (*see* Initial Pretrial Case Management Procedures at 2 ¶ 9), the witness will be made available for deposition before the commencement of trial. The parties will also provide an agreement as to how and when they will give notice to each other of the order of their trial witnesses.

3. A list by each party of exhibits that it, in good faith, presently expects to offer in its case in chief, together with any specific objections thereto other than on grounds of relevancy. Any objection not included on this list will be deemed waived, other than for good cause shown. Prior to filing the Joint Final Trial Report the parties will meet and confer in order to eliminate or narrow disputes about the admissibility of exhibits, to agree upon exhibits that can be utilized during opening statements at the trial, and to facilitate the filing of any *in limine* motions.
4. In the case of bench trials, the parties' recommendation on whether the direct testimony of fact and expert witnesses who testify in person at trial will be submitted by affidavit to the Court in advance of trial.
5. The parties' recommendation on the time limits for the length of the trial, and, if appropriate, the division of time between or among the parties and the protocol for tracking the time.
6. All stipulations or statements of fact or law on which the parties have agreed and which will be offered at trial shall be appended to the Joint Final Trial Report as exhibits.
7. An agreed schedule by which the parties will exchange deposition designations and counter-designations, notify each other of objections to such designations, consult with each other regarding those objections, and notify the Court of any remaining disputes. In any event, the parties must notify the Court of any remaining dispute no later than 48 hours before the deposition testimony is offered at trial.
8. An agreed schedule by which the parties will exchange all demonstratives not otherwise listed in Paragraph C.3 that the parties intend to use at trial during opening statements or otherwise, notify each other of any objections thereto, consult

with each other regarding those objections and notify the Court of any remaining disputes.

9. The parties' recommendation on the number of jurors and any agreement on whether a verdict can be rendered by fewer than all jurors.
10. A brief report on whether the outcome of any settlement discussions or mediation ordered at the Case Management Conference impacts any of the claims or issues remaining to be tried.
11. All other matters that the Court may have ordered at the Case Management Conference or that the parties believe are important to the efficient conduct of the trial, such as bifurcation or sequencing of issues to be tried, or use of interim summations, etc.

**D. Filings to Accompany Joint Final Trial Report.** The Joint Final Trial Report shall be accompanied by the following documents:

1. In all bench trials, unless directed otherwise at the Case Management Conference, each party shall submit a trial memorandum.
2. Any motions *in limine*. An *in limine* motion does not include a motion for summary judgment or a *Daubert* motion, which must be filed pursuant to the schedule fixed under Paragraph B.3. Opposition to *in limine* motions must be filed within 7 days; no reply will be allowed absent leave of court.
3. Any proposed juror questionnaire.
4. Any requested questions to be asked by the Court during the voir dire.
5. A joint description of the case to be provided to the venire during the voir dire.
6. Any proposed substantive instructions on the issues to be tried to be given by the Court to the jury prior to opening statements.

**E. Final Pretrial Conference Procedures.** Subsequent to the filing of the Joint Final Trial Report, and in no event less than 7 days before the commencement of trial, the Court shall hold a Final Pretrial Conference which must be attended

by lead trial counsel for each party. At that Conference the Court shall take the following actions:

1. Determine the length of the trial and the division of time between or among the parties.
2. Determine the method by which the jury will be selected, including whether a juror questionnaire will be used and its contents.
3. Rule on any disputes among the parties identified in the Joint Final Trial Report.
4. Rule, if possible, on any motions *in limine* that remain outstanding.
5. Advise the parties of any substantive instructions it will give to the jury prior to opening statements.
6. Notify counsel of a schedule for submission of proposed final jury instructions.



## **EXHIBIT A**

### **INITIAL PRETRIAL CONFERENCE CHECKLIST**

Proportionality assessment of “the needs of the case, 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” (see Rule 26(b)(2)(C) (iii))

1. Possible limitations on document preservation (including electronically stored information)
2. Appropriateness of initial disclosures pursuant to Rule 26(a)(1)
  - a. Is there some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures?
3. Possibility of a stay or limitation of discovery pending a dispositive motion
4. Possibility of communication/coordination between the Magistrate Judge and District Judge with respect to pretrial matters
5. Preliminary issues that are likely to arise that will require court intervention
6. Discovery issues that are envisioned and how discovery disputes will be resolved
7. Proposed discovery including:
  - a. limitations on types of discovery beyond those in the Rules (i.e., waiver of interrogatories, requests for admission, expert depositions)
  - b. limitations on scope of discovery
  - c. limitations on timing and sequence of discovery
  - d. limitations on restoration of electronically-stored information
  - e. agreement to allow depositions of trial witnesses named if not already deposed
  - f. preservation depositions

- g. foreign discovery and issues anticipated
- 8. Schedule (as appropriate and possibly excluding public agency cases) including:
  - a. date(s) for completion of discovery
  - b. date(s) for dispositive motions
  - c. date(s) for exchange for expert reports
  - d. date(s) for exchange of witness lists
  - e. date (s) for Joint Preliminary Trial Reports and Final Joint Trial Reports
  - f. date for Case Management Conference
- 9. Issues to be tried
  - a. ways in which issues can be narrowed to make trial more meaningful and efficient
  - b. whether there are certain issues as to which a mini-trial would be helpful
- 10. Bifurcation
- 11. Class certification issues
- 12. ADR/mediation
- 13. Possibility of consent to trial before a Magistrate Judge
- 14. Pleadings, including sufficiency and amendments, and the likelihood and timing of amendments
- 15. Joinder of additional parties, and the likelihood and timing of joinder of additional parties
- 16. Expert witnesses (including necessity or waiver of expert depositions)
- 17. Damages (computation issues and timing of damages discovery)
- 18. Final pretrial order (including possibility of waiver of order)

19. Possible trial-ready date
20. Court logistics and mechanics (e.g., communication with the court, streamlined motion practice, pre-motion conferences, etc.)
21. The need for additional meet and confer sessions, to continue to discuss issues raised at the initial conference among counsel.

**EXHIBIT B**

**UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK**

_____	)	
	)	
Plaintiff(s)	)	
	)	
-against-	)	
	)	
_____	)	
	)	
Defendant(s)	)	
	)	

No.: \_\_\_\_ CV \_\_\_\_  
**Joint Electronic Discovery Submission No.**  
**\_\_\_\_ and [Proposed] Order**

One or more of the parties to this litigation have indicated that they believe that relevant information may exist or be stored in electronic format, and that this content is potentially responsive to current or anticipated discovery requests. This Joint Submission and [Proposed] Order (and any subsequent ones) shall be the governing document(s) by which the parties and the Court manage the electronic discovery process in this action. The parties and the Court recognize that this Joint Electronic Discovery Submission No. \_\_\_\_ and [Proposed] Order is based on facts and circumstances as they are currently known to each party, that the electronic discovery process is iterative, and that additions and modifications to this Submission may become necessary as more information becomes known to the parties.

- (1)                    **Brief Joint Statement Describing the Action, [e.g., “Putative securities class action pertaining to the restatement of earnings for the period May 1, 2009 to May 30, 2009”]:**

(a) **Estimated amount of Plaintiff(s)' Claims:**

- ☐ Less than \$100,000
- ☐ Between \$100,000 and \$999,999
- ☐ Between \$1,000,000 and \$49,999,999
- ☐ More than \$50,000,000
- ☐ Equitable Relief
- ☐ Other (if so, specify) \_\_\_\_\_

(b) **Estimated amount of Defendant(s)' Counterclaim/Cross-Claims:**

- ☐ Less than \$100,000
- ☐ Between \$100,000 and \$999,999
- ☐ Between \$1,000,000 and \$49,999,999
- ☐ More than \$50,000,000
- ☐ Equitable Relief
- ☐ Other (if so, specify) \_\_\_\_\_

- (2) **Competence.** Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf.
- (3) **Meet and Confer.** Pursuant to Fed. R. Civ. P. 26(f), counsel are required to meet and confer regarding certain matters relating to electronic discovery before the Initial Pretrial Conference (the Rule 16 Conference). Counsel hereby certify that they have met and conferred to discuss these issues.

Date(s) of parties' meet-and-confer conference(s): \_\_\_\_\_

- (4) **Unresolved Issues:** After the meet-and-confer conference(s) taking place on the aforementioned date(s), the following issues remain outstanding and/or require court intervention: ☐ Preservation; ☐ Search and Review; ☐ Source(s) of Production; ☐ Form(s) of Production; ☐ Identification or Logging of Privileged Material; ☐ Inadvertent Production of Privileged Material; ☐ Cost Allocation; and/or ☐ Other (if so, specify) \_\_\_\_\_. To the extent specific details are needed about one or more issues in dispute, describe briefly below.

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As set forth below, to date, the parties have addressed the following issues:

(5) **Preservation.**

- (a) The parties have discussed the obligation to preserve potentially relevant electronically stored information and agree to the following scope and methods for preservation, including but not limited to: retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.

Plaintiff(s):

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Defendant(s):

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- (b) State the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of “litigation hold” communications.

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- (c) The parties anticipate the need for judicial intervention regarding the following issues concerning the duty to preserve, the scope, or the method(s) of preserving electronically stored information:

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**(6) Search and Review**

- (a) The parties have discussed methodologies or protocols for the search and review of electronically stored information, as well as the disclosure of techniques to be used. Some of the approaches that may be considered include: the use and exchange of keyword search lists, “hit reports,” and/or responsiveness rates; concept search; machine learning, or other advanced analytical tools; limitations on the fields or file types to be searched; date restrictions; limitations on whether back-up, archival, legacy, or deleted electronically stored information will be searched; testing; sampling; etc. To the extent the parties have reached agreement as to search and review methods, provide details below.

Plaintiff(s):

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Defendant(s):

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- (b) **The parties anticipate the need for judicial intervention regarding the following issues concerning the search and review of electronically stored information:**

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**(7) Production**

- (a) **Source(s) of Electronically Stored Information. The parties anticipate that discovery may occur from one or more of the following potential source(s) of electronically stored information [e.g., email, word processing documents, spreadsheets, presentations, databases, instant messages, web sites, blogs, social media, ephemeral data, etc.]:**

Plaintiff(s):

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Defendant(s):

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**(b) Limitations on Production. The parties have discussed factors relating to the scope of production, including but not limited to: (i) number of custodians; (ii) identity of custodians; (iii) date ranges for which potentially relevant data will be drawn; (iv) locations of data; (v) timing of productions (including phased discovery or rolling productions); and (vi) electronically stored information in the custody or control of non-parties. To the extent the parties have reached agreements related to any of these factors, describe below:**

Plaintiff(s):

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Defendant(s):

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**(c) Form(s) of Production:**

- (1) The parties have reached the following agreements regarding the form(s) of production:**

Plaintiff(s):

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Defendant(s):

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- (2) Please specify any exceptions to the form(s) of production indicated above (e.g., word processing documents in TIFF with load files, but spreadsheets in native form):**

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- (3) The parties anticipate the need for judicial intervention regarding the following issues concerning the form(s) of production:**

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**(d) Privileged Material.**

- (1) Identification. The parties have agreed to the following method(s) for the identification (including the logging, if any, or alternatively, the disclosure of the number of documents withheld), and the redaction of privileged documents:**

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- (2) Inadvertent Production / Claw-Back Agreements. Pursuant to Fed R. Civ. Proc. 26(b)(5) and F.R.E. 502(e), the parties have agreed to the following concerning the inadvertent production of privileged documents (e.g. “quick-peek” agreements, on-site examinations, non-waiver agreements or orders pursuant to F.R.E. 502(d), etc.):**

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- (3) The parties have discussed a 502(d) Order. Yes \_\_; No \_\_**

**The provisions of any such proposed Order shall be set forth in a separate document and presented to the Court for its consideration.**

- (e) **Cost of Production. The parties have analyzed their client's data repositories and have estimated the costs associated with the production of electronically stored information. The factors and components underlying these costs are estimated as follows:**

**(1) Costs:**

Plaintiff(s):

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Defendant(s):

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- (2) Cost Allocation. The parties have considered cost-shifting or cost-sharing and have reached the following agreements, if any:**

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**(3) Cost Savings.** The parties have considered cost-saving measures, such as the use of a common electronic discovery vendor or a shared document repository, and have reached the following agreements, if any:

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**(f) The parties anticipate the need for judicial intervention regarding the following issues concerning the production of electronically stored information:**

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**(8) Other Issues:**

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The next scheduled conference with the Court for purposes of updating the Court on electronic discovery issues has been scheduled for \_\_\_\_\_. Additional conferences, or written status reports, shall be set every 3 to 4 weeks, as determined by the parties and the Court, based on the complexity of the issues at hand. An agenda should be submitted to the Court four (4) days before such conference indicating the issues to be raised by the parties. The parties may jointly seek to adjourn the conference with the Court by telephone call 48 hours in advance of a scheduled conference, if the parties agree that there are no issues requiring Court intervention.

\_\_\_ Check this box if the parties believe that there exist a sufficient number of e-discovery issues, or the factors at issue are sufficiently complex, that such issues may be most efficiently adjudicated before a Magistrate Judge.

Additional Instructions or Orders, if any:

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Dated: \_\_\_\_\_, 20\_\_

SO ORDERED:

\_\_\_\_\_  
United States District Judge

## EXHIBIT C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
Plaintiff, :  
 :  
 : ORDER OF REFERENCE  
 v. : TO A MAGISTRATE  
 : JUDGE  
 :  
 Defendant, :  
 : ( ) ( )  
 :  
----- X

The above entitled action is referred to the designated Magistrate Judge for the following

purpose(s):

- |                                                                                                                                                                                                   |                                                                                                                                                   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> General Pretrial (includes scheduling, discovery, non –dispositive pretrial motions, and settlement)                                                                     | <input type="checkbox"/> Consent under 28 U.S.C. §636(c) for all purposes (including trial)                                                       |
| <input type="checkbox"/> Specific Non-Dispositive Motion/Dispute*<br>_____<br>_____<br>_____                                                                                                      | <input type="checkbox"/> Consent under 28 U.S.C. §636(c) for limited purpose (e.g., dispositive motion, preliminary injunction)<br>Purpose: _____ |
| <input type="checkbox"/> If referral is for discovery disputes <b>for a specific period</b> when the District Judge is unavailable, the time period of the referral:                              | <input type="checkbox"/> Habeas Corpus                                                                                                            |
| <input type="checkbox"/> <b><u>Referral for discovery disputes requiring prompt attention at any time when the District Judge is not immediately available</u></b> (e.g. on trial or out of town) | <input type="checkbox"/> Social Security                                                                                                          |
| <input type="checkbox"/> Settlement*                                                                                                                                                              | <input type="checkbox"/> Dispositive Motion (i.e., motion requiring a Report and Recommendation)<br>Particular Motion: _____<br>_____             |
| <input type="checkbox"/> Inquest After Default/Damages Hearing                                                                                                                                    | <input type="checkbox"/> All such motions: _____                                                                                                  |

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\*Do not check if already referred for general pretrial.

Dated \_\_\_\_\_

SO ORDERED:

\_\_\_\_\_  
United States District Judge



**PILOT PROJECT REGARDING  
INITIAL DISCOVERY PROTOCOLS  
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION**

**November 2011**

The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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## **INTRODUCTION**

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to “encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.” Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific “pattern discovery” as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, “regularly litigated and [presenting] recurring issues,”<sup>1</sup> would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison<sup>2</sup> (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel<sup>3</sup> (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

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<sup>1</sup> Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

<sup>2</sup> Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for “categories of cases which routinely appear in the federal courts” and suggested the appointment of a task force to bring the idea to fruition.

<sup>3</sup> Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced 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*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use as a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.<sup>4</sup> If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, [elee@fjc.gov](mailto:elee@fjc.gov), so that their cases may be included in the evaluation.

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<sup>4</sup> Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

## **EMPLOYMENT PROTOCOLS COMMITTEE ROSTER**

Fred Alvarez  
*Wilson Sonsini Goodrich & Rosati*  
*Palo Alto, CA*

Kathryn Burkett Dickson  
*Dickson Levy Vinick Burrell Hyams LLP*  
*Oakland, CA*

Herbert Eisenberg  
*Eisenberg & Schnell LLP*  
*New York, NY*

Joseph Garrison  
*Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, PC*  
*New Haven, CT*

Margaret Harris  
*Butler & Harris*  
*Houston, TX*

John Jansonius  
*Akin Gump Strauss Hauer & Feld LLP*  
*Dallas, TX*

Chris Kitchel  
*Stoel Rives LLP*  
*Portland, OR*

Jonathan Margolis  
*Rodgers, Powers & Schwartz, LLP*  
*Boston, MA*

Ellen Messing  
*Messing, Rudavsky & Weliky, PC*  
*Boston, MA*

Bettina (Betsy) Plevan  
*Proskauer Rose LLP*  
*New York, NY*

Felix Springer  
*Day Pitney LLP*  
*Hartford, CT*

# **INITIAL DISCOVERY PROTOCOLS** **FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION**

## **PART 1: INTRODUCTION AND DEFINITIONS.**

### **(1) Statement of purpose.**

- a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.
- b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
  - i. Class actions;
  - ii. Cases in which the allegations involve only the following:
    - 1. Discrimination in hiring;
    - 2. Harassment/hostile work environment;
    - 3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
    - 4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
    - 5. Violations of the Family Medical Leave Act (FMLA);
    - 6. Violations of the Employee Retirement Income Security Act (ERISA).

If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

- c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

- d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

**(2) Definitions.** The following definitions apply to cases proceeding under the Initial Discovery Protocols.

- a. **Concerning.** The term “concerning” means referring to, describing, evidencing, or constituting.
- b. **Document.** The terms “document” and “documents” are defined to be synonymous in meaning and equal in scope to the terms “documents” and “electronically stored information” as used in F.R.C.P. 34(a).
- c. **Identify (Documents).** When referring to documents, to “identify” means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.
- d. **Identify (Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

**(3) Instructions.**

- a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.
- b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

- c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.
- d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.
- e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

## **PART 2: PRODUCTION BY PLAINTIFF.**

### **(1) Timing.**

- a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

### **(2) Documents that Plaintiff must produce to Defendant.**

- a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.
- b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.
- c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.
- d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.
- e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.
- f. The plaintiff's current resume(s).
- g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.
- h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income



and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

- i. Documents concerning the termination of any subsequent employment.
- j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

**(3) Information that Plaintiff must produce to Defendant.**

- a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- b. Describe the categories of damages the plaintiff claims.
- c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

**PART 3: PRODUCTION BY DEFENDANT.**

**(1) Timing.**

- a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

**(2) Documents that Defendant must produce to Plaintiff.**

- a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
  - i. The plaintiff and the defendant;
  - ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

- b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.
- c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.
- d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.
- e. The plaintiff's performance evaluations and formal discipline.
- f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.
- g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
  - i. Discipline;
  - ii. Termination of employment;
  - iii. Promotion;
  - iv. Discrimination;
  - v. Performance reviews or evaluations;
  - vi. Misconduct;
  - vii. Retaliation; and
  - viii. Nature of the employment relationship.
- h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.
- i. Job description(s) for the position(s) that the plaintiff held.
- j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.
- k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.
- l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

- m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.
- n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

**(3) Information that Defendant must produce to Plaintiff.**

- a. Identify the plaintiff's supervisor(s) and/or manager(s).
- b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.
- c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

**UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
\_\_\_\_\_ DIVISION**

	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
	)	Judge _____
	)	
Defendant.	)	

**STANDING ORDER FOR CERTAIN EMPLOYMENT CASES**

This Court is participating in a Pilot Program for **INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION**, initiated by the Advisory Committee on Federal Rules of Civil Procedure (see “Discovery protocol for employment cases,” under “Educational programs and materials,” at [www.fjc.gov](http://www.fjc.gov)).

The Initial Discovery Protocols will apply to all employment cases pending in this court that challenge one or more actions alleged to be adverse, except:

- i. Class actions;
- ii. Cases in which the allegations involve only the following:
  - 1. Discrimination in hiring;
  - 2. Harassment/hostile work environment;
  - 3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
  - 4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
  - 5. Violations of the Family Medical Leave Act (FMLA);

6. Violations of the Employee Retirement Income Security Act (ERISA).

Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 30 days following the defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial Discovery Protocols for the relevant time period. This obligation supersedes the parties' obligations to provide initial disclosures pursuant to F.R.C.P. 26(a)(1). The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the F.R.C.P. 26(f) discovery plan.

The parties' responses to the Initial Discovery Protocols shall comply with the F.R.C.P. obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in F.R.C.P. 26(b)(2)(B).

ENTER:

Dated: \_\_\_\_\_

\_\_\_\_\_

[Name]

United States [District/Magistrate] Judge

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action are designed to achieve the goal of more efficient and targeted discovery. If a protective order will be entered in a case to which the Initial Discovery Protocols applies, immediate entry of the order will allow the parties to commence discovery without delay. In furtherance of that goal, the Employment Protocols Committee offers the following Model Protective Order. Recognizing that the decision to enter a protective order, as well as the parameters of any such order, rests within the Court's sound discretion and is subject to local practice, the following provisions are options from which the Court might select.

### **MODEL PROTECTIVE ORDER**

It is hereby ordered by the Court that the following restrictions and procedures shall apply to certain information, documents and excerpts from documents supplied by the parties to each other in response to discovery requests:

1. ☐ Counsel for any party may designate any document, information contained in a document, information revealed in an interrogatory response or information revealed during a deposition as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL." "Confidential" information or documents may be referred to collectively as "confidential information."
2. ☐ Unless ordered by the Court, or otherwise provided for herein, the Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the above-captioned action.
3. ☐ In the event a party challenges another party's confidential designation, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may thereafter seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and Court rules.
4. ☐ Information or documents designated as "confidential" shall not be disclosed to any person, except:
  - a. ☐ The requesting party and counsel, including in-house counsel;

- b. ☐ Employees of such counsel assigned to and necessary to assist in the litigation;
  - c. ☐ Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel;
  - d. ☐ Any person from whom testimony is taken or is to be taken in these actions, except that such a person may only be shown that Confidential Information during and in preparation for his/her testimony and may not retain the Confidential Information; and
  - e. ☐ The Court (including any clerk, stenographer, or other person having access to any Confidential Information by virtue of his or her position with the Court) or the jury at trial or as exhibits to motions.
5. ☐ Prior to disclosing or displaying the Confidential Information to any person, counsel shall:
- a. ☐ inform the person of the confidential nature of the information or documents; and
  - b. ☐ inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
6. ☐ The Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this Order in the form attached hereto as Exhibit A. In the event such person refuses to sign an agreement in the form attached as Exhibit A, the party desiring to disclose the Confidential Information may seek appropriate relief from the Court.
7. ☐ The disclosure of a document or information without designating it as “confidential” shall not constitute a waiver of the right to designate such document or information as Confidential Information provided that the material is designated pursuant to the procedures set forth herein no later than that latter of fourteen (14) days after the close of discovery or fourteen (14) days after the document or information’s production. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.

8. ☐ All information subject to confidential treatment in accordance with the terms of this Stipulation and Order that is filed with the Court, and any pleadings, motions or other papers filed with the Court disclosing any Confidential Information, shall be filed under seal to the extent permitted by law (including without limitation any applicable rules of court) and kept under seal until further order of the Court. To the extent the Court requires any further act by the parties as a precondition to the filing of documents under seal (beyond the submission of this Stipulation and Order Regarding Confidential Information), it shall be the obligation of the producing party of the documents to be filed with the Court to satisfy any such precondition. Where possible, only confidential portions of filings with the Court shall be filed under seal.
9. ☐ At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than thirty (30) days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain confidential.

The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to confidential information; or to object to the production of documents or information; or to apply to the Court for an order compelling production of documents or information; or for modification of this Order. This Order may be enforced by either party and any violation may result in the imposition of sanctions by the Court.



**EXHIBIT A**

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled \_\_\_\_\_ have been designated as confidential. I have been informed that any such documents or information labeled “CONFIDENTIAL – PRODUCED PURSUANT TO PROTECTIVE ORDER” are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

\_\_\_\_\_ DATED:

Signed in the presence of:

\_\_\_\_\_

(Attorney)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re:   Counseled Employment Discrimination Cases  
         Assigned to Mediation by Automatic Referral  
-----X

Second Amended Standing  
Administrative Order  
M10-468

LORETTA A. PRESKA, Chief United States District Judge:

This Court's Standing Administrative Order of May 24, 2015, requires all counseled employment discrimination cases, except cases brought under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq., to be automatically referred to the Southern District of New York's Alternative Dispute Resolution program of mediation upon the filing of an Answer. Effective November 2, 2015, unless otherwise ordered by the judge in the particular case, within 30 days of the filing of an Answer in such cases, the parties must produce the information specified in the Pilot Discovery Protocols for Counseled Employment Cases ("Discovery Protocols"), attached as Exhibit A. Within 60 days of the filing of an Answer, or as soon thereafter as it can be scheduled, the parties and their counsel must participate in a mediation session.

The Discovery Protocols require the early exchange of targeted, core discovery, and are intended to frame issues for resolution through mediation and to assist the parties in planning for additional discovery in the event the case is not promptly resolved through mediation. If any party believes that there is good cause why a particular case should be exempted from the Discovery Protocols, in whole or in part, or from mediation, that party must raise the issue promptly with the Court.

The Discovery Protocols do not modify any party's rights under the Federal Rules of Civil Procedure or the Local Civil Rules, but they do supersede the parties' obligations under Fed. R. Civ. P. 26(a)(1). The Protective Order attached as Exhibit B is deemed issued in all cases governed by this Standing Order. All documents and information produced under the Discovery Protocols will be deemed part of discovery under the Federal Rules of Civil Procedure. The parties' responses to the Discovery Protocols are subject to Fed. R. Civ. P. 26(e) regarding supplementation, Fed. R. Civ. P. 26(g) regarding certification of responses, and Fed. R. Civ. P. 34(b)(2)(E) regarding the form of production for documents and electronically stored information.

SO ORDERED:

DATED:     New York, New York  
          October 1, 2015



LORETTA A. PRESKA  
Chief United States District Judge

## **Exhibit A**

### **PILOT DISCOVERY PROTOCOLS** **FOR COUNSELED EMPLOYMENT CASES**

The use of the term “documents” below includes electronically stored information (“ESI”).

#### **(1) Documents that the plaintiff must produce to the defendant.**

- a. The plaintiff’s employment contract.
- b. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiff’s application for the position and any documents the plaintiff sent or received concerning the defendant’s decision.
- c. If the claims in this lawsuit include the wrongful termination of employment, any documents the plaintiff sent or received concerning the defendant’s decision.
- d. If the claims in this lawsuit include a failure to accommodate a disability, any requests for accommodation and responses to such requests.
- e. If the plaintiff’s employment was terminated, any documents demonstrating the plaintiff’s efforts to obtain other employment. The defendant shall not contact or subpoena a prospective or current employer absent agreement or leave of court.
- f. Any application for disability benefits or unemployment benefits after the alleged adverse action and documents sufficient to show any award.

#### **(2) Information that the plaintiff must produce to the defendant.**

- a. If the plaintiff is relying on any oral comments that the plaintiff alleges were discriminatory or on any instances of harassment, identify the speaker or actor, the comment or action, and any witnesses to the comments or harassment.
- b. A description of the categories and amounts of damages for the plaintiff’s claims.

#### **(3) Documents that the defendant must produce to the plaintiff.**

- a. The plaintiff’s employment contract, job description, and documents sufficient to show plaintiff’s compensation and benefits.
- b. The plaintiff’s personnel file.
- c. For the most recent 5 years of employment, plaintiff’s performance reviews and the file

created for any disciplinary actions taken against the plaintiff.

- d. Any documents sent by the defendant to a government agency in response to government agency claims filed by the plaintiff in which the plaintiff relied on any of the same factual allegations as those in this lawsuit.
- e. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiff's application and any documents the defendant created that record the reasons the defendant rejected the plaintiff's application.
- f. If the claims in this lawsuit include the wrongful termination of employment, any documents the defendant sent to or received from the plaintiff regarding the termination, and any documents that record the reasons for the termination decision.
- g. If the claims in this lawsuit include a failure to accommodate a disability, any written requests for accommodation, written responses to such requests, and documents that record the reasons for rejection of a requested accommodation.
- h. Written workplace policies relevant to the alleged adverse action.

**(4) Information that the defendant must produce to the plaintiff.**

Information concerning the ability to pay, including insurance coverage, if relevant to the mediation.

## **Exhibit B**

### **PROTECTIVE ORDER**

WHEREAS, on October 1, 2015, the Court issued the Second Amended Standing Administrative Order 11 Misc. 003 for the mediation of certain counseled employment cases;

WHEREAS, the Order requires the parties to exchange certain documents and information within 30 days of the filing of an Answer;

WHEREAS, the parties seek to ensure that the confidentiality of these documents and information remains protected; and

WHEREAS, good cause therefore exists for the entry of an order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the following restrictions and procedures shall apply to the information and documents exchanged by the parties pursuant to the Discovery Protocol:

1. Counsel for any party may designate any document or information, in whole or in part, as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL."
2. The Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the action.
3. In the event a party challenges another party's designation of confidentiality, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party reserves the right to object to the use or admissibility of the Confidential Information.
4. The parties should meet and confer if any production requires a designation of "For Attorneys' or Experts' Eyes Only." All other documents designated as "CONFIDENTIAL" shall not be disclosed to any person, except:
  - a. The requesting party and counsel, including in-house counsel;
  - b. Employees of such counsel assigned to and necessary to assist in the litigation;
  - c. Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel; and
  - d. The Court (including the mediator, or other person having access to any Confidential Information by virtue of his or her position with the Court).

5. Prior to disclosing or displaying the Confidential Information to any person, counsel must:
  - a. Inform the person of the confidential nature of the information or documents;
  - b. Inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of the information or documents to any other person; and
  - c. Require each such person to sign an agreement to be bound by this Order in the form attached hereto.
6. The disclosure of a document or information without designating it as “confidential” shall not constitute a waiver of the right to designate such document or information as Confidential Information. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.
7. At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than 30 days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties’ counsel shall be permitted to retain their working files on the condition that those files will remain protected.

**Agreement**

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled \_\_\_\_\_ have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

DATED:

\_\_\_\_\_

Signed in the presence of:

\_\_\_\_\_

(Attorney)

**Report on Pilot Project Regarding  
Initial Discovery Protocols for Employment  
Cases Alleging Adverse Action**

Emery G. Lee III and Jason A. Cantone

Federal Judicial Center

October 2015

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.



## **Executive Summary**

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System (IAALS), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About seventy-five federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center (FJC) to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011. For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts. Information was collected on case processing times, case outcomes, and motions activity in the pilot and comparison cases. Following are the key findings summarized in this report.

- There was no statistically significant difference in case processing times for pilot cases compared to comparison cases.
- There was generally less motions activity in pilot cases than in comparison cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in comparison cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than comparison cases. On average, however, pilot cases did not settle faster than comparison cases.

## **Background**

In May 2010, the Judicial Conference Advisory Committee on Civil Rules sponsored a major Civil Litigation Review Conference at Duke University School of Law. The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. Joseph Garrison chaired the plaintiffs' subcommittee, and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System (IAALS) and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the Federal Judicial Center (FJC) public website ([www.fjc.gov](http://www.fjc.gov)). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about seventy-five judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges have participated.

The introduction to the protocols identifies the pilot's purposes:

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use [as] a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in ten districts: Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern. Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, the number of eligible cases in the various districts, or a combination of these factors.

A nationwide random sample of terminated employment discrimination cases filed in 2011 or later was drawn for a comparison sample. The comparison sample included 672 terminated cases alleging employment discrimination.

## Findings

*Disposition times.* The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for comparison cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant ( $p = .241$ ).

*Case outcomes.* The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% of cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way, including dismissals for want of prosecution and for failure to exhaust administrative remedies.

The most common case outcome for comparison cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the comparison cases is around 65%. Thus, the lower settlement rate for comparison cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two

outcomes account for fully a quarter of dispositions in comparison cases but only about an eighth of dispositions in pilot cases. Ten comparison cases (2%) were resolved by trial. Eight percent of the comparison cases were resolved in some other way.

Comparing the pilot cases and comparison cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and comparison cases have essentially the same mean disposition time (just under 300 days).

*Motions practice.* Fewer discovery motions were filed in the pilot cases than in the comparison cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the comparison cases, compared to only 12% of the pilot cases. The difference of means for the number of discovery motions filed between pilot and comparison cases is statistically significant ( $p < .001$ ).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of comparison cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the comparison cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of comparison cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the comparison cases.

## Discussion

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that fewer motions correspond with lower costs overall. (Costs are difficult to measure directly.) The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and comparison cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the

exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and comparison cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or comparison cases. Individual judges' practices vary, and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and comparison cases.

## Appendix A: Comparison cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011–2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

*Disposition times by case outcomes.* The median time to disposition for all comparison cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside other outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment took much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

*Times to important case events.* The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cutoff was 186 days (6.1 months). The median time from filing to the first discovery cutoff (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

*Motions activity.* About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

## Appendix B: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

*Disposition times by case outcomes.* The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside other outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment took much longer to resolve—median time to disposition, 623 days (20.5 months)—but the small number of cases decided by trial was shorter—median 459 days (15.1 months).

*Times to important case events.* The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cutoff was 168 days (5.5 months). The median time from filing to the first discovery cutoff (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

*Motions activity.* About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.

# **7<sup>th</sup> CIRCUIT ELECTRONIC DISCOVERY COMMITTEE**

## **PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

**(Rev. 08/01/2010)**

### ***General Principles***

#### **Principle 1.01 (Purpose)**

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, 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 electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

#### **Principle 1.02 (Cooperation)**

An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

#### **Principle 1.03 (Discovery Proportionality)**

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

### ***Early Case Assessment Principles***

#### **Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)**

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

- (1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);



- (2) the scope of discoverable ESI and documents to be preserved by the parties;
- (3) the formats for preservation and production of ESI and documents;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and
- (5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

## **Principle 2.02 (E-Discovery Liaison(s))**

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party's e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

### **Principle 2.03 (Preservation Requests and Orders)**

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

### **Principle 2.04 (Scope of Preservation)**

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a

fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) 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 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.

(e) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

### **Principle 2.05 (Identification of Electronically Stored Information)**

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

### **Principle 2.06 (Production Format)**

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

## **Education *Principles***

### **Principle 3.01 (Judicial Expectations of Counsel)**

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf); and
- (3) Familiarize themselves with these Principles.

### **Principle 3.02 (Duty of Continuing Education)**

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery<sup>1</sup>, additional materials available on web sites of the courts<sup>2</sup>, and of other organizations<sup>3</sup> providing educational information regarding the discovery of ESI.<sup>4</sup>

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<sup>1</sup> [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)

<sup>2</sup> E.g. <http://www.ilnd.uscourts.gov/home/>

<sup>3</sup> E.g. <http://www.7thcircuitbar.org>, [www.fjc.gov](http://www.fjc.gov) (under Educational Programs and Materials)

<sup>4</sup> E.g. <http://www.du.edu/legalinstitute>

**UNITED STATES [DISTRICT/BANKRUPTCY] COURT**  
**FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_**  
**\_\_\_\_\_ DIVISION**

	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
	)	Judge _____
	)	
Defendant.	)	

**[PROPOSED]**  
**STANDING ORDER RELATING TO THE**  
**DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee. Parties and counsel in the Pilot Program with civil cases pending in this Court shall familiarize themselves with, and comport themselves consistent with, that committee's Principles Relating to the Discovery of Electronically Stored Information. For more information about the Pilot Program please see the web site of the Committee, [www.discoverypilot.com](http://www.discoverypilot.com). If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Principles Relating to the Discovery of Electronically Stored Information, then that party may raise such reason with the Court.

***General Principles***

**Principle 1.01 (Purpose)**

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, 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 electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

### **Principle 1.02 (Cooperation)**

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

### **Principle 1.03 (Discovery Proportionality)**

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

### ***Early Case Assessment Principles***

#### **Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)**

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

- (1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);
- (2) the scope of discoverable ESI and documents to be preserved by the parties;
- (3) the formats for preservation and production of ESI and documents;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and
- (5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of

privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

#### **Principle 2.02 (E-Discovery Liaison(s))**

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party's e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

#### **Principle 2.03 (Preservation Requests and Orders)**

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation



letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

#### **Principle 2.04 (Scope of Preservation)**

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) 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;
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- (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
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(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If

the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

**Principle 2.05 (Identification of Electronically Stored Information)**

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
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(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

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## ***Education Provisions***

### **Principle 3.01 (Judicial Expectations of Counsel)**

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf); and
- (3) Familiarize themselves with these Principles.

### **Principle 3.02 (Duty of Continuing Education)**

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery<sup>1</sup>, additional materials available on web sites of the courts<sup>2</sup>, and of other organizations<sup>3</sup> providing educational information regarding the discovery of ESI.<sup>4</sup>

ENTER:

Dated: \_\_\_\_\_

\_\_\_\_\_  
[Name]

United States [District/Bankruptcy/Magistrate] Judge

---

<sup>1</sup> [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)

<sup>2</sup> E.g. <http://www.ilnd.uscourts.gov/home/>

<sup>3</sup> E.g. <http://www.discoverypilot.com>, [www.fjc.gov](http://www.fjc.gov) (under Educational Programs and Materials)

<sup>4</sup> E.g. <http://www.du.edu/legalinstitute>

# SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM

FINAL REPORT  
ON  
PHASE TWO

MAY 2010 – MAY 2012

[WWW.DISCOVERYPILOT.COM](http://WWW.DISCOVERYPILOT.COM)

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The Committee wishes to express its whole-hearted appreciation of Ms. Margaret Winkler and Ms. Gabriela Kennedy, Judicial Assistants to Chief Judge James F. Holderman, for their outstanding and invaluable work on behalf of the Committee throughout its existence.

## **1. EXECUTIVE SUMMARY**

The Seventh Circuit Electronic Discovery Pilot Program Committee (“Committee”) was formed in May 2009 to conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while reducing the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure. To that end we brought together the most talented experts in the Seventh Circuit from all sectors of the bar, including government lawyers, plaintiffs’ lawyers, defense lawyers, and in-house lawyers from companies with large information systems, as well as experts in relevant fields of technology. The Committee developed and promulgated “Principles Relating to the Discovery of Electronically Stored Information” (“Principles”) and a Proposed Standing Order by which participating judges could implement the Principles in the Pilot Program’s test cases.

### **A. Phase One**

From October 2009 through March 2010, thirteen judges of the United States District Court for the Northern District of Illinois implemented the Phase One Principles in ninety-three (93) civil cases pending on their individual dockets. The Phase One judges and the counsel for the parties in the Phase One cases were surveyed in April 2010. On May 1, 2010, the Committee unveiled its detailed Report on Phase One at the 2010 Seventh Circuit Bar Association meeting in Chicago. Phase One was necessarily limited in duration to provide a basis for evaluating any needed adjustments to the Pilot Program. The Phase One Report provided an initial “snapshot” of how the Principles appeared to be working in practice. The full Phase One Report is available at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com) but, in summary, the participating judges overwhelmingly felt that the Principles were having a positive effect on counsel’s cooperation with opposing counsel and on counsel’s knowledge of procedures to follow addressing electronic discovery issues. In particular, the judges felt that the involvement of e-discovery liaisons required by Principle 2.02 contributed to a more efficient and cost effective discovery process. Many of the participating lawyers reported little impact on their cases, presumably because of the limited duration of Phase One. But those lawyers who did see an effect from the application of the Principles in their cases overwhelmingly reported that the effect was positive in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating advocacy on behalf of their clients. As a result, apart from some minor revisions suggested by the Phase One Report, the Principles were mostly unchanged for Phase Two of the Pilot Program. The modifications are set out in Section 9.D (pp. 74-75) and Section 9.I (pp. 96-97).

## **B. Phase Two**

Although Phase Two was originally planned to last one year, from May 2010 to May 2011, the Committee early in Phase Two determined that a two-year duration would be preferable and would allow a fuller evaluation of the Principles' application during Phase Two. In May 2011, the Committee issued an Interim Report (available at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com)) midway through the two-year period designated for Phase Two of the Pilot Program, and Chief District Judge James Holderman presented the Interim Report on May 17, 2011, at the Seventh Circuit Bar Association Meeting and Judicial Conference in Milwaukee, Wisconsin.

During Phase Two, a number of e-discovery experts from across the country joined as committee members or advisors to the Pilot Program. The Committee had about fifty (50) members and advisors by the end of Phase One in May 2010, and by the end of Phase Two that number had tripled to over one hundred and fifty (150) members. The Committee during Phase Two has included members not only from all seven (7) federal districts in the three (3) states of the Seventh Circuit, but also from an additional eighteen (18) states outside the Seventh Circuit. The Pilot Program has grown from the thirteen (13) initial participating judges and ninety-three (93) Pilot Program cases studied for a six (6) month period in Phase One, to forty (40) participating judges and two hundred ninety-six (296) cases in which the Pilot Program Principles were tested during the Phase Two period (May 2010 - May 2012).

During Phase Two of the Pilot Program, the Education Subcommittee produced five (5) free educational on-line webinars and another five (5) live seminars all of which were attended by more than ten thousand (10,000) lawyers and others seeking to further their understanding about discovery procedures and the technology related to electronically stored information. The Subcommittee has also created a compilation of case law concerning electronic discovery issues from the Seventh Circuit, along with seminal electronic discovery cases from around the country. In furtherance of the Pilot Program's educational mission, the Committee launched its web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), in May 2011, where it posts information and materials for judges and practitioners seeking to stay abreast of the latest e-discovery developments.

The Preservation and Early Case Assessment Subcommittees joined together and revised certain of the Phase One Pilot Program Principles in response to the Phase One survey results. The Phase Two Principles were promulgated on August 1, 2010, and were applied by the participating judges and lawyers in the cases that were a part of Phase Two.

The Criminal Discovery Subcommittee was created during Phase Two and is comprised of representatives from the U.S. Attorney's Office and the Federal Defender Office, as well as other

members of the criminal defense bar, who are working together to develop resources to educate criminal practitioners about the use of electronic discovery, with the objective of identifying and addressing commonly occurring issues relating to electronic discovery in criminal cases.

The Survey Subcommittee partnered with experts at the Federal Judicial Center of the United States Courts (“FJC”) and with the cooperation of each chief district judge and district court clerk in the Seventh Circuit designed an E-filer Baseline Survey, which surveyed over six thousand (6,000) federal court electronic filing attorneys throughout the seven (7) districts of the Seventh Circuit during August 2010 to set the stage for future Pilot Program surveys as to the effectiveness of the Principles. In March 2012, the same E-filer Baseline Survey was repeated. Again, over six thousand (6,000) e-filing attorneys in all seven (7) districts of the Seventh Circuit responded. The March 2012 E-filer Baseline Survey added a series of questions focused on the responding attorneys’ awareness of the Pilot Program. Additionally, in March 2012, the Survey Subcommittee administered both the Phase Two Judge Survey and the Phase Two Attorney Survey to judges and attorneys with cases in which Phase Two Principles were applied to assess the effectiveness of the Pilot Program Principles during Phase Two.

The Committee’s Communications and Outreach Subcommittee coordinated the Committee members’ involvement in presenting information and materials about the Pilot Program in over forty-five (45) seminars and panel discussions in fifteen (15) different states throughout the country and internationally during Phase Two.

The National Outreach and Membership Subcommittees continue to respond to and coordinate the tremendous interest in the Pilot Program by judges, attorneys, and business people both in the Seventh Circuit and across the country. By the end of Phase Two, people from twenty-one (21) states and the District of Columbia had become Committee members or advisors to the Pilot Program.

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was formed as part of Phase Two to keep up with rapidly evolving technology and to further advance the bench’s and bar’s understanding and use of new technology in the electronic record retention and discovery field.

The Web Site Subcommittee, which was also formed as a part of Phase Two, is responsible for designing and managing the Pilot Program’s web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), that was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The Web site Subcommittee has continued to update, expand and enhance the information offerings on

[www.DiscoveryPilot.com](http://www.DiscoveryPilot.com) throughout the second half of Phase Two, and will continue to do so as the Pilot Program enters Phase Three.

The Phase Two survey results, which were based on a larger population of judges (twenty-seven (27) judges responded in Phase Two compared to thirteen (13) in Phase One) and lawyers (two hundred thirty-four (234) lawyers responded in Phase Two compared to one hundred thirty-three (133) in Phase One), were similar in many respects to the results of the Phase One surveys.

For example, in both the Phase One and Phase Two Judge Surveys, one hundred percent (100%) of the responding judges who had cases involving e-discovery liaisons agreed or strongly agreed that “[t]he involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.” (Table J-21.)<sup>1</sup> All of the responding judges felt that the Principles increased or did not affect the lawyers’ levels of cooperation to efficiently resolve the case (Table J-5), the lawyers’ likelihood to reach agreements on procedures to handle inadvertent disclosures (Table J-6), the lawyers’ meaningful attempts to resolve discovery disputes without the court (Table J-7), the lawyers’ promptness in bringing unresolved disputes to the court (Table J-8), and the parties’ ability to obtain relevant documents (Table J-9.)

Also in Phase One, ninety-six percent (96%) of the attorneys responded that the Principles had no effect or increased the attorney’s ability to zealously represent the client, and in Phase Two ninety-seven percent (97%) responded the same. (Table A-21.)<sup>2</sup> When asked if the Principles affected the fairness of the e-discovery in both the Phase One and Phase Two Attorney Surveys, fifty-five percent (55%) responded, “No effect.” Of the remaining forty-five percent (45%), forty-three percent (43%) of the responding attorneys in Phase One said the Principles increased or greatly increased fairness and 40% in Phase Two thought the Principles increased or greatly increased fairness. (Table A-23.)

Both the Phase One and Phase Two surveys’ results show that in those cases in which the Principles had a perceived effect, those effects were overwhelmingly positive with respect to assisting attorneys’ cooperation and enhancing their ability to resolve disputes amicably, their ability to obtain relevant documents, and their ability to zealously represent their clients, as well as providing fairness to the process. Attorneys reported that the Principles improved levels of cooperation in thirty-six percent (36%) of the cases and decreased it in two percent (2%). (Table A-20.) Attorneys reported that the Principles increased the ability to zealously represent clients in

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<sup>1</sup> The Phase Two Judge Survey Data Results are attached as Appendix F.2.a.

<sup>2</sup> The Phase Two Attorney Survey Data Results are attached as Appendix F.2.a.

twenty-five percent (25%) of the cases, and decreased it in three percent (3%). (Table A-21.) Attorneys reported that the Principles improved the ability to resolve disputes without court involvement in thirty-five percent (35%) of the cases, and decreased it in four percent (4%). (Table A-22.) Attorneys reported that the Principles increased the fairness of the e-discovery process in forty percent (40%) of the cases, and decreased it in five percent (5%). (Table A-23.) Attorneys reported that the Principles increased the ability to obtain relevant documents in twenty-eight percent (28%) of the cases, and decreased it in two percent (2%). (Table A-24.) The judges agree. Of the judge respondents: seventy-eight (78%) reported improved cooperation (twenty-two percent (22%) greatly) and none reported decreased cooperation (Table J-5); seventy-five percent (75%) reported that the Principles increased or greatly increased the fairness of the e-discovery process (nineteen percent (19%) greatly) and none observed decreased fairness (Table J-16); sixty-six percent (66%) reported that the Principles increased ability to obtain relevant documents and none felt access was diminished. (Table J-9.) The bottom line is that the Principles are perceived to result in more cooperation, more access to needed information and more fairness.

All of the Phase One and Phase Two survey data results, including the results of the August 2010 and March 2012 E-filer Baseline Surveys, are set out in Appendix F.

## **2. THE PHASE TWO PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION IMPLEMENTED BY ORDERS OF THE PARTICIPATING JUDGES**

**(Revised as Part of Phase Two on August 1, 2010)**

### ***General Principles***

#### **Principle 1.01 (Purpose)**

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, 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 electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

#### **Principle 1.02 (Cooperation)**

An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

#### **Principle 1.03 (Discovery Proportionality)**

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

## ***Early Case Assessment Principles***

### **Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)**

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

- (1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (*See* Principle 2.05);
- (2) the scope of discoverable ESI and documents to be preserved by the parties;
- (3) the formats for preservation and production of ESI and documents;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and
- (5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.



### **Principle 2.02 (E-Discovery Liaison(s))**

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party's e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

### **Principle 2.03 (Preservation Requests and Orders)**

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

#### **Principle 2.04 (Scope of Preservation)**

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing

herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet-and-confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) 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 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.

(e) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

**Principle 2.05 (Identification of Electronically Stored Information)**

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

**Principle 2.06 (Production Format)**

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

## ***Education Principles***

### **Principle 3.01 (Judicial Expectations of Counsel)**

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf); and
- (3) Familiarize themselves with these Principles.

### **Principle 3.02 (Duty of Continuing Education)**

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery<sup>1</sup>, additional materials available on web sites of the courts<sup>2</sup>, and of other organizations<sup>3</sup> providing educational information regarding the discovery of ESI.<sup>4</sup>

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<sup>1</sup> [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)

<sup>2</sup> E.g. <http://www.ilnd.uscourts.gov/home/>

<sup>3</sup> E.g. <http://www.7thcircuitbar.org>, [www.fjc.gov](http://www.fjc.gov) (under Educational Programs and Materials)

<sup>4</sup> E.g. <http://www.du.edu/legalinstitute>

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## **4. BACKGROUND REGARDING PHASES ONE AND TWO**

### **A. Formation of the Committee**

The Committee was first conceived by Chief U.S. District Judge James F. Holderman and U.S. Magistrate Judge Nan R. Nolan. Together they appointed lawyers and non-lawyers who are experts in the field of electronically stored information (“ESI”) to serve on the Committee. The idea was to get a diverse collection of viewpoints on the fairest ways to address the issues associated with ESI in discovery. The Committee quickly expanded as word and interest among members of the Seventh Circuit legal community spread. The Seventh Circuit Bar Association provided support and liaison representatives, who became members of the Committee. Also, the Illinois State Bar Association’s Civil Practice Section and Federal Civil Practice Section are represented on the Committee. Other bar associations, including the Chicago Bar Association and the Federal Bar Association - Chicago Chapter, have lent support to the Seventh Circuit Electronic Discovery Pilot Program.

The Committee members include practitioners from the full spectrum of the bar (plaintiff, defense, and government) who are leaders in the area of electronic discovery, in-house counsel at companies that regularly face the challenges of discovery in organizations with large and complex electronic systems, and experts from electronic discovery vendors who routinely collect and process electronically stored information.

### **B. Committee’s Goals for Phase One**

At its initial meeting on May 20, 2009, the Committee members identified the need to foster a better balance between discovery costs and efforts to reach a “just, speedy, and inexpensive” determination of cases as intended by the Federal Rules of Civil Procedure. Fed R. Civ. P. 1.

With that primary goal in mind, the Committee focused on three (3) related goals for Phase One of the Committee’s Pilot Program: (1) develop guiding Principles for the discovery of ESI that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation; (2) implement those Principles in actual pending or filed court cases; and (3) survey the judges and lawyers involved in the cases to determine the effectiveness of the Principles, solicit opinions regarding improvements that could be made to the Principles, and assess whether the Principles fulfilled the Committee’s goals.

With the continuing support and assistance of former Justice of the Colorado Supreme Court, Rebecca L. Kourlis, the Executive Director of the Institute for Advancement of the American Legal System at the University of Denver, and Kenneth J. Withers, the Director of Judicial Education and Content for The Sedona Conference®, the Committee moved vigorously and expeditiously in pursuit of its goals and, on September 16, 2009, produced the Committee’s Principles Relating to the Discovery of Electronically Stored Information (“Principles”).

### **C. Action on the Goals for Phase One**

The Committee members identified three (3) major areas of emphasis and formed three (3) corresponding subcommittees: the Preservation Subcommittee, co-chaired by James Montana, Jr. and Thomas Lidbury; the Early Case Assessment Subcommittee, co-chaired by Karen Quirk and Thomas Lidbury; and the Education Subcommittee, co-chaired by Mary Rowland and Kathryn Kelly. The Survey Subcommittee, co-chaired by Joanne McMahon and Natalie Spears, was also created as Phase One progressed. Each Committee member joined at least one — and often two — subcommittees. The subcommittees were tasked with developing discovery Principles and the methodology to test them in the Pilot Program. The subcommittees held dozens of meetings, and subcommittee members devoted much time to drafting the proposed Principles. In early 2010, the Communications and Outreach Subcommittee was formed to help centralize the flow of information regarding the Pilot Program to the press and general public. The full Committee held three (3) meetings after the initial meeting (June 24, August 26, and September 16, 2009) to review the progress of the subcommittees as well as to refine and complete the drafting of the proposed Principles and a standing order to be entered in participating Phase One cases. In the course of the Committee's discussions, Thomas M. Staunton of Miller Shakman & Beem LLP served as the recording secretary for the Committee and prepared minutes of the meetings.

The Principles adopted by the Seventh Circuit Electronic Discovery Committee on September 16, 2009, for Phase One of the Pilot Program are set forth in the May 1, 2010 Final Report on Phase one, which can be found on the Pilot Program's Web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com). The goal of the Principles are to continue to incentivize early and informal information exchange between counsel on commonly encountered issues relating to evidence preservation and discovery, both paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which are routinely followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify issues concerning the preservation and discovery of evidence in the case. As a result, counsel for the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic, unduly burdensome, or costly to preserve or produce.

Because ESI has become a source of discovery disputes, there have been calls for cooperation in the pretrial discovery process, such as The Sedona Conference® Cooperation Proclamation. The Pilot Program Principles are intended not just to call for cooperation but also to encourage the cooperative exchange of information on evidence preservation and discovery. Therefore, education programs were developed. A list of the Phase one Programs, along with an up-to-date listing of electronic discovery case law are on the Pilot Programs Web site: [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

### **D. Developments During Phase Two**

Phase Two of the Pilot Program ran from May 2010 through May 2012. During Phase Two, the Committee worked to expand the scope of the Pilot Program by moving it beyond litigation pending in the Northern District of Illinois to include litigation in the other six (6) districts within the Seventh



Circuit. The Committee also dramatically increased the number of participating judges, and along with those additional judges came a significant increase in the number of participating attorneys and the number of cases implementing the Principles across the Seventh Circuit. The Committee also worked to become more effective by expanding its scope, by adding subcommittees, by developing its web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), and introducing the concept of an e-discovery mediation program. Additionally, subcommittees were formed to meet the need for a coordinated response to national interest in the Pilot Program, to address the need of ever-advancing technology issues, and to address issues unique to discovery in criminal, as opposed to civil, cases.

During Phase Two, the Committee expanded its reach and expertise by adding attorneys and other experts from outside the Seventh Circuit and from segments that may have had less representation during Phase One, such as in-house counsel, members of the plaintiffs' bar, and lawyers practicing primarily criminal law. The Committee has increased in size from about fifty (50) members and advisors by the end of Phase One to over one hundred fifty (150) members and advisors today.

Judicial participation also expanded dramatically during Phase Two throughout the Seventh Circuit. In Phase One, five (5) district court judges and eight (8) magistrate judges — all from the Northern District of Illinois — implemented the Principles in ninety-three (93) federal civil cases involving approximately two hundred eighty-five (285) lead counsel. During Phase Two, the Pilot Program included judges from other districts within the Seventh Circuit. A total of forty (40) judges, including seventeen (17) district judges, twenty-one (21) magistrate judges, and two (2) bankruptcy judges, participated in Phase Two. The number of cases in the Pilot Program more than tripled, to two hundred ninety-six (296) cases. The number of attorneys listed as lead counsel in those cases nearly tripled, to seven hundred eighty-seven (787).

The Committee also added new subcommittees during Phase Two.

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was designed to keep up with rapidly evolving electronic record retention and discovery technology and to further advance the bench and bar's understanding of that technology.

The Web site Subcommittee designed and manages the Pilot Program's web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), which was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The web site contains a host of information about the Pilot Program, the Committee, and the survey process. It also contains a number of valuable e-discovery resources, including links to each of the Committee's webinars; summaries of relevant e-discovery case law; links to relevant rules, handbooks, and publications; and other resources.

The National Outreach Subcommittee was formed to help the Committee make use of and respond to the tremendous interest the Pilot Program has generated among judges, attorneys, and business people across the country.

The Criminal Discovery Subcommittee was formed to address issues that arise during discovery in criminal cases. The Committee observed that criminal cases present electronic discovery issues that are, in many ways, distinct from the issues presented in civil cases. The Committee also determined that criminal cases present a unique opportunity for study, both because the law in that area is three (3) to four (4) years behind the law governing civil cases and because of the relative lack of attention that has been paid to e-discovery in criminal cases.

The E-Mediation Subcommittee was proposed to consider the possibility and feasibility of adding an e-discovery mediation program during Phase Three. Although lawyers practicing in the Northern District of Illinois have made substantial efforts to educate themselves about electronic discovery, the fast pace of adoption of new technologies continues to create significant barriers. Even a lawyer who is highly knowledgeable in some technologies may become involved in a dispute involving unfamiliar technology. The Committee believed that a mediation program might reduce the time the judges must devote to discovery disputes, and enable disputes to be resolved more quickly and at a lower cost to the parties.

Finally, to conclude Phase Two, the Committee, in conjunction with experts headquartered at the Federal Judicial Center of the United States Courts, conducted a second set of surveys, in February and March 2012, to gauge the effect and effectiveness of the Principles and to provide guidance for Phase Three. Foremost, as a follow up to the committee's survey of those participating in Phase One, the Committee conducted a Phase Two Judge Survey of the forty (40) judges participating in Phase Two of the Pilot Program, and a Phase Two Attorney Survey of the seven hundred eighty-seven (787) attorneys participating in Phase Two of the Pilot Program. Additionally, the Committee in March 2012 conducted a separate E-filer Baseline Survey of all attorneys registered as e-filers in the seven (7) districts in the Seventh Circuit. This survey has provided valuable information when compared to the results of the first E-filer Baseline Survey conducted a year and a half earlier in August 2010.

## **5. SUBCOMMITTEES**

The Committee has organized itself into several subcommittees charged with taking the lead on specific projects. These Subcommittees include:

- A. Education,
- B. Preservation and Early Case Assessment,
- C. Criminal Case Discovery,
- D. Survey,
- E. Communications and Outreach,
- F. National Outreach,
- G. Membership,
- H. Technology, and
- I. Web site.

The subcommittees have been busy furthering the mission of the Pilot Program and implementing Phase Two.

## **A. Education Subcommittee**

### **(1.) Members**

Kathryn A. Kelly (Co-Chair)	
Mary M. Rowland (Co-Chair)	
Michael Bolton	Adrienne B. Naumann
Kevin Brown	Chad Riley
Sean Byrne	Michael Rothmann
Timothy J. Chorvat	Greg Schodde
Christina Conlin	Jeffrey C. Sharer
Brian D. Fagel	Howard Sklar
Tiffany M. Ferguson	Natalie J. Spears
Megan Ferraro	Tomas Thompson
Todd H. Flaming	Martin Tully
Alisa May Ittner Harrison	Kelly Twigger
Brandon D. Hollinder	Kelly M. Warner
Colleen Kenney	P. Shawn Wood
Christopher Q. King	Christina M. Zachariasen
Cameron Krieger	Zachary Ziliak
Cinthia Granados Motley	

### **(2.) Subcommittee's Charge and Continuing Role**

The Education Subcommittee is the first of the initial three (3) subcommittees formed during the full Committee's first meeting in May 2009. The Education Subcommittee was created because of the Committee members' belief that many of the problems that arise in connection with electronic discovery stem from a lack of expertise by many lawyers. While this lack of expertise is understandable, lawyers and judges, to keep pace in today's technological environment, must now advance their level of knowledge because most discoverable information is now electronically stored. The Education Subcommittee's initial function was to conceive and draft the educational Principles that are now being put to the test in the Pilot Program (Principles 3.01 and 3.02). After the Principles were adopted, the Education Subcommittee was tasked with organizing educational programs, often in coordination with the Communications and Outreach Subcommittee. The Subcommittee organized four (4) programs during Phase One and presented five (5) programs during Phase Two as well as another five (5) live seminars. The Subcommittee also created and maintains a compilation of case law concerning electronic discovery issues from the Seventh Circuit, along with seminal electronic discovery cases from around the country. This valuable compilation is

available to practitioners free of charge on the Committee’s web site. The Education Subcommittee routinely updates this compilation to keep it current.

The Education Subcommittee remains committed to providing free education to the bar about handling electronic discovery and fulfilling their legal obligations. The Subcommittee throughout Phase One and Phase Two conceived, organized and produced several educational opportunities including six (6) free webinars, which remain available on demand at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

(a.) Webinars

(1.) February 17, 2010 – “Re-forming Discovery:  
The Seventh Circuit E-Discovery Pilot Program”

During Phase One, the Subcommittee, the Seventh Circuit Bar Association, and Technology Concepts & Design, Inc. (TCDI®) produced the Pilot Program’s initial one-hour webinar that was broadcast on February 17, 2010, in a question-and-answer format, and described the highlights of the Principles and the motivation behind several of the provisions. The webinar was titled “Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program.” To reach the maximum number of lawyers, the Subcommittee partnered with LAW.COM to broadcast the webinar. Over 1,000 registrants heard from Chief Judge James F. Holderman, Magistrate Judge Nan R. Nolan, and Committee members Thomas Lidbury of Drinker Biddle & Reath and Alexandra Buck of Bartlit Beck Herman Palenchar & Scott. The panel not only described the Principles, but also explained the impetus for certain provisions and highlighted the requirements of others. Attendees, who received CLE credit, had an opportunity to ask questions, and the subcommittee provided a written response to every question submitted. Attendees were also encouraged to comment on the quality of the webinar and to propose future topics.

(2.) April 28, 2010 – “You and Your Client:  
Communicating about E-Discovery”

Given the overwhelming response to the initial webinar and based upon a thorough review of the written comments from the attendees, the Subcommittee, on April 28, 2010, broadcast the Pilot Program’s second webinar with TCDI, titled “You and Your Client: Communicating about E-Discovery.” This webinar focused on a lawyer’s obligation to understand a client’s systems and to use that knowledge to facilitate the e-discovery process. Over three thousand (3,000) participants heard from Committee members Chris King of SNR Denton, Tiffany Ferguson of Pugh, Jones, Johnson & Quandt, P.C., Tom Staunton of Miller Shakman & Beem, LLP, and Michael Bolton of

Baxter Healthcare Corp., about the initial and essential steps counsel must take in order to understand his or her clients' electronic data and the discovery obligations which flow from it.

(3.) April 6, 2011 – “What Everyone Should Know  
About the Mechanics of E-Discovery”

During Phase Two, the Subcommittee, in conjunction with Merrill Corporation, presented another free-of-charge webinar on April 6, 2011, titled “What Everyone Should Know About the Mechanics of E-Discovery,” featuring Committee members Ronald Lipinski of Seyfarth Shaw LLP and Daniel Graham of Clark Hill PLC. Through the cooperation of the chief federal district judges in Illinois, Wisconsin, and Indiana, ECF users in the federal district courts in all three (3) states were invited to attend. Over three thousand (3,000) participants registered for the webinar.

(4.) November 30, 2011 – “The Ethics of E-Discovery”

On November 30, 2011 the Subcommittee, in conjunction with Wilson Elser, presented another free webinar titled “The Ethics of E-Discovery.” The panel of participants were U.S. Magistrate Judge Mark J. Dinsmore of the Southern District of Indiana, Rachel Lei of GATX Corporation, and Committee members Debra Bernard of Perkins Coie LLP, Timothy Chorvat of Jenner & Block LLP, and Cinthia Motley of Wilson Elser. Over two thousand seven hundred (2,700) people registered for the webinar.

(5.) March 28, 2012 – “ESI 101”

On March 28, 2012, in cooperation with McAndrews Held & Malloy, LTD, and its partner Gregory Schodde, the Subcommittee presented “ESI 101.” Over one thousand (1,000) lawyers tuned in for this in-depth discussion of the technological aspects of ESI. As with all the other webinars and presentations sponsored by the Subcommittee, this program and any related materials are available on the Pilot Program's web site [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

(b.) Live Seminars

In addition to the free webinars, which remain available at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), the Subcommittee during Phase Two presented live seminars at various locations in the Seventh Circuit.

- (1.) January 18, 2011, October 18, 2011, and April 18, 2012 – E-Discovery Expert Attorney Jonathan Redgrave presented “The 4 P’s of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy”

On January 22, 2011, the Subcommittee in conjunction with attorney Jonathan Redgrave, an expert and prominent thought-leader in the field of electronic discovery, presented a free in-person seminar titled “The 4 P’s of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy.” With a standing-room-only audience of over three hundred (300) attorneys in the Dirksen U.S. Courthouse in Chicago, Mr. Redgrave spoke about the concepts of preservation, proportionality, privilege, and privacy in the context of the Pilot Program Principles and recent case law. To accommodate the large number of interested parties who were unable to attend this seminar, Mr. Redgrave provided an equally outstanding encore presentation on October 18, 2011, which was digitally recorded and is available at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com). Once again, by popular demand, Mr. Redgrave, on April 18, 2012, graciously participated in a video broadcast of this program, followed by an insightful question and answer section.

- (2.) February 28, 2011 and April 11, 2011 – “The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications”

On February 28, 2011, in Milwaukee, Wisconsin, the Subcommittee presented “The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications.” The judicial panelists were U.S. Chief District Judge Charles Clevert, Jr. of the Eastern District of Wisconsin and U.S. Magistrate Judge Nan Nolan of the Northern District of Illinois, along with Committee members Timothy Edwards of Axley Brynerson LLP, James McKeown of Foley & Lardner LLP, and Richard Moriarty, an Assistant Attorney General in Wisconsin. On April 11, 2011, in Madison, Wisconsin, the Subcommittee presented this live seminar again with judicial panelists U.S. Magistrate Judge Stephen Crocker of the Western District of Wisconsin and U.S. Magistrate Judge Nan Nolan, along with Committee members Timothy Edwards, James McKeown, and Richard Moriarty.

- (3.) September 8, 2011 – “Mock Rule 16 Meet and Confer”

On September 8, 2011, the Subcommittee teamed with Cohasset Group and The Sedona Conference®, and presented a Mock Rule 16 Meet and Confer. With Ken Withers of The Sedona Conference® moderating, the Subcommittee was honored to have U.S. District Judge Shira Scheindlin of the Southern District of New York, and a nationally recognized expert on electronic discovery, as well as Craig Ball and John Jessen, both experts in electronically stored information, participate in the event. Two Pilot Program pioneers, Tom Lidbury of Drinker Biddle & Reath and

Mary Rowland of Hughes Socol Piers Resnick & Dym, took on the roles of opposing counsel. The hypothetical presented a myriad of disputed discovery issues based upon litigation arising from a toxic chemical spill. The program was presented in the Dirksen U.S. Courthouse, and it was simultaneously videotaped by the Cohasset Group. The program has been edited and is now available on the web site of The Sedona Conference® through a link on [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

(c.) Other information on [DiscoveryPilot.com](http://DiscoveryPilot.com)

The Pilot Program's web site has a vast array of information including news items on e-discovery and a highly valuable up-to-date compendium of case law from judges in the Seventh Circuit and across the country. Committee member Christina M. Zachariasen of Navigant maintains this key feature of the Pilot Program's web site. It is an outstanding resource for all attorneys, including in-house counsel, who must address e-discovery issues.

More educational opportunities are being planned for Phase Three of the Pilot Program.



## **B. Preservation and Early Case Assessment Subcommittee**

### **(1.) Members**

Thomas A. Lidbury (Co-Chair)	
Karen Caraher Quirk (Co-Chair)	
James S. Montana, Jr. (Co-Chair)	
George S. Bellas	Reuben L. Hedlund
Debra R. Bernard	Arthur J. Howe
Matthew A. Bills	Michael Kanovitz
Kevin S. Brown	Joshua Karsh
Alexandra G. Buck	Samara Kaufman
Timothy J. Chorvat	Daniel J. Kurowski
Kendric M. Cobb	Pauline Levy
Ethan M. Cohen	Ronald L. Lipinski
Christina Conlin	Joanne McMahon
Cathy DeGenova-Carter	Bruce A. Radke
Elizabeth H. Erickson	Anupam Razdan
Jennifer Freeman	Jeffrey C. Sharer
Arthur Gollwitzer III	Howard Sklar
Rex Gradeless	Thomas Staunton
Daniel Graham	Kelly M. Warner
Marie Halpin	Marni Willenson

### **(2.) Subcommittee's Charge and Continuing Role**

The Preservation Subcommittee and Early Case Assessment Subcommittee were two of the initial three (3) subcommittees formed at the full Committee's first meeting in May of 2009. Their function has been to conceive and draft the procedural Principles (Principles 1.01 through 2.06) that have been put to the test in the Pilot Program, and to draft revisions to Principles 1.01 through 2.06 based on the findings in Phase One of the Pilot Program. As these two subcommittees performed their tasks it became clear that there is significant overlap between their charges. Matters pertaining to evidence preservation often overlap with matters concerning early case assessment, and vice versa. As a result, throughout the Pilot Program the two subcommittees worked very closely together to develop a cohesive framework. In Phase Two, these two Subcommittees were formally merged into one Subcommittee.

The Preservation and Early Case Assessment Subcommittee has been actively involved in analyzing survey data developed by the Survey Subcommittee in Phases One and Two of the Pilot Program. This Subcommittee will have the primary responsibility of drafting any revisions to the procedural Principles that the Committee deems appropriate as the Pilot Program progresses.

## **C. Criminal Discovery Subcommittee**

### **(1.) Members**

David Glockner (Co-Chair)  
Beth Gaus (Co-Chair)  
Meghan Morrissey Stack (Co-Chair)  
Sergio Acosta  
Molly Armour  
John Beal  
Debra R. Bernard  
Gabriel Bankier Plotkin  
Justin Murphy  
Barry Spevack

### **(2.) Subcommittee's Charge and Continuing Role**

The Criminal Discovery Subcommittee was formed to expand the reach of the Seventh Circuit's Electronic Discovery Pilot Program to the practice of criminal law. The Subcommittee's first goal is to publicize the recently-issued "Recommendations and Strategies for ESI Discovery," which was developed by the Joint Electronic Technology Working Group, composed of representatives from the Justice Department, Federal Defender Program, and private attorneys who accept Criminal Justice Act appointments, as well as liaisons from the courts. As part of this effort, the Subcommittee will be hosting a live event on June 8, 2012, featuring as speakers national discovery coordinators from both the Department of Justice and the Federal Defender Program. This event is intended to educate criminal practitioners about these national protocols, and to help facilitate the expanding use of electronic discovery in criminal cases. The Subcommittee's second goal is to bring together criminal practitioners from both the prosecution and defense bars, to identify frequently occurring electronic discovery issues, and to work collaboratively to address those problems. Finally, the Subcommittee also intends to develop and make available additional educational resources, to assist in making electronic discovery more efficient, secure, and less costly for criminal practitioners.

## **D. Survey Subcommittee**

### **(1.) Members**

Natalie J. Spears (Co-Chair)  
Thomas Staunton (Incoming Co-Chair)  
Joanne McMahon (Outgoing Co-Chair)  
Debra Bernard  
Karen Coppa  
Rebecca Elmore  
Tiffany Ferguson  
Marie Halpin  
Richard Briles Moriarty  
Adrienne B. Naumann

### **(2.) Subcommittee's Charge and Continuing Role**

Collecting feedback from the judiciary and members of the bar relating to the Principles and the other work of the Seventh Circuit Electronic Discovery Pilot Program is a critical aspect of the Pilot Program's mission. To this end, immediately following the adoption of the Principles on September 16, 2009, the Committee formed the Survey Subcommittee. The Survey Subcommittee initially was tasked with developing a survey to assess the effectiveness of the Principles and gather reactions and information from the lawyers and judges participating in Phase One of the Pilot Program.

The May 2010 Pilot Program Report on Phase One sets forth the results of the survey conducted by the Survey Subcommittee of those who participated in Phase One of the Program. The Subcommittee received tremendous assistance and support during Phase One from the Institute for Advancement of the American Legal System at the University of Denver ("IAALS"), which led the development of the Phase One survey questionnaire and assisted with analysis of the survey results. The FJC administered the Phase One survey and also provided vital input during the survey questionnaire development process.

Following the Phase One Survey, in the Summer of 2010, the Survey Subcommittee worked with the FJC to develop and administer a new E-filer Baseline Survey of electronic-filing attorneys in the district courts of the Seventh Circuit. The purpose of the E-filer Baseline Survey was to assess, among other things, attorneys' views on the level of e-discovery involved in their cases, their own experience with and general knowledge about e-discovery issues, the proportionality of costs incurred as a result of e-discovery issues and the level of cooperation experienced with opposing

counsel on such issues. In August 2010, the initial E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand (6,000) of those attorneys. The same E-filer Baseline Survey was then repeated in March 2012, with an added series of questions focused on attorneys' awareness of the Pilot Program and of the educational and other resources provided by the Program. The March 2012 E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand five hundred (6,500) attorneys, for a response rate of twenty-six percent (26%). The Phase One and Phase Two E-filer Baseline Survey results are attached to this Report in Appendix F.2.b.

In addition, in March 2012, the Survey Subcommittee, again with critical support from the FJC, conducted a separate survey of the attorneys and judges participating in the Pilot Program to assess the effectiveness of the Principles and Phase Two of the Pilot Program. The Subcommittee reviewed and refined the Phase One judges' and attorneys' survey questionnaires, mainly to add areas of inquiry, as the vast majority of the original survey questions remained the same in both surveys in order to allow for potential comparison to the Phase One 2010 survey results. The Phase Two Attorney Survey results and the Phase Two Judge Survey results, along with analysis, is contained in the May 2012 Pilot Program Report on Phase Two.

## **E. Communications and Outreach Subcommittee**

### **(1.) Members**

Alexandra G. Buck (Co-Chair)

Steven W. Teppler (Co-Chair)

George S. Bellas

Sean Byrne

Timothy J. Chorvat

Claire Covington

Moira Dunn

Michael Gifford

Brandon D. Hollinder

Vanessa Jacobsen

Colleen M. Kenney

Christopher King

Richard Briles Moriarty

Steven Puiszis

Karen Caraher Quirk

Teri Cotton Santos

Jeffrey C. Sharer

Tomas Thompson

Allison Walton

### **(2.) Subcommittee's Charge and Continuing Role**

The Communications and Outreach Subcommittee's charge is to promote awareness of and provide education about the Pilot Program to attorneys and judges throughout the various federal district courts within the Seventh Circuit, to the Illinois state courts, and to the bench and bar of other federal and state jurisdictions. This subcommittee generates and provides a growing repository for presentations and other educational material in connection with the Pilot Program, and functions as the point of contact for media inquiries and speaker referrals.

Through the Communication and Outreach Subcommittee, members of the Committee have given over fifty (50) presentations about the Pilot Program in more than twenty (20) states and internationally since 2010. The Pilot Program has also been the subject of dozens of articles, blogs, and continuing legal education programs.

The subcommittee has provided, and will update as necessary, orientation packets for federal judges to learn about the Pilot Program and either participate in the Pilot Program or start a similar program in their own circuits. For a complete list of articles and speaking engagements about the Pilot Program, please visit the program's web site: [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

The Communications and Outreach Subcommittee will continue to be the point of contact for media inquiries, speaker referrals, and education about the Pilot Program

## **F. National Outreach Subcommittee**

### **(1.) Members**

Arthur Gollwitzer III (Chair)

Patrick Ardis

Randolph Barnhart

Shannon Brown

Michael Carbone

Jason Cashio

Li Chen

Cass Christenson

Kelly Clay

Richard Denney

Adrian Fontecilla

Kelly Griffith

Maura Grossman

Jaime Jackson

Steve McGrath

Mark E. (Rick) Richardson

Teri Cotton Santos

Mathieu Shapiro

Howard Sklar

Allison Walton

Joy Woller

### **(2.) Subcommittee's Charge and Continuing Role**

The National Outreach Subcommittee is a subcommittee of the Communications and Outreach Subcommittee, focused on publicizing and promoting the Pilot Program outside of the Seventh Circuit. The National Outreach Subcommittee identifies and contacts leaders in the field of ESI discovery around the country, including noted authors and speakers, specialized organizations and bar associations, and conference organizers. The subcommittee provides these leaders with information about the Pilot Program and encourages publication of works and organization of events that address the Pilot Program. The subcommittee also encourages its members to pass along Pilot Program results by word-of-mouth and by using the Principles in their own cases. Finally, the subcommittee looks for interested individuals from outside of the Seventh Circuit to refer to the Membership Subcommittee.

In Phase Three of the Pilot Program, the National Outreach Subcommittee plans to continue its grass-roots efforts to publicize the Pilot Program. In addition, the subcommittee will monitor the development of other ESI pilot programs around the country as well as possible amendments to the Federal Rules of Civil Procedure regarding ESI, preservation obligations, and spoliation sanctions. The subcommittee recognizes that there are other approaches to ESI discovery and plans to review those approaches and try to coordinate our efforts with other similar efforts where possible. Finally, the subcommittee will continue to recruit members from around the nation with an eye towards working with other pilot programs and informing those programs about this group's work to date.

## **G. Membership Subcommittee**

### **(1.) Members**

Michael D. Gifford (Co-Chair)

Marie V. Lim (Co-Chair)

Moiria K. Dunn (Outgoing Co-Chair)

### **(2.) Subcommittee's Charge and Continuing Role**

The Membership Subcommittee was created after the completion of Phase One. The Membership Subcommittee is charged with seeking and screening potential new members for the Committee and encouraging new members to fully participate in the work of the Committee and its subcommittees. To that end, the subcommittee has developed materials for new members regarding the Committee, its work, and the commitments anticipated of new members. The Membership Subcommittee also coordinates adding new members to the Committee's roster and is available to answer inquiries regarding membership.

During Phase One, Committee membership was heavily oriented toward the Northern District of Illinois. At Phase One's close, the Committee had over fifty (50) members, and consisted of trial judges and lawyers, including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants. At present, the Committee has doubled in size with more than one hundred (100) members, expanded beyond its initial focus in the Northern District, and includes members outside of the Seventh Circuit. The Committee now has members from all across the Seventh Circuit, and from across the country including Illinois, Indiana, Wisconsin, Arizona, California, Colorado, Florida, Georgia, Louisiana, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and the District of Columbia. As the Committee grows, the Membership Subcommittee will continue to screen potential new members, as well as reach out to current members to affirm continued interest and involvement in the Pilot Program.



## **H. Technology Subcommittee**

### **(1.) Members**

Sean Byrne (Co-Chair)  
Tomas M. Thompson (Incoming Co-Chair)  
Jennifer Freeman (Outgoing Co-Chair)  
Brent Gustafson  
Zachary Ziliak

### **(2.) Subcommittee's Charge and Continuing Role**

The Technology Subcommittee's mission is to provide the bar with educational information about the various technologies that are available and how they can be effectively used to improve efficiency and quality in electronic discovery. The Technology Subcommittee is comprised of seasoned technologists and technology thought-leaders including attorneys who are highly sophisticated technologists, in-house technology counsel, information technology professionals, law firm litigation support leaders, and software developers. The Technology Subcommittee assists the Committee in developing educational information which the Committee will make available to the bar free-of-charge through the activities of the Education, Communications and Outreach, and Web site Subcommittees.

## **I. Web site Subcommittee**

### **(1.) Members**

Timothy J. Chorvat (Co-Chair)  
Christopher Q. King (Co-Chair)  
Alexandra G. Buck  
Sean Byrne  
Jennifer W. Freeman  
Michael D. Gifford  
Jeffrey C. Sharer  
Martin T. Tully  
Christina M. Zachariasen

### **(2.) Subcommittee's Charge and Continuing Role**

The Web site Subcommittee is responsible for designing and managing the Committee's web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), which is now the world's window into the Pilot Program.

The [DiscoveryPilot.com](http://DiscoveryPilot.com) web site provides the latest information about the Committee's activities, official publications, and educational resources. It is the Committee's primary means of disseminating news and connections to useful resources and helps to tie together the Committee's numerous outreach and educational activities. The Committee provides the web site as a service to the public, the judiciary, litigants, and the bar. The site makes available the Committee's Principles, reports, and contact information for its membership. [DiscoveryPilot.com](http://DiscoveryPilot.com) shares news and recent case law from the courts of the Seventh Circuit concerning electronic discovery and related issues, provides round-the-clock access to webinars and other educational materials, and includes links to other locations where further resources are available. Recently, the Committee arranged to add the well-regarded annual Federal E-Discovery Case Law updates from The Sedona Conference®. Members of each of the Committee's subcommittees are able to update applicable portions of the site as frequently as substantive developments warrant.

The Committee launched the [DiscoveryPilot.com](http://DiscoveryPilot.com) web site on May 1, 2011. From the time that the Committee was organized in 2009 until May 2011, the Seventh Circuit Bar Association graciously made space available on its web site. The Committee very much appreciates the Seventh Circuit Bar Association's generosity in that regard. As the Committee's work matured and its scope expanded, the Committee decided to create its own web site, under its own domain name,

[www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), which now permits the Committee to furnish a wide range of substantive materials in an easy-to-use, contemporary format that interested parties can find and recall readily.

The web site has welcomed visitors from locations throughout the United States and around the world. Of the 6,866 visits through April 18, 2012, not surprisingly, nearly half the traffic has come from the Seventh Circuit's business centers (Chicago (with 34% of total visits), Milwaukee (3%), Madison (1.6%) and Indianapolis (2%)) with New York, Denver, St. Louis, Minneapolis and Silicon Valley rounding out the top ten. [DiscoveryPilot.com](http://DiscoveryPilot.com) has been accessed by visitors from over eight hundred (800) locations across the U.S. In addition, foreign users from Canada, India, Mexico, the United Kingdom, and other locations for a total of sixty (60) countries have accessed the site.

The [DiscoveryPilot.com](http://DiscoveryPilot.com) web site is designed and powered by Justia, located in Mountain View, California, and the Committee greatly appreciates the invaluable time and skill that Justia has donated to that effort.

## **6. FORTY (40) PHASE TWO JUDGES WHO IMPLEMENTED THE PRINCIPLES WITH STANDING ORDER IN TWO HUNDRED AND NINETY-SIX (296) CIVIL CASES**

Starting in the fall of 2010, forty (40) judges implemented the Committee’s Phase Two Principles in federal civil cases selected to be part of the Pilot Program. Each judge used his or her individual criteria for selecting the participating cases from among the cases on the judge’s docket, with an average of slightly more than seven (7) cases per judge. The testing period of Phase Two ran through March 2012, when surveys were administered to the judges and attorneys in the Phase Two cases.

### **Forty Phase Two Judges**

#### Participating District Judges

Judge Sarah Evans Barker (S.D. Ind.)  
Judge Ruben Castillo (N.D. Ill.)  
Judge Edmond Chang (N.D. Ill.)  
Chief Judge Charles N. Clevert, Jr. (E.D. Wisc.)  
Chief Judge William M. Conley (W.D. Wisc.)  
Judge Barbara B. Crabb (W.D. Wisc.)  
Judge Robert M. Dow, Jr. (N.D. Ill.)  
Judge Gary S. Feinerman (N.D. Ill.)  
Judge Joan B. Gottschall (N.D. Ill.)  
Chief Judge James F. Holderman (N.D. Ill.)  
Judge Virginia M. Kendall (N.D. Ill.)  
Judge Matthew F. Kennelly (N.D. Ill.)  
Judge Joan Humphrey Lefkow (N.D. Ill.)  
Judge Rebecca R. Pallmeyer (N.D. Ill.)  
Judge Rudolph T. Randa (E.D. Wisc.)  
Judge J.P. Stadtmueller (E.D. Wisc.)  
Judge Amy J. St. Eve (N.D. Ill.)

#### Participating Magistrate Judges

Judge Martin C. Ashman (N.D. Ill.)  
Judge David G. Bernthal (C.D. Ill.)  
Judge Geraldine Soat Brown (N.D. Ill.)  
Judge William E. Callahan, Jr. (E.D. Wisc.)

Judge Jeffrey Cole (N.D. Ill.)  
Judge Susan E. Cox (N.D. Ill.)  
Judge Stephen L. Crocker (W.D. Wisc.)  
Judge Morton Denlow (N.D. Ill.)  
Judge Sheila M. Finnegan (N.D. Ill.)  
Judge Jeffrey T. Gilbert (N.D. Ill.)  
Judge Aaron E. Goodstein (E.D. Wisc.)  
Judge Patricia J. Gorence (E.D. Wisc.)  
Judge John A. Gorman (C.D. Ill.)  
Judge Arlander Keys (N.D. Ill.)  
Judge Young B. Kim (N.D. Ill.)  
Judge P. Michael Mahoney (N.D. Ill.)  
Judge Michael T. Mason (N.D. Ill.)  
Judge Nan R. Nolan (N.D. Ill.)  
Judge Sidney I. Schenkier (N.D. Ill.)  
Judge Maria Valdez (N.D. Ill.)  
Judge Donald G. Wilkerson (S.D. Ill.)

Participating Bankruptcy Judges

Judge Carol A. Doyle (N.D. Ill.)  
Judge Eugene R. Wedoff (N.D. Ill.)

## **7. PHASE TWO SURVEY PROCESS**

For Phase Two of the Pilot Program, the Survey Subcommittee was tasked with refining the Phase One Survey to develop a Phase Two Survey that would assess the effectiveness of the Principles and gather feedback and information from the lawyers and judges participating in Phase Two of the Program. The Survey Subcommittee also was tasked with implementing an E-filer Baseline Survey of electronic-filing attorneys in the district courts of the Seventh Circuit, to be administered at the completion of Phase One and again at the completion of Phase Two.

The Survey Subcommittee's work would not have been possible without the dedication, assistance, and support of others. The IAALS led the development of the Phase One Survey, whose work largely carried over to the Phase Two Survey. In addition, the FJC not only assisted with all aspects of the refinement and development of the Phase Two Survey, the FJC also administered the main Phase Two Survey and both Phase Two E-filer Baseline Surveys. The Phase Two Survey work ultimately was the product of the FJC's invaluable commitment, resources and collaboration with the Survey Subcommittee. Again, the entire Committee extends its utmost gratitude to IAALS and the FJC, including particular thanks to Emery G. Lee III, Jason A. Cantone, and Margaret S. Williams of the FJC Research Division for their work during Phase Two.

Immediately following the completion of Phase One, in the summer of 2010, the Survey Subcommittee worked with the FJC to develop and administer a new E-filer Baseline Survey, with the purpose of assessing, among other things, ECF filing attorneys' views on the level of e-discovery involved in their cases, their own experience with and general knowledge about e-discovery issues, the proportionality of costs incurred as a result of e-discovery issues and the level of cooperation experienced with opposing counsel on such issues. In August 2010, the initial E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand (6,000) of those attorneys. Eighteen (18) months later, in March 2012, the same E-filer Baseline Survey was repeated, with an added series of questions focused on attorneys' awareness of the Pilot Program and of the educational opportunities and resources provided by the Program. The March 2012 E-filer Baseline Survey was again sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand five hundred (6,500) attorneys, for a response rate of twenty-six percent (26%).

Additionally, in March 2012, the Survey Subcommittee, with critical support from the FJC, reviewed and refined the Phase One Survey in order to develop a Phase Two Survey. During this process, the Subcommittee reviewed every question on both the Phase One Attorney Survey and the Phase One Judge Survey. The goal of the Phase Two Survey, as with Phase One, was to assess the

effectiveness of the Principles and Phase Two of the Pilot Program by gathering opinion data through a self-report questionnaire to obtain perceptions of the procedures from the participants in the Program and assess satisfaction with the Principles and processes surrounding the Principles. Upon review by the Subcommittee, the vast majority of the original Phase One survey questions were left intact in both the attorneys' and judges' questionnaires in order to allow for potential comparison to the Phase One 2010 Survey results, in addition to independently serving as an evaluative and information-gathering tool to assess effectiveness of the Program during Phase Two.

As noted in the May 2010 Phase One Report, the Subcommittee worked closely with Corina Gerety of IAALS to develop the original Phase One Survey questionnaires, including extensive group drafting sessions of the questionnaires, which began with the drafting of hypotheses based on the Principles themselves. The FJC Research Division also provided invaluable guidance and recommendations during the development of the original Survey questionnaires. Before completion, the Survey Subcommittee's original Phase One questionnaires were distributed to the full Committee, which met to discuss recommended changes for improving, and in some cases expanding, the Survey questionnaires to include additional perspectives. As a part of the work in Phase One, the Survey Subcommittee ultimately designed two survey questionnaires for Pilot Program participants — the Phase One Judge Survey and the Phase One Attorney Survey; the same approach was maintained for Phase Two.

Further, once again, given that the majority of the participating judges had numerous cases in the Pilot Program, the Phase Two Survey asked each of the judges to complete one Survey questionnaire covering all of their cases in the Program, with the narrative portion of the Survey questionnaire providing judges an opportunity to provide information on specific cases or types of cases, where appropriate. In contrast, the vast majority of attorneys with cases in the Pilot Program had only one case in the Pilot Program, and thus were asked to fill out a separate Survey questionnaire based on the application of the Principles for each specific case in the Pilot Program. The Subcommittee again opted in Phase Two not to send a survey questionnaire directly to parties to the lawsuits in the Pilot Program based on a number of considerations, including overlap with the Attorney Survey Questionnaire and continued administrative barriers to collecting such information. The final Phase Two Judge Survey E-mail and Questionnaires is attached to this Report as Appendix E.2.a. and the final Phase Two Attorney Survey E-mail and Questionnaires is attached to this Report as Appendix E.2.b.

Emery G. Lee III, Jason A. Cantone, and Margaret S. Williams of the FJC led the digitization and the on-line electronic administration of the Phase Two Survey, which began on February 13, 2012, and was completed by March 7, 2012. The Phase Two Judge Survey was sent to forty (40) judges; twenty-seven (27) replied, for a response rate of sixty-eight percent (68%). The Phase Two

Attorney Survey was sent to seven hundred eighty-seven (787) attorneys designated as lead counsel in cases identified as Phase Two Pilot Program cases; the Survey instructions requested that only one counsel per party respond for each case, and, accordingly, that either the lead attorney or the lawyer on the team with the most knowledge of the e-discovery in the case complete the Survey. Two hundred thirty-four (234) attorneys replied, for a response rate of thirty percent (30%).

The completed Phase Two questionnaires were reviewed by the FJC only for processing and analysis. Identifying information included in response to the Survey was maintained strictly confidential by the FJC Survey administrators. Neither the court, the Seventh Circuit Electronic Discovery Pilot Program Committee, nor any other judges or attorneys had access to any identifying information.



## **8. PHASE TWO SURVEY RESPONSES AND RESULTS**

Phase Two included a total of two hundred ninety-six (296) cases selected by the participating U.S. District Judges and U.S. Magistrate Judges from among the cases on their respective dockets as explained in Section 7. In February and March 2012, surveys were sent to the participating judges (the “Judge Survey”) and attorneys (the “Attorney Survey”). In March 2012, surveys were sent to each of attorneys who registered as e-filers in at least one of the seven (7) districts in the Seventh Circuit (the “E-filer Baseline Survey”). Selected results from those surveys are discussed, summarized, and reported below. The Federal Judicial Center’s reports summarizing the results of (a) the Judge Survey and Attorney Surveys and (b) the E-filer Baseline Survey are attached as Appendices F.2.a. and F.2.b. to this Report. The FJC’s reports also provide the detailed survey results, including the survey totals by question and all of the narrative comments submitted by the attorneys and judges in response to the surveys.

### **A. Judge Survey**

#### **(1.) Number and Percentage of Participation**

Forty (40) federal judges, including seventeen (17) district judges, twenty-one (21) magistrate judges, and two (2) bankruptcy judges, participated in Phase Two of the Pilot Program by implementing the Principles through orders entered in each Phase Two Case. On average, each judge used the Principles in approximately 7.2 cases.

A total of twenty-seven (27) of the participating judges (sixty-eight percent (68%)) responded to the Phase Two Judge Survey Questionnaire. Each judge was asked to consider all of the Phase Two cases over which they individually presided in answering the questionnaire. Despite this healthy response rate, the survey responses should be treated as anecdotal expressions of opinion from expert observers, and some caution should be taken before extrapolating the participating judges’ responses to the larger population of judges in the Seventh Circuit and the country overall.

#### **(2.) Summary of Results**

Overall, the Phase Two Judge Survey results reflect continued strong support for the Program and the Principles. For example, three-quarters of all of the responding judges reported that the Principles increased or greatly increased the fairness of the e-discovery process. And not a single judge reported that the Principles decreased fairness. (Table J-16.) And as was the case in Phase One, most of the responding judges — sixty-three percent (63%) — indicated that the proportionality

Principles set out in Federal Rule of Civil Procedure 26(b)(2)(C), and emphasized in Principle 1.03, played a significant role in the development of discovery plans in their pilot cases. (Table J-4.)<sup>3</sup>

Responding judges provided a positive picture of their familiarity with the Principles. Seventy-seven percent (77%) of the judge respondents rated themselves as a 4 or 5 (“Very familiar”) on a 0-5 scale. No judge rated herself as “Not at all familiar.” (Table J-2.) In addition, the judge respondents tended to rate the parties’ discussions of e-discovery issues prior to the Rule 16(b) conference as comprehensive, with seventy-eight percent (78%) rating the discussions in the upper half of the 0-5 scale (5 being “Comprehensive Discussion”). (Table J-3.)

The results of the survey also provide clear confirmation of the judges’ favorable view of the e-discovery liaison. Fully sixty-three percent (63%) of judge respondents agreed or strongly agreed with the statement that “The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process,” and no judge respondent disagreed or strongly disagreed with that statement. (Table J-21.) And sixty-eight percent (68%) of judge respondents reported that the Principles work better in some cases than in others. (Table J-22.)

The results of the survey also provide other evidence of the continuing positive effect the Principles are having on discovery in the federal courts. For example, of the twenty-seven (27) responding judges,<sup>4</sup>

- Eighty-four percent (84%) reported that application of the Principles had increased or greatly increased counsel’s familiarity with their clients’ data and systems. (Table J-19.)
- Seventy-eight percent (78%) reported that the Principles had increased or greatly increased levels of cooperation exhibited by counsel to efficiently resolve their cases. (Table J-5.)

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<sup>3</sup> Interestingly, responding attorneys had a different perception; only nineteen percent (19%) indicated that proportionality Principles played a significant role. Fifty-eight percent (58%) of those responding stated that they did not play a significant role, and an additional twenty-three percent (23%) stated that there was no discovery plan in the case.

<sup>4</sup> The Phase One Judge Survey results were similar. In most cases, however, the majorities/pluralities were higher in Phase One than Phase Two. For example, ninety-one percent (91%) of Phase One responding judges reported that the Principles had the effect of increasing or greatly increasing counsel’s demonstrated familiarity with their clients’ electronic data and data systems. The reason for the variation is not clear. It is worth noting, however, the small number of judges in the two surveys and the significant increase in the number of judges from Phase One to Two (thirteen (13) judges to twenty-seven (27)). For a survey with only thirteen (13) respondents, such as Phase One, the difference between ninety-one percent (91%) and eighty-four percent (84%) would be less than one judge.

- Seventy-eight percent (78%) reported that the Principles had increased or greatly increased the likelihood of an agreement between counsel under Federal Rule of Evidence 502. (Table J-6.)
- Seventy-one percent (71%) indicated that the Principles had increased or greatly increased the attorneys' demonstrated level of attention to the technologies affecting the discovery process. (Table J-17.)
- Seventy percent (70%) reported that the Principles had increased or greatly increased their own understanding of the parties' data and systems. (Table J-20.)
- Sixty-seven percent (67%) reported that the Principles had increased or greatly increased the extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention. The remaining judges reported that the Principles had no effect; no judge reported a decrease. (Table J-7.)
- Sixty-six percent (66%) indicated that the Principles had increased or greatly increased the parties' ability to obtain relevant documents. The remaining judges reported that the Principles had no effect; no judge reported a decrease in the parties' ability to obtain relevant documents as a result of the application of the Principles. (Table J-9.)
- Fifty-nine percent (59%) stated that the Principles had increased or greatly increased their own level of attention to the technologies affecting the discovery process. (Table J-18.)
- Fifty-two percent (52%) indicated that the Principles had increased or greatly increased the promptness with which unresolved discovery disputes are brought to the court's attention. The remaining judges reported that the Principles had no effect; no judge reported a decrease in how promptly such disputes were brought to the court's attention. (Table J-8.)
- Forty-eight percent (48%) reported that the Principles had decreased or greatly decreased the number of discovery disputes brought before the court, as opposed to only eight percent (8%) reporting that they increased such disputes. (Table J-13.)

The vast majority of the responding judges also reported that the Principles reduced (forty-one percent (41%)), or had no effect on (forty-eight percent (48%)), the number of allegations of spoliation or sanctionable conduct in cases. Only eleven percent (11%) reported that the effect of the Principles was to increase the number of such allegations. (Table J-10.) Finally, the responding judges confirmed that the Principles either reduced (thirty-seven percent (37%)), or had no effect on

(forty-four percent (44%)), the number of requests for discovery on another party's efforts to preserve or collect ESI. Only nineteen percent (19%) reported that the Principles increased the number of requests for discovery of preservation or collection of ESI. (Table J-14.)

## **B. Attorney Survey**

### **(1.) Number and Percentage of Participation**

Two hundred thirty-four (234) of the seven hundred eighty-seven (787) attorneys designated as lead counsel in the Pilot Program cases responded to the Phase Two Attorney Survey Questionnaire. This constitutes a response rate of thirty percent (30%). Each attorney was asked to respond with regard to his or her experience in connection with the single Phase One case in which he or she served as counsel of record. The most commonly reported role with respect to ESI was representing a party that was primarily a producing party (thirty-eight percent (38%)), followed by representing a party equally a requesting and producing party (twenty-seven percent (27%)), representing a party that was primarily requesting ESI (twenty-five percent (25%)), and representing a party that was neither a requester nor a producer (ten percent (10%)). (Table A-5.) This relative imbalance makes sense, given that sixty-three percent (63%) of the attorney respondents reported having represented a defendant in their Pilot case. This is in contrast to the Phase One survey, in which the respondents were split evenly between plaintiff and defendant attorneys. (Table A-1.)

The mean number of years in practice for responding attorneys was 21 years. The most common practice area was commercial litigation — not primarily class action. The median attorney reported 6-10 e-discovery cases in the past 5 years, not including Pilot cases. Fully thirty-seven percent (37%) of attorneys rated their own familiarity with the Principles at 4 or 5 ("Very familiar") on a 0-5 scale; the median attorney rated herself at 3 on the 0-5 scale. The most common type of client for the attorney respondents was a privately held company (forty-three percent (43%)). (Table A-1.)

The Phase Two cases were at various stages in the litigation process when they were selected for inclusion in the Pilot Program. As a result, some of the questions posed in the Phase Two Attorney Survey Questionnaire were not applicable to all cases. The attorneys' responses provide a snapshot of information. As with the Phase Two Judge Survey Questionnaire, however, caution should be exercised in extrapolating the attorneys' responses to a larger population.

### **(2.) Summary of Results**

The Phase Two Attorney Survey results generally reflect that the Principles are having a positive effect. Forty percent (40%) of attorney respondents reported that the application of the Principles

in their Pilot cases had increased or greatly increased the fairness of the e-discovery process, as compared to only five per cent (5%) who indicated that the Principles decreased or greatly decreased fairness. (Table A-23.) Thirty-six percent (36%) of responding attorneys reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel, as compared to only two percent (2%) reporting that the Principles decreased or greatly decreased cooperation. (Table A-20.) Thirty-five percent (35%) reported that the Principles had increased or greatly increased the parties' ability to resolve e-discovery disputes without court involvement, as compared to only four percent (4%) who indicated that the Principles decreased or decreased the parties' ability to resolve such disputes. (Table A-22.) Twenty-eight percent (28%) of attorney respondents reported that the Principles increased or greatly increased their ability to obtain relevant documents, as compared to only two percent (2%) who reported that they decreased or greatly decreased that ability. (Table A-24.) And ninety-seven percent (97%) of attorney respondents reported that the Principles increased, or had no effect on, their ability to zealously represent their clients, as opposed to three percent (3%) who reported a decrease. (Table A-21.)<sup>5</sup>

Responding attorneys also generally reported that the Principles were helpful in facilitating understanding of and discussions about e-discovery issues. Forty-nine percent (49%) of attorney respondents reported discussing the preservation of ESI with opposing counsel at the outset of the case, almost double the number of attorneys who reported not having such discussions (twenty-nine percent (29%)). The number of respondents having discussions and not having discussions were each slightly higher in Phase One. (Table A-7.) Sixty-three percent (63%) reported that, prior to meeting with opposing counsel, they became familiar with their client's electronic data and systems, essentially the same result as in Phase One. (Table A-8.) Forty-six percent (46%) of responding attorneys reported that, at or soon after the Rule 26(f) meeting, the parties discussed potential methods for identifying ESI for production, as opposed to only thirty percent (30%) who did not. The number of attorneys having such discussions was slightly higher, and the number not having discussions slightly lower, in Phase One. (Table A-9.)

Forty-one percent (41%) of attorney respondents reported that they met with opposing counsel prior to the Rule 16(b) conference to discuss the discovery process and ESI, as compared to thirty-five percent (35%) of attorneys who did not. (Table A-10.) Ten percent (10%) of respondents reported that unresolved e-discovery disputes were presented to the court at the Rule 16(b) conference, while forty-five percent did not. (Table A-11.) Twenty-nine percent (29%) of respondents reported that e-discovery disputes arising after that conference were raised promptly with the court, as opposed to seventeen percent (17%) who reported they were not. (Table A-12.) The most commonly reported e-discovery topics discussed by counsel prior to beginning discovery

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<sup>5</sup> These numbers are very similar to the results for these same questions in Phase One.

were reported as the scope of relevant and discoverable ESI (fifty-six percent (56%)), the scope of ESI to be preserved by the parties (forty-six percent (46%)), and formats of production for ESI (thirty-nine percent (39%)). (Table A-13.)

The attorney respondents also reported on the scope and volume of electronic data involved in their cases, as well as who pays for the production cost. Forty-one percent (41%) of respondents reported less than one quarter of the information exchanged was in electronic format; twenty-nine percent (29%) reported more than three (3) quarters. (Table A-3.) In terms of more complex cases, forty-one percent (41%) of respondents reported high volume data of 100-500 gigabytes and up to twenty-five (25) custodians, twenty-two percent (22%) reported segregated data, twenty-two percent (22%) listed structured data, and nineteen percent (19%) legacy data. (Table A-6.) Interestingly, no attorney respondent in Phase Two reported foreign data. Only twenty-three (23%) of attorney respondents reported that any requesting party in their Pilot case would bear a material portion of the production costs of ESI. (Table A-4.)

The e-discovery liaison provisions in the Principles were particularly well received. Attorney respondents who reported that the e-discovery liaison was applicable in their case tended to agree overwhelmingly with the statement that “The involvement of my client’s e-discovery liaison has contributed to a more efficient discovery process,” with forty-seven percent (47%) agreeing or strongly agreeing and only three percent (3%) disagreeing. These numbers were similar to the Phase One results. (Table A-33.) Out of the same group of responding attorneys for whom the e-discovery liaison was applicable, most also agreed that “The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient e-discovery process,” with twenty-nine percent (29%) agreeing or strongly agreeing, as compared to only seven percent (7%) disagreeing or disagreeing strongly. In Phase One, slightly fewer attorneys agreed with this statement, and slightly more disagreed. (Table A-34.) The most commonly reported type of e-discovery liaison was an employee of the party — thirty-three percent (33%) — although thirty-six percent (36%) of those responding reported that no e-discovery liaison was designated in the Pilot case.

Separate and apart from the Principles, a substantial majority of responding attorneys reported cooperation among opposing counsel as being excellent or adequate. *See* Tables A-15-19. Cooperation in facilitating the understanding of ESI in the case was rated by fifty-seven percent (57%) of responding attorneys as excellent or adequate — including forty-three percent (43%) adequate and fourteen percent (14%) excellent — as opposed to seventeen percent (17%) who reported it as poor. (Table A-15.) The numbers for other questions on cooperation in other respects were similar:

- Cooperation in facilitating understanding of the data systems involved: ten percent (10%) excellent, forty-two percent (42%) adequate, and fourteen percent (14%) poor (Table A-16);
- Cooperation in formulating a discovery plan: seventeen percent (17%) excellent, forty-two percent (42%) adequate, and fifteen percent (15%) poor (Table A-17);
- Cooperation in reasonably limiting discovery requests and responses: thirteen percent (13%) excellent, thirty-eight percent (38%) adequate, and twenty-three percent (23%) poor (Table A-18);
- Cooperation in ensuring proportional e-discovery: eleven percent (11%) excellent, thirty-three percent (33%) adequate, and twenty percent (20%) poor (Table A-19.)

When asked how application of the Principles has affected the level of cooperation exhibited by counsel to efficiently resolve the case, all but two percent (2%) of attorney respondents reported that the Principles either had no effect or increased or greatly increased the level of cooperation. (Table A-20.)

Seventy-three percent (73%) of responding attorneys reported that the Principles decreased, greatly decreased, or had no effect on discovery costs, with most of those respondents reporting that the Principles had no effect on those costs. Only twenty-seven percent (27%) reported that the Principles had increased or greatly increased discovery costs. (Table A-27.) Seventy-five percent (75%) of respondents reported that the Principles decreased, greatly decreased, or had no effect on total litigation costs. Once again, most attorneys responded “no effect” to that question. In contrast, only twenty-six percent (26%) (with adjustments for rounding) reported that the Principles had increased or greatly increased those costs. (Table A-28.) Similarly, attorneys reported that seventy-seven percent (77%) of respondents reported that the Principles decreased, greatly decreased, or had no effect on the number of discovery disputes (with most of those being “no effect”), as compared to twenty-four percent (24%) reporting an increase or great increase. (Table A-31.)

### **C. E-filer Baseline Survey**

The Phase Two E-filer Baseline Survey was sent to 25,894 attorneys who were registered as e-filers in at least one of the seven (7) districts in the Seventh Circuit. A total of 6,631 attorneys replied, for a response rate of twenty-six percent (26%). The 6,631 Phase Two attorney respondents represent the full range of practice types, with the largest blocs coming from private firms with 2-10

attorneys (thirty percent (30%)) and 11-25 attorneys (fourteen (14%)). (Table E-1.)<sup>6</sup> The type of case the Phase Two attorneys usually litigate varies widely, and includes employment discrimination cases (twenty-two percent (22%)), contracts cases (twenty-one percent (21%)), civil rights cases (twenty percent (20%)), and complex commercial transactions cases (twenty percent (20%)). (Table E-2.) Forty-three percent (43%) primarily represent defendants, thirty percent (30%) primarily represent plaintiffs, and twenty-seven percent (27%) represent both equally. (Table E-3.) The Phase Two respondents were slightly more likely to represent plaintiffs and slightly less likely to represent defendants than their Phase One counterparts. (Table E-4.) Twenty-two percent (22%) of Phase Two respondents reported that their cases always involve the discovery of electronically stored information and documents, an increase from the seventeen percent (17%) of Phase One respondents. (Tables E-9 and E-10.)

The E-filer Baseline Survey results also show that the Principles, and the increased focus on cooperation, are having the desired effect. Seventy-seven percent (77%) of respondents in both Phase One and Phase Two rated opposing counsel as cooperative or very cooperative, and only five percent (5%) of respondents in Phase One and Phase Two rated opposing counsel as very uncooperative. (Tables E-5 and E-6.) Ninety-five percent (95%) of respondents in both Phase One and Phase Two rated their own level of cooperation in the discovery process as cooperative or very cooperative. (Tables E-7 and E-8.)

Phase Two respondents were more likely to find opposing counsel to be knowledgeable of and experienced with the discovery of electronically stored information and documents, with sixty-six percent (66%) of Phase Two respondents reporting that opposing counsel was very knowledgeable or knowledgeable, an increase from sixty-one percent (61%) of Phase One respondents. (Tables E-11 and E-12.)

Phase Two respondents were slightly more likely to rate themselves as knowledgeable of and experienced with the discovery of electronically stored information and documents. But the difference between Phase One and Two was much smaller here than with respondents' ratings of opposing counsel, perhaps because respondents typically tend to rate their own knowledge rather highly. Seventy-six percent (76%) of Phase Two respondents reported themselves as very knowledgeable or knowledgeable, as compared to seventy-three percent (73%) of Phase One respondents. (Tables E-13 and E-14.)

Respondents' position on the level of proportionality of costs, resources required, and ease of identification and production of ESI for requests for production remained consistent between Phase

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<sup>6</sup> The Phase Two E-filer Baseline Survey Data Results are attached as Appendix F.2.b.



One and Two. For requests received, respondents in both phases were split almost evenly between finding that requests were disproportionate (forty nine percent (49%)) or proportionate (fifty-one percent (51%)). (Tables E-15 and E-16.) Not surprisingly, respondents were more likely to see their own requests as proportionate. For requests served, in both phases about one-third of respondents found them disproportionate and two-thirds found them proportionate. (Tables E-17 and E-18.)

Respondents in Phase Two rated themselves as more knowledgeable of and experienced with the Principles, with thirty percent (30%) of Phase Two respondents rating themselves as very knowledgeable or knowledgeable, as compared to twenty-six percent (26%) of Phase One respondents. Parts of Wisconsin and Indiana, in particular, showed an improvement in knowledge and experience between Phase One and Phase Two. In the Northern District of Indiana, during Phase One, twenty percent (20%) reported themselves as knowledgeable or very knowledgeable, as compared to eighty percent (80%) not knowledgeable or very unknowledgeable. In Phase Two, the knowledgeable numbers climbed to twenty-five percent (25%) and the not knowledgeable numbers dropped to seventy-five percent (75%). Similarly, in the Eastern District of Wisconsin, knowledgeable numbers increased from eighteen percent (18%) to twenty-five percent (25%), and not knowledgeable numbers fell from eighty-two percent (82%) to seventy-five percent (75%). The Western District of Wisconsin experienced the most dramatic change: knowledgeable numbers went from fifteen percent (15%) in Phase One to twenty-seven percent (27%) in Phase Two, and not knowledgeable numbers fell from eighty-six percent (86%) in Phase One to seventy-three percent in Phase Two (73%). (Tables E-19 and E-20.)

The Phase Two E-filer Baseline Survey also included six (6) new questions to gauge respondents' knowledge of the Pilot Program and its web site, webinars, resources, and educational programs. Thirty-five percent (35%) of respondents were aware of the Pilot Program's web site (Table E-21) and eighteen percent (18%) reported that they had visited that web site (Table E-22.) Thirty percent (30%) of respondents were aware that the Program has sponsored a series of webinars and that copies are available on the web site (Table E-23); thirteen percent (13%) reported that they had viewed or listened to a Program webinar. (Table E-24.) Seven percent (7%) of respondents reported that they had used the case law and other resources available on the Program's web site. (Table E-25.) Eleven percent (11%) of respondents reported that they had participated in an educational program offered by the Program. (Table E-26.)

Almost all of these numbers were highest in the Northern District of Illinois, where thirty-nine percent (39%) of responding attorneys reported being aware of the Program's web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com); twenty-two percent (22%) report having visited the web site; thirty-four percent (34%) state that they are aware of the webinars on the web site; fifteen percent (15%) report having viewed or listed to a Program webinar; eight percent (8%) report having used the case law

lists or the other resources on the web site; and thirteen percent (13%) having used the educational programs on the site. (Tables E-21 — E-26.)

The E-filer Baseline Survey results show that the Committee's significant outreach efforts have had an effect. A significant and growing number of attorneys report having knowledge of and experience with the Principles. A smaller, but also significant, number of attorneys have used and benefitted from the Pilot Program's web site, webinars, educational programs, and other resources. But despite this interest, there is more work to be done. The Committee in Phase Three will redouble its efforts at outreach and education, with the goal of ensuring fairness in, and reducing the costs of, electronic discovery.

## **9. ASSESSMENT OF PILOT PROGRAM PRINCIPLES FOR PHASES ONE AND TWO**

Section 8 of this Report summarizes the results of Phase Two in a global “snapshot.” This Section, in contrast, matches the Phase Two Survey results with particular Principles being tested. As explained in Section 8, caution should be exercised in extrapolating the results of the Survey to a larger population of attorneys or judges. Because of the limited duration of Phase Two, the participating cases were captured at various states of litigation. Consequently, many attorneys and judges felt it was too early to draw conclusions. Indeed, a majority of the responding attorneys reported that the Principles had a neutral effect on discovery costs, length of discovery, and the number of discovery disputes. (App. F.1.b. at 41-44.) However, as explained in detail below, the attorneys who did report an impact on their cases generally felt that the Principles were having a positive effect on a wide range of ESI discovery issues.

### **A. Principle 1.01 (Purpose)**

*The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, 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 electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.*

#### **(1.) Committee’s Reasoning for Principle 1.01**

Principle 1.01 explains the intended purpose of the Principles. The Committee felt that practitioners too often overlook Rule 1 of the Federal Rules of Civil Procedure and, in particular, the stated purpose for the rules of securing the “just, speedy, and inexpensive” determination of cases. Litigants may be rightly frustrated when a just determination is reached but only after inordinate delay and excessive expense. Accordingly, the Committee took the opportunity in Principle 1.01 to remind practitioners of the stated purpose of the Rules.

The Committee also felt it important to observe that many disputes regarding ESI, and spoliation in particular, are caused or exacerbated by parties’ reluctance to discuss potentially controversial issues at the outset. The Committee felt that early discussion was more likely to lead to amicable

resolution of most issues and, where amicable resolution is not possible, to fewer complex and contentious issues being presented to the courts. Often parties or counsel hope the issue will be mooted by the passage of time. Perhaps the discovery issues will be avoided by a successful motion to dismiss or settlement or will simply never percolate to the surface. However, it is the nature of ESI that the passage of time tends to make issues more difficult to resolve. If issues regarding preservation are not promptly addressed with the opposing party and any remaining disputes presented to the court, then it is often the case that the disputed ESI will be lost. As a result, the delayed identification of these disputes is more likely to require court intervention and often quickly escalates into a spoliation issue. Similarly, issues concerning whether to search and produce certain sources of ESI also tend not to improve with age. Indeed, many ESI sanctions cases have involved preserved, but belatedly identified, sources of ESI. Accordingly, a key purpose of the Principles, stated expressly in Principle 1.01, is to encourage the early discussion and resolution of disputes concerning discovery of ESI.

Finally, Principle 1.01 notes that discovery of ESI is an emerging area. Litigants and courts still have much to learn. The Principles are not meant to anticipate or solve every issue. Hopefully they do provide a useful framework for identifying and resolving discovery issues in a just, speedy, and inexpensive fashion.

## (2.) Phase One Survey Results on Principle 1.01

The Survey responses do not suggest any controversy over the aspirational statements set forth in Principle 1.01. The Survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and the focus on proportionality. A representative respondent stated that the most useful aspect of the Principles is that it “forces the part[ies] to discuss e-discovery at the beginning of the case.” (App. F.1.b. at 51.) Another respondent reported that “[m]erely focusing the parties’ and the Court’s attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.” (*Id.*) Given the brief length of Phase One of the Pilot Program and the various stages of litigation at which many of the cases were selected to participate many felt it was too early to draw conclusions, which is understandable. Of those attorney respondents who felt there was or likely would be an impact on their cases, the vast majority thought the Principles were having a positive effect on a wide range of ESI fronts, including levels of cooperation, ability to zealously represent clients, fairness, amicable resolution of issues, ability to get needed discovery, and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 35-40.) The goals stated in Principle 1.01 appear to be well received.

While the Committee hoped the Principles ultimately would lead to better cooperation and less discovery motion practice, the Committee suspected that the Principles initially might increase the number of disputes by forcing parties to more proactively confront potentially contentious issues. Most attorney respondents, over seventy percent (70%), felt that the Principles had no effect on the incidence of allegations of spoliation and other sanctionable conduct. (*Id.* at 39.) However, of those attorneys who thought the Principles were having an effect, more felt that the Principles increased (or were likely to increase) such allegations than felt the Principles decreased (or were likely to decrease) such allegations. (*Id.*) The judges overwhelmingly (eighty-five percent (85%)) felt that the Principles were reducing discovery disputes brought before the court. (App. F.1.a. at 16.) Whether the Principles ultimately will reduce the incidence of discovery disputes, in particular sanctions disputes, after Phase One remains to be determined. Also, any reduction in the number of disputes coming before the courts will only be a positive change if the parties are cooperating and constructively resolving discovery issues, and not if the reduction occurs because the parties are being discouraged from seeking relief when needed.

(3.) Committee’s Phase One Recommendation on Principle 1.01

Principle 1.01 appears to be well received and no significant revisions appear to be necessary at this time. In Phase Two of the Pilot Program, the Committee should continue testing whether the Principles actually lead to the just, speedy, and inexpensive determination of cases.

(4.) Phase Two Survey Results on Principle 1.01

The Phase Two Survey (“Survey Two”) results align closely with those from Phase One (“Survey One”), and continue to suggest no controversy over the aspirational statements set forth in Principle 1.01.<sup>7</sup> While the Committee’s cautionary statement that the application of the Principles might initially result in an increase in the number of discovery disputes appears to have been borne out (Table A-31), it is notable that after only the second full year of the Pilot Program, fully forty percent (40%) of attorney respondents reported that the application of the Principles in their Pilot cases had increased or greatly increased the fairness of the e-discovery process (Table A-23), while only five percent (5%) believed fairness was diminished. The gains in fairness have come with the apparent

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<sup>7</sup> It should be kept in mind that sixty-two percent (62%) of Survey Two attorney respondents reported having represented a defendant in their Pilot case, compared with Survey One’s nearly even split between plaintiff and defendant representation.

trade-off of an increase in discovery and total litigation costs, at least in the opinion of the bar as opposed to the bench. (Tables A-27, A-28.)<sup>8</sup>

Survey Two attorney respondents frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues, and focus on proportionality. Notwithstanding a de minimis downward drift between Survey One and Survey Two, the overall response was positive. One attorney respondent noted that the court’s serious attitude toward the Program “coupled with the clarity of the Program — has led to increased professionalism and significantly decreased costs.” Another attorney respondent reported that “[t]he requirement to meet and confer early regarding ESI early on in litigation is most beneficial for purposes of avoiding discovery disputes down the road.” A third attorney respondent reported that the Principles “[p]rovided a clearer framework for the parties to deal with e-Discovery issues.”

Fully seventy-five percent (75%) of judge respondents reported that the Principles had increased or greatly increased the fairness of the e-discovery process (Table J-16), while forty-eight percent (48%) of judge respondents reported that the application of the Principles to their cases during the Survey Two period decreased or greatly decreased the number of discovery disputes before the court (eight percent (8%) reported an increase, zero percent (0%) greatly). (Table J-13.) This reported increase in discovery disputes may reflect the application of the Principles to an increasing number of cases within the Seventh Circuit. One judge respondent reported that the standards embodied in the Principles “provide a uniform and default set of Principles that need not be reinvented for each case, so that improves case management efficiency.” Another judge respondent reported the Principles “in general...prompt[s] the parties to discuss e-discovery issues, if applicable, in advance of the Rule 16(b) conference. A third judge respondent suggested that the Principles could be improved by having a “third stage that addresses the admissibility of electronic evidence.”

#### (5.) Committee’s Phase Two Recommendation as to Principle 1.01

Principle 1.01 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing and analysis in Phase 3.

### **B. Principle 1.02 (Cooperation)**

*An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties*

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<sup>8</sup> It should be noted that the Survey data do not currently provide reasons why these costs increased (i.e., type of matter litigated, discovery dispute vs. discovery processing as sources of litigation costs).

*to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.*

(1.) Committee’s Reasoning for Principle 1.02

The Committee believes that the culture of our adversarial system tends to result in overly combative discovery that is often counterproductive to the stated purpose of the Federal Rules of Civil Procedure: securing the “just, speedy, and inexpensive” determination of cases. Fed. R. Civ. P. 1. Principle 1.02 echoes The Sedona Conference® Cooperation Proclamation, a proclamation adopted by numerous judges that calls for intelligent cooperation among counsel on discovery. Lawyers are advocates and take justifiable pride in zealously representing their clients. But “[a]s officers of the court, attorneys share this responsibility [to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay] with the judge to whom the case is assigned.” Fed. R. Civ. P. 1, Advisory Committee Notes. Lawyers are officers of the court and should not use discovery as a weapon in ways that undermine resolving cases timely, efficiently, and on their merits.

(2.) Phase One Survey Results on Principle 1.02

The survey responses do not suggest any controversy over Principle 1.02's call for cooperation. In fact, many survey responses identified the call for cooperation as the most useful aspect of the Principles. In one attorney’s assessment, the Principles are useful in “[p]romoting cooperation and understanding before disputes arise and when egos have flared.” (App. F.1.b. at 51.) Of those respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level of cooperation between counsel and on the attorney’s ability to zealously represent his or her client. (*Id.* at 35-36.) The judge respondents agreed on both points. (App. F.1.a. at 11, 17.) This tends to confirm that there is not a conflict between these two concepts.

(3.) Committee’s Phase One Recommendation on Principle 1.02

Principle 1.02 appears to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

(4.) Phase Two Survey Results on Principle 1.02

Survey Two results follow in line with Survey One and do not suggest any controversy over Principle 1.02's call for cooperation. Indeed, Survey Two results indicate that the introduction of Principle 1.02's mandate for cooperation in the discovery process has provided substantive and

substantial momentum in achieving the aspirational objectives set forth in Principle 1.01. Fully forty-percent (40%) of attorney respondents reported that the application of the Principles in their Pilot cases had increased or greatly increased the fairness of the e-discovery process (Table A-23), thirty-six percent (36%) reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel (Table A-20), and thirty-five percent (35%) reported that the Principles had increased or greatly increased the parties' ability to resolve e-discovery disputes without court involvement. (Table A-22.) Of responding attorneys, seventy-one percent (71%) reported that the application of the Principles had no affect with respect to their ability to zealously represent clients (Table A-21), while thirty-six percent (36%) reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel. (Table A-20.) Fully forty-nine percent (49%) of attorney respondents reported meeting with opposing counsel at the case's outset to discuss preservation of ESI (Table A-7), sixty-three percent (63%) reported that prior to meeting with opposing counsel, they became familiar with their client's electronic data and systems (Table A-8), and forty-six (46%) reported that, at or soon after the Rule 26(f) meeting, the parties discussed potential methods for identifying ESI for production. (Table A-9.) Fully forty-one percent (41%) of attorney respondents reported that they met with opposing counsel prior to the Rule 16(b) conference to discuss the discovery process and ESI. (Table E-10.) Only ten percent (10%) of attorney respondents reported that unresolved e-discovery disputes were presented to the court at the Rule 16(b) conference (Table A-11), while twenty-nine percent (29%) reported that e-discovery disputes arising later in the Pilot case were raised promptly with the court. (Table A-12.) Many attorney respondents reported with positive comments about their experiences with the Principles. One attorney respondent noted "[t]he parties have been relying strongly on the written Principles of the Pilot Program, which has facilitated cooperation and resolution when disputes arise." Another attorney respondent commented that the Principles "[r]equired cooperation of counsel to streamline process and identify responsive documents (separating wheat from the chaff) early on."

Judge respondents' experiences were similarly positive, with fully seventy-eight percent (78%) of responding judges reporting that the Principles had increased or greatly increased levels of cooperation exhibited by counsel to efficiently resolve their cases (Table J-5), while twenty-six percent (26%) of judge respondents reported that, based on filed materials and in-court interactions, application of the Principles to Pilot Program cases, increased counsel's ability to zealously represent the litigants. (Table J-15.) Further, sixty-seven percent (67%) of judge respondents reported that the Principles had increased or greatly increased the extent to which counsel meaningfully attempted to resolve discovery disputes before seeking court intervention. (Table J-7.) One judge respondent reporting on the utility of the Principles stated that they resulted in "[i]ncreasing awareness of the need to cooperate and work on protocols to anticipate problems and develop mechanisms for avoiding them altogether or resolving them."



(5.) Committee’s Phase Two Recommendation as to Principle 1.02

Principle 1.02 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing, analysis and evaluation in Phase 3.

**C. Principle 1.03 (Discovery Proportionality)**

*The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.*

(1.) Committee’s Reasoning for Principle 1.03

The proportionality Principle set forth in Rule 26(b)(2)(C) is vital to achieving the goals already discussed with respect to Principles 1.01 and 1.02. The Committee felt that the proportionality Principle too often is not observed or is not invoked appropriately in connection with ESI discovery. Therefore, Principle 1.03 expressly calls attention to the proportionality Principle embodied in Rule 26(b)(2)(C).

(2.) Phase One Survey Results on Principle 1.03

Attorney respondents frequently identified the focus on proportionality as the most useful aspect of the Principles. One attorney praised the Principles’ “[e]xplicit discussion of the need to ensure proportionality,” while another noted “[t]he focus on proportionality actually caused the parties in my case to determine that e[-]discovery would not be necessary except on limited issues.” (App. F.1.b. at 50, 52.) Of those respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the ability to zealously represent clients, fairness, the ability to get needed discovery, and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 36- 40.) This suggests that the call for a significant focus on proportionality of discovery is welcome and generally is not seen as impeding the just determination of cases.

(3.) Committee’s Phase One Recommendation on Principle 1.03

Principle 1.03 appears to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

#### (4.) Phase Two Survey Results on Principle 1.03

Survey Two results roughly approximate the results in Survey One, and do not suggest any controversy over either of Principle 1.03's incorporation of the proportionality standard articulated in Fed.R.Civ.P. 26(b)(2)(C), or the requirement for targeted, clear, and specific ESI discovery requests.

On the question of the level of cooperation between counsel in ensuring proportionality consistent with the factors of Fed.R.Civ.P. 26(b)(2)(C), the most common attorney respondent response (thirty-seven percent (37%)) was “not applicable,” representing a de minimis (one percentage point (1%)) drop from Survey One; however, forty-four percent (44%) reported that the level was adequate or excellent, while twenty percent (20%) reported that the level was poor [a drop of two (2%) and four percentage (4%) points, respectively]. (Table A-19.) While nineteen percent (19%) of attorney respondents reported that the proportionality factors set forth in Fed.R.Civ.P. 26(b)(2)(C) played a significant role in the development of a discovery plan (Table A-14), it represented a two-percentage point drop from Survey One. It should be noted, however, that nineteen percent (19%) of attorney respondents reported that the application of the Principles decreased or greatly decreased discovery costs (a four percentage (4%) point drop compared with Survey One), while twenty-seven percent (27%) reported that that Pilot application to their case increased discovery costs (only five percent (5%) reported greatly increased). (Table A-27.) Further, nineteen percent (19%) of attorney respondents reported that application of the Principles either decreased or greatly decreased total litigation costs (a drop of two percentage points from Survey One), while twenty-six (26%) reported that they increased or greatly increased total litigation costs (an increase of four percentage points (4%) from Survey One). (Table A-28.) One attorney respondent found the “emphasis on proportionality” to be one of the most useful aspects of the Pilot Program. Another attorney respondent reported that the aspect of the Pilot Program found to be useful was “[t]he requirement of meeting early to define boundaries and discuss e-discovery issues; proportionality. I feel the requirement that discovery be proportional required the other side to focus and not fish (wasting resources).”

Fully sixty-three percent (63%) of judge respondents reported that the proportionality standards set forth in Fed.R.Civ.P. 26(b)(2)(C) played a significant role in the development of discovery plans for their Pilot Program cases (Table J-4), while forty-eight percent (48%) of judge respondents reported that the application of the Principles had decreased or greatly decreased the number of discovery disputes brought before the court. (Table J-13.) One judge respondent reported that the proportionality and meet and confer requirements were aspects of the Pilot Program Principles found most useful. Another judge respondent commented that “...the emphasis on cooperation and

proportionality cut down the discovery disputes that arise and decrease the frustration level on the part of counsel and their clients toward the litigation process as a whole.”

(5.) Committee’s Phase Two Recommendation as to Principle 1.03

Principle 1.03 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing and evaluation in Phase Three of the Pilot Program.

**D. Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)**

*(NOTE: Principle 2.01 was modified after Phase One, and therefore, the version set forth below shows the modifications that were made.)*

*(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion discussed are:*

- (1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);*
- (2) the scope of discoverable ESI and documents to be preserved by the parties;*
- (3) the formats for preservation and production of ESI and documents;*
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and*
- (5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged*

*information and other privilege waiver issues ~~under~~pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.*

*(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.*

*(c) ~~Disputes regarding EDI will be resolved more efficiently if, before meeting with opposing counsel, the~~The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.*

*(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.*

(1.) Committee's Reasoning for Principle 2.01

The Federal Rules of Civil Procedure already require parties to meet and confer at the outset of cases, and throughout the progress of cases, on discovery matters. Principle 2.01(a) reinforces these requirements and sets the stage for subsequent Principles which elaborate on the topics of discussion for which, in some cases, the Rules provide little in the way of specifics. The “identification” of relevant and discoverable ESI is addressed in more detail in Principle 2.05. The “scope of discoverable ESI to be preserved” is addressed in more detail in Principle 2.04. The “format[] for preservation and production of ESI” is addressed in more detail in Principle 2.06. Principle 2.01(a) also reinforces the requirement in the Rules to consider the potential for conducting discovery in phases or stages, with an emphasis on using this procedure as a method for “reducing costs and burden.” Finally, Principle 2.01(a) draws attention to Rule 502 of the Federal Rules of Evidence and encourages parties to consider whether they can reduce costs by taking advantage of a Rule 502(d) order providing for non-waiver of privilege despite even intentional disclosure. As a result of the survey data from Phase One, Principle 2.01 was strengthened in Phase Two, as shown in the comparison version above.

Principle 2.01(b)'s requirement that parties “shall” promptly raise disputes that have been, or should have been, identified in the meet and confer process adds teeth to Principle 1.01's stated goal of encouraging “the early resolution of disputes regarding the discovery of ESI.” Both parties to a

case too often perceive an advantage in putting off difficult issues concerning preservation and discovery of documents and ESI. This attitude undermines the Principles' goals of encouraging the early identification and resolution of disputes and changing the adversarial culture of discovery. Principle 2.01(b) therefore seeks to incentivize parties to discuss and raise such issues promptly. The risk of ignoring the mandate is that the presiding judge may refuse to hear an issue that should have been raised earlier. This potential for waiver creates an incentive for parties to make their opponents aware of thorny issues as soon as possible so that, if the opponents do not raise the issue with the court promptly, they can invoke Principle 2.01(b) in their waiver argument. By the same token, Principle 2.01(b) discourages lying in wait concerning a perceived shortfall of one's opponent.

It is also important to note Principle 2.01(b) recognizes that preservation and discovery are part of an ongoing process that continues throughout the progress of the case. Issues that are, or reasonably should be, identified before the initial status conference must be raised by that time. Other issues will not be apparent to either party until the case has progressed further. Parties will not be faulted for not identifying those issues earlier. However, parties must raise such issues promptly once they have been identified.

Principle 2.01(c) makes the point that lawyers cannot fulfill the purpose and specific requirements of the Principles unless they take the necessary steps to understand their clients' information systems. The nature of the information that must be understood can be gleaned largely from the content of the other Principles.

Principle 2.01(d) sets out two potential consequences for a failure to meaningfully participate and cooperate in the meet and confer process. One potential consequence is that the presiding judge may delay the commencement of discovery. This option may be appropriate when the recalcitrant litigant is attempting to begin discovery on its opponent, while at the same time failing to meaningfully participate in the prescribed meet and confer process. The second potential consequence set forth in Principle 2.01(d) simply reinforces that the court may impose sanctions.

## (2.) Phase One Survey Results on Principle 2.01

The Survey responses do not suggest any controversy over the purpose of Principle 2.01. Indeed, the Survey responses frequently identified the most useful aspects of the Principles as the encouragement of an early focus on e-discovery issues, and one attorney specifically named Principle 2.01(a) as the most useful aspect of the Principles. (App. F.1.b. at 51.) A representative respondent stated that the most useful aspect of the Principles is “[g]etting parties to focus on e-discovery early by highlighting issues in a case up front.” (*Id.*) Another respondent reported that “[m]erely focusing the parties’ and the court’s attention on these issues has been helpful in moving the case forward

more efficiently and saving my client money.” (*Id.*) More generally, one respondent praised “[t]he detailed clarification of the obligations of the parties.” (*Id.* at 52.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the amicable resolution of issues and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 37, 40.) More than nine (9) out of ten (10) judge respondents indicated that the Principles had a positive effect on counsels’ demonstrated level of attention to the technologies affecting the discovery process and counsels’ familiarity with their own clients’ electronic data and data systems. (App. F.1.a. at 18-19.) A solid majority of judge respondents also indicated that the Principles had a positive effect on the judges’ understanding of the parties’ electronic data and data systems for the appropriate resolution of disputes. (*Id.* at 20.) Principle 2.01 appears to be having a positive effect. However, there appears to be room for improvement in compliance.

While most attorneys are following the guidance of Principle 2.01(a) and (c), a significant minority still is not. Where applicable, a majority of attorney respondents reported that they familiarized themselves with their clients’ information systems and had early discussions with their opponents about ESI preservation issues and methods for identifying relevant ESI. (App. F.1.b. at 22-23.) The judges also reported that these things appeared to be occurring. (App. F.1.a. at 18-20.) Curiously, though, a substantial minority of attorneys reported that they did not do these things despite acknowledging that the issues were applicable to their case. (App. F.1.b. at 22-23.)

The requirement of Principle 2.01(b) that disputes be raised with the court promptly does not appear to be followed regularly. To the extent there were unresolved issues at the time of the initial status, only twenty-five percent (25%) of respondents reported that they were raised at the initial status. (App. F.1.b. at 24-25.) To the extent that issues arose after the initial status hearing, only fifty-six percent (56%) reported that the issues were raised promptly thereafter. (*Id.*) A majority of judge respondents indicated that the Principles had a positive effect on the promptness with which the parties raised unresolved discovery disputes with the court and the parties’ ability to obtain relevant documents. (App. F.1.a. at 13-14.) According to the attorneys, however, there remains room for more improvement.

### (3.) Committee’s Phase One Recommendation on Principle 2.01

Principle 2.01 seems to be on the right track encouraging an early focus on issues concerning preservation and discovery of ESI, where applicable. However, Principle 2.01 may be only partially effective in achieving its aims. The Committee might consider strengthening Principle 2.01 in Phase Two of the Pilot Program. (Note: The Committee did strengthen Principle 2.01 for Phase Two as indicated by the comparison version printed above.)

(4.) Phase Two Survey Results on Principle 2.01

Principle 2.01, as modified for Phase Two, requires early discussion of subjects that are treated in more detail in subsequent Principles and sets forth a framework of incentives to encourage litigants to do so. One attorney respondent summed this up as follows: “early meet and confer with ‘teeth’ discouraging bad behavior by litigants.” Because Principle 2.01 is an overarching Principle, evaluating it requires an overview of most of the survey results. The data suggest that the Principles promote cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. But these gains may have come in exchange for at least some increased cost and delay.

The attorney respondents reported that in most cases the Principles had no effect with respect to most of the metrics the Committee sought to measure, including: the levels of cooperation (sixty-two percent (62%)), the ability to zealously represent clients (seventy-one percent (71%)), the ability to resolve disputes without court involvement (sixty-one percent (61%)), the fairness of the e-discovery process (fifty-five percent (55%)), the ability to obtain relevant documents (seventy percent (70%)), the incidence of allegations of spoliation or other sanctionable conduct (sixty-eight percent (68%)), the number of discovery disputes (fifty-five percent (55%)), the incidence of discovery about another party’s efforts to preserve and collect ESI (sixty-four percent (64%)), the total costs of discovery (fifty-four percent (54%)), the total cost of litigation (fifty-six percent (56%)), the length of the discovery period (sixty-six percent (66%)), and the length of the litigation (seventy percent (70%)). The survey data do not provide quantitative data to understand why this was so. But there is qualitative data in the narrative comments to suggest that many cases settle early or before discovery becomes a major issue, many do not involve much discovery, and sophisticated parties often are able to work things out themselves. The lack of a perceived effect in many cases is not surprising or troubling. The Principles did have perceived effects on important metrics, ranging from twenty-six percent (26%) to forty-five percent (45%) of the cases depending for various metrics. It is in these cases where the Principles are potentially important and should be evaluated.

In those cases in which the Principles did have a perceived effect those effects were overwhelmingly positive with respect to cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. Attorneys reported that the Principles improved levels of cooperation in thirty-six percent (36%) of the cases and decreased it in two percent (2%). Attorneys reported that the Principles increased the ability to zealously represent clients in twenty-five percent (25%) of the cases, and decreased it in three percent (3%). Attorneys reported that the Principles improved the ability to resolve disputes without court involvement in thirty-five percent (35%) of the cases, and decreased it in four percent (4%). Attorneys reported that the Principles increased the fairness of the e-discovery process in forty

percent (40%) of the cases, and decreased it in five percent (5%). Attorneys reported that the Principles increased the ability to obtain relevant documents in twenty-eight percent (28%) of the cases, and decreased it in two percent (2%). The judges agree. Of the judge respondents: seventy-eight (78%) reported improved cooperation (twenty-two percent (22%) greatly) and none reported decreased cooperation; seventy-five percent (75%) reported that the Principles increased or greatly increased the fairness of the e-discovery process (nineteen percent (19%) greatly) and none observed decreased fairness; sixty-six percent (66%) reported that the Principles increased ability to obtain relevant documents and none felt access was diminished. The consensus view then is that the Principles result in more cooperation, more access to needed information and more fairness.

On the other hand, in those cases in which the Principles were perceived to have an impact, the consensus view among attorneys appears to be that the Principles resulted in more discovery disputes, more discovery on discovery, longer discovery periods, and greater expense for discovery and the litigation in general. So, according to the attorneys, the gains in cooperation, access and fairness appear to have come at a cost. However, the increased costs were considered to be great in only a small percentage of the cases. Attorneys reported that the Principles increased the incidence of charges of spoliation and other sanctionable discovery misconduct in twenty-four percent (24%) of the cases (three percent (3%) greatly), and decreased it in eight percent (8%) (two percent (2%) greatly). The Principles were perceived to increase the incidence of all types of discovery disputes in twenty-four percent (24%) of the cases (four percent (4%) greatly), and to decrease the incidence in twenty-two percent (22%) (two percent (2%) greatly). Attorneys reported that the Principles increased the total costs of discovery in twenty-seven percent (27%) of the cases (five percent (5%) greatly), and decreased it in nineteen percent (19%) (one percent (1%) greatly). Attorneys reported that the Principles increased the incidence of discovery on another party's efforts to preserve and collect ESI in thirty-two percent (32%) of the cases (three percent (3%) greatly), and decreased it in four percent (4%) (one percent (1%) greatly). Attorneys reported that the Principles increased the length of the discovery period in twenty-four percent (24%) of the cases (three percent (3%) greatly), and decreased it in eleven percent (11%) (one percent (1%) greatly). Attorneys reported that the Principles increased the length of the litigation in general in twenty percent (20%) of the cases (two percent (2%) greatly), and decreased it in nine percent (9%) (one percent (1%) greatly). Attorneys reported an increase in the total cost of litigation in twenty-six percent (26%) of the cases (four percent (4%) greatly), and a decrease in nineteen percent (19%) (one percent (1%) greatly).

The Committee anticipated that the Principles might increase the incidence of discovery disputes, at least initially. The Principles seek to encourage and create an incentive for earlier and more fulsome discussion of potentially thorny discovery issues because these issues are usually easier to resolve the earlier they are addressed. In the Phase One Report, the Committee noted that "any reduction in the number of disputes coming before the courts will only be a positive change if the



parties are cooperating and constructively resolving discovery issues, and not if the reduction occurs because the parties are being discouraged from seeking relief when needed.” Given the consensus that the Principles yield gains in cooperation, access and fairness, it would appear that attorneys generally view the perceived increased costs — which were rarely considered substantial — as an acceptable trade off.

The judicial perception varies from the bar on these metrics. Forty-one percent (41%) of the judges perceived a decrease in the number of spoliation/sanctions disputes compared to eleven percent (11%) who perceived an increase. Forty-eight percent (48%) perceived a decrease in discovery disputes in general while only eight percent (8%) perceived an increase. Thirty-seven percent (37%) reported fewer cases of discovery into another party’s preservation and collection efforts whereas nineteen percent (19%) reported an increase. Twenty-two percent (22%) felt that the Principles decreased the length of the discovery period, compared to fifteen percent (15%) who perceived an increase. Twenty-two percent (22%) saw the length of the litigation in general tend to decrease, while only seven percent (7%) saw an increase. The judges, on balance, see fewer disputes and speedier resolutions resulting from application of the Principles.

While there is consensus among the bench and bar that the Principles improve the “just” resolution of cases, it remains unclear to what extent the Principles also promote the more “speedy” and “inexpensive” determination of cases. The attorney respondents seem to believe the Principles, more often than not, moderately increase discovery disputes, delay and costs. The judge respondents feel otherwise. It remains to be determined whether the Principles ultimately will reduce the incidence of discovery disputes and the costs of litigation as the bar’s knowledge and culture around e-discovery matures.

#### (5.) Committee’s Phase Two Recommendation as to Principle 2.01

Principle 2.01 and the other Principles to which it relates seem to promote cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. These gains seem to have come in exchange for at least some increased cost and delay, which the Committee anticipated might be the initial experience as litigants began engaging on e-discovery issues earlier and more substantively. In further phases the Committee should seek to measure whether any increased costs and delays are reasonable in light of the benefits that are being achieved, and whether any perceived increases in these metrics persist or diminish with further education and experience.

## **E. Principle 2.02 (E-Discovery Liaison(s))**

*In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:*

*(a) be prepared to participate in e-discovery dispute resolution;*

*(b) be knowledgeable about the party's e-discovery efforts;*

*(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and*

*(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.*

### **(1.) Committee's Reasoning for Principle 2.02**

The experience of lawyers with the technical aspects of ESI varies widely. The judges on the Committee noted the frequency of counsel appearing before them on electronic discovery disputes who do not appear to have a good understanding of the issues at hand. The Committee felt that the result of many lawyers' lack of technical expertise on ESI issues was an increase in the reluctance of parties to discuss ESI issues at the meet and confer and in the likelihood of ESI disputes being presented to the court. Principle 2.02, therefore, requires that when there is a dispute about technical matters the use of an ESI liaison is mandatory. Principle 2.02 does not require that the liaison be an information systems employee of the party or a third party expert. The liaison can be anyone, including trial counsel. The only requirements are that the liaison be available and competent to discuss the technology issues that are the subject of the dispute. A lawyer who lacks such competence and lacks the inclination to acquire such competence must involve a liaison who possesses the necessary technical expertise.

Because technology can be very complex, it is not realistic to expect anyone to anticipate and master every possible question that may arise in the course of discussions or court hearings concerning ESI. Also, litigants and counsel may be concerned about placing non-lawyers in direct contact with opponents or the court. For this reason, Principle 2.02 requires the liaison to have either the requisite knowledge or reasonable access to those who have the requisite knowledge. A liaison may not know the answer to an unanticipated technical question, but should be reasonably prepared on the matters at hand and be prepared to contact the relevant subject-matter experts as necessary.

(2.) Phase One Survey Results on Principle 2.02

Almost ninety percent (90%) of attorney respondents who had a discovery liaison, and all of the judge respondents, felt that liaisons made for a more efficient discovery process. (App. F.1.b. at 47; App. F.1.a. at 21.) About seventy-five percent (75%) of the attorneys felt the same way about their opponent's liaison. (App. F.1.b. at 48.) Discovery liaisons included technical employees (twenty-eight percent (28%)), inside counsel (twenty percent (20%)), outside counsel (fifteen percent (15%)), and consultants (ten percent (10%)). (*Id.* at 45.) Not surprisingly, this Principle was mentioned positively in many of the written comments to the question regarding which aspects of the Principles were most useful. As one judge wrote, “[d]esignating liaison is the single best idea — it helps focus the discovery requests.” (App. F.1.a. at 24.)

(3.) Committee's Phase One Recommendation on Principle 2.02

Principle 2.02 appears to be very well received and no revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

(4.) Phase Two Survey Results on Principle 2.02

Principle 2.02 introduced the e-discovery liaison and the survey responses indicate that the use of liaisons has been frequent. Attorneys Respondents reported liaison use in sixty-four percent (64%) of the cases. Where liaisons were used, the liaison was an employee of the party more than eighty percent (80%) of the time (in-house counsel about thirty percent (30%) of the time and other employees the other fifty percent (50%) of the time). The balance was split equally between third party consultants and outside counsel.

Principle 2.02's e-discovery liaison continues to be one of the most successful innovations. All of the judge respondents whose cases involved liaisons (sixty-eight percent (68%) of them) believed that the liaisons contributed to a more efficient discovery process, with thirty-three percent (33%) feeling strongly about it. The attorneys also are quite positive about the liaisons. In the cases in

which a liaison was used: (a) ninety-four percent (94%) of the attorneys felt that their own liaison contributed to a more efficient discovery process, while six percent (6%) felt their own liaison did not improve efficiency (but none felt this way strongly); and (b) a little more than eighty percent (80%) of the attorneys felt that their opponent's liaison contributed to a more efficient discovery process, while a little over nineteen percent (19%) felt their opponent's liaison did not improve efficiency (only a fraction of a percent felt so strongly).

The survey data does not track the reasons for the small percentage of respondents who expressed negative views about liaisons. Some anecdotal comments suggest that at least some of the negative views come from lawyers who feel that the costs may outweigh the benefits:

“Most disputes do not warrant the expense of bringing in outside computer consultants and the cost to litigate on ediscovery issues ends up costing more than the issue at hand.”

“Having a computer consultant was very helpful, but costly. Cost should be allocated more fairly.”

These comments do not seem to be warranted where Principle 2.02 is properly applied. Principle 2.02 requires use of a liaison only when there is a discovery dispute that involves technical ESI issues. And the liaison can be anyone who understands the technical issue well enough to address it intelligently with the Court, including even the party's attorney. The very suggestion that it is overly burdensome for counsel to acquire (or else hire) basic competence in the technical question being presented to the Court is evidence of the precise problem that 2.02 seeks to remedy.

One attorney respondent also suggested that he was obstructed by an opponent's *attorney* liaison:

“[A]llowing an attorney to be the liaison allows counsel to obstruct the information.”

It is unclear why a judge would grant more leeway to obstruct on technical issues to a liaison who is an attorney as opposed to, say, an information systems professional. Nor is it clear whether the respondent sought the judge's assistance. In any event, prohibiting attorneys from serving in the role would be arbitrary and tend to exacerbate the complaints about driving up costs.

The few negative views that were reported in the survey results do not appear to be well grounded. And they are vastly outweighed by positive views.

(5.) Committee’s Phase Two Recommendation as to Principle 2.02

Principle 2.02 continues to be very well received. No change is recommended at this time.

**F. Principle 2.03 (Preservation Requests and Orders)**

*(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).*

*(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:*

- (1) names of the parties;*
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;*
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;*
- (4) relevant time period; and*
- (5) other information that may assist the responding party in assessing what information to preserve.*

*(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:*

*(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;*

*(2) identifies any disagreement(s) with the request to preserve; and*

*(3) identifies any further preservation issues that were not raised.*

*(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.*

(1.) Committee’s Reasoning for Principle 2.03

One of the primary problem areas that the Committee identified from the outset is the issue of over broad and counterproductive evidence preservation demands and responses. Demands that another party preserve evidence all too often provide nothing but a generic laundry list of the kinds of computer systems and data storage devices that exist in the world today. The Committee felt that these sorts of broad preservation demands do not promote the just, speedy, and inexpensive resolution of the case and are not reasonably designed to identify relevant categories or sources of information. These types of broad demands tend to result in similarly generic responses. As a result, the sending and answering of letters demanding preservation of evidence tend to prevent rather than promote the meaningful exchange of information, which is a missed opportunity for both parties.

Principle 2.03(a) observes that while “appropriate” preservation requests can further the goals of the Principles, “vague and overly broad” preservation requests do not and are “disfavored.” The scope of the duty to preserve evidence includes evidence that reasonably can be identified as likely to be relevant and discoverable. It does not require preservation of all available sources of information just because the possibility always exists that some source of potentially relevant evidence has been overlooked. Laundry lists of systems and storage devices proceed from the opposite assumption, which is the reason Principle 2.03(a) expressly discourages them.

Principle 2.03(a) also provides that preservation demands “should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).” In other words, the proportionality Principle applies to preservation demands as much as it does to discovery demands. Overly broad preservation can be as serious a cost problem as overly broad searches and productions.

Whereas Principle 2.03(a) seeks to identify and discourage unhelpful practices, Principle 2.03(b) is intended to identify potentially productive uses of preservation demands. The duty to preserve evidence is triggered by knowledge of actual or reasonably anticipated litigation. One productive

use of a preservation demand is to make one's opponent aware that future litigation is likely. Receipt of a letter threatening suit or demanding preservation of evidence can be a factor in determining whether a pre-litigation duty to preserve evidence has been triggered.

Another productive use of a preservation demand is to provide information that helps one's opponent identify the scope of evidence that is likely to be relevant and discoverable in the case. Principle 2.03(b) identifies a number of examples of the sort of specific and actionable information that can constructively help one's opponent identify the subset of documents and ESI that should be preserved. Reference must also be made to Principle 2.04(d), which identifies several specific preservation steps that ordinarily are not required and must be expressly demanded if one considers them important in a given case. There will not always be agreement about the subjects and classes of documents and ESI that are so identified, and such materials do not automatically become relevant and discoverable just because they are demanded. But specific and actionable disputes concerning the appropriate scope of preservation can in this way be identified and often resolved early as required by Principle 2.01(b), before the information is no longer available. Such constructive preservation demands can also be effective pre-suit, as the recipient of a constructive preservation demand that thoughtfully identifies relevant subjects and classes of information will find it more difficult to explain non-preservation if the court later finds the evidence was relevant and discoverable.

Principle 2.03(c) provides guidance on how to constructively approach responding to a preservation demand. Just as a preservation demand should be constructive and specific, a response or even a unilateral preservation disclosure is useful only to the extent it identifies a specific and actionable issue. A party considering responding to a preservation demand, or initiating a preservation disclosure, should view it as an opportunity to put one's opponent on notice of a potentially controversial preservation issue. This Principle appeals to the notion of cooperation (*see* Principle 1.02) and the importance of counsel's role as an "officer of the court" in seeking to identify and resolve issues early, before they become more complex and combative spoliation problems. This Principle also appeals to the adversarial instinct which the Committee hopes will more and more be drawn to the opportunity to make one's adversary aware of a preservation issue that it then must raise or risk waiving (*see* Principle 2.01(b)).

Principle 2.03(d) makes very clear that the Principles do not require that a party send a preservation demand or respond to one. The Committee clarified this point out of concern that the guidance on how to effectively utilize preservation demands and responses might lead some readers to believe that such letters and responses were required or encouraged. Quite the contrary, the Committee believes that preservation demand letters are usually unnecessary and only rarely can be

constructive. Similarly, there is little purpose in responding to preservation demand letters, at least where they are of the generic, laundry list variety.

(2.) Phase One Survey Results on Principle 2.03

In only seven percent (7%) of the cases did the respondents report some effect on preservation letters. (App. F.1.b. at 49.) Given the short time period of Phase One implementation and Survey evaluation, as well as the stage at which many cases entered the Pilot Program, this is not surprising. Of those attorneys who did report an effect, all indicated that the Principles resulted in more targeted letters.

(3.) Committee's Phase One Recommendation on Principle 2.03

It is too early to draw conclusions about Principle 2.03. It does appear that it is tending to achieve its aim of promoting more thoughtful preservation letters where they are used. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 2.03

The survey asked the attorneys if the Principles affected the parties' use of preservation letters. In response, more than twice as many respondents (sixteen percent (16%)) said that their preservation letters were more targeted in Phase Two versus in Phase One (only seven percent (7%)). (Table A-35.) A large percentage of respondents, however, stated that the Principles have had no effect on preservation letters (ninety-three percent (93%) in Phase One and eighty-three percent (83%) in Phase Two). (*Id.*)

(5.) Committee's Phase Two Recommendation as to Principle 2.03

It appears that Principle 2.03 is helping litigants draft more narrowly tailored preservation letters, to the extent the parties send such letters at all. This is consistent with the Committee's belief that overbroad, boilerplate preservation demands are not productive.

On the other hand, the vast majority of litigants think this Principle has no effect. This may be a result of preservation letters not being used at all in many cases. For instance, preservation letters are uncommon in certain areas of law where threats of litigation can lead to declaratory judgment suits, such as in intellectual property disputes. Preservation letters also are uncommon in smaller cases, making Principle 2.03 inapplicable in those cases.



In the end, the Committee recommends no changes to Principle 2.03 at this time.

#### **G. Principle 2.04 (Scope of Preservation)**

*(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.*

*(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.*

*(c) The parties and counsel should come to the meet-and-confer conference prepared to discuss the claims and defenses in the case, including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.*

*(d) 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 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.*

*(e) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.*

(1.) Committee’s Reasoning for Principle 2.04

Principle 2.04 addresses preservation of ESI. The Committee feels that litigants often struggle with evidence preservation concerns at least as much as they do with concerns about the scope and costs of producing documents and ESI.

Principle 2.04(a) provides that the scope of preservation is subject to the limits of reasonableness and proportionality. Furthermore, the scope of preservation is limited to that which is “discoverable,” a term which incorporates all of the various limitations on discovery in the Federal Rules of Civil Procedure. As a result, a litigant need not retain sources of information that are not likely to contain information that will be discoverable. Principle 2.04(a) also recognizes that evidence preservation is an evolving process. What a party should know is discoverable is based on the information available to that party at the time of the decision whether to preserve the source of information. The fact that a certain employee’s significance to a case has become apparent three (3) years into the case does not demonstrate that the disposal of that employee’s information two years

prior was improper. The duty to preserve is assessed based on the information available at the time that the litigant disposes of the information, not on the basis of hindsight.

Principle 2.04(b) is meant to address the issue of discovery on discovery. Too often litigants immediately launch into detailed, formal discovery on the subject of their opponent's evidence preservation and discovery steps. This discovery tends to seek excruciating detail about information systems and legal department activities. The former tend to veer widely into the legally insignificant. The latter tend to involve privilege and work product concerns because lawyers and paralegals usually can best supply the requested information. The Committee believes that the best way for parties to exchange necessary information about their respective preservation and discovery steps is informally through the meet and confer process set forth in the Principles, which should reduce or eliminate the need for formal discovery on these topics. Therefore, Principle 2.04(b) strongly encourages informal cooperation in exchanging this information and requires that a party first explore and exhaust this avenue before resorting to formal discovery methods; parties nevertheless may still ask merits deponents about their own documents and ESI.

Principle 2.04(c) echoes Federal Rule of Civil Procedure 26 in instructing litigants to come to the meet and confer sessions prepared to address reasonably foreseeable evidence preservation issues. Failing to identify such issues as they relate to one's adversary may result in waiver. (*See* Principle 2.01(b).) Conversely, failing to identify such an issue with respect to one's own preservation approach misses the opportunity to resolve a grey area by early judicial decision or waiver. (*Id.*) The Committee added the final sentence of Principle 2.04(c) out of concern that some might read this Principle as expecting a party to identify every conceivable issue concerning its own evidence preservation efforts that could theoretically be resolved early by the judge, lest that party be accused of hiding the ball in a subsequent discovery or sanctions motion. This sentence makes clear that judges should not expect litigants to identify every conceivable issue concerning their own evidence preservation efforts, which is not realistic. But the meet and confer process should be regarded as an opportunity to resolve troublesome issues before they become more complex and avoid combative spoliation disputes.

Principle 2.04(d) offers specific categories of ESI that "generally are not discoverable in most cases" and requires a party who intends to request their "preservation or production" to raise the issue promptly. The first category is "deleted," "slack," "fragmented," or "unallocated" data on hard drives. This sort of information can be preserved and recovered only with specialized forensic tools at increased expense and can dramatically increase the amount of data to be collected, processed, and reviewed. To be sure, in certain cases these extraordinary measures will be warranted, but these are the exception.

The second category is random access memory (“RAM”) and other “ephemeral” data. RAM is the storage location for software applications and data that a computer is actively using. Unless saved to a hard drive, or other durable storage location, RAM disappears when the computer is powered off. In rare cases, tending to involve disputes concerning software code, RAM may be relevant and discoverable.

The third category is “on-line access data such as temporary internet files, history, cache, cookies, etc.” Collecting this sort of information can dramatically increase the amount of data to be collected, processed, and reviewed, and the associated discovery costs. In most cases such ESI is unlikely to be relevant or discoverable.

The fourth category is “metadata fields that are frequently updated automatically, such as last-opened dates.” Many litigants do not have ESI collection tools that can collect data without affecting such metadata fields. Using vendors to perform a forensically sound collection adds expense. Because the last-opened metadata field rarely will be the key to resolving most civil cases, the increased cost generally will not be warranted.

The fifth category is backup data that is “substantially duplicative of data that is more accessible elsewhere.” Here the Committee had in mind backup tapes that contain snapshots of active systems a short period of time before the litigant implemented a reasonable and proportionate legal hold to preserve data on the active systems, as well as backups that will subsequently take snapshots of those active systems as the case proceeds. Absent unusual circumstances, such as a recent crash or purge of the active systems, the ESI contained on such backup tapes is unlikely to contain substantially more relevant and discoverable ESI than is available from the more readily searchable, active computer systems. Retaining substantially duplicative backup tapes adds costs. But even more importantly, forcing a party to retain backup tapes unnecessarily leads to those tapes aging to a point where they can contain data that is substantially different from the data available on the active system which can make these tapes difficult or impossible to ever recycle. This defeats a company’s legitimate records management program and potentially drives up the costs of unrelated, future litigation.

The sixth category is a catchall: “other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.” The Committee has in mind specific examples that fall within this category but, in light of the rapidly evolving technology sector, decided to state the concept in general terms so as to avoid technical obsolescence over time. The specific examples the Committee has in mind are email “journaling” and IM “logging.” These are processes that capture all email and IM as they are sent or received on a company’s computer systems. These processes are rarely used outside of financial services firms,

which are subject to specific regulatory retention requirements with respect to their communications. The Committee believes that companies ordinarily should not be expected to adopt such technology solely for litigation purposes.

The Committee emphasizes that these categories are not placed beyond the scope of discovery in all cases. The purpose of this Principle is simply to require litigants to promptly notify their adversary if they believe their case necessitates preservation and production of ESI in one or more of these categories. However, in raising the preservation of these categories, the demanding party should keep in mind that vague and overly broad preservation demands and responses are discouraged in Principle 2.03.

Principle 2.04(e) reiterates the concept expressed elsewhere that a party who has a concern about the scope of another party's preservation efforts must raise the issue promptly with the court. The reasons for this prompt notification are the same as those explained in relation to Principle 2.01(b).

#### (2.) Phase One Survey Results on Principle 2.04

The survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and on the “detailed clarification” they provide. (App. F.1.b. at 52.) One attorney respondent, for example, found that the Principles “[e]ncourag[ed] the parties to deal with E-discovery at an early stage.” (*Id.* at 50.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level of cooperation between counsel and on the counsels' ability to get needed discovery and information about their opponents' efforts to preserve and collect ESI. (*Id.* at 35, 40.) A majority of judge respondents indicated that the Principles reduced the number of requests for formal discovery into another party's ESI preservation and collection efforts. (App. F.1.a. at 16-17.) Principle 2.04 appears to be promoting some of its goals so far but further testing is needed.

#### (3.) Committee's Phase One Recommendation on Principle 2.04

It is too early to draw firm conclusions about Principle 2.04, although it appears preliminarily to be achieving some of its objectives. This Principle should be further tested in Phase Two.

#### (4.) Phase Two Survey Results on Principle 2.04

As in Phase One, Principle 2.04 seemed to help parties focus on ESI discovery early in the process and help parties focus their ESI discovery efforts. For example, more than half of all

respondents stated that early discovery conversations with opposing counsel included the scope of ESI to be preserved and produced. (Table A-13.) More than one-third of respondents stated that the Principles helped the parties resolve ESI disputes without court intervention and increased the fairness of the ESI discovery process. (Tables A-22 and A-23.) Almost no one thought the Principles made ESI discovery harder or less fair. (*Id.*) Similarly, one-quarter of respondents thought that the Principles made it easier to obtain relevant documents, and almost no one thought that the Principles made it harder to obtain such documents. (Table A-24.)

Comments from the participating attorneys were consistent with these results. One attorney wrote that the Principles were useful because they provided an “enforceable protocol.” Another attorney wrote that “guiding the parties’ expectations” was useful. Others noted that the Principles provided a useful framework, but the parties still need to cooperate or the Court needs to enforce the rules.

On the other hand, respondents were evenly split regarding the Principles’ impact on discovery costs and the number of discovery disputes. (Tables A-27 and A-32.) Some attorneys thought the Principles led to more spoliation allegations. (Table A-25.) And some attorneys, however, believed that discovery on discovery increased. (Table A-26.)

Judges reported a significant increase in cooperation (seventy-eight percent (78%)) among counsel, and that may be attributable, in part, to Principles like Principle 2.04, which provides presumptive limits to ESI discovery. (Table J-5.) Similarly, forty-one percent (41%) of judges believed that the Principles reduced spoliation allegations, while only eleven percent (11%) believed that the Principles increased such allegations. (Table J-10.) Again, this may be attributable to provisions like Principle 2.04(d), which expressly states that parties do not have to preserve certain types of volatile ESI. More generally, a plurality of judges thought the Principles have reduced the length of discovery, litigation, and the number of discovery disputes brought to their attention. (Tables J-11, -12, and -13.) In contrast, as stated above, some attorneys think the Principles led to more spoliation allegations. (Table A-25.)

The judges also reported a decrease in requests for discovery on discovery. (Table J-14.) Principle 2.04(b) acknowledges that discovery on discovery is allowed, but Principle 2.04(b) also limits such discovery and warns against misuse of discovery on discovery. Some attorneys, however, believed that discovery on discovery increased. (Table A-26.)

Overall, the vast majority of judges (seventy-five percent (75%)) reported that the Principles make the entire ESI discovery process fairer. (Table J-16.)

(5.) Committee’s Phase Two Recommendation as to Principle 2.04

Based on the overall survey results and comments, Principle 2.04 contributes to the usefulness of the Principles. Principle 2.04 is an important part of the Principles’ overall themes of proportionality, early attention to potential disputes, carefully governing discovery on discovery, and limiting expensive discovery of forms of ESI that are difficult to obtain and process. Attorneys like these guide posts and judges think the number of ESI discovery disputes has decreased. Very few people said that these concepts were detrimental to the overall goal of making ESI discovery more efficient.

Specific sections like 2.04(b) and 2.04(d) also appear to be working. The survey shows a decrease in disputes over discovery on discovery. Moreover, as reported above, respondents like the protocols and guideposts provided in section 2.04(d). Although some attorneys think the number of spoliation disputes has increased under the Principles.

To the extent the Principles can be improved, the respondents want stronger and more consistent enforcement of all rules. Judges and lawyers lament lack of cooperation, but attorney survey responses note that some lawyers and parties are just not inclined to cooperate. There are “bad guys” in the system, and the survey respondents want judges to use the rules to hold the bad actors to account.

In summary, the Committee recommends no changes to Principle 2.04. The Committee, however, believes that future surveys should include questions addressing the specific subsections of Principle 2.04. This Principle covers a number of topics, and more specific feedback from judges and attorneys may be helpful.

**H. Principle 2.05 (Identification of Electronically Stored Information)**

*(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.*

*(b) Topics for discussion may include, but are not limited to, any plans to:*

*(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians;*

*(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and*

*(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.*

(1.) Committee’s Reasoning for Principle 2.05

Principle 2.05 is intended to encourage parties to cooperate in discussing the sources from which they intend to collect ESI and the methodologies they plan to use to cull the universe of collected ESI down to a production set. It is better to address issues concerning the process for identifying key employees, or other sources, from which ESI will be collected early on than near the close of discovery, or later. It is also better for parties to address methodologies that will be used to exclude ESI from the set to be reviewed by humans so as to avoid disputes down the road after these methodologies have already been implemented. Litigants commonly use tools to limit the set of ESI that will be reviewed by humans to ESI that matches certain search parameters. These tools are often set to automatically “deduplicate” large collections of ESI and to eliminate from the collection certain file types that are not likely to contain relevant information, as well as eliminating files that do not match certain key words and phrases, among other parameters. Early cooperation in developing the search parameters allows disputes to be resolved before the dispute threatens to disrupt the discovery or trial schedule, which not only assists the court in managing its calendar but also prevents the issue from becoming one of potential sanctions. More advanced technologies are also growing in use and early discussion of their use can be similarly beneficial.

(2.) Phase One Survey Results on Principle 2.05

Where applicable, over two-thirds of attorney respondents reported discussing methods for identifying ESI around the time of the Rule 26(f) conference. (App. F.1.b. at 23-24.) There were several attorney respondents who called for more guidance on the development of search terms. One responding attorney, for example, suggested “a special master type of advisor for developing keywords for ESI searches.” (*Id.* at 54.)

(3.) Committee’s Phase One Recommendation on Principle 2.05

It is too early to draw firm conclusions about Principle 2.05, although it appears preliminarily to be achieving some of its objectives. This Principle should be further tested in Phase Two. The Committee might reconsider whether further guidance can be offered on effective search methods.



(4.) Phase Two Survey Results on Principle 2.05

The Phase Two survey asked the attorneys if the parties discussed potential methods of identifying ESI for production at or soon after the FRCP 26(f) conference. While in Phase One 56 percent of respondents responded yes to this question, in Phase Two that number dropped slightly to forty-six percent (46%). (Table A-9.) Twenty-nine percent (29%) of respondents identified “search methodologies to identify ESI for production” as one of the topics discussed prior to commencing discovery, as compared to thirty-four percent (34%) in Phase One. (Table A-13.) In contrast with Phase One, attorney comments to the survey did not focus specifically on the need for more guidance regarding search terms. However, one attorney respondent asked for guidance on cost assessments related to performing searches, especially related to the respondent’s perceptions that such searches are of “little value.” There were also several attorney respondents that made comments requesting more guidance on cost allocation in general.

(5.) Committee’s Phase Two Recommendation as to Principle 2.05

Principle 2.05 appears to remain uncontroversial and effective in achieving some of its objectives, by encouraging parties to discuss search methodologies prior to beginning discovery. The Committee recommends no changes to Principle 2.05. The Committee might wish to consider further guidance related to whether costs should be a factor considered when discussing and developing search methodologies.

**I. Principle 2.06 (Production Format)**

***(NOTE: Principle 2.06 was modified after Phase One, and therefore, the version set forth below shows the modifications that were made.)***

*(a) At the Rule 26(f) conference, counsel ~~or~~ and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.*

*(b) The parties should confer on whether ESI stored in a database or a database management system ~~often~~ can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.*

*(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.*

*(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.*

(1.) Committee’s Reasoning for Principle 2.06

The Federal Rules of Civil Procedure provide guidance on production format. Principle 2.06(a) simply reinforces that guidance and encourages parties to begin discussing production format during the meet and confer process. The parties can certainly begin discussing production format for the usual file types, e.g., Microsoft Office Suite file types, and raise any disputes with the court at the initial Rule 16 hearing. Other file types may arise only as discovery progresses, and any production format issues with respect to those file types should be raised promptly.

Principle 2.06(b) addresses databases, particularly enterprise databases that tend to be highly specialized and often customized. Producing such a database in “native” form presents more complex issues than producing an Excel spreadsheet in native form. Building an identical database generally is not realistic. Placing the raw data points into some other database built by the requesting party raises complex issues, including authenticity of any reports the requesting party ultimately generates. The Committee does not intend to rule out the possibility that “native” production may sometimes be appropriate. But the Committee hopes to encourage litigants to pause and consider whether they really want or need “native” production when the producing party already has a functioning database that can generate reports of the relevant data in various electronic forms, often including Excel or Access.

Principle 2.06(c) addresses the production format for documents and ESI that are not text searchable in their “native” form, e.g., paper documents and image files such as TIFFs and many PDFs. To the extent that production format is addressed in the Federal Rules of Civil Procedure, the focus is on the problem of a producing party downgrading the format of the files by making them less usable and searchable. The Committee sought to provide guidance on the converse issue of upgrading the format of documents and ESI to make them more usable and searchable. Paper documents and non-searchable ESI commonly are scanned with optical character recognition (“OCR”) software that identifies text and creates searchable text fields that can be associated with the images in a database. Case law has varied on whether such upgrades must be provided and on

who should pay for such upgrades. Principle 2.06(c) takes the view that the producing party cannot be required to upgrade non-text searchable documents or pay for such upgrades, any more than it should be permitted to downgrade text searchable ESI.

Principle 2.06(d) addresses allocation of production costs and encourages cooperation on upgrades that both parties would otherwise pay to do separately. First, Principle 2.06(d) makes clear that a requesting party is responsible for paying the incremental cost of its copy of a production. This is the result of applying the Federal Rules of Civil Procedures, which require a producing party not to produce copies but to make the production documents and ESI available for inspection and copying. Second, Principle 2.06(d) encourages parties to discuss sharing costs for upgrades of non-searchable documents. If both parties intend to upgrade documents, the spirit of cooperation required by Federal Rule of Civil Procedure 1 suggests that the parties ought to pay to accomplish this once together rather than twice separately.

#### (2.) Phase One Survey Results on Principle 2.06

It is not clear yet how effective Principle 2.06 is in encouraging early discussion of the format for producing ESI. Only about half of the attorney respondents indicated that the parties discussed production format before commencing discovery. (App. F.1.b. at 27.) It is also unclear so far what effect the cost allocation aspects of Principle 2.06 are having.

#### (3.) Committee's Phase One Recommendation on Principle 2.06

It is too early to draw conclusions about Principle 2.06. This Principle should be further tested in Phase Two.

#### (4.) Phase Two Survey Results on Principle 2.06

The Phase Two survey asked the attorneys if the parties discussed format(s) of production prior to commencing discovery. While in Phase One forty-nine percent (49%) of respondents responded yes to this question, in Phase Two that number dropped slightly to thirty-nine percent (39%). (Table A-13.) The cost allocation provisions of Principle 2.06 were mentioned favorably by some attorney respondents. There were also several respondents that requested more general guidance regarding cost shifting as a method to fairly contain discovery costs and the scope of discovery requests. Some of these respondents suggested costs should be shifted more to the requesting party.

(5.) Committee’s Phase Two Recommendation as to Principle 2.06

Principle 2.06 appears to remain uncontroversial and effective achieving some of its objectives, by encouraging parties to discuss format of production prior to beginning discovery. The Committee recommends no changes to Principle 2.06. However, in light of the number of attorney comments specific to cost shifting or allocation, the Committee might want to consider expanding its discussion of cost allocation within or even beyond Principle 2.06.

**J. Principle 3.01 (Judicial Expectations of Counsel)**

*Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:*

- (1) Familiarize themselves with the electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;*
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf); and*
- (3) Familiarize themselves with these Principles.*

(1.) Committee’s Reasoning for Principle 3.01

As Principle 3.01 expressly states, the Committee believed that many attorneys would do well to better understand the fundamentals of electronic discovery. Principle 3.01 makes clear that attorneys in the Pilot Program should familiarize themselves with the basic rules that apply in this area.

(2.) Phase One Survey Results on Principle 3.01

The survey responses do not provide data on Principle 3.01.

(3.) Committee’s Phase One Recommendation on Principle 3.01

It is too early to draw conclusions about Principle 3.01, although its guidance seems self evident and indisputable. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 3.01

Educational materials described in Principle 3.01 have been posted on Pilot Program’s web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), and are updated regularly so judges and practitioners have a source for reliable and objective educational information.

Although the E-filer Baseline Survey results (App. F.2.b.) showed a marked improvement from August 2010 to March 2012 in the respondents’ knowledge about e-discovery, its concomitant issues, and the Pilot Program as well as the educational information it provides, more education is need for both lawyers and judges.

(5.) Committee’s Phase Two Recommendation as to Principle 3.01

The Pilot Program remains committed to providing high quality programs at no charge and on demand at [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com).

**K. Principle 3.02 (Duty of Continuing Education)**

*Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery<sup>1</sup>, additional materials available on web sites of the courts<sup>2</sup>, and of other organizations<sup>3</sup> providing educational information regarding the discovery of ESI.<sup>4</sup>*

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<sup>1</sup> [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)

<sup>2</sup> E.g. <http://www.ilnd.uscourts.gov/home/>

<sup>3</sup> E.g. <http://www.7thcircuitbar.org>, [www.fjc.gov](http://www.fjc.gov) (under Educational Programs and Materials)

<sup>4</sup> E.g. <http://www.du.edu/legalinstitute>

(1.) Committee’s Reasoning for Principle 3.02

Like Principle 3.01, Principle 3.02 is meant to encourage attorneys to better understand the fundamentals of electronic discovery. Principle 3.02 points attorneys to useful resources on matters of electronic discovery.

(2.) Phase One Survey Results on Principle 3.02

The survey responses do not provide data on Principle 3.02.

(3.) Committee’s Phase One Recommendation as to Principle 3.02

It is too early to draw conclusions about Principle 3.02, although its guidance seems uncontroversial. This Principle should be tested further in Phase Two, which will hopefully provide more comprehensive data for evaluation.

(4.) Phase Two Survey Results on Principle 3.02

The Phase Two survey posed several questions regarding the Pilot Program’s web site, webinars, resources, and educational programs. The results show that a significant number of attorneys have used and benefitted from these resources. Thirty-five percent (35%) of respondents were aware of the Pilot Program’s web site (Table E-21) and eighteen percent (18%) reported that they had visited that web site. (Table E-22.) Thirty percent (30%) of respondents were aware that the Program has sponsored a series of webinars and that copies are available on the web site (Table E-23); thirteen percent (13%) reported that they had viewed or listened to a Program webinar. (Table E-24.) Seven percent (7%) of respondents reported that they had used the case law and other resources available on the Program’s web site. (Table E-25.) A full eleven percent (11%) of respondents reported that they had participated in an educational program offered by the Program. (Table E-26.) Furthermore, in response to the question: “What aspects of the Pilot Program are the most useful?” one judge responded, “The educational programs that are offered free to the lawyers and the judges.”

The educational work of the Committee is not complete, however, since several lawyers who responded to the survey indicated that the Pilot Program could be improved by providing more education. According to one lawyer: “Before the Pilot Program will help, attorneys continue to need more technical education to better understand ESI. Judges, too, rely too much on the parties and continue to need more ESI education on the technical abilities, limitations and practical ways to review or search ESI.”

(5.) Committee’s Phase Two Recommendation on Principle 3.02

Principle 3.02 advises judges and lawyers alike to continue to be educated about the complex and fast-changing issues surrounding ESI. This guidance is as important now as it was when the Principles were first developed. The Pilot Program has had an impact. In addition to the survey results noted above, data gathered outside of the Phase Two survey also supports the finding that a significant number of attorneys have used and are accessing the resources made available through the web site. To date, [Discoverypilot.com](http://Discoverypilot.com) has been accessed from over eight hundred (800) locations across the United States, and by foreign users in locations including India, Canada, the United Kingdom, and Mexico. In total the site has been accessed from sixty (60) countries.

The Education Subcommittee remains committed to providing free education to the bar about handling electronic discovery and fulfilling their legal obligations. The Subcommittee conceived, organized and produced several educational opportunities during Phase Two. For example, in November 2011 the Education Subcommittee, in conjunction with Wilson Elser, presented a free webinar entitled “The Ethics of E-Discovery” for which over two thousand seven hundred (2,700) people registered. In March of 2012, in cooperation with McAndrews Held & Malloy, LTD, the Subcommittee presented “ESI 101” attended by over one thousand (1,000) lawyers from Illinois and Wisconsin.

As the Phase Two survey results make clear, the Committee must expand its outreach efforts to raise awareness of the existence of the web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), as well as the variety and depth of resources it can provide to the legal community. We will continue to post our educational programs on the web site for future viewing and update the pertinent caselaw. Additionally, and in furtherance of one of Principle 3.02's specific goals, the Pilot Program will continue to partner with The Sedona Conference® to make selected Sedona Conference® materials available on our web site.

## **10. PHASE THREE COMMENCES MAY 2012**

As we proceed from Phase Two to Phase Three of the Pilot Program, the Committee wishes to acknowledge all of the work of all of the people involved, and invites anyone who is interested to join us in our endeavor.

The Committee seeks to have discovery procedures implemented so that each civil case filed in the United States District Courts is administered in as “just, speedy, and inexpensive” (F.R.C.P. 1) manner as possible. Through the efforts of all the participants in the Seventh Circuit Electronic Discovery Pilot Program, we are striving, and will continue striving, to reach the goal of providing justice to all parties while minimizing the cost and burden of discovery in litigation in the United States.

The Committee continues to seek to expand interest in improving the e-discovery process across the country and internationally. Advancing the e-discovery information available on our Web site, [www.DiscoveryPilot.com](http://www.DiscoveryPilot.com), continues to be a priority. Also, education continues to be a primary goal of the Pilot Program. The Committee has a number of new webinars planned for Phase Three and is considering others. The Committee is considering new subcommittees to focus on specific needs of those seeking e-discovery and those providing it in the litigation process. Cutting costs, improving efficiency, and providing fairness to all parties continues to be area in which the Committee has great interest in the civil litigation e-discovery process as well as in criminal litigation. Phase Three will see new developments in these areas.

In addition, during Phase Three, the newly created E-Mediation Subcommittee will continue its work to explore the creation of a program to provide free mediation of electronic discovery disputes in cases pending in the District. Our goal is to establish a panel of experienced electronic discovery practitioners who will volunteer to mediate discovery disputes involving electronic discovery at no cost to the parties. Panel members would receive training in mediation techniques. The Committee views an E-Mediation Program as a logical extension of the Committee’s robust education program. It is hoped that volunteer mediators would be able to contribute their formidable technical and legal expertise to help parties reach common ground and avoid expensive and time-consuming motion practice. The Committee believes that a well-designed E-Mediation Program furthers the Pilot Program’s first Principle: to achieve the goals of Federal Rule of Civil Procedure 1 to secure the just, speedy and inexpensive determination of civil cases through the early resolution of electronic discovery disputes without Court intervention.

The Committee remains open to suggestions and welcomes feedback. You may reach the Committee through [DiscoveryPilot@ilnd.uscourts.gov](mailto:DiscoveryPilot@ilnd.uscourts.gov).



# The 7<sup>th</sup> Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America

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# The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America

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## INTRODUCTION

James Holderman is the Chief Judge of the Northern District of Illinois. He and his colleague, Magistrate Judge Nan Nolan, have been captaining the [7th Circuit Electronic Discovery Pilot Project](#) (Pilot Project) since 2009. It is an important experiment. At a minimum, it is a valuable educational exercise for counsel and the participating judges in the district and bankruptcy courts of the Seventh Circuit. It should lead to identification of better or even best litigation practices for electronic discovery. It could lead to useful additions to, or revisions of, the e-discovery portions of the Federal Rules of Civil Procedure. It may also help answer the question posed by Rule 1: Just how fast and how frugal can justice be in the “gigabytic” or “terabytic” period,<sup>1</sup> yet still satisfy the “just, speedy, and inexpensive” goals for resolution of actions under the Federal Rules of Civil Procedure?

There are 18 district court judges, 23 magistrate judges, and 3 bankruptcy judges participating in Phase Two of the Pilot Project.<sup>2</sup> They utilize a model “Standing Order Relating to the Discovery of Electronically Stored Information” ([Model Standing Order](#)) that provides in its first paragraph:

*This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee. Parties and counsel in the Pilot Program with civil*

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<sup>1</sup> By “gigabytic” and “terabytic” I refer to the litigation equivalent of geological periods (e.g., Precambrian, Mesozoic). “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: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.” [Manual for Complex Litigation](#) (4th) § 11.446. Most lawsuits will involve hundreds of pages of discovery, not hundreds of thousands or millions of pages, and all trials where exhibits matter will typically turn on a handful of exhibits, not hundreds or thousands of them. However, depending upon how and where electronic documents are stored, a search of a gigabyte of information or more may be required to find those hundreds of pages or handful of key trial exhibits, and this is true for litigants seeking electronically stored information from others or looking for it to support the litigant’s own case. At roughly \$1 per gigabyte for “thumb drives,” and pennies or less per gigabyte for portable storage media or external storage drives, data almost always are kept for long periods of time by persons or entities who or which one day may become litigants. In the palm of a hand, a child can hold a 32-gigabyte “thumb drive” capable of storing over 15 million typewritten pages.

<sup>2</sup> Interested readers can find on the Pilot Project website the [Phase One Report](#) and [Interim Report on Phase Two](#) of the project. Neither report contains much empirical data about how to improve the administration of e-discovery because Phase One lasted only seven months (October 2009 to March 2010) and Phase Two will not end until May 2012 after two years of operation. After Phase Two, a Phase Two Report will be issued.

*cases pending in this Court shall familiarize themselves with, and comport themselves consistent with, that committee's Principles Relating to the Discovery of Electronically Stored Information. For more information about the Pilot Program please see the web site of the Committee, [www.discoverypilot.com](http://www.discoverypilot.com). If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Principles Relating to the Discovery of Electronically Stored Information, then that party may raise such reason with the Court.*

The Model Standing Order then states each of the Principles.

In this paper, I review the “Principles Relating to the Discovery of Electronically Stored Information” being applied in the Pilot Project. I relate each Principle to the discovery rules of the Federal Rules of Civil Procedure. I then frame questions that the Phase Two Report might answer to satisfy the empirical interest of rulemakers and other judges and lawyers whose many eyes are waiting to read the report on the results of Phase Two of the Pilot Project.<sup>3</sup>

## THE PRINCIPLES UNDERLYING THE PILOT PROJECT

There are “General,” “Early Case Assessment,” and “Education” Principles by which participants in the Pilot Project abide. I discuss them in this same order.

### General Principles

There are three “General Principles” that address “Purpose,” “Cooperation,” and “Discovery Proportionality.”

#### *Principle 1.01 (Purpose)*

The touchstone of all discovery is reasonableness.<sup>4</sup> The Principles make thirteen references to “reasonable,” “reasonably,” or “reasonableness.” The first such reference is in Principle 1.01, which provides:

*The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, 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 electronically stored information (“ESI”) without Court intervention.*

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<sup>3</sup> Pilot projects have enormous value to rulemakers. They can be organized and implemented relatively quickly. In contrast, the rulemaking process is deliberative and changes occur slowly. Rulemakers do not want to make a mistake. Empirical information gives rulemakers more confidence that what is inscribed as a rule of civil procedure will improve the administration of justice without adversely impacting cost and speed. Pilot and other research projects that are well-designed and implemented in a disciplined manner should produce helpful information to assist rulemakers in improving the civil rules.

<sup>4</sup> [\*Rimkus Consulting Group, Inc. v. Cammarata\*](#), 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“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.”).

*Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.*

One should pay very close attention to the success of the Pilot Project in achieving the “early” resolution of disputes regarding discovery of electronically stored information “without Court intervention.” If the final Phase Two Report documents such success, all litigants should have an interest in seeing how it was done and whether it was done in asymmetric cases (a data-poor party against a data-rich party); symmetric cases (a data-rich party against a data-rich party); and cases involving a cost imbalance, where the cost of e-discovery is disproportionately high in comparison to the amount or issues in controversy.

The asymmetric case raises the potential that e-discovery from the data-rich party will become the focus of the litigation where a requesting party hopes that the producing party will either elect to settle rather than pay the costs of e-production or will trip up in preservation and suffer a spoliation sanctions order.

The symmetric case raises the potential of discovery wars where two data-rich parties make extraordinary preservation demands resulting in multiple meet-and-confer sessions with debates over the numbers of custodians (dozens or hundreds), production formats, and search approaches, frequently also in the hope that one’s opponent will fail to preserve something that can lead to a motion for sanctions.

The disproportionate case may be the most challenging because, relative to paper, e-discovery is not inexpensive if one has to retain a consultant to process information. Where the amount or issues in controversy are dwarfed by the costs of e-discovery, a sensible solution must be identified early to avoid or minimize expenditure of those costs.

The Pilot Project may provide insights into what tools worked best to promote the early resolution of ESI disputes without court intervention, or whether court intervention was necessarily required to focus counsel on problem solving, instead of problem expanding.

Given the aspirations of Principle 1.01, it is sensible that the next Principle addresses cooperation.

#### *Principle 1.02 (Cooperation)*

The first sentence of the preamble to the original rules of professional conduct—the 1908 Canons of Ethics—focused on the administration of “Justice”:

*In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.*

[Preamble, 1908 Canons](#). The Preamble continues by putting the onus on lawyers to maintain “Justice pure and unsullied” to preserve the future of the “Republic”:

*The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.*

*Id.*

The times have changed only a little. In the digital world, the future of affordable litigation depends in large part on the conduct and motives of lawyers. Hence, it is not surprising that Principle 1.02 emphasizes cooperation among counsel. Without it there will not be early resolution of disputes involving electronic discovery without court intervention. Principle 1.02 provides:

*An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.*

Principle 1.02 echoes the pleas that the Advisory Committee on Civil Rules has been making to lawyers in its own quiet way for quite some time. For example, in 2000, the Advisory Committee amended Rule 26(b)(1) to provide that a party may obtain discovery regarding any nonprivileged matter that is “relevant to any party’s claim or defense,” and moved discovery “of any matter relevant to the subject matter involved in the action” to the end of Rule 26(b)(1), limiting such discovery to issuance of a court order upon a showing of good cause.<sup>5</sup> The Advisory Committee explained that the change was intended to “signal” the district courts that they have the authority to cabin discovery. In language similar to Principle 1.02, the Committee implored “reasonable lawyers” to cooperate to manage discovery without court involvement:

*The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.*<sup>6</sup>

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<sup>5</sup> The redlined changes appear in the Advisory Committee Report included in the Supreme Court’s submittal of the [2000 amendments](#) to Congress.

<sup>6</sup> Rule 37 is titled, “Failure to Make Disclosure or to Cooperate in Discovery; Sanctions.” However, the text of Rule 37 makes no reference to a breach of a duty to cooperate. [Rule 16\(c\)\(2\)](#) gives the district courts the power to take “appropriate action on the following matters.” Among those matters is “facilitating in other ways the just, speedy, and inexpensive disposition of the action.” Fed. R. Civ. P. 16(c)(2)(P). Lawyers cooperating on minimizing e-discovery costs without compromising their ethical duties to their clients would seem to fall comfortably within this text. See Barkett, [Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?](#), pp.14-18 (discussing steps judges can take under existing Rule 16 to control e-discovery costs) (hereafter “Walking the Plank”).

The “Cooperation Proclamation” issued by the Sedona Conference<sup>7</sup> is a direct result of the sea change<sup>8</sup> in lawyers’ behavior required by the demands and costs of electronic discovery. The Proclamation asks lawyers to focus on sportsmanship, not gamesmanship:

*Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone’s interest to waste resources on unnecessary disputes, and the legal system is strained by “gamesmanship” or “hiding the ball,” to no practical effect.<sup>9</sup>*

The Cooperation Proclamation has also received considerable attention in reported decisions.<sup>10</sup>

In the final Phase Two Report, readers should be interested in knowing whether (i) lawyers felt compromised by the demand for cooperation in the arena of advocacy,<sup>11</sup> (ii) cooperation was real or forced by the fear of sanctions, or (iii) there was a true cultural shift in attitude that prompted lawyers to genuinely focus on efficiency and cost sensibility in e-discovery as part of a speedy track to resolution of the case on the merits. Did meet-and-confer sessions become more meaningful than they were in cases handled before the Pilot Project? Were there fewer discovery disputes? Were litigation costs lower as a result of cooperation? Was the case more efficient without compromising fairness? Was any party prejudiced by the Model Standing Order’s insistence on cooperation by the lawyers? How?

Cooperation will be made a lot easier if discovery requests are proportional. And that takes us to the next Principle.

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<sup>7</sup> [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation/proclamation.pdf](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf) (July 2008). As of September 30, 2010, the Cooperation Proclamation has been endorsed by over 100 federal and state judges. *Id.*

<sup>8</sup> In Act I, Scene II of *The Tempest*, the nymph, Ariel, sings of the transformation of Ferdinand’s father by the sea: “Full fathom five thy father lies; Of his bones are coral made; Those are pearls that were his eyes; Nothing of him that doth fade; But doth suffer a sea-change; Into something rich and strange” (from *The Complete Works of William Shakespeare* (Borders Press), p. 6).

<sup>9</sup> Specifically with respect to e-discovery, the Proclamation contains these suggestions: 1. Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses; 2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI; 3. Jointly developing automated search and retrieval methodologies to cull relevant information; 4. Promoting early identification of form or forms of production; 5. Developing case-long discovery budgets based on proportionality principles; and 6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

<sup>10</sup> Appendix I lists reported decisions from eleven different district courts endorsing the Cooperation Proclamation.

<sup>11</sup> [Rule 1.3](#) of the Model Rules of Professional Conduct (RPC) and [Illinois RPC 1.3](#) provide: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Comment [1] to both rules states that a lawyer should take “whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” It will be useful to learn whether any Pilot Project advocates felt constrained in any way in exercising their Model Rule 1.3 obligations and, if so, how.

### *Principle 1.03 (Discovery Proportionality)*

The Federal Rules of Civil Procedure do not use the word “proportionality” in relation to the scope of discovery.<sup>12</sup> Rather, as noted above, [Rule 26\(b\)\(1\)](#) addresses the “scope of discovery” and allows a party to obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” If good cause can be shown to a court, a party may also obtain discovery “of any matter” relevant to the subject matter involved in the action. For information to be “relevant” to the subject matter involved in the action, it need not be admissible if “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>13</sup>

Rule 26(b)(1) then ends with this sentence: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). Rule 26(b)(2)(C) provides:

*On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.*<sup>14</sup>

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<sup>12</sup> By way of contrast, the 2011 amendments to the Rules and Practice Directions in the courts of the United Kingdom added [Practice Direction 31B](#) dealing with disclosure of electronic documents. Rule 31B.3 now provides: “The purpose of this Practice Direction is to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner.”

<sup>13</sup> Courts still discuss the “calculated to lead” standard without discussing the necessary showing of good cause. See *Passlogix, Inc. v. 2FA Technology, LLC*, 2010 WL 1702216, \*28 (S.D.N.Y. Apr. 27, 2010) (holding that a duty to preserve extends to what is “reasonably calculated to lead to the discovery of admissible evidence”); *Puckett v. Tandem Staffing Solutions, Inc.*, 2007 U.S. Dist. LEXIS 47287, \*8 (N.D. Ill. June 27, 2007) (ordering, without a discussion of good cause, restoration of backup tapes because the information was reasonably calculated to lead to the discovery of admissible evidence, but, then also without discussion, ordering the requesting party to pay 50% of the cost of restoration).

<sup>14</sup> [Rule 26\(b\)\(2\)\(C\)](#) was added in 1983 to attempt to curb discovery abuse. The [Advisory Committee Note](#) on the 1983 amendment began ominously: “Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems.” [Amendments to Federal Rule of Civil Procedure](#), 97 F.R.D. 165, 216 (April 28, 1983). The Committee continued: “Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.” *Id.* at 216-17. More broadly, see Barkett, *From Canons to Cannon in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics* (American Bar Association, Chicago, 2009). In that paper, I compared the aspirations of the 1908 Canons to the warlike tactics of lawyers in discovery that resulted in a decline in civility that resulted, among others, in the promulgation of the Seventh Circuit’s 1992 Standards for Professional Conduct which echoed the 1908 Canons in stating: “A lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.” I also cataloged the changes to the Federal Rules of Civil Procedure beginning in 1983 designed to foster desired discovery behavior and punish undesirable discovery behavior made necessary because rules of professional conduct that superseded the 1908 Canons had failed to control abusive discovery.



The threat of punishment is another way that the federal rules attempt to achieve proportionality. I am referring to Rule 26(g). Rule 26(g)(1)(B)(iii) provides that by signing a discovery request, response, or objection, an attorney or party certifies that “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” the request, response, or objection is “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.” If a court later determines that, without substantial justification, a discovery request was, in fact, unreasonable or unduly burdensome or expensive in proportion to the needs of the case, prior discovery, the amount in controversy, or the issues at stake, then, under Rule 26(g)(3), the court “must impose” an appropriate sanction on the lawyer who signed the request or the party or both.

The Protocols do not affect a lawyer’s obligations under Rule 26(g). They do, however, give greater emphasis to the “limitations on discovery” in Rule 26(b)(2)(C) by linking them, in effect, to the scope of discovery in Rule 26(b)(1). Principle 1.03 provides:

*The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.*

This is an area where the Pilot Project holds great promise. Those of us watching this experiment unfold will be very curious to see the answers to, among others, these questions:

- By requiring that the “limitations” of Rule 26(b)(2)(C) be applied to the formulation of a discovery plan, was e-discovery, in fact, proportional to the amount and issues in controversy?
- Did Principle 1.03 result in reasonably targeted e-discovery requests? Clear requests? Specific requests (at least to the limits of practicality)?
- Were disputes avoided because lawyers hewed to the dictates of Principle 1.03? Or, phrased differently, in the absence of Principle 1.03, would a lawyer have drafted e-discovery requests more broadly?
- Were there differences in opinion among the plaintiffs’ bar and the defense bar as to the effects of Principle 1.03? If so, what were the factual bases underlying any differences in opinion?
- Was “proportionality” used as a tool by producing parties to attempt to limit or prevent legitimate discovery?
- Did any Pilot Project judge have to invoke Rule 26(g)(3) to impose sanctions because of a failure to engage in proportional discovery given the needs of the case, prior discovery, the amount in controversy, or the issues at stake? Why or how did that happen?
- Will the results of the Pilot Project provide empirical evidence to support a Rules amendment to incorporate the word “proportional” into Rule 26(b)(1) and to give more prominence to Rule 26(b)(2)(C) by making it part of the beginning of Rule 26(b)(1) instead of the last sentence? Or will they suggest just the opposite; that the problem is not in the Rules but their application?

The General Principles emphasize Rule 1, familiarity with e-discovery, cooperation, and proportionality. They set the stage for the implementation of additional Principles in what the Pilot Project calls “Early Case Assessment.”



## Early Case Assessment Principles

### *Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)*

Rule 26(f) requires parties to confer on a number of topics, including preservation of discoverable information, “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” and whether a “claw-back” procedure can be agreed upon to assert privilege or work product claims *after* production of information.<sup>15</sup>

Principle 2.01 goes further. It commands lawyers to be prepared for the Rule 26(f) conference in specific and meaningful ways. A lawyer working under the dictates of the Model Standing Order must understand the client’s electronic information systems, must be prepared to identify relevant ESI, introduces the concept of phased production to reduce cost and burden, suggests that it might be appropriate to agree on an initial set of document custodians by encouraging an “initial subset” of ESI sources, directs counsel to discuss search and retrieval technologies, encourages counsel to address inadvertent production of privileged or protected information by entry of a Rule 502(d) Order, and creates the specter of sanctions for noncompliant lawyers. It provides:

*(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:*

*(1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);*

*(2) the scope of discoverable ESI and documents to be preserved by the parties;*

*(3) the formats for preservation and production of ESI and documents;*

*(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and*

*(5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.*

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<sup>15</sup> Rule 26(f) was amended to include these topics as part of the December 1, 2006 “e-discovery amendments” to the Federal Rules. See <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>. The Standing Committee approved the Report of the Advisory Committee on the Federal Rules of Civil Procedure dated May 27, 2005 (revised July 25, 2005) (hereafter, “2005 Advisory Committee Report”). The Advisory Committee Report can be found at Appendix C in the above link (page 86 of 332) and is cited here as “Rules App. C-\_\_.”

*(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.*

*(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.*

*(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.*

Principle 2.01 is very important for another reason: it directs parties unable to resolve disputes regarding ESI to present them to the Court at an initial status conference, the Rule 16(f) Scheduling Conference, “or as soon as possible thereafter.” An engaged judge will solve all e-discovery problems.<sup>16</sup> Engagement, however, requires time to be educated about, and then to act on, the issues. Principle 2.01 represents the agreement of the participating judges in the Pilot Project to do just that. With this promise by the participating judges, the Pilot Project recognizes what the Advisory Committee recognized but cannot enforce: to advance the goals of Rule 1, the e-discovery amendments to the Civil Rules require judges to become hands-on—early in a lawsuit.

Because the Principles are embodied in a court order, the threat of sanctions where appropriate is also a real one. To impose sanctions, a court can always rely on inherent authority in the absence of a court order. However, with the Model Standing Order, Rule 37(b)(2)(A)’s requirement for an order “permitting or providing discovery” before a sanction can be awarded should be satisfied.<sup>17</sup>

Anyone interested in improving the civil justice system in America will want to learn whether the Pilot Project’s more specific requirements for the Rule 26(f) conference with a direction by the judges for early court involvement where necessary, reduces the cost and duration of litigation without compromising justice. Among the questions that might be answered are these:

- Did the lawyers take seriously their duty to prepare properly for the Rule 26(f) conference?
- Where the provisions of Principle 2.01 were not really necessary given the size of the case or the insignificant nature of the amount of e-discovery, did lawyers seek relief from the Model Standing Order and receive it? Or is there no such type of case?
- Did this Principle produce agreement on limitations on the number of custodians with respect to whom preservation obligations would apply?

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<sup>16</sup> Barkett, [Walking the Plank](#), pp.14-17 (arguing that, along with cooperation among lawyers and proportionality in discovery, engaged judges who exercise their considerable authority under Rule 16 are needed if we are to make Rule 1 meaningful to all federal court litigants).

<sup>17</sup> Cf. [Tracinda Corp. v. DaimlerChrysler AG, et al.](#), 502 F.3d 212 (3<sup>rd</sup> Cir. 2007) (affirming Rule 16(f) sanction of \$556,061 for late production of paper documents because of a violation of the Rule 16 Scheduling Order). Rule 16(f), like Rule 26(g)(3) contains a mandatory sanction requirement unless certain limited exceptions are satisfied. See, generally, Barkett, [Twenty Questions and Answers](#), pp.41-52 (First Chair Press, Chicago, October 2008) (hereafter “*Twenty Questions and Answers*”) (discussing sanction-related case law under the rules of civil procedure and inherent authority).

- Did the suggestion of phased production have application in all cases, some cases, or certain types of cases? Did it work or not? Why?
- Did a first phase lead to a second or third phase? Was each production preceded by a meet-and-confer session?
- Was there any situation where a party elected not to have a Rule 502(d) order entered? What was the reason?
- Did the participating judges have to become involved and was there involvement early in the action?
- Were sanctions ever awarded for the failure by a lawyer to follow Principle 2.01? What steps did the court take to decide whether sanctions should be awarded? What was the legal basis for sanctions? Were there any similar fact patterns underlying sanctions awards?
- Should Principle 2.01 be bulked up or trimmed down? In which ways?
- Did the lawyers feel that implementing Principle 2.01 made litigation more efficient and less expensive? Why?
- Do the lawyers believe there was any bias in the application of Principle 2.01 that favored requesting parties over producing parties or vice versa? Did the judges feel the same way? Why?

While Principle 2.01 takes one giant step for Rule 1, lawyers still may not be able to answer every e-discovery question that comes up in a Rule 26(f) conference. And so the Pilot Project introduces the concept of technical support for dispute resolution.

#### *Principle 2.02 (E-Discovery Liaison(s))*

One of the reasons that e-discovery is different from paper discovery is that lawyers usually need expert assistance to manage it. Principle 2.02 recognizes this fact in emphasizing the role that an e-discovery liaison might play to advance resolution of a dispute regarding preservation or production of ESI:

*In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:*

- (a) be prepared to participate in e-discovery dispute resolution;*
- (b) be knowledgeable about the party's e-discovery efforts;*
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and*
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.*

It will rarely be cost-effective for a lawyer to become an information systems expert. And not every litigant has information technology support staff at its, his, or her beck and call. Cases like *O'Keefe*,<sup>18</sup> *Equity Analytics*,<sup>19</sup> and *Victor Stanley*<sup>20</sup> make the point that lawyers are not necessarily trained to identify e-discovery solutions that are practical and cost-effective.

On the other hand, involving e-discovery consultants in every matter might itself, because of the additional expense, be unreasonable.

Certification programs might fill the void. A person who has passed a certification exam to become an e-discovery specialist might provide cost-effective assistance to lawyers. I can see the day when every district court in America will have access to an e-discovery specialist on the staff of the court in larger districts or on the Federal Judicial Center's staff for smaller districts to assist all of the judges on the court in cases where the litigants may not be able each to afford e-discovery liaisons or where an e-discovery neutral is also out the parties' financial reach.<sup>21</sup>

So it will be important to see how Principle 2.02 worked:

- How often were e-discovery liaisons needed?
- Why were they needed?
- Did their involvement result directly or indirectly in the resolution of the dispute? How? Why?
- What was the cost of using e-discovery liaisons?
- Did the lawyers regard the involvement of e-discovery liaisons as cost-effective?
- Were there cases involving an ESI dispute where a party could not afford an e-discovery liaison? If so, what was done?
- What skill set did the e-discovery liaison require?
- What was the profile of the e-discovery liaison? An outside consultant? In-house employee? Outside counsel with an expertise in e-discovery? A certified specialist? Other?

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<sup>18</sup> *United States v. O'Keefe et al.*, 2008 U.S. Dist. LEXIS 12220 (D.D.C. Feb. 12, 2008). In this criminal matter, defendants claimed that the government's electronic production of exculpatory evidence was deficient. Judge Facciola was not persuaded by counsel's offer of proof: "If the defendants intend to charge the government with destroying information that they were obliged to preserve and produce pursuant to Judge Friedman's order or the due process clause itself, they must make that claim directly and support it with an evidentiary basis—not merely surmise that they should have gotten more than they did. If they do not do so within 21 business days of this opinion, I will deem any such claim to have been waived." *Id.* at \*20-21.

<sup>19</sup> *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008) (Judge Facciola explained again that "determining whether a particular search methodology, such as key words, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence."

<sup>20</sup> *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261-62, n.10 (D. Md. 2008) (Judge Grimm explains that *O'Keefe* and *Equity Analytics* merely require parties "to be prepared to back up their positions with respect to a dispute involving the appropriateness of ESI search and information retrieval methodology—obviously an area of science or technology—with reliable information from someone with the qualifications to provide helpful opinions, not conclusory argument by counsel.").

<sup>21</sup> Video conferencing technology is becoming mainstream. An e-discovery specialist does not need a physical presence in a district court to assist lawyers in resolving an e-discovery dispute.

*Principle 2.03 (Preservation Requests and Orders)*

In the electronic world, it is never wise for a judge to enter an ex parte preservation order. A judge might unwittingly cripple a litigant with unnecessary costs. It is no less unwise to enter a vague and overly broad preservation order; it could have the same effect. The Advisory Committee recognized these facts in its December 1, 2006 Note to Rule 26(f): “The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.”

In the electronic world, it is just as unwise for a litigant to disrespect the duty to preserve—and certainly so, intentionally. For all litigants, that duty is triggered once a party reasonably anticipates litigation, or, in the case of a defendant without sufficient prior knowledge of litigation, once the litigant has notice of the filing of the action.<sup>22</sup>

Principle 2.03 addresses preservation requests and preservation orders. It provides:

*(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).*

*(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:*

- (1) names of the parties;*
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;*
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;*
- (4) relevant time period; and*
- (5) other information that may assist the responding party in assessing what information to preserve.*

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<sup>22</sup> Barkett, [Walking the Plank](#), pp.27-28. See also, Barkett, [The Prelitigation Duty to Preserve: Look Out!](#) (ABA Annual Conference, Chicago, 2005) (listing circuit formulations of the duty to preserve and presenting a circuit-by-circuit analysis of culpability standards applied in prelitigation spoliation cases, anticipating the difficulties litigants would face in the digital world where auto-delete programs are routine); Barkett, [Zubulake Revisited, Pension Committee and the Duty to Preserve](#), (ABA Litigation News, February 2010) (analyzing trigger, scope, and culpability standards in relation to the duty to preserve and the loss of evidence).

*(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:*

*(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;*

*(2) identifies any disagreement(s) with the request to preserve; and*

*(3) identifies any further preservation issues that were not raised.*

*(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.*

To the extent that subparagraph (a) addresses preservation orders, it restates the Advisory Committee Note to Rule 26(f).<sup>23</sup>

As to Principle 2.03's references to preservation letters, presumably it is designed to address a prefiling preservation letter. I say this because Principle 2.03 has no binding effect until the Model Standing Order does; i.e., postfiling. That means that litigation has begun, and a producing party has a preservation duty by then anyway. One might argue that if the lawyers are cooperating under Principle 1.02 and following the directions of Principle 2.01, a preservation letter would be unnecessary. Instead, counsel should fully prepare for their Rule 26(f) conference and discuss preservation issues then beyond whatever litigation holds should have already been issued.

Also the illustrations given of "specific" and "useful" information in subparagraphs (b)(1), (2) and (4) should be covered already by the complaint, which identifies the names of the parties, the causes of action, and the factual allegations supporting them, and should cover the relevant time period. Subparagraph (3) could be the subject of a postfiling preservation letter but is also an obligation that is covered by Rule 26(a)(1), which requires disclosure—without a demand letter—by all parties of each individual who has discoverable information that might be used to support a party's claims or defenses.

If I am right in this assessment, Principle 2.03 has greater value. Prelitigation demand letters have vexed courts and litigants.<sup>24</sup> A prelitigation demand letter that is sufficiently specific to trigger a duty to

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<sup>23</sup> Issuing a preservation order may be necessary in certain settings. See, e.g., *Haraburda v. Arcelor Mittal USA, Inc.*, 2011 WL 2600756, \*3 (N.D. Ind. June 28, 2011). Plaintiff in this employment discrimination action was concerned that Mittal would destroy relevant information because Mittal had deleted emails from plaintiff's account without plaintiff's consent during the period of an EEOC investigation and prior to plaintiff's termination. Plaintiff contacted Mittal about preserving relevant evidence. Mittal responded by saying it would not implement a litigation hold until the Rule 26(f) conference. Plaintiff then moved for a preservation order, which was granted by the magistrate judge: "Given the nature of Haraburda's suit, and the information before the court, it is apparent that Haraburda's claim is based primarily on communications exchanged between Mittal employees, namely e-mails. Absent this information, it may prove difficult for Haraburda to support her claim. Although Haraburda may seek sanctions if Mittal did not in fact preserve the communications reasonably related to her claim, such relief may not remedy the prejudice she would suffer if the documents were not preserved. Furthermore, Mittal already has the burden to preserve the evidence in question, and ordering Mittal to abide by its preexisting duty will not increase its burden."

<sup>24</sup> Compare *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 2007 U.S. Dist. LEXIS 15277, \*29-31 (D. Colo. Mar. 2, 2007) (a prelitigation preservation letter did not trigger a duty to preserve where the letter hinted at a "non-litigious solution" and litigation did not follow for nearly two years) and *Goodman v. Praxair Services, Inc.*, 2009 U.S.

preserve and contains useful information such as the names of the parties, the claims, supporting facts, the relevant time period, and names of potential witnesses would, at least, allow a recipient of the letter to make an informed judgment on the scope of a prelitigation document retention notice.

A recipient of a preservation request who chooses to respond is also supposed to provide “useful” information regarding its preservation efforts. Postfiling, the recipient should already be preserving based on the complaint. Whether the recipient responds to the letter or not, the Rule 26(f) conference would take place soon enough. Prefiling, the recipient is probably ill-advised to rely on Principle 2.03(d)’s statement that the recipient need not respond to a preservation request, at least if that means “ignore it.” A court that later decides that the prefiling letter triggered a duty to preserve could under its inherent authority sanction the recipient if relevant information is lost and causes prejudice to the sender of the preservation letter.

When the final Phase Two Report is issued, insights that we might look for would include these:

- Were postfiling preservation letters sent by a party? If so, under what circumstances?
- Did counsel conclude that it made more sense to ready themselves for the Rule 26(f) conference, eschewing transmittal of a preservation letter?
- Did counsel apply Principle 2.03 to prelitigation preservation letters? With what effect?
- What was the prelitigation preservation letter experience from the perspective of the sender and the recipient? Did the letter result in cooperative approaches to preservation or did it generate debate and discord?
- Did a situation ever arise where a prelitigation letter resulted in a sanctions motion because the recipient ignored it?

Whatever event triggers the duty to preserve, the scope of preservation remains a hot topic in controlling litigation costs. So it is appropriate that the next Principle addresses it.

#### *Principle 2.04 (Scope of Preservation)*

Principle 2.04 must be read very carefully by litigants. It provides:

*(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.*

*(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged*

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Dist. LEXIS 58263 (D. Md. July 7, 2009) (a prelitigation duty to preserve was triggered by a letter sent three years before suit was brought, which was not conciliatory).

*matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.*

*(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.*

*(d) 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 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.*

*(e) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.*

Subparagraph (a) is significant because of the use of the words “reasonable and proportionate” and because of the emphasis on continuing dialogue among counsel and calibration of the preservation duty as the case progresses. What is reasonable and proportionate will depend on the facts of each case, as Principle 2.03(a) points out, but still the ability of lawyers to invoke this standard in their Rule 26(f) discussion should produce sensible discussions at the Rule 26(f)



conference. When the results of the Pilot Project are reported, it will be of considerable interest to learn, at least, the following:

- Were litigants able to agree upon the scope of the preservation obligation?
- Was the assertion of “reasonable and proportionate” challenged? If so, how was it tested?<sup>25</sup>
- Were there any fact patterns that demonstrated that the “reasonable and proportionate” standard compromised the discovery rights of the requesting party?
- Did this Principle itself become the subject of discovery?
- Did litigants agree on a limited number of custodians for, at least, the initial preservation phase?
- Did counsel reach sensible agreement on the preservation of backup tapes?
- Under what circumstances did the scope of preservation grow as the case progressed?

Subparagraph (b) in tone, at least, intimates that there should be boundaries on discovery on e-discovery. It is acceptable to inquire of witnesses regarding their preservation and collection efforts. It is not acceptable to initiate discovery on e-discovery without conferring with the other side and evaluating the need for the discovery, the relevance of the discovery, and whether there is another means to obtain the information. Counsel must also evaluate the risk of unnecessary expense and delay in advancing discovery-related claims.

The case law on discovery on e-discovery requires some misfeasance or malfeasance to justify such discovery. See, e.g., *In Re Ford Motor Company*, 345 F.3d 1315, 1371 (11<sup>th</sup> Cir. 2003) (vacating order allowing discovery of certain databases where there was no factual finding of “some non-compliance with discovery rules by Ford”); *Scotts Co., LLC v. Liberty Mutual Insurance Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (mere suspicion that defendant was withholding ESI is an insufficient basis to permit forensic searches of defendant’s computer systems, network servers, and databases); *Ameriwood Indus. Inc. v. Liberman*, 2006 U.S. Dist. LEXIS 93380, \*16 (E.D. Mo. Dec. 27, 2006) (permitting a forensic search of defendants’ computer hard drives where a relevant email obtained from a third party was not produced by defendants).

Hence, subparagraph (b) should not come into play without a basis to question a lawyer’s Rule 26(g) certification of the correctness of a discovery response.<sup>26</sup> Cf. *Hubbard v. Potter*, 2008 WL 43867, \*4 (D.D.C. Jan. 3, 2008) (rejecting a request for additional discovery because speculation that other electronic documents existed does not overcome a Rule 26(g) certification). And if lawyers at the Rule 26(f) conference honor the General Principles and the other Early Case Assessment Principles, the subject of discovery on e-discovery should not arise. So the results of Phase Two hopefully will put a spotlight on whether any situation arose where discovery on e-discovery itself became an issue in any litigation,

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<sup>25</sup> Cf. *Pippins v. KPMG LLP*, 2011 WL 4701849, \*8 (S.D.N.Y. Oct. 7, 2011) (cautioning “against the application of a proportionality test as it relates to preservation” where it would be expensive for the producing party to maintain thousands of hard drives of employees who might become members of a Fair Labor Standards Act class action if the class is certified, but where the producing party was not able to “establish conclusively that the materials contained on the hard drives are either of ‘little value’ or ‘not unique’; discovery had not yet begun to resolve what materials are contained on the hard drives; the motion to certify had not yet been decided; and the producing party was reluctant to work with the plaintiffs “to generate a reasonable sample” of the hard drives “that may well be less burdensome to maintain”).

<sup>26</sup> Rule 26(g)(1)(A) provides that by signing a discovery response, a lawyer certifies that the disclosure is “complete and correct as of the time it is made.”

and, if so, why. Was there a breakdown in the implementation of other Principles? A breakdown in communications between counsel? An exercise in gamesmanship? Who was right in such situations? The requesting party or the producing party? Was a party sanctioned or denied sanctions for failing to confer or contributing to unnecessary delay or expense?

Because the first sentence of subparagraph (c) refers to counsel's preparation to discuss the claims and defenses, including specific issues, time frame, potential damages and target discovery that each anticipates requesting, subparagraph (c) must be referring to the Rule 26(f) conference and not the conference described in subparagraph (b). These are all logical topics for discussion at the Rule 26(f) conference because they frame the scope of preservation for the lawsuit, which the second sentence of subparagraph (c) directs should also be discussed at the conference. The last clause of subparagraph (c) is significant: the identification of preservation issues "should be specific." That should mean that each side identifies key custodians, key dates, and the location of key data that will be embraced by the scope of preservation. It should also mean specific discussion of backup tapes or other storage mediation not reasonably accessible because of undue burden or cost. Let's see whether, in the Pilot Project cases, disputes over the scope of preservation were eliminated. If they were, is it because of the application of the Principles? Or was it somehow the nature of the cases that dictated this outcome? If disputes over preservation scope were not eliminated, what were the reasons? Should those reasons result in a modification to the Principles?

Subparagraph (d) creates a presumption that deleted, slack, fragmented data; RAM or other ephemeral data; temporary files, cache, cookies, "frequently updated" metadata; and other forms of ESI whose preservation requires "extraordinary affirmative measures that are not utilized in the ordinary course of business," are not generally discoverable in most cases<sup>27</sup> so that if a party is seeking preservation of such ESI, it has to be the subject of discussion at the Rule 26(f) conference "or as soon thereafter as practicable."

Subparagraph (d) does not offer a solution to address backup tapes. It puts in the generally-not-discoverable category "backup data that is substantially duplicative of data that is more accessible elsewhere." The problem, of course, is that it may be difficult to know at the beginning of a case whether backup data is "substantially duplicative" or, instead, is unique and relevant. Two-tiered discovery may be the solution—looking in accessible data locations first.<sup>28</sup> Technology also may solve the backup data preservation quandary as backup data become stored on media that are searchable without restoration. Record management practices that reduce the number of backup tapes and result in more frequently recycling of them may also eliminate the likelihood of relevant information possibly being located on backup media. The Pilot Project could provide valuable insights if subparagraph (d)(5) results in improved practices on how courts and counsel should deal with preservation of backup data at the beginning of a matter. Did requesting parties seek discovery of data that were reasonably inaccessible

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<sup>27</sup> There are cases where RAM (discovery allowed) and cache (sanction for failure to preserve cache rejected) have been the focal point of discovery. Barkett, [Twenty Questions and Answers](#), pp. 7-12.

<sup>28</sup> In discussing the discovery of information inaccessible because of undue burden or cost versus discovery of information in accessible electronically stored information, the 2005 Advisory Committee Report suggested a "two-tier system": "Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources." Rules App. C. 42.

because of undue burden or cost? At the outset of discovery? Or later in discovery? Why was it sought? Was the discovery resisted? Was court intervention required? What happened?

Subparagraph (e) is important because, again, it represents a commitment of the participating judges to involve themselves in resolution of preservation disputes immediately, and it integrates the concept of reasonableness and proportionality into the scope of preservation, much more directly than Rule 26(b)(1) does with respect to the scope of discovery. Counsel must first meet. They must “fully explain” their reasons for believing that additional preservation efforts are not reasonable and proportionate pursuant to Rule 26(b)(2)(C). And if they don’t resolve the issue, they must raise the issue “promptly” with the Court. These requirements and the commitment of the participating judges to act offer the promise that disputes should be minimized or resolved because the judges are going to quickly figure out who is being reasonable and proportionate and who is not. It remains to be seen what the results of the Pilot Project tell us about the effect of subparagraph (e) on minimizing or eliminating disputes over the scope of preservation.

*Principle 2.05 (Identification of Electronically Stored Information)*

Once the parties know what is going to be preserved, they should reach agreement on how to find what they are looking for. That’s what Principle 2.05 speaks to:

*(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.*

*(b) Topics for discussion may include, but are not limited to, any plans to:*

*(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians;*

*(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and*

*(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.*

Note that Principle 2.05 does not require parties to agree on anything; they just have to discuss potential methodologies for identifying ESI for production. In cases involving two or three custodians and a handful of emails, most parties will likely just print and produce the ESI and the topics covered by Principle 2.05 will be easily addressed by lawyers. For data-rich parties, Principle 2.05(b)(3) gives them the option to offer “advanced culling technologies”—using software that is “trained” through an initial investment of lawyers or linguists’ time with initial productions from the document data set to then develop effective search algorithms to find just the relevant documents or at least the highest proportion of them among all documents identified to be responsive—which continue to receive more and more attention from litigants because of promising research on their success in finding relevant documents at a

lower cost than would result from human review.<sup>29</sup> Such technologies will have to come down in price before they become attractive in low-volume ESI cases, which predominate in federal court.<sup>30</sup> And until they do, Principle 2.05 essentially echoes the case law that says that lawyers should not make unilateral decisions on search terms. See, e.g., *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (“[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process. Rather than working with Plaintiffs from the outset to reach agreement on appropriate and comprehensive search terms and methods, AZ undertook the task in secret.”).

Among the questions that Principle 2.05 might answer are these:

- Were the lawyers sufficiently knowledgeable on search methodologies to engage in meaningful discussion of these topics? Or did e-discovery liaisons have to become involved?
- Did the requirement to discuss the topics covered by Principle 2.05 result in agreements on search methodologies?
- What search methodologies predominated? Did litigants primarily rely on keyword searches? If so, was there testing and quality control?<sup>31</sup>
- Did technology-assisted review, or what some call “predictive coding,” of ESI occur? By agreement of counsel? If not, were there objections on technology-assisted review that were addressed by the courts?<sup>32</sup> How did the court address the objection?

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<sup>29</sup> The National Institute of Standards and Technology (part of the Department of Commerce) has sponsored the TREC Legal Track since 2006. In Legal TREC, document sets are made available to participant teams who then apply software tools to retrieve documents relevant to the issues presented to the teams. There is a “focus on business records as documents, representative discovery requests as topics, relevance judgments by legal professionals and law students, evaluation measures for retrieval of sets of documents, and (in one task) modeling an interactive search process.” [Overview of the TREC 2009 Legal Track](#); see also Maura R. Grossman & Gordon V. Cormack, [Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review](#), XII Rich. J.L. & Tech. 11 (2011) (discussing TREC 2009 and describing results achieved through the use of technology-assisted review that were superior to results achieved through manual review).

<sup>30</sup> Of the civil cases commenced in the United States district courts in 2009-10, only 5.72% were characterized as antitrust, bankruptcy, banking, environmental, intellectual property, securities, or RICO actions. [Civil Cases Commenced in US District Court by Basis of Jurisdiction/Nature of Suit, During the 12-Month Period Ending September 30, 2009 and 2010](#). In the 12-month period ending on September 30, 2010, 29.4% of the cases commenced were categorized as tort, personal injury, or personal property damage cases; 45.2% were civil rights, labor, prisoner petition, social security, or consumer credit cases; and 11.0% were “contract actions.” The remaining 8.7% of cases fall into a variety of other categories.

<sup>31</sup> See *William A. Gross Construction Associates, Inc. v. American Manufacturers Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (giving a “wake-up” call to the Bar about the need for “careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’” to produce ESI). Judge Peck reprised his opinion in his article, *Search, Forward*, Law Technology News (Oct. 1, 2011) where he writes that despite his and others judges’ criticisms of “the use of keywords without sufficient testing and quality control,” many lawyers “still use the ‘Go Fish’ model of keyword search.”

<sup>32</sup> Judge Peck’s article, *Search, Forward*, also discussed computer-assisted review: “To my knowledge, no reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.” Judge Peck suggests that he is willing to hear the “guinea-pig” decision, that lawyers should not worry that judges have a bias in favor of keyword searches or that they will have to satisfy *Daubert* standards to support computer-assisted review. He adds, however, that he will want to know “what was done and why that produced defensible results. I may be less interested in the science behind the ‘black box’ of the vendor’s software than in whether it produced responsive documents with reasonably high recall and high precision.” Judge Peck earlier explained that recall “is the fraction of relevant documents identified during a review.” Precision “is the fraction of identified documents that are relevant.” Would a litigant

- More broadly did search methodology disputes result in the need for court intervention? If so, in what circumstances? What happened?
- Were privilege or work product concerns raised in counsel discussions?<sup>33</sup> If so, in what context, and what happened?

#### *Principle 2.06 (Production Format)*

The final Early Case Assessment Principle addresses the form of production.

Under Rule 34(b)(1)(C), the requesting party “may specify the form or forms in which electronically stored information is to be produced.”<sup>34</sup> If the form or forms are specified in the request, under Rule 34(b)(2)(D), the responding party may object “to a requested form for producing electronically stored information.” If an objection is made, or if the form of production was not specified in the original request for production, the responding party “must state the form or forms it intends to use.”<sup>35</sup> Rule 34(b)(2)(E)(ii) and (iii) then provide that “unless otherwise stipulated or ordered by the court,”

*(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained<sup>36</sup> or in a reasonably usable form or forms; and*

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attempting to defend technology-assisted review have to run a test against human reviewers to show that the computer-assisted review produced “reasonably high recall and high precision.” Can that comparative question be answered by other studies or must it be answered in the case before a court? Judge Peck suggests in his article that adequate documentation of the process with the “seed data” set and validation of the search approach through studies like the Legal TREC might be enough to convince him. If other judges agree, then litigants might find a receptive judicial audience in the “guinea pig” cases. But it is a safe guess that it is just a matter of time before technology-assisted review or computer-assisted review or predictive coding (whichever phrase takes hold) becomes “mainstream” and judicially accepted in cases where the data set is large enough and litigants can afford the upfront investment of time to teach the software what to look for.

<sup>33</sup> Barkett, [Twenty Questions and Answers](#), pp. 71-77 (discussing privilege arguments in relation to litigation holds and search terms).

<sup>34</sup> For example, the requesting party may request hard copy, a CD with the information on it in searchable format, or direct access to the storage media that holds the electronic information. A party might request production in native format (e.g., Excel spreadsheet or Word documents), in TIFF (Tagged Image File Format in which nonsearchable images of documents are created) or in PDF (Portable Document Format). The 2006 Advisory Committee Note to Rule 34 recognizes that in some cases, a requesting party might request different forms of production for different types of electronically stored information. For example, a database might be treated differently from a spreadsheet or a word processing document. Committee Note, Rules App. C-76.

<sup>35</sup> The Principles echo the [2006 Advisory Committee Note to Rule 34](#), which emphasizes the importance of communication among counsel to minimize disputes: “Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.” Rules App. C-77. If the form or forms of production is or are not agreed upon, the parties must confer under Rule 37(a)(1) to attempt to resolve the matter before the requesting party can file a motion to compel. If the district court must resolve the dispute, the district court is “not limited to the forms initially chosen by the requesting party, the responding party, or specified in this rule for situations in which there is no court order or party agreement.” Committee Note, Rules App. C-77.

<sup>36</sup> Producing documents in the form “in which it is ordinarily maintained” implicates metadata. See generally, Barkett, [Twenty Questions and Answers](#), pp. 83-88 (discussing standards for production of metadata).

*(iii) A party need not produce the same electronically stored information in more than one form.<sup>37</sup>*

Principle 2.06 supplements Rule 34, again with a commitment by the participating judges to accept a dispute for prompt review. It provides:

*(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.*

*(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.*

*(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.*

*(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.*

Subparagraph (a) is a given: it must be the subject of discussion early in an action, and if litigants can't agree, courts must be available to address the dispute promptly. Festering format fights will consume more judicial resources, not less.

Subparagraph (b) is suggestive, not prescriptive. It urges parties to confer where ESI is stored in a database and determine whether a query to that database might generate a report or an exportable electronic file for review by a requesting party. Because it is not mandatory, subparagraph (b) might not

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<sup>37</sup> "One form" does not mean "one form." The Committee Note creates ambiguity by the use of the word "ordinarily" in describing this change: "Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form." The case law has struggled a bit with this Rule. See generally, Barkett, [Twenty Questions and Answers](#), p. 89-94 (discussing whether "one form" really means "one form"); see also Barkett, [Walking the Plank](#), pp. 57-63 (discussing case law under Rule 34 since the e-discovery amendments went into effect).



generate any,<sup>38</sup> or at least many, such reports or files. But when the final Phase Two Report is issued, hopefully, we will find out whether that statement is true.<sup>39</sup>

Subparagraph (c) is not a disputable proposition; a litigant cannot be forced to make paper documents text-searchable. Subparagraph (d) makes the sensible proposal that if the same set of nontext searchable data should be made text searchable, the parties ought to discuss cost-sharing.<sup>40</sup> I assume that the final Phase Two Report will document that subparagraphs (c) and (d) were noncontroversial.

## Education Principles

Without better education, e-discovery may not be managed fairly or frugally, and certainly not quickly. Some persons think that if data are stored on a computer, it is just a matter of hitting a keystroke to magically locate desired information in an instant. In a single document, that is true. In a massive data set with a variety of authors, some who do not spell well, or where words can take on other than their ordinary meaning, or where relationships among individuals must be discerned in a particular time period—and these are just examples—the task of finding documents helpful to one's position or responsive to a request for production is much more complicated. Education will help litigants and judges alike advance cost-effective e-discovery.

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<sup>38</sup> See *Getty Properties Corp. v. Raceway Petroleum, Inc.*, 2005 WL 1412134 (D.N.J. June 2005). Here, plaintiff sought sanctions because defendant did not create certain types of reports from a computerized alarm system. The reports sought by plaintiff were not ones that defendant needed as part of its ordinary business operations. Plaintiff nonetheless sought an adverse inference instruction claiming that had the reports been generated and preserved they would have been relevant and useful to plaintiff's case. The district court denied plaintiff's motion for sanctions. The district court agreed with defendant that defendant was not responsible to create records not kept within the normal course of its business. The district court distinguished this case from those cases dealing with the active deletion of data, explaining that defendant's failure to create more reports than it used in the daily activities of its business was "not the kind of willful action that discovery sanctions are intended to redress."

<sup>39</sup> The Sedona Conference has published a commentary on databases and database information. [\*Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation\*](#). There are six database principles: 1. "Absent a specific showing of need or relevance, a requesting party is entitled only to database fields that contain relevant information...." 2. Because the information in a database may not be equally accessible due to the manner of storage or programming, "a party's request for such information must be analyzed for relevance and proportionality." 3. Empirical information such as that generated from test queries and pilot projects should be used by the litigants "to ascertain the burden to produce information stored in databases and to reach consensus on the scope of discovery." 4. "A responding party must use reasonable measures to validate ESI collected from database systems to ensure completeness and accuracy of the data acquisition." 5. "Verifying information that has been correctly exported from a larger database or repository is a separate analysis from establishing the accuracy, authenticity, or admissibility of the substantive information contained within the data." 6. "The way in which a party intends to use database information is an important factor in determining the appropriate format of production."

<sup>40</sup> See *Portis et al. v. City of Chicago et al.*, 2004 WL 1535854 (N.D. Ill. July 7, 2004). Plaintiffs' counsel had prepared a database of selected data from the City's arrest reports to support its claim that plaintiffs' civil rights had been violated by the City. Initially, plaintiffs had proposed that the parties jointly undertake the project. The City had refused. Plaintiffs had spent \$90,000 to prepare the database. They opposed the motion claiming the database was work product. The district court held that the database was fact work product, not opinion work product, that the City had a substantial need for access to the database and could not replicate it without undue hardship (expending extensive, duplicative resources), and ordered production of the database. However, the City was ordered to pay one-half of the past expenses plaintiffs incurred to compile the database. The district court did give the City a credit of \$5,000 representing one-half of the \$10,000 in expenses the City had incurred in special computer programming costs to obtain information in the first instance to provide to the plaintiffs. Each side was required to pay one-half of future expenses as well.

### *Principle 3.01 (Judicial Expectations of Counsel)*

Principle 3.01 focuses on counsel's familiarity with e-discovery amendments to the Federal Rules of Civil Procedure and the supporting Advisory Committee Report. It also provides that counsel will become familiar with the Principles, but with the Model Standing Order issued by each participating judge, counsel must be familiar with the Principles since I assume that lawyers appearing in front of judges will read the standing orders issued by those judges! Principle 3.01 provides:

*Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:*

*(1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;*

*(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf);<sup>41</sup> and*

*(3) Familiarize themselves with these Principles.*

For new lawyers, education must begin in law schools. Law students must understand the basics of e-discovery before they graduate. If current and future law students are not trained to identify cost-effective solutions to handling e-discovery in reasonable and proportionate ways without compromising either justice or vigorous advocacy, litigation in the digital era will become a sport for the wealthy.

Law students' understanding must be developed not just in civil procedure classes or workshops but also in classes on professional ethics.<sup>42</sup> A lawyer who is cooperative can still be an able advocate for a client. Law students must be taught this.

We should learn from the final Phase Two Report whether lawyers participating in the cases in which the Principles were applicable showed the sophistication expected by Principle 3.01.

### *Principle 3.02 (Duty of Continuing Education)*

Principle 3.02 also addresses education. It provides:

*Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal*

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<sup>41</sup> I was unable to pull up the Advisory Committee Report on the 2006 e-discovery amendments at this link. The report can be found, however, at the [link](#) listed earlier.

<sup>42</sup> My book, *The Ethics of E-Discovery* (First Chair Press, Chicago, January 2009) originated in part out of the E-Discovery Workshop I teach at the University of Miami School of Law.



*Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery, additional materials available on web sites of the courts, and of other organizations providing educational information regarding the discovery of ESI.*

The Federal Judicial Center has to provide helpful, practical programs to judges to, at a minimum, keep them up to date on rapid advancements in technology and help them adopt best practices. Continuing legal education programs by the sections of the American Bar Association and state and local bar associations should include programs on achieving cooperative, reasonable, and proportionate e-discovery without compromising either justice or a lawyer's duties to the lawyer's client. The Pilot Project may generate "best practices" if the participating lawyers and judges are willing to invest the time in recounting for the final Phase Two Report what actions or requirements were most effective and which ones were not as effective, and why.

The Pilot Project itself may also present opportunities for video productions of problem-solving tools utilized by lawyers and judges in the Pilot Project that can be shared with the bench and bar nationally.

## **OTHER HOPES FOR EMPIRICAL INFORMATION FROM PHASE TWO OF THE PILOT PROJECT**

Here is a wish list of other information that might be garnered from surveys of the judges and lawyers participating in Phase Two of the Pilot Project.

### **An E-Discovery Model Order?**

Will there be a sufficient consensus about best practices that the Pilot Project might lead to development of an E-Discovery Model Order?

The Federal Circuit Advisory Council<sup>43</sup> issued one in October 2011.<sup>44</sup> The Court of Appeals for the Federal Circuit has not approved the specific language of the proposed Model Order. Nonetheless, given the makeup of the FCAC, the Model Order merits discussion.

Explaining that patent cases "tend to suffer from disproportionately high discovery expenses" and this problem is compounded when attorneys use discovery tools as "tactical weapons," the FCAC instead decided to focus litigants on what matters most in resolving a patent dispute: "what the patent states, how the accused products work, what the prior art discloses, and the property calculation of damages."

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<sup>43</sup> The members of this body are identified at <http://www.cafc.uscourts.gov/the-court/advisory-council.html> (as of November 1, 2011).

<sup>44</sup> The order can be found at [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=20947](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20947). The October 19, 2011 announcement of adoption of the Model Order by the FCAC is at <http://www.cafc.uscourts.gov/announcements> (as of November 1, 2011). The Introduction to the FCAC's Model Order is signed by the "E-Discovery Committee," which lists as its members, Chief Judge Rader from the Federal Circuit, two district court judges (Chief Judge James Ware from the Northern District of California and Judge Virginia Kendall from the Northern District of Illinois), a magistrate judge from the Eastern District of Texas and six members of the plaintiff and defense bar. Judge Kendall is also one of the participating judges in Phase Two of the Pilot Project.

“Thus,” the FCAC explained, “far reaching e-discovery, such as mass email searches, is often tangential to adjudicating these issues.” Concerned about “intolerable” expense in the resolution of patent disputes, the FCAC explained that its Model Order is designed to promote “economic and judicial efficiency by streamlining e-discovery, particularly email production and requiring litigants to focus on the proper purpose of discovery—the gathering of material information—rather than permitting unlimited fishing expeditions.” It is also intended, like the Pilot Project, to foster discussion among judges, litigants, and others “regarding e-discovery problems and potential solutions.”

The key components of the Model Order are:

1. It “supplements” all other discovery rules and orders.
2. It can be modified “for good cause.”
3. Paragraph 3 of the Model Order introduces proportionality into the cost-shifting calculus of Rule 26(b)(2)(B) by determining a priori that costs “will be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26.”<sup>45</sup>
4. Without explaining the legal basis, Paragraph 3 of the Model Order also provides that a party’s “nonresponsive or dilatory discovery tactics will be cost-shifting considerations.”<sup>46</sup> Balancing this “stick” is the “carrot” in Paragraph 4: “A party’s meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.”<sup>47</sup>
5. While some courts have used a “particularized need” standard before permitting discovery of metadata,<sup>48</sup> Paragraph 5 imposes a “good cause” requirement before metadata have to be produced

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<sup>45</sup> As experience with the Model Order grows, whether there is increased motion practice over what are “disproportionate ESI production requests” is a topic that should be studied.

<sup>46</sup> It is not clear that Rule 26(b)(2)(B) would permit cost-shifting for “disproportionate ESI production requests.” Rule 26(b)(2)(B) allows a court, upon a showing of good cause, to specify conditions for discovery by a requesting party of ESI from sources that are not reasonably accessible because of undue burden or cost. Perhaps these words are broad enough to enforce Paragraph 3 of the FCAC’s Model Order. It is more likely that the FCAC was referring to Rule 26(c)(1), which allows a producing party to obtain an order, for good cause, to be protected from undue burden or expense in dealing with a discovery request. The FCAC appears to be saying that a disproportionate ESI production request presumptively represents good cause requiring a protective order to shift the costs of the production. It seems less likely but the FCAC here might be referring to cost-shifting instead as a sanction under Rule 37 since its Model Order would provide a basis to apply Rule 37(b)(2)(A)’s requirement for an “order to provide or permit discovery.” Or perhaps it is referring to the cost-shifting as a sanction under Rule 26(g) which would be required where a discovery request was interposed for “any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the costs of litigation” or is unreasonable or 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.”

<sup>47</sup> Cf. *Covad Communications Co. v. Revonet, Inc.*, “Covad IV”, 2010 U.S. Dist. LEXIS 31165 (D.D.C. Mar. 31, 2010). In this matter, the magistrate judge had granted a motion to compel and awarded fees but the parties could not agree on the amount. The question presented was whether defense counsel was entitled to compensation for the time spent in writing letters to plaintiff’s counsel detailing discovery deficiencies as part of an effort to avoid filing the motion to compel. The court’s scheduling order had required cooperation among counsel and defense counsel’s efforts to reach a discovery accord with plaintiff’s counsel, the magistrate judge held, was sufficiently related to the motion to compel to warrant an entitlement to fees: “Indeed, if the efforts of the federal courts to reduce the costs of discovery and, in particular electronic discovery, are to be taken seriously, then counsel will have to know that judicial orders and local rules requiring meaningful discussions between counsel before discovery motions are filed mean what they say. If attorneys insist on ‘drive by’ meetings and conferrals, or they think that exchanging nasty e-mails ... will suffice, then they have to know that they are going to get hit where it hurts—in their pocketbooks.” *Id.* at \*50.

<sup>48</sup> Barkett, [Twenty Questions](#), pp. 83-88; see also “Default Standards for Discovery of Electronic Documents” of the District of Delaware, [Standard 6](#): “If, during the course of the Rule 26(f) conference, the parties cannot agree to the format for document production, electronic documents shall be produced to the requesting party as image files

under Rules 34 or 45.<sup>49</sup> Note, however, that Paragraph 5 recognizes that electronically stored information that contains “fields showing the date and time that the document was sent and received, as well as the complete distribution list, shall generally be included in the production.”

6. The FCAC eliminates email from general ESI production requests. Under Paragraph 6, “To obtain email parties must propound specific email production requests.”
  - a. Under Paragraph 7, those email production requests “shall only be propounded for specific issues, rather than general discovery of a product or business.”
  - b. In Paragraph 8, the FCAC encourages litigants voluntarily to exchange “basic documentation about the patents the prior art, the accused instrumentalities, and the relevant finances.” However, it directed that “email production requests” had to be phased to occur after initial disclosures are made under Rule 26(a)(1) and after this voluntary exchange if the parties decide to engage in it.
  - c. Under Paragraph 9, the email production requests have to identify the custodian, search terms, and time frame.
  - d. Also under Paragraph 9, the parties “shall cooperate to identify the proper custodian, proper search terms, and proper timeframe.”
  - e. Under Paragraph 10, email production requests are limited to five custodians per producing party “for all such requests.”
    - i. Parties can jointly modify this limit without a court order.
    - ii. If warranted by the size, complexity, or issues of the case, the district court “shall consider contested requests for up to five additional custodians per producing party.”
    - iii. To add another “stick,” Paragraph 10 also provides that if a party serves email production requests beyond the limit agreed to by the parties or ordered by the district court, “the requesting party shall bear all reasonable costs caused by such additional discovery.” This sentence appears to be stating that the limit is not binding on a party willing to pay the “reasonable” costs of looking for more information. In other words, the limit is a “soft” one rather than a “hard” one.
  - f. Under Paragraph 11, email production requests are also limited to a total of “five search terms per custodian per party.”
    - i. Again the parties can modify this limit by agreement, or the court can, based on the size, complexity, and issues of the specific case.
    - ii. Search terms have to be “narrowly tailored to particular issues.” “Indiscriminate terms, such as the producing company’s name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction.” Conjunctive combinations of multiple words

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(e.g., PDF or TIFF). When the image file is produced, the producing party must preserve the integrity of the electronic document’s contents, i.e., the original formatting of the document, its metadata and, where applicable, its revision history. After initial production in image file format is complete, a party must demonstrate particularized need for production of electronic documents in their native format.” The default standards can be found at <http://www.ded.uscourts.gov/Announce/Policies/Policy01.htm>.

<sup>49</sup> Note that the Principles only expressly address Rule 34 and not Rule 45, although the goals of the Principles should apply equally to counsel for subpoena-issuers and subpoena-recipients.

are counted as one search term, not more than one. Disjunctive search terms, however, “broaden the search” and thus each word counts against the limit of search terms.

- iii. Paragraph 11 also provides a carrot. “Use of narrowing search criteria (*e.g.* “and,” “but not,” “w/x”) is encouraged to limit the production and shall be considered when determining whether to shift costs for disproportionate discovery.”
  - iv. Again, the search term limit apparently is not a fixed one, because a requesting party willing to pay “all reasonable costs” of an email production request that exceeds the presumptive, agreed-upon, or court-ordered limit on search terms, can add search terms. It remains to be seen how “reasonable costs” are defined in this setting should requesting parties decide to go beyond a court-ordered limit.
7. The Model Order institutionalizes application of Federal Rule of Evidence 502(d) by providing in Paragraphs 12-14 that ESI that the producing party asserts is attorney-client privileged or work product protected “shall not” be used by the receiving party to challenge the privilege or protection; insulating inadvertently produced privileged or protected documents from waiver; and holding that the “mere production of ESI in a litigation as part of a mass production” does not constitute a waiver for any purpose.”

While it seems likely that the FCAC’s Model Order will evolve over the course of the first few cases in which it is applied and while the Model Order is directed at patent cases, which typically are symmetric cases (data-rich parties squaring off against each other), those entrusted with gathering information for the final Phase Two Report might want to compare the results of the Pilot Project’s Phase Two to the requirements and sentiments of the Model Order to evaluate its broader application beyond patent cases to cases involving comparable concerns over the time and costs associated with unfocused e-discovery. Then, perhaps a model order can be developed that establishes presumptive boundaries on e-discovery that are speedy and inexpensive but still just, consistent with Rule 1’s goals, for application in certain kinds of cases.

### **Impacts of the Principles on Cost-Shifting**

Rule 26(b)(2)(B) addresses production of electronic information that is reasonably inaccessible because of undue burden or cost. A court can, for good cause shown, order production of such information and specify conditions for the discovery, which, of course, would include shifting some or all of the costs of production to the requesting party.<sup>50</sup> The words “cost-shifting” do not appear in the Principles. In a

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<sup>50</sup> [\*Wiginton v. CB Richard Ellis, Inc.\*](#), 229 F.R.D. 568, 73 (N.D. Ill. 2004) where the magistrate judge established these as cost-shifting standards before shifting 75% of the cost of production to the requesting party: “1) the likelihood of discovering critical information; 2) the availability of such information from other sources; 3) the amount in controversy as compared to the total cost of production; 4) the parties’ resources as compared to the total cost of production; 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; 7) the importance of the requested discovery in resolving the issues at stake in the litigation; and 8) the relative benefits to the parties of obtaining the information. At all times we keep in mind that because the presumption is that the responding party pays for discovery requests, the burden remains with CBRE to demonstrate that costs should be shifted to Plaintiffs. See *Zubulake (III)*, 216 F.R.D. at 283.” *Wiginton* was

perfect world, cooperative lawyers who issue reasonable and proportionate discovery requests might not ever have a cost-shifting dispute. However, assuming that, despite the application of the Principles, the litigation world remains an imperfect one, it will be useful to learn whether there were cost-shifting demands despite the application of the Principles, and how they were resolved.

### **Impacts of the Principles on Subpoena Disputes**

When the e-discovery amendments to Rules 16, 26, 33, and 34 were made, conforming changes were made to Rule 45. This includes Rule 45(d)(1)(D), which mimics the provisions of Rule 26(b)(2)(B) with respect to “not reasonably accessible” information:

*The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless 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.*

Rule 45(c)(1) directs a party serving a subpoena to take “reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Where an objection is made to a subpoena, Rule 45(c)(2)(B)(ii) states that an order on a motion to compel “must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.”

The Principles do not mention disputes under Rule 45. But it would seem a shame if the surveyors of the participants in the Pilot Project did not capture any information that might be generated by research on the effects of the Pilot Project on subpoena-related e-discovery questions:

- Were the Principles naturally applied to the scope of subpoenas for ESI?
- If not, were they enforced by the court, if a dispute was brought to the court’s attention?
- How was cost-shifting required under Rule 45 handled? By resolution among counsel? By court order?

### **Impacts of the Principles on Taxing Costs**

[Fed. R. Civ. P. 54\(d\)\(1\)](#) allows for costs, other than attorneys fees, to be awarded to the prevailing party in federal litigation. Under Rule 54(d)(1), the losing party in litigation bears the burden of showing why costs should not be taxed against it. *Race Tires America Inc. v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (W.D. Pa. May 6, 2011).

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applied in *Clean Harbors Env. Serv. Inc. v. ESIS, Inc.*, 2011 U.S. Dist. LEXIS 53212, \*20 (N.D. Ill. May 17, 2011) (the magistrate judge required Clean Harbors to cover 50% of the costs of restoration and searching data from backup tapes and two other parties to cover equally the remaining 50%). *Cf. Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 97554 (D.N.J. Oct. 20, 2009) (refusing to order defendants to search backup tapes for emails but allowing search of certain backup tapes if plaintiffs share in the cost of the retrieval (but not the cost of a relevancy and privilege review), and certain other backup tapes if plaintiffs paid all costs to retrieve and search the tapes including defendants’ cost to review emails for relevancy and privilege).

Costs are taxed pursuant to [28 U.S.C. § 1920](#). Under Section 1920(4), the court may assess as costs, “Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.” What does “exemplification” mean? The district court in *Hoosier Racing* held that it meant \$367,000 in e-discovery production costs consisting of (1) costs associated with imaging nineteen hard drives and processed data from five custodians,<sup>51</sup> and (2) costs associated with imaging four servers which contained 490 gigabytes of data over 270,000 files.<sup>52</sup>

The result in *Hoosier Racing* might be explained in part by this passage from the district court opinion:

*STA aggressively pursued e-discovery under the Case Management Plan. For example, STA directed 273 discovery requests to DMS, including 119 separate requests for documents and ESI. Capitol City, the vendor for DMS, copied 490 gigabytes of electronic data and over 270,000 files from DMS’ servers. During the collection process, STA imposed—over DMS’s objections—over 442 search terms. During an initial search by Capitol City of DMS’s computers in May 2008, 274 keywords searched resulted in over seven million “hits” upon possibly relevant and responsive ESI files.*

*Id.* at \*9 (record citations omitted).<sup>53</sup> If the Principles are honored by the litigants, one would like to think that in the Pilot Project no comparable set of facts could ever arise.

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<sup>51</sup> Invoices presented in support of the motion to tax costs reflected that the vendor in question “extracted data, processed data, loaded data, and performed all tasks associated with putting electronic documents in the position to be produced” to the requesting party. The case management order in the matter required that the requesting party receive metadata and “key-word searchable” files. 2011 WL 1748620 at \*10-11.

<sup>52</sup> The files contained “a mix of native files – Word, Excel, Zip, JPG pictures, music files (sound), HTML (web), etc.” 2011 WL 1748620 at \*11.

<sup>53</sup> See also *In re Aspartame Antitrust Litigation*, 2011 WL 4793239 (E.D. Pa. Oct. 5, 2011). After prevailing, three defendants obtained an order taxing costs in the amounts of \$195,398.82, \$120,364.17, and \$194,375.19 respectively (representing discounts of 5% to 25% of the original claims). *Id.* at \*8. The district court explained that the “volume of discovery...was staggering.” *Id.* at \*2. “Defendant Ajinomoto was required to collect documents from over twenty-eight different document custodians, including documents relating to defendants’ foreign activities and affiliates, that totaled 87.73 gigabytes of data—the equivalent to copying 4.4 to 6.1 million pages of documents. Ajinomoto spent \$135,696.00 processing this data, which amounts to 2 or 3 cents per page. Defendant NutraSweet collected over 1.05 terabytes of potentially responsive electronic documents—over 75 million pages—and 262,000 pages of hard-copy documents. Defendant Holland Sweetener amassed over 366 gigabytes of potentially responsive documents that amounted to several million pages. *Id.* (record citations omitted). It awarded costs “for the creation of a litigation database, storage of data, imaging hard drives, keyword searches, deduplication, data extraction and processing. Because a privilege screen is simply a keyword search for potentially privileged documents, we award that cost as well. In addition, we award costs associated with hosting data that accrued after defendants produced documents to plaintiffs because, as the plaintiffs themselves acknowledged earlier in the proceedings, discovery was ongoing in this case up until summary judgment was issued.” *Id.* at \*3 (footnote and record citations omitted). The district court also awarded costs associated with “technical support necessary to complete these tasks.” *Id.* It further taxed costs associated with optical character recognition, the creation of load files that allowed documents to be saved in Tagged Image File Format to be loaded onto a software platform for review, and the cost of creating Concordance load files. *Id.* The district court rejected costs associated with a software tool that involved clustering of a document collection based on concepts extracted from those documents as well as associated technical usage fees. “This service, while undoubtedly helpful, exceeds necessary keyword search and filtering functions. Rather, it is advanced technology that falls squarely within the realm of costs that are not necessary for litigation but rather are acquired for the convenience of counsel.” *Id.* at \*4. The district court also awarded the costs of electronic data recovery and tape restoration, *id.*, as well as the “full” costs of creating CDs (at \$15-35) and DVDs (at \$25-50), and the cost of a third-party vendor intaking, cataloging and loading” defendant NutraSweet’s hard drives into its processing system. *Id.* at 7. Cf. *Tibble v. Edison International*, 2011 U.S. Dist. LEXIS 94995 (C.D. Cal. Aug. 22, 2011). In this ERISA matter, plaintiffs succeeded only in a portion of one claim out of ten, and the bulk of plaintiffs attorneys’ fees were incurred in relation to a claim that was rejected. Plaintiffs had sought their attorneys’ fees and costs under Rule 54(d)(1) as the “prevailing party.” The district court initially



Nonetheless, *Hoosier Racing* raises another approach to cost-shifting beyond that contained in Rule 26(b)(2)(B). If enough of the cases being litigated under the Pilot Project reach the final judgment phase and involve cost taxation issues, it will be very helpful to the bar and the academy to see how e-discovery costs were handled and whether the Principles affected in any way decisions made on taxing costs.

### Use of Federal Rule of Evidence 502(d)

Fed. R. Evid. 502(d) addresses the binding effect of a federal district court order on protection of privileged and work-product-protected documents from a claim of waiver if they are produced in the action. It provides in full:

*A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court<sup>54</sup> – in which event the disclosure is also not a waiver in any other federal or state proceeding.*

This language gives force to a nonwaiver order approving a clawback procedure. Party agreement is not necessary to enforce a 502(d) order.

There are lawyers litigating in federal courts who do not seek a 502(d) order to protect their clients from waiver of privilege or work-product protection for inadvertently produced privileged or protected documents.<sup>55</sup> These lawyers harbor a concern that showing any privileged document to one's opponent is a bad idea even if it can be clawed back under the 502(d) order.

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awarded plaintiffs a portion of their fees because of their limited success and directed plaintiffs to recalculate their fees pursuant to the court's order. They did so, seeking \$407,227.30 in fees. Defendants countered by seeking to offset their e-discovery costs as the parties that prevailed in the "substantial part of the litigation." On reconsideration, the district court denied plaintiffs' request for fees as unreasonable, but in the alternative, held that defendants' motion to tax costs was well taken and the offset against plaintiffs' fees would be permitted. The bulk of defendants' costs, about \$530,000, were consumed by utilizing expert computer technicians "in unearthing the vast amount of computerized data sought by Plaintiffs in discovery." The district court explained that these costs "were necessarily incurred in responding to" twenty-eight requests for production of documents, including electronically stored information, "reaching documents over a decade old." *Id.* at \*22. "Plaintiffs aggressively sought electronic files, whether active, deleted, fragmented, or stored on electronic media or network drives. Ultimately, Defendants produced 537,955 pages of electronic documents in response to Plaintiffs' requests." *Id.* at \*22-23 (record citations omitted). The district court also approved of the rates charged defendants by their vendors based on the expertise involved and the use of competitive bidding. *Id.* at \*24.

<sup>54</sup> The Explanatory Note to Rule 502(d) states that this provision "does not allow a federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding." [Fed. R. Evid. 502\(c\)](#) addresses disclosures generally made in state proceedings where the disclosure is not the subject of a state-court order concerning waiver. The disclosure does *not* operate as a waiver in a federal proceeding as long as the disclosure: (1) "would not be a waiver under this rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred." The Explanatory Note to Rule 502(c) states that the Evidence Rules Advisory Committee elected to have courts "apply the law that is most protective of privilege and work product."

<sup>55</sup> See *Infor Global Solutions (Mich.) Inc. v. St. Paul Fire & Marine Co.*, 2009 U.S. Dist. LEXIS 71370, \*6-8 (N.D. Cal. Aug. 3, 2009) (where plaintiff produced a compact disc and "did not qualify the production with any 'clawback' notice for privileged documents," because of the failure to take reasonable steps to prevent disclosure, waiver was found by the magistrate judge as to 227 privileged emails included among 5,000 email files on the disc); see also [Victor Stanley, Inc. v. Creative Pipe, Inc.](#), 250 F.R.D. 251 (D. Md. 2008) (producing party elected not to pursue a clawback order; the magistrate judge found a waiver. This case was decided before Fed. R. Evid. 502 went into

To be sure, Fed. R. Evid. 502(d) should not be used as a convenient judicial tool to allow a requesting party to have wholesale discovery of a data set containing privileged or protected documents solely because they can be clawed back after production. Such documents might not be relevant. They also might contain competitively sensitive information.<sup>56</sup> On the other hand, litigants should not be so uncooperative that a court imposes a clawback order on them to move a case along.<sup>57</sup> And best litigation practices should always involve a protective order to require return of a privileged or protected document and nonwaiver of the privilege or protection should even the most careful producing parties allow a privileged or protected document to be inadvertently produced.

Hence, Fed. R. Evid. 502(d) is used (i) as a best practice to protect against waiver for inadvertent production of privileged or work-product-protected documents not just in the action in which the 502(d) order is entered but in any federal, state, or agency proceeding, (ii) to save review costs in situations where production of a data set will not create legitimate or perceived concerns for the producing party should privileged or work-product-protected documents be seen by counsel for the requesting party, or (iii) in situations where there is urgency associated with the production and there might not be time to conduct a privilege review.<sup>58</sup>

It will be important to learn from the Pilot Project whether participants embraced or eschewed Rule 502(d) and whether the cases on either side of that ledger fell into particular fact patterns or the motivations or concerns of the lawyers involved were similar. Rule 502(d) was intended to save producing parties review time and costs by protecting the party from waiver claims. When applied in a Pilot Project case, did it do so?<sup>59</sup>

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effect. However, defendants had elected not to have an order entered under [Hopson v. Mayor of Baltimore](#), 232 F.R.D. 228 (D. Md. 2005), which would have protected privileged documents inadvertently produced to the other party from a waiver claim. 250 F.R.D. at 255.

<sup>56</sup> See *Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, 2009 WL 1649592, \*5 (E.D. Wis. June 10, 2009) (“Kay Beer also suggests that the need for Energy Brands to incur the cost of having attorneys review the information stored on the DVDs can be avoided through the use of a ‘claw back’ provision of Rule 26(b)(5)(B), which permits a party to demand that privileged information that is inadvertently produced be returned or destroyed. The availability of a remedy for inadvertently produced material, however, does not deprive a party of their right to withhold it in the first place. Moreover, a claw back arrangement does not spare Energy Brands the need to review information that it may wish to withhold on the ground that it is simply not discoverable and contains the kind of proprietary or confidential information that businesses in its position simply prefer not to disclose.”).

<sup>57</sup> *Williams v. Taser International, Inc.*, 2007 U.S. Dist. LEXIS 40280, \*20-21 (N.D. Ga. June 4, 2007) (the court imposed a clawback provision where the parties were “unable to cooperate in the discovery process” that had gone on for 18 months and, to prevent further delay, the district court ordered production of electronic documents within a short time frame).

<sup>58</sup> *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, \*51, n.6 (S.D.N.Y. Aug. 13, 2009) (suggesting the parties confer on a clawback agreement because of an earlier deadline established for email production); *Starbucks Corp. v. ADT Security Services, Inc.*, 2009 WL 4730798, \*4 (W.D. Wash. Apr. 30, 2009) (“Because the ESI would be produced quickly, and perhaps without the complete review for privileged materials that might otherwise accompany production, a claw-back agreement permits the party producing to reclaim privilege on otherwise potentially privilege-waived material. At the hearing on April 29, 2008, the parties agreed that each would have claw-back rights relating to production of privileged materials.”).

<sup>59</sup> If there is a Phase Three of the Pilot Project evaluating the application of some of the Principles to criminal matters might be considered. Cf. *United States v. Warshak*, 631 F.3d. 266, 296 (6<sup>th</sup> Cir. 2010) (refusing to apply Fed. R. Civ. P. 34 to government production); *United States v. Briggs*, 2011 WL 4017886 (W.D.N.Y. Sept. 8, 2011) (under inherent authority, ordering the government to reproduce disclosures in a searchable format or native format); *United States v. O’Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008) (borrowing from Fed. R. Civ. P. 34, requiring



## CONCLUSION

The 7<sup>th</sup> Circuit Pilot Project is the only experiment of its kind occurring in the federal court system today. It has the potential to generate enormously helpful information about ways to control e-discovery costs without compromising justice, to improve the time it takes to resolve a lawsuit without sacrificing fairness, and to promote cooperation without jeopardizing advocacy. While it is not too early to applaud the Pilot Project committee members and the participating judges and lawyers, they will deserve a standing ovation if they are able to effect rigorous surveys and interviews that realize the potential represented by this very important study. The Pilot Project might vastly change for the better the way federal court litigation occurs in the 21<sup>st</sup> century. We who are interested in speedy and inexpensive, but still just, resolution of all actions would like to see that hope become reality.

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government to produce documents as PDF or TIFF files unless defendants could show that these formats were not reasonably usable but that production in native format with metadata intact would be).

## APPENDIX I – COURTS ENDORSING THE COOPERATION PROCLAMATION

- *In re Facebook PPC Advertising Litigation*, 2011 WL 1324516, \*1-2 (N.D. Cal. Apr. 6, 2011) (Emphasizing that communication among counsel is crucial to the success of electronic discovery and citing the Sedona Conference on the importance of cooperation, the magistrate judge ordered the parties to agree on an ESI protocol that addresses formats of production, and to meet and confer to discuss search terms that had been and would be used by Facebook.).
- *American Federation of State County & Municipal Employees v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2010 U.S. Dist. LEXIS 135371, \*15 (E.D. Pa. Dec. 21, 2010) (Citing the Proclamation, the district court told the parties “to immediately meet and confer in good faith to cooperatively and independently resolve these disputes to the extent possible,” adding it would give parties “ample time” to do so. “If the Parties are unable to resolve these matters within the time allotted, the Court may require them to submit their discovery processes to a special master, with costs to be borne by the parties.”).
- *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 918, 930-31 (N.D. Ill. 2010) (After endorsing the Proclamation, Magistrate Judge Nolan lamented the consequence of the absence of prior cooperation: “This case demonstrates the importance of candid, meaningful discussion of ESI at the outset of the case, including discovery of ESI from non-parties. Had that been done, the parties should have been able to avoid the issuance of multiple subpoenas to Huron. After service of Defendants’ subpoena, Huron and Defendants should have collaborated on the use of particular search terms and the data custodians to be searched in advance of Huron’s searches. Counsel are ordered to confer in person (not via email, letters, or phone) to establish reasonable limits on the scope of Huron’s future ESI production, including restricting the searches to certain key data custodians and agreeing on a narrow list of search terms and date ranges. Counsel are on notice that going forward the Court expects them to genuinely confer in good faith and make reasonable efforts to work together and compromise on discovery issues whenever possible.”).<sup>60</sup>
- *Home Design Services, Inc. v. Trumble*, 2010 U.S. Dist. LEXIS 46723 (D. Colo. Apr. 9, 2010) (Citing the Cooperation Proclamation, the magistrate judge explained: “Counsel’s case management responsibilities should not been seen as antithetical to their role as advocate.”).
- *Cartel Asset Management v. Ocwen Financial Corp.*, 2010 U.S. Dist. LEXIS 17857, \*40 (D. Colo. Feb. 8, 2010) (The magistrate judge, citing the Cooperation Proclamation, lamented the conduct of counsel: “The court is left with the impression that counsel are searching for discovery disputes, rather than

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<sup>60</sup> A month before her decision in *DeGeer*, Magistrate Judge Nolan admonished counsel in *Tamburo v. Dworkin*, 2010 U.S. Dist. LEXIS 121510, \*10-11 (N.D. Ill. Nov. 17, 2010 (footnote and citation omitted)): “The parties are expected to be familiar with the Case Management Procedures regarding discovery on the Court’s website, the Seventh Circuit’s Electronic Discovery Pilot Program’s Principles Relating to the Discovery of Electronically Stored Information, and the Sedona Conference Cooperation Proclamation, available at [www.thesedonaconference.org](http://www.thesedonaconference.org). The parties are ordered to actively engage in cooperative discussions to facilitate a logical discovery flow. For example, to the extent that the parties have not completed their initial disclosures pursuant to Rule 26(a), or if their initial disclosures require updating, the parties should focus their efforts on completing their Rule 26(a) requirement before proceeding to other discovery requests.”

working cooperatively to avoid or defuse those disagreements. Given the talented attorneys involved in this case, that development is regrettable.”).<sup>61</sup>

- *Building Erection Services Co., L.C. v. American Buildings Co.*, 2010 U.S. Dist. LEXIS 2625, \*5-6 (D. Kan. Jan. 13, 2010) (In a dispute over setting deposition dates, the magistrate judge told counsel: “To help counsel understand their obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation, which this Court has previously endorsed.”).
- *Securities and Exchange Commission v. Collins & Aikman*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (The SEC’s lack of cooperation prompted the district court to draw the parties’ attention to the Cooperation Proclamation, which “urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the ‘rising monetary costs’ of discovery disputes.”).
- *Dunkin’ Donuts Franchised Restaurants LLC v. Grand Central Donuts, Inc.*, 2009 U.S. Dist. LEXIS 52261, \*14-15 (E.D.N.Y. June 19, 2009) (Citing the meet-and-confer provisions of Rule 26(f) and the Sedona Cooperation Proclamation in connection with the need to reduce the “rising costs” of discovery disputes, the magistrate judge ordered defendants to work out their differences.).<sup>62</sup>
- *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (Referencing the Cooperation Proclamation, the magistrate judge said that a failure of a party to respond to an invitation to propose search terms is not the kind of “collaboration and cooperation that underlies the hope that the courts can, with the sincere assistance of the parties, manage e-discovery efficiently and with the least expense possible.”).
- [\*William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.\*](#), 2009 U.S. Dist. LEXIS 22903, \*136 (S.D.N.Y. Mar. 19, 2009) (The magistrate judge admonished the Bar: “[T]he best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses The Sedona Conference Cooperation Proclamation.”).
- *In re DirecTech Southwest, Inc., Fair Labor Standards Act Litigation*, 2009 U.S. Dist. LEXIS 69142 (E.D. La. Aug. 7, 2009) (The magistrate judge echoes the statements made in *William A. Gross.*).
- *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 426 (D.N.J. 2009) (In denying a motion to compel reproduction of electronically stored information, the magistrate judge, citing *William A. Gross*, admonished counsel: “It is beyond cavil that this entire problem could have been avoided had there been an *explicit* agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection.”).
- *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009) (Also citing *William A. Gross*, the magistrate judge was critical of counsel’s unilateral decision on search terms for

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<sup>61</sup> The magistrate judge quoted from the Cooperation Proclamation: “[T]he *Cooperation Proclamation* correctly recognizes that while counsel are ‘retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. . . . Cooperation does not conflict with the advancement of their clients’ interests—it enhances them. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.” 2010 WL 502721, at \*13-14 ).

<sup>62</sup> This is another case involving a dispute over search terms: “Defendants’ proposed search can be narrowed temporally and the scope of the search terms sought tailored to each employee, since some employees may have knowledge of only issues relevant to one set of counterclaims but not the other. The defendants must provide Dunkin with a list of the employees or former employees whose emails they want searched and the specific search terms to be used for each individual depending on whether they were likely to be involved with issues relating to the termination of the franchise agreement or the performance of the store development agreement.” 2009 U.S. Dist. LEXIS 52261 at \*16.

electronically stored information: “MP3tunes’ unilateral decision regarding its search reflected a failure to heed Magistrate Judge Andrew Peck’s recent ‘wake-up call’ regarding the need for cooperation concerning e-discovery.”).

- *Gipson v. Southwestern Bell Tel. Co.*, 2008 U.S. Dist. LEXIS 103822, \*5-6 (D. Kan. Dec. 23, 2008) (Where 115 motions had been filed in less than 12 months after filing of the complaint, the same magistrate judge ordered counsel to read the Cooperation Proclamation and then to attempt to agree on discovery issues or a Special Master would be appointed.).<sup>63</sup>
- *Mancia v. Mayflower Textile Servs Co.*, 253 F.R.D. 354, 357-60 (D. Md. 2008) (Endorsing the Cooperation Proclamation, Judge Grimm wrote: “It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot ‘behave responsively’ during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.”).<sup>64</sup>

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<sup>63</sup> See *Evolution, Inc. v. The Suntrust Bank*, 2004 U.S. Dist. LEXIS 20490, \*18 (D. Kan. Sept. 29, 2004) (where the same magistrate judge had to appoint a Special Master to resolve e-discovery issues and ultimately required the defendant to pay 70% of the Special Master’s \$52,000 fee because of its “representations and lack of cooperation”).

<sup>64</sup> State courts are echoing these federal judges. See, e.g., *In re Weekley Homes, L.P.*, 2009 Tex. LEXIS 630, \*32 (Tex. 2009) (“A fundamental tenet of our discovery rules is cooperation between parties and their counsel, and the expectation that agreements will be made as reasonably necessary for efficient disposition of the case”); see also “[The Texas Lawyer’s Creed – A Mandate for Professionalism](#),” issued by the Supreme Court of Texas and the Texas Court of Criminal Appeals (November 7, 1989). The Texas Lawyer’s Creed contains a preamble followed by a number of general and then personal mandates that lawyers in Texas make. One of the general mandates is: “A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.” One of the personal mandates reads: “I will refrain from excessive and abusive discovery.”

**COMMITTEE ON RULES OF  
PRACTICE AND PROCEDURE**

**Phoenix, AZ  
January 7-8, 2016**

## MEMORANDUM

To: Standing Committee

From: Civil Rules Pilot Project Subcommittee

Date: December 12, 2015

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One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal courts.

The subcommittee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, and various innovative federal courts. Exhibits A, B, C, and D contain summary memos prepared by members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibit E describes a pilot project undertaken at the direction of Congress in the early 1990s.

After considering a number of alternatives, the subcommittee has focused on two possible pilot projects: one on enhanced initial disclosures, and another that calls upon judges to set more aggressive schedules for completion of litigation and, at the same time, trains them on case management techniques needed to adhere to such schedules.

### A. Enhanced Disclosures.

This is a rule-driven project that would make more robust the voluntary disclosures already required by Civil Rule 26(a) at the beginning of a case to include helpful *and* hurtful information known by each party. It is similar to an Arizona state court rule that has been used with some success for over a decade, as well as an analogous rule in Colorado and the federal employment law protocols currently used by many federal judges. It also is akin to a proposed amendment to Civil Rule 26(a) that failed to pass in the late 1990s.

As you may know, the Civil Rules actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the Rule 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation. Exhibit F is a summary of a study recently completed by the Federal Judicial Center on the effect of the employment protocols. It finds significantly fewer discovery disputes in cases where the protocols are used.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit G. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The Rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. This Rule, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, only one expert per issue) appears to have produced favorable results. In a survey completed for the Advisory Committee's May 2010 conference, 73% of Arizona lawyers who practice in federal and state court said that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit H includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The subcommittee feels that this draft must be more specific in its description of the documents to be disclosed. Otherwise, lawyers will provide only the most general descriptions of "categories" of documents and little that is helpful will be revealed. The subcommittee is working on more specific language, and welcomes any suggestions.

In considering such a pilot project, we should keep in mind the experience from the 1990s. Attached as Exhibit I is a summary of some of the arguments made in opposition to the enhanced disclosure rule proposed at that time.

We would appreciate your thoughts on several questions: Should the Advisory Committee promote a pilot project that tests the benefits of initial disclosures? Alternatively, should the Committee proceed directly to drafting and publishing a rule amendment requiring more robust initial disclosures? If a pilot project were undertaken, what would we measure to determine its success?

## B. Case Expedition.

The goal of the Civil Rules is to further the “just, speedy, and inexpensive determination of every action.” Case dispositions that are not speedy and inexpensive often are not just.

Under this pilot, judges would use the initial case management conference to set a firm time cap on discovery and a firm trial date no more than 12 to 14 months from the filing of each case. For such a schedule to work, judges would be required to resolve discovery disputes and dispositive motions promptly. Exceptions to the 12-14 month trial date would be needed for some complex cases, but the subcommittee is inclined to limit the exceptions to narrowly defined categories of cases, such as patent cases, MDLs, and class actions. Pilot judges would still be required to set firm caps on discovery and firm trial dates in these cases, and to resolve discovery disputes and dispositive motions promptly.

Building on the work of several federal and state courts, this project would attempt to seize on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to present its case at trial; redundancy is lessened and efficiency increases.

To increase the odds of success with this pilot, and to develop materials that might be used in general judge training if more aggressive schedules were to be proposed broadly, the pilot would include significant judicial training, in conjunction with the FJC, to educate the pilot judges on the kinds of tools that would make the pilot goals achievable. The pilot project could examine, over time, the ability of judges to set expeditious and effective litigation schedules as they are trained, gain experience, and share ideas in meetings with colleagues.

There are several premises for such a pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions,



and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; and (3) lawyer cooperation should increase when both parties must conduct discovery within a relatively short period of time.

#### C. Another Possible Pilot Project.

The subcommittee has considered a pilot project that would divide cases into separate tracks for simple, standard, and complex cases. Such case-tracking was tried in federal courts during the 1990s Congress-initiated CJRA pilots, and has been tried in several states. Case tracking is still used in some courts, but has at other times encountered difficulty in efficiently and accurately identifying cases for specific tracks. The Conference of State Chief Justices is currently preparing a tracking recommendation, and an initial draft is likely to be available in the spring. We will continue to watch that effort and consider the possible role of case tracking in our pilot project proposals.

#### D. Other Thoughts.

Any pilot effort would require not only the participation of the Civil Rules and Standing Committees, but also CACM and the FJC. We have made a report to CACM, which was received favorably, and CACM plans to designate one or two liaisons for our pilot project effort. Jeremy Fogel of the FJC has also been an active participant in our pilot project conference calls.

We are considering the following possible timetable:

- April 2016—approval by Civil Rules Committee.
- June 2016—approval by Standing Committee.
- September 2016—approval by Judicial Conference.
- Early 2017—initial implementation.
- End of 2019—completion.

Our current thinking is that pilot districts must be willing to make the pilot requirements mandatory, all judges in the district must be willing to participate, and at least three to five districts will be needed.

This is a work in process. We would very much appreciate your thoughts and suggestions.

# EX. A

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## MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on “business cases.” Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve’s memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System’s (“IAALS”) Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states’ pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project (“CAPP”). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to “business actions” on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for “good cause.”

7. The rules provided that the scope of discovery should be matters that “enable a party to prove or disprove a claim or defense or to impeach a witness” and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in “active” management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent “extraordinary circumstances.”

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.
2. There would be a decrease in the cost of resolution for cases.
3. The process would be fair for all parties.
4. There would be a substantial increase in judicial involvement in cases.
5. The number of judges per case would decrease.
6. There would be a decrease in motions practice.
7. There would be a decrease in motions practice associated with discovery.
8. There would be a decrease in trial time.
9. There would be an increase in the number of cases that went to trial.
10. There would be a decrease in the amount of trial time per trial.
11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.
2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.
3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the “most approved” part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: “Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional.”

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain “challenges” with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant’s responsive disclosures and pleadings were keyed to the time of a plaintiff’s disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant’s timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as “business” and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.
2. Adoption of the federal regime of automatic initial disclosures.
3. Requirement of a discovery conference of counsel and discovery plan in every case.
4. An expedited process for non-dispositive motions.
5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.
2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.



3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The “intention” of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a “date certain.”

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. “Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling \$200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief.” Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an “initial evaluation” of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving \$75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.
2. One summary judgment motion may be filed by each party.
3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.
2. Staging discovery where possible.
3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."
4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

\* \* \* \*

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

# EX. B

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**SIMPLIFIED PROCEDURES SUBCOMMITTEE --  
SUMMARY OF CERTAIN JUDICIAL REFORMS**

As part of the “Simplified Procedures” Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System’s (“IAALS”) Rule One initiative project.

**I. New Hampshire Pilot Project:**

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot (“PAD”) Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

- 1. Pleading Standards:** The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.
- 2. Early Meet and Confer:** The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the “case structuring order.” If the parties agree on the deadlines, they do not need a conference with the court.
- 3. Early and Meaningful Initial Disclosures:** This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party’s claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or policies under which such damages may be paid. If a party fails to make

these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

**4. Limit on Interrogatories and Deposition Hours:** The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

**5. Preservation of ESI:** The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts (“NCSC”) evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC’s findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC’s review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.
2. Establish a firm trial date in the case structuring order.
3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.
4. Establish a uniform time standard for return of service.

## **II. New York Task Force**

New York created a Task Force on Commercial Litigation in the 21<sup>st</sup> Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project’s scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

**1. Robust expert disclosures:** The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

**2. New privilege log rules to streamline discovery:** The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) The Sedona Principles: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) The Facciola-Redgrave Framework: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See John Facciola & Jonathan Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of



the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

**3. E-discovery:** The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

**4. Deposition and Interrogatory Limits:** The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

**5. An accelerated adjudication procedure:** The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

### III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to “develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas.” Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio’s Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio’s courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special masters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

#### **IV. Texas Task Force**

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to “promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed \$100,000.” In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of \$100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and “advise the Supreme Court regarding rules to be adopted” to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to “aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants.” The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

- 1. Expedited Actions:** This Rule applies to all cases that seek \$100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court’s ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.
- 2. Pleading Requirements Regarding Relief Sought:** The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.
- 3. Discovery Plan:** For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

## **CONCLUSION**

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on “simplified procedures”, I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.
2. The New York Task Force’s recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.
3. Expedited Actions. Both Texas’ and New York’s Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell’s insights because it would save significant time and money for the parties.

**Amy J. St. Eve**  
**September 24, 2015**

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# EX. C

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## MEMORANDUM

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

### **A. Arizona.**

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the “Zlaket Rules,” a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

#### **1. Disclosures.**

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;



- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than \$50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

#### 6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

#### 7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed \$50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

#### 8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

## **B. Utah.**

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of \$50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.
- Tier 2 applies to cases between \$50,000 and \$300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.
- Tier 3 applies to cases of \$300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a party to file a “Statement of Discovery Issues” no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a “Statement in Opposition,” also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called “extraordinary discovery” in the rules) in only a small minority of cases.

Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

## **C. Oregon.**

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever

the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery.”

- Oregon’s civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party’s attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with \$50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

#### **D. District of Kansas.**

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court’s Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force’s recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

#### **E. Thoughts.**

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth \$50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say \$100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.



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# EX. D

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## MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

\* \* \*

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a “cheap and inferior set of rules” for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee’s discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper’s simplified rules is that “current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery.” *Id.* at 1796. The following is an overview of these simplified rules.

- ▶ The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.
- ▶ The simplified rules apply to all cases where the amount in controversy is less than \$50,000, and may be applied voluntarily when the amount in controversy is between \$50,000 and \$250,000.
- ▶ The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.
- ▶ The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- ▶ Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.
- ▶ The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.
- ▶ The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.
- ▶ While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.
- ▶ Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.
- ▶ The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise,  
The American College of Trial Lawyers Task Force on Discovery and  
Civil Justice & The Institute for the Advancement of the American Legal  
System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two “fundamental principles” for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to “secure the just, speedy, and inexpensive determination of every action.” The second principle states that the “one size fits all approach” to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: “[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.



Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the “battle of the experts” and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- ▶ automobile, intentional, and premises liability torts
- ▶ insurance coverage claims arising out of such torts
- ▶ cases where a buyer or seller is a plaintiff
- ▶ consumer debt
- ▶ appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- ▶ a focus on case attributes rather than dollar value
- ▶ presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- ▶ mandatory disclosures
- ▶ truncated discovery
- ▶ simplified motion practice
- ▶ an easy standard for removal from the pathway
- ▶ conventional fact finding
- ▶ no displacement of existing procedural rules consistent with streamlined pathway rules
- ▶ an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than \$50,000, where the plaintiff seeks monetary relief between \$50,000 and \$250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a “claim or defense of a party,” rather than any matter related to a “subject matter involved in the pending action.” Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer’s term expired. However, the Committee’s reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper’s proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper’s draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs’ and defendants’ attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

EX. E

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To: Rebecca Womeldorf  
Cc: Simplified Procedures Pilot Project Subcommittee  
From: Amelia Yowell, Supreme Court Fellow  
Date: October 15, 2015  
RE: CACM report on the CJRA pilot program

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The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,<sup>1</sup> study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,<sup>2</sup> with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

### **The CJRA Pilot Program**

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their “size, the complexity and size of their caseloads, the status of their dockets and their locations.” *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were “pilot districts,”<sup>3</sup> which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;
- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

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<sup>1</sup> The RAND Corporation conducted the independent evaluation. Report at 15.

<sup>2</sup> The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

<sup>3</sup> The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.



- “Careful and deliberate monitoring” of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;
- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;
- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and
- Encouraging alternative dispute resolution programs

*Id.* at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;
- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;
- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;
- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and
- Requiring a representative with the power to bind the parties to be present at all settlement conferences

*Id.* at 15, 39–44.

These pilot districts were compared with ten “comparison districts,”<sup>4</sup> which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

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<sup>4</sup> The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,<sup>5</sup> which implemented “demonstration programs to test systems of differentiated case management and alternative dispute resolution.” *Id.* at 9.

### **The Judicial Conference’s Assessment and Recommendation**

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least “as a total package.” *Id.* at 2, 15. The Conference based its recommendation on the RAND Study’s finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.<sup>6</sup> *Id.* at 26. Assessing these results, the Conference noted that “there is a need for individualized attention to each case that a ‘one size fits all’ approach cannot satisfy.”<sup>7</sup> *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge’s docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id.* at 45–46. In particular, the Study noted that “[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims.” *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study’s findings, and the Judicial Conference’s resulting recommendation.

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<sup>5</sup> The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

<sup>6</sup> One reason for this may be that the judiciary had already adopted many of the CJRA’s case management procedures. Report at 26.

<sup>7</sup> The RAND Study reported that “reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in ‘time to disposition.’” Report at 46.

Tested Procedure	Findings	Recommendation
<p><b>Differentiated case management using a “track” system</b></p> <p>Report at 26–28</p>	<ul style="list-style-type: none"> <li>• The districts sorted cases into expedited, standard, and complex tracks.</li> <li>• The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings.</li> <li>• Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the “standard” track.</li> <li>• Many districts found that a judge’s ability to tailor the management of each particular case was more effective than rigid case tracks.</li> </ul>	<ul style="list-style-type: none"> <li>• Some form of differentiated case management should be used.</li> <li>• However, track systems “can be bureaucratic, unwieldy, and difficult to implement.”</li> <li>• Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.</li> </ul>
<p><b>Early judicial case management</b></p> <p>Report at 19, 29–31</p>	<ul style="list-style-type: none"> <li>• Early judicial case management included “any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing.</li> <li>• Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours.</li> <li>• If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.</li> </ul>	<ul style="list-style-type: none"> <li>• Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period.</li> <li>• The Conference was “opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin,” mainly because a standard time line would slow down cases that could be resolved more quickly.</li> </ul>

<p><b>Early voluntary exchange of information and use of cooperative discovery techniques</b></p> <p>Report at 33–</p>	<ul style="list-style-type: none"> <li>• All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information.</li> <li>• It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery.</li> <li>• Discovery deadlines were a major factor in decreasing the cost and length of litigation.</li> </ul>	<ul style="list-style-type: none"> <li>• The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures</li> <li>• The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).</li> </ul>
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Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study’s finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

*Id.* at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that “a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay.” Report at 22. The Conference also noted that a court’s ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

EX. F

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**Report on Pilot Project Regarding  
Initial Discovery Protocols for Employment  
Cases Alleging Adverse Action**

Emery G. Lee III & Jason A. Cantone  
Federal Judicial Center  
October 2015



## Executive Summary

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System (“IAALS”), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About 75 federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center (“FJC”) to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011 (“pilot cases”). For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts (“control cases”). Information was collected on case processing times, case outcomes, and motions activity in the pilot and control cases. The key findings summarized in this report:

- There was no statistically significant difference in case processing times for pilot cases compared to control cases.
- There was generally less motions activity in pilot cases than in the control cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in control cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than control cases. On average, however, the pilot cases did not settle faster than the control cases.

## Background

In May 2010, the Judicial Conference Advisory Committee on Civil Rules (“Committee”) sponsored a major Civil Litigation Review Conference at Duke University School of Law (“the Duke conference”). The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (“protocols”). Joseph Garrison chaired the plaintiffs’ subcommittee and Chris Kitchel chaired the defendants’ subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System (“IAALS”) and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the FJC public website ([www.fjc.gov](http://www.fjc.gov)). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about 75 judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges participate.

The introduction to the protocols identifies the pilot’s purposes in the following way:

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant’s responsive pleading or motion. While the parties’ subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use as a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on

the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in 10 districts (Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern). Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, and/or the number of eligible cases in the various districts.

A nationwide random sample of terminated employment discrimination cases (nature of suit = 442), filed in 2011 or later, was drawn for a control sample. The control sample included 672 terminated cases alleging employment discrimination.

## Findings

**Disposition Times.** The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for control cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant ( $p = .241$ ).

**Case Outcomes.** The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time, and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way (including dismissals for want of prosecution and for failure to exhaust administrative remedies).

The most common case outcome for control cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the control cases is around 65%. The lower settlement rate for control cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two outcomes account for fully a quarter of dispositions in control cases, but only about an eighth of dispositions in pilot cases. Ten control cases (2%) were resolved by trial. Eight percent of the control cases were resolved in some other way.

Comparing the pilot cases and control cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and control cases have essentially the same mean disposition time (just under 300 days).

**Motions Practice.** Fewer discovery motions were filed in the pilot cases than in the control cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the control cases, compared to only 12% of pilot cases. The difference of means for the number of discovery motions filed between pilot and control cases is statistically significant ( $p < .001$ ).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of control cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the control cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of control cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the control cases.

## **Discussion**

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that less motions practice is associated with lower costs overall. Costs are difficult to measure directly. The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily

an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and control cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and control cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or control cases. Individual judges' practices vary and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and control cases.

## Appendix 1: Control cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases (Nature of suit 442) filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011-2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

**Disposition times by case outcomes.** The median time to disposition for all control cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside “other” outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment take much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

**Times to important case events.** The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 186 days (6.1 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

**Motions activity.** About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

## Appendix 2: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

**Disposition times by case outcomes.** The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside “other” outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment take much longer to resolve, median time to disposition, 623 days (20.5 months), but the small number of cases decided by trial was shorter, median 459 days (15.1 months).

**Times to important case events.** The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 168 days (5.5 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

**Motions activity.** About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.

# EX. G



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## DISCOVERY-GENERAL PROVISIONS

## /IL PROCEDURE

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## Note

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tions. The 1984 amendment to Rule 11 ade-  
quately accomplishes the purposes of Federal  
Rule 26(g).

The rejection of Federal Rule 26(g), and the  
concomitant loss of its language expressly requir-  
ing certification that the discovery request, re-  
sponse or objection is not unreasonable or undu-  
ly burdensome or expensive, is not intended to  
diminish the protection provided by Rule 26(c).

**Rule 26(g). Discovery motions**

No discovery motion will be considered or sched-  
uled unless a separate statement of moving counsel  
is attached thereto certifying that, after personal  
consultation and good faith efforts to do so, coun-  
sel have been unable to satisfactorily resolve the  
matter.

Added and effective June 27, 2001.

**Rule 26(h). Deleted. Effective Nov. 1, 1970****Rule 26.1. Prompt disclosure of information**

(a) **Duty to Disclose, Scope.** Within the times  
set forth in subdivision (b), each party shall dis-  
close in writing to every other party:

(1) The factual basis of the claim or defense.  
In the event of multiple claims or defenses, the  
factual basis for each claim or defense.

(2) The legal theory upon which each claim or  
defense is based including, where necessary for a  
reasonable understanding of the claim or de-  
fense, citations of pertinent legal or case authori-  
ties.

(3) The names, addresses, and telephone num-  
bers of any witnesses whom the disclosing party  
expects to call at trial with a fair description of  
the substance of each witness' expected testimo-  
ny.

(4) The names and addresses of all persons  
whom the party believes may have knowledge or  
information relevant to the events, transactions,  
or occurrences that gave rise to the action, and  
the nature of the knowledge or information each  
such individual is believed to possess.

(5) The names and addresses of all persons  
who have given statements, whether written or  
recorded, signed or unsigned, and the custodian  
of the copies of those statements.

(6) The name and address of each person  
whom the disclosing party expects to call as an  
expert witness at trial, the subject matter on  
which the expert is expected to testify, the sub-  
stance of the facts and opinions to which the

expert is expected to testify, a summary of the  
grounds for each opinion, the qualifications of  
the witness and the name and address of the  
custodian of copies of any reports prepared by  
the expert.

(7) A computation and the measure of damage  
alleged by the disclosing party and the docu-  
ments or testimony on which such computation  
and measure are based and the names, address-  
es, and telephone numbers of all damage wit-  
nesses.

(8) The existence, location, custodian, and gen-  
eral description of any tangible evidence, rele-  
vant documents, or electronically stored informa-  
tion that the disclosing party plans to use at trial  
and relevant insurance agreements.

(9) A list of the documents or electronically  
stored information, or in the case of voluminous  
documentary information or electronically stored  
information, a list of the categories of documents  
or electronically stored information, known by a  
party to exist whether or not in the party's pos-  
session, custody or control and which that party  
believes may be relevant to the subject matter of  
the action, and those which appear reasonably  
calculated to lead to the discovery of admissible  
evidence, and the date(s) upon which those docu-  
ments or electronically stored information will  
be made, or have been made, available for in-  
spection, copying, testing or sampling. Unless  
good cause is stated for not doing so, a copy of  
the documents and electronically stored informa-  
tion listed shall be served with the disclosure. If  
production is not made, the name and address of  
the custodian of the documents and electronical-  
ly stored information shall be indicated. A party  
who produces documents for inspection shall  
produce them as they are kept in the usual  
course of business.

**Court Comment to 1991 Amendment**

In March, 1990 the Supreme Court, in con-  
junction with the State Bar of Arizona, appointed  
the Special Bar Committee to Study Civil Litiga-  
tion Abuse, Cost and Delay, which was specifical-  
ly charged with the task of studying problems  
pertaining to abuse and delay in civil litigation  
and the cost of civil litigation.

Following extensive study, the Committee con-  
cluded that the American system of civil litigation  
was employing methods which were causing  
undue expense and delay and threatening to  
make the courts inaccessible to the average citi-  
zen. The Committee further concluded that cer-  
tain adjustments in the system and the Arizona  
Rules of Civil Procedure were necessary to re-  
duce expense, delay and abuse while preserving

## RULES OF CIVIL PROCEDURE

## Rule 26.1

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

#### Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

#### Committee Comment to 1996 Amendment

**Rule 26.1(a)(3).** With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must

disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

#### (b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

#### Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

EX. H

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

*Proposed Rule Sketch*

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

- 1 (a) [Version 1: Within the times set forth in subdivision (b),<sup>1</sup>  
2 each party must disclose in writing to every other party:<sup>2</sup>]  
3 [Version 2: Before seeking discovery from any source, except  
4 in a proceeding listed in Rule 26(a)(1)(B), each party must  
5 answer these Rule 33 interrogatories {and Rule 34 requests  
6 to produce or permit entry and inspection}, providing:]
- 7 (1) (A) the factual basis of its claims or defenses;
- 8 (B) the legal theory upon which each claim or defense  
9 is based;
- 10 (C) a computation of each category of damages  
11 claimed by the disclosing party – who must  
12 also make available for inspection and  
13 copying as under Rule 34 the documents or  
14 other evidentiary material, unless privileged  
15 or protected from disclosure, on which each  
16 computation is based, including materials  
17 bearing on the nature and extent of the  
18 injuries suffered;
- 19 (D) for inspection and copying as under Rule 34  
20 any insurance [or other] agreement under  
21 which an insurance business [or other person]  
22 may be liable to satisfy all or part of a  
23 possible judgment in the action or to  
24 indemnify or reimburse for payments made to  
25 satisfy the judgment;<sup>3</sup> and

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<sup>1</sup> The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

<sup>2</sup> Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

<sup>3</sup> This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

(2) whether or not the disclosing party intends to use them in presenting its claims or defenses:

(A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action;

(B) the names and addresses of all persons known to have given statements, and – if known – the custodian of any copies of those statements; and

(C) a list of the categories of documents, electronically stored information, nondocumentary tangible things or land or other property, known by a party to exist whether or not in the party's possession, custody or control and which that party reasonably believes may be relevant to any party's claims or defenses, including – if known – the custodian of the documents or electronically stored information not in the party's possession, custody, or control.

### *Discussion*

#### RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court's authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of



the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more – often far more – than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

#### PILOT PROJECT DESIGN

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways – as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including – perhaps particularly including – complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot's lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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# EX. I

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## MEMORANDUM

To: Judge Jeffrey S. Sutton

From: Derek Webb

Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Criticisms in the 1990s.

Date: December 7, 2015

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In the 1990s, the Civil Rules Committee attempted to reform Civil Rule 26 disclosures. The goal was to require disclosures of helpful *and* hurtful information held by each party. The rule gave district courts the choice of opting out and most of them did. Ultimately, the “hurtful” part was abandoned because too many lawyers thought it was not their job to help the other side. In response to your request, I have done a quick survey of the precise criticisms of this reform and the individuals who made them.

Let me start first with the Supreme Court's reaction. On April 22, 1993, Justices Scalia, Thomas, and Souter officially dissented from the proposed Rule 26(a) requiring the duty to disclose helpful and harmful information held by each party. Before this dissent, Supreme Court Justices had only objected twice to the substance of a proposed rule since the early 1960's. Scalia objected to the proposed rule change, which he called “potentially disastrous,” for the following reasons:

- 1) It would actually add another layer of discovery, requiring litigants to determine and fight over what information was “relevant” to “disputed facts” and whether either side had adequately disclosed the required information.
- 2) It would undermine the adversarial nature of the litigation process and infringe upon lawyers' ethical duties to represent their clients and not to assist the opposing side.
- 3) It had not been tested locally in three-year “pilot project” experiments prior to the implementation of a nation-wide rule change.
- 4) It had been widely opposed by the bench, bar, and ivory tower.

I am appending Justice Scalia's dissent to this memo.

The response from lawyers appears to have been overwhelmingly negative. Of the 264 written comments submitted to the Federal Judicial Center, 251 opposed the rule change.



Many politicians opposed the rule change. The House of Representatives actually passed a bill, co-sponsored by William Hughes of New Jersey and Carlos Moorehead of California, to block its passage. Perhaps distracted by NAFTA, health care reform, and other pressing matters, and rushed by the eleventh-hour nature of the debate, the Senate, despite the support of Senator Howell Heflin, did not pass its own bill and thereby allowed the rule change to go into effect on December 1, 1993.

A host of academics and other lawyer-commentators chimed in with other criticisms. Some who weighed in critically included Michael J. Wagner, Randall Samborn, Carl Tobias, Carol Campbell Cure, John Koski, Thomas Mengler, Griffin Bell, Chilton Varner, and Hugh Gottschalk. Among their additional criticisms included these concerns:

- 1) It would lead litigants on both sides to bury the other side in voluminous and often irrelevant documents, thereby frontloading the costs of litigation to its early stages and impeding settlement because both sides would have already invested too much in the case and would want to go to trial.
- 2) It would make complex litigation, which is often highly technical and document-intensive, more difficult and expensive under the new rules.
- 3) It would be particularly onerous for defendants, especially large corporations, who have less time than plaintiffs to consider the case and determine what documents are relevant. For large corporations, it might incline them to settle more rather than go to trial.
- 4) It would ironically add extra responsibilities to district court judges who would have to preside over satellite litigation and mini-trials on which documents were relevant.
- 5) It would chill attorney-client communications, with both sides reluctant to discuss pending cases lest their content eventually need to be disclosed.
- 6) The ability of district courts to opt out of the rule would undermine national uniformity and make practice all that more difficult.

This is just a quick survey of the relevant terrain. Please let me know if you would like me to layer this with further research (e.g., more arguments, names, details).

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401,  
507**

[April 22, 1993]

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

...

## **II**

### ***Discovery Rules***

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information “relevant to disputed facts alleged with particularity.” See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is “relevant” to “disputed facts,” whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, \***511** in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own

initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is “relevant to disputed facts” plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments \*512 relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.<sup>2</sup> See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

\* \* \*

Constant reform of the federal rules to correct emerging \*513 problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Footnote:

2. For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

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# TAB 7C

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**Local Rules of the  
United States District Courts for the  
Southern and Eastern Districts of New York**

**Effective September 3<sup>rd</sup>, 2013**

**with amendments to**

**Rule 1.3 effective 8/25/2015  
Rule 3 Part I (SDNY) revised 8/25/2015  
Rule 83.9 (SDNY) revised 9/28/2015**

**Adopted by the Board of Judges of the  
Eastern District of New York and the  
Southern District of New York  
Approved by the Judicial Council of the Second Circuit**



## COMMITTEE NOTE

Local Civil Rule 83.9 has been revised to refer to the “Procedures of the Mediation Program for the Southern District of New York.” This revision is intended to increase flexibility in the administration of the Mediation Program. Local Civil Rule 83.9 has been revised to make clear that judicial settlement conferences are an available form of alternative dispute resolution.

### **LOCAL CIVIL RULE 83.10. PLAN FOR CERTAIN § 1983 CASES AGAINST THE CITY OF NEW YORK (SOUTHERN DISTRICT ONLY)**

**Supporting documents to the rule can be found at <http://nysd.uscourts.gov/mediation>.**

Unless otherwise ordered, in civil cases filed by a represented plaintiff against the City of New York (“City”) and/or the New York City Police Department (“NYPD”) or its employees alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983, the procedures set forth below shall apply, except that the procedures and Protective Order identified in paragraphs 3 through 12 shall not apply to class actions, actions brought by six or more plaintiffs, complaints requesting systemic equitable reform, or actions requesting immediate injunctive relief.

#### **1. Service of Releases with Complaint**

- a. At the same time that plaintiff serves the complaint, plaintiff must serve on the City the release annexed as Exhibit A (“§ 160.50 Release”) for sealed arrest records for the arrest that is the subject of the complaint, and for a list of all prior arrests. In the case of class actions, plaintiff must serve § 160.50 Releases for the named putative class representatives.
- b. If plaintiff seeks compensation for any physical or mental injury caused by the conduct alleged in the complaint other than “garden variety” emotional distress, plaintiff must serve on the City the medical release annexed as Exhibit B (“Medical Release”) for all medical and psychological treatment records for those injuries at the same time that plaintiff serves the § 160.50 Release. Where plaintiff has a pre-existing physical or mental condition that reasonably appears to be related to the injury for which compensation is sought, plaintiff must at that same time serve Medical Releases on the City for all records of treatment for such pre-existing condition(s). Failure to so serve the above-described

Medical Release(s) will constitute a waiver of plaintiff's claims for compensation for that physical or mental injury.

**2. Failure to Serve § 160.50 Release**

If no § 160.50 Release is served on the City with the complaint, the City will promptly send a letter to plaintiff's counsel requesting the § 160.50 Release and attaching a copy of Local Civil Rule 83.10.

**3. Time to Answer**

If the § 160.50 Release is served on the City at the time the complaint is first served on a defendant, that defendant will have 80 days from the date of such service to answer the complaint. Any subsequently-served defendant will have the greater of (i) 60 days or (ii) the date by which the first-served defendant must answer, to answer the complaint. If the § 160.50 Release is served on the City after the complaint is first served on a defendant, each defendant will have the greater of (i) 60 days from the date the § 160.50 Release is served on the City, or (ii) 60 days after that defendant is served, to answer the complaint. If any defendant moves to dismiss the entire complaint rather than filing an answer, the deadlines in this Rule shall be stayed unless the Court orders otherwise.

**4. Rule 26(f) Conference, Initial Disclosures, and Applying for Exemption from the Rule**

- a. Within 14 days after the first defendant files its answer, the parties shall meet and confer pursuant to Fed. R. Civ. P. 26(f). The parties shall also discuss whether to request that the court (i) refer the case for settlement purposes to a magistrate judge; or (ii) exempt the case from Local Civil Rule 83.10. Any such application by a party must be submitted to the presiding judge no later than 21 days after the first defendant files its answer. Absent any such application from a party, the case shall automatically proceed under the Rule and shall automatically be referred to a mediator selected from the Southern District Mediation Panel.
- b. Within 21 days after the first defendant files its answer, the parties shall exchange their initial disclosures.

5. **Limited Discovery**

Within 28 days after the first defendant files its answer, the parties must complete production of the following discovery. All other discovery is stayed. Unless otherwise ordered, the discovery stay shall expire at the conclusion of the mediation or settlement conference.

a. The City shall serve on plaintiff:

- i. Subject to any applicable privileges, any items on the list attached as Exhibit C that were not part of the City's initial disclosures; documents received from the District Attorney's office; and documents obtained from the court file.
- ii. Any CCRB records and the IAB closing report regarding the incident that forms the basis of the complaint. If the incident or the conduct of defendants involved in the incident is the subject of an ongoing CCRB investigation, NYPD investigation or disciplinary proceeding, criminal investigation or outstanding indictment or information, discovery under this paragraph shall be suspended, and the City will produce the investigative records 30 days after the investigation or proceeding has been terminated (whether by completion of the investigation without charges being brought or by disposition of such charges). This suspension shall not apply to documents related to any investigation or proceeding that has concluded.
- iii. For each defendant, the CCRB and CPI indices of complaints or incidents that are similar to the incident alleged in the complaint or that raise questions about the defendant's credibility. If the complaint alleges that a defendant officer used excessive force, the City will state whether that defendant officer has been or is on NYPD "force monitoring."
- iv. For each officer named as a defendant, a list identifying all prior Section 1983 lawsuits filed against and served on the defendant.

- v. Any records obtained by the City pursuant to the Medical Releases. Medical records received after this date shall be produced to plaintiff within 7 days of receipt.

b. Plaintiff shall serve on the City:

- i. Any documents identified in Exhibit C; documents received from the District Attorney's office; and documents obtained from the court file.
- ii. Any medical records for which plaintiff has served a Medical Release on the City.
- iii. Any video and photographs of the incident.

6. **Amended Pleadings**

The complaint may be amended to name additional defendants without leave of the presiding judge within six weeks after the first defendant files its answer. The filing of the amended complaint shall not affect any of the duties imposed by Local Civil Rule 83.10.

7. **Settlement Demand and Offer**

Within six weeks after the first defendant files its answer, plaintiff must serve a written settlement demand on the City. The City must respond in writing to plaintiff's demand within 14 days thereafter. The parties shall thereafter engage in settlement negotiations.

8. **Mediation or Settlement Conference**

Unless the presiding judge has referred the case to a magistrate judge to conduct a settlement conference, within 14 days after the first defendant files its answer, the Mediation Office will assign a mediator. The mediator shall promptly confer with counsel for the parties to schedule a mediation session to occur no later than 14 weeks after the first defendant files its answer. The mediator shall inform the Mediation Office no later than 60 days after the first defendant files its answer of the schedule for the mediation session. Unless the parties have filed a Stipulation of Dismissal with the Clerk of Court, the

parties shall appear at the mediation session or at a settlement conference before a magistrate judge. The plaintiff shall attend the mediation or settlement conference. The City's representative must have full authority to settle the case; if the City requires additional approvals in order to settle, the City must have arranged for telephone access to such persons during the mediation or settlement conference.

9. **Failure to Timely Comply with the Requirements of this Rule**

If any party fails to comply with any requirement under this Rule, the other party shall promptly write to the presiding judge indicating the nature of the failure and requesting relief.

10. **Request for Initial Pre-Trial Conference**

Unless the presiding judge has already scheduled or held an initial pre-trial conference, if the mediation or settlement conference is unsuccessful, the parties shall promptly request that the presiding judge schedule an initial pre-trial conference.

11. **Protective Order**

The Protective Order attached as Exhibit D shall be deemed to have been issued in all cases governed by this Rule.

12. **Preservation**

Local Civil Rule 83.10 does not relieve any party of its obligation to preserve documents and to issue preservation instructions