

ESI OVER-PRESERVATION:

# COST, BURDENS, & SOLUTIONS



Adapted from a presentation on ESI Over-Preservation by representatives of the Lawyers for Civil Justice (“LCJ”) at the 2011 Legal Technology Leadership Summit:



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## Overview

This session provided real world examples of the day-to-day challenges facing major corporations in trying to determine what their obligations are to preserve and produce electronically stored information in a way that will provide assurance that they will not someday be sanctioned by a court that determines that there was some shortcoming or lapse in the process under the rules as announced or interpreted by that court. Presented by senior counsel representing major corporations, the session presented well-researched and strongly-supported arguments that the Federal Rules of Civil Procedure need to be modified to provide far clearer and more consistent guidance in three areas:

**Trigger** – when does the obligation to preserve arise

**Scope** – what is covered

**Sanctions** – the severity of sanctions ought to be tied to the materiality of any spoliated information and to the level of mens rea involved

The session was attended by over a hundred in-house counsel and private practitioners from a broad cross section of practice as well as judges, IT and records management professionals, and technology providers. Live polling of the audience confirmed that the experience of the audience matched the general findings of the studies and reports presented by the panel.

A References section at the end of this document provides URL's to the studies and cases cited by the panel members as well as to where further information may be obtained about LCJ and the eDiscovery Institute.

Note: This is an edited synopsis of a presentation made at the 2011 Legal Technology Leadership Summit. The views expressed herein are those of the presenters or of the EDI editors, and not those of the organizations with which the presenters may be employed.

## Introduction by Al Cortese, Counsel for Lawyers for Civil Justice

Lawyers for Civil Justice is a national coalition of corporate and defense counsel who are interested in improving the civil justice system. Our focus currently is on the rules of civil procedure, primarily e-discovery.

## Federal Rules Committee

The federal rules committee, which is a committee of the judicial conference of the United States courts, is currently reexamining all of the federal rules of civil procedure, and it is focusing first on preservation.

This content may be of most interest to:



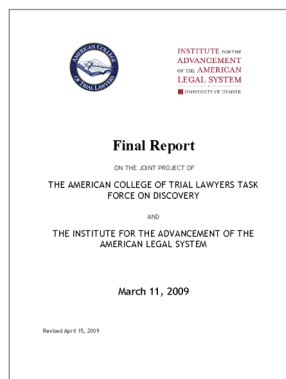
Judges or legislators interested in researching the real world implications of ESI preservation rules.



In-house counsel or trial counsel seeking support for arguments about the need to provide reasonable limits to the scope of preservation and to match sanctions to the state of mind or incremental value of any spoliated information.



That interest in reexamining the federal rules was promoted by a study and a report that was prepared by the American College of Trial Lawyers, a bipartisan group, and the IAALS of the University of Denver, which stimulated a rule-making breakthrough that Lawyers for Civil Justice and its allies have been advocating for over twenty years.



## The ACTL/IAALS Report

The report found, and this had a great impact on the rules committee, that discovery in litigation was badly in need of attention, and acknowledged that the discovery system is broken. Indeed, it pointed out that longstanding problems of skyrocketing cost over discovery

and discovery abuse have haunted the discovery process for many years, and since 1970 actually, the history of rulemaking has been trying to put the discovery genie back in the bottle. Not terribly successfully, unfortunately.

The report also found that the explosion in information and electronic discovery threatens the availability of just, speedy and inexpensive determination of civil actions

before the courts, which is known as Rule 1 of the Rules of Civil Procedure. You all know, I'm sure, of the nightmare of discovery, e-discovery primarily, which has really become the biggest problem with the system.

### LCJ Proposed Amendments.

Lawyers For Civil Justice, as a representative organization of corporate and defense lawyers, has advocated a number of amendments to the federal rules of procedure, primarily focused now on discovery.

The first would be limiting the scope of discovery to non-privileged matter that would support proof of a claim or a defense. Second would be presumptively exempting from discovery specific categories of information such as the types or sources of information, absent a showing of substantial need and good cause, and third would be to presumptively limit the number of requests for production, the number of custodians of information and the time period of discovery.

Now as a result of a conference that was organized by the rulemaking committee of the judicial conference at their 2010 Duke Law School conference, the committee is first studying the need, scope and nature of preservation rules.

### Rulemaking Process.

Let me give you a quick peek of the rulemaking process, how it will unfold. It's really an exacting two-to five year process in seven stages. I won't go through all the stages, but you can see that it is a very demanding, lengthy process that is just beginning, because we're now at step one, and the committee is examining preservation as its first attempt at determining whether or not there is a need for, and if so, what rules should be amended or created to solve the preservation problems that we know you are all facing.

### THE RULEMAKING PROCESS

- Here's a quick peek at how the Rulemaking process will unfold. Rulemaking is an exacting two to five year, seven stage process:

- We are now at Step 1 and will hear from several experts about the important preservation issues with which the Committee is dealing beginning with an invitation only Mini Conference this Friday at DFW that several of our panelists will be attending.

### Panel Members.

Let me just mention the panel. Bob Owen is to my immediate left; he is the moderator, of Sutherland Asbill & Brennan. Robert Levy to his left is counsel to ExxonMobil and he is also chair of the Lawyers for Civil Justice rules committee. John Palmer is senior counsel at Microsoft, Tim Crouthamel is associate general counsel of State Farm Company, and John O'Tuel is assistant general counsel of GlaxoSmithKline. All of these gentlemen are representatives and members of LCJ. And now I'll turn it over to Bob Owen.



### Bob Owen, Sutherland Asbill & Brennan

Thank you all for coming and for joining us. I think this is an extremely important panel because preservation is an extremely important issue in our legal system today.

What I'm going to do for these first three survey questions is ask for a show of hands. These are preliminary; these are uninformed by what our panel will be saying, but let me read the question and then I will ask you for a show of hands and we'll make an estimate as to how many people believe the following:

### Audience Poll Questions.

*Should the rules of procedure govern the scope of the preservation obligation? That is, how many custodians, or how much data is required to be preserved in advance of civil litigation?*

Raise your hand. So we're looking at about, I would say, 30 percent, 25 percent of the room.

*Should the rules of civil procedure govern when the obligation to preserve information arises? That is, when it's triggered. Hold on for a second, I'm going to try to stack the deck. There is no rule that says precisely when the obligation is triggered. If you believe there*

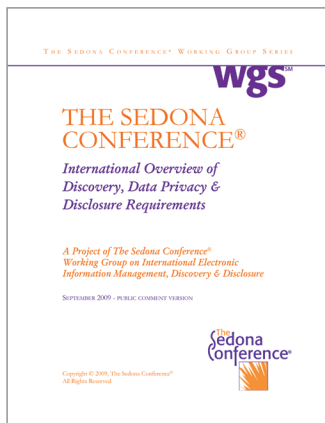
should be a rule specifying when the obligation is triggered, please raise your hand.

Okay, that's about sixty percent, I would say. *And the last question is should the Rules of Civil Procedure govern when sanctions for destruction or spoliation of information be imposed?* Right now we have the inherent power of the courts. We have Rule 37. There's nothing expressly in the rules that codifies when sanctions should or should not be awarded the complaining party. If you believe there should be a rule of procedure with more specificity, please raise your hand. And so that's about 30 percent, I would say. Okay.

Let me move us along. As I said, I've been a commercial litigator in New York City for 38 years, and it's fair to say the world I live in now and practice in now is drastically different from the one that I started in. I think it's fair to say that even ten years ago on this issue the world was drastically more complex.

### Sedona Conference Working Group 6 Comparison of Civil Litigation Systems

On top of the American philosophy on full pre-trial disclosure, we now have what is essentially a judge-made body of law governing preservation of evidence. This is entirely new. First of all, we're the only country on Earth that has a system of full pre-trial disclosure. And if you don't believe that, go to the Sedona Conference Working Group Six memo. They compiled information about 12 of the civil litigation systems most comparable to the United States, countries you would expect to be most like us.



### 20-Year Perspective

We're the only one that has a system like this, and now we've added on to it in the last ten years this completely new body of law that concerns preservation. When I started practicing and even just twenty years ago preservation wasn't really an issue. Ten years ago it was rarely an issue.

### Creation of Duty to Preserve

One thing that I realized as I was preparing for this panel was that there was no affirmative duty to preserve as such. What the law said is you can't destroy relevant

evidence, but there was not a duty that said you must preserve every possible piece of evidence. And so that was a very different emphasis back then. The assumption in our world was that the employees were honest; they wouldn't go ditching the files, and that was the assumption. There were no litigation holds, and this is interesting, there was no real collection of the information until the discovery was served. Yes, you would collect some key documents, yes you would talk to some key people, but there was no effort to collect the entire universe of documents until it was necessary, and that's a very different aspect. Now, obviously, it's complex, it's an issue, it's collateral to the merits.

### Collateral Issues – Satellite Litigation Considerations

You know, it's interesting, when you're cross examining a witness, you may not impeach the witness on issues that are collateral to the case. That is a sensible limitation on the expenditure of court time. What we've done in the issue of preservation is to spawn this enormous collateral world of satellite litigation completely unhinged from the merits.

“What we've done in the issue of preservation is to spawn this enormous collateral world of satellite litigation completely unhinged from the merits.”

– Bob Owen

### Underlying Assumptions About Honesty

As I said, our current law, ever since *Zubulake*, assumes that employees are dishonest, employees have to be watched over, it's our ethical duty to watch over these employees or else they will busily delete all the relevant information. It's a very different paradigm, which is interesting and odd because in this digital world, no employee could ever be sure that he or she could delete every piece of information relevant to the case. That's one of the first things we learned. They learned it in *Zubulake*. And yet in *Zubulake*, this duty was announced.

### Present Day

So what we have are these new liabilities and risks, picking the wrong trigger, failing to issue and oversee a litigation hold. Scheindlin in *Pension Committee* says that the failure to issue a written litigation hold is per se negligence, failing to predict the required scope. This, as you will hear from our panelists, is a tremendous

problem because you don't know where the line is, there's no safe harbor when it comes to scope, failing to prevent destruction irrespective of whether the ESI was outcome changing.

### Zubulake – Emails Not Outcome Changing

Just by the way, if you go back and read *Zubulake* closely, you will not see that the emails that were destroyed in *Zubulake* are ever characterized as having been outcome changing. Now, how would you know? There could have been oral testimony about it. And to those critics of me who would say, "Well we have to have all the emails, how can we try our cases?" Well, you can try the cases with witnesses and juries, is what you can do. You don't have to have an e-mail for every single thing. Another risk is dispositive sanctions.

### Question for Dallas – Need for More Clarity

So the question before the committee in Dallas on this Friday is, do we need more clarity than we have? On the plane here I read a memo that Andrea Kuperman who is now counsel to the Civil Rules Advisory Committee and had been law clerk to Judge Rosenthal, wrote about the spoliation issue.

#### Need for Clarity?

- Trigger – "seems to depend on the facts and circumstances of the particular case"
- Scope – "depends heavily on the facts and circumstances of each case"
- Duration – "disagreement in the case law"
- Litigation hold – "courts differ in the fault they assign" when no hold issued
- Sanctions – "assessed on a case-by-case basis"

As to *trigger*, this is a direct quote from a case, "Seems to depend on the facts and circumstances of the particular case." How does that give our corporate citizens and our litigants guidance?

**Scope:** "Depends heavily on the facts and circumstances of each case."

**Duration:** "There's disagreement in the case law."

**Litigation hold,** "Courts differ in the fault they assign when no hold is issued."

**Sanctions,** "Assessed on a case-by-case basis."

So I think it's obvious from their own documents that there is a need for clarity. The question before the committee on Friday and the question for all of us as citizens to consider is what should it be, how should it work, what would be the best for our system?

I think this is the right order of speakers: Robert, John, Tim is at the end, and then John O'Tuel. I think Tim and John will trade off a little bit because they have topics that overlap, but I think it's time for me to stop talking and I will give the clicker to Robert Levy of ExxonMobil.

### Robert Levy, ExxonMobil



### Rule 1

I put up on the screen Rule 1. This is Rule 1 of the Federal Rules of Civil Procedure. It's not a platitude. This is the foundation for how our Rules of Civil Procedure are designed to function in the federal court system, and it's a model that states use to develop their rules of procedure in their civil, and in some cases, criminal systems.

Everything as a part of the rules and the functioning of the courts is designed, and by rule, is supposed to follow this dictate. The rules as designed and construed and administered must secure the just, speedy and inexpensive determination of every action and proceeding.

### Changes Where We Are Not Just, Not Speedy, and Not Inexpensive.

We often refer back, as AI did in his introduction, to the issues of Rule 1. If we were to look at our current system of justice, our court system, could we determine that our system is being administered to achieve just, speedy and inexpensive resolution of disputes? I think the answer is no. And so one of the questions that the courts are looking at, and the rules advisory committee, is, "How can we make changes to address where we are not just, we are not speedy, and we are certainly not inexpensive?"

## Preservation

The first area is the question of preservation. The issues related to preservation are founded upon one of the essential failures, I think, of our process, and that is that we have rules on preservation de facto based upon decisions that courts have rendered in various jurisdictions around the country.

### Law as Judges Think it Should Be

As Bob alluded, we didn't deal with the preservation issue fifteen years ago, or even ten years ago. It all became a focus and somewhat of a priority based upon some decisions that certain judges issued about facts that were before those courts in particular cases. And those judges are very intelligent, very well spoken, and they understood that there was a gap and they sought to fill it by writing opinions. But those opinions created a perspective based upon a precedent in that particular circuit and issues that related to the facts of those cases. And those decisions are very detailed and thoughtful, but as a result, we now have a rule based upon their view of what the law is in their circuit or what the law should be about an issue, and that's not an appropriate way to establish rulemaking. That's why we think it's very important that the Federal Rules Advisory Committee and the Rules Committee issue specific and detailed rules addressing preservation.

“How can we make changes to address where we are not just, we are not speedy, and we are certainly not inexpensive?”

– Robert Levy

### Three Approaches to Preservation Rule

This is a little bit more detail about the LCJ proposal. There are three primary elements that the rule of preservation should address. And you'll see, by the way, there are three approaches that the advisory committee talks about. One is a very specific rule that provides detailed guidance about various elements of the rule which deal with trigger, scope and sanctions. There is another approach that I would say would be a little more general about what a rule should look at, provide general guidance and guidelines for a court, but not be specific, and the third is, let's not deal specifically with anything, let's just have a rule that maybe deals with the broad topic like sanctions. So the committee is looking at what three approaches make sense. Our argument, speaking

from the LCJ perspective, is that we need a specific rule. We need a rule that goes into enough clarity and detail to provide guidance.

### Trigger

The question there is, “When is an appropriate time to trigger the duty?” We think the answer is a reasonable expectations of the certainty of litigation.

### Experience: Most Holds for Matters That Never Result in Litigation

We are finding in our company and in the other information from the other companies, that a vast, a significant increase in the number of cases that are put on hold are cases that are not in litigation. As high as 40 percent of ongoing holds are for matters that have not yet matured to litigation, and the reality is that most of those cases never go to litigation. So we are preserving a broad swath of information, we are putting people under the burden of a hold when there will never be ensuing litigation that will justify all that effort.

### Institutional Cost

And as a premise, I will point out that any time you put somebody on hold and you have to develop systems to address holds, there's a significant institutional cost associated with that. It's a very big issue. Many courts, I think, believe that putting somebody on hold is a very easy thing. You just send them an e-mail, tell them they're on hold, and that's about it. That's not the case. We and most companies have to develop very significant infrastructure to support a hold and to deal with the people as they move throughout the company or leave the company. It's very detailed, very involved, and we take such a great risk of making a mistake based upon the potential for an adverse court case that we have to go to even greater lengths to make sure that those holds are appropriate.

### Scope

Second area is a question of scope, and we'll talk in more detail later, but the idea is that the scope of preservation should be narrow. It doesn't have to do with any potential issue or any potential type of material that might under some theory become relevant in the lawsuit. It should be much more narrow to the specific issues that will arise in the case, and potentially could be subject to presumptive limits on the number of people placed on hold, the types of information that would need to be placed on hold, and that way you could have a reasoned approach at the outset. If later it's determined it should be broader, then the courts can get involved to address that point.

## Sanctions

Sanctions, as Bob, I think, made a strong case, this is not about a gotcha game. This is not about trying to create satellite litigation. Sanctions should be issued in those cases where it's clear that somebody took deliberate action to try to destroy information or keep it out of the hands of the court, not in a situation where parties act in good faith yet a mistake happens. Mistakes happen in just about every case where information is not preserved.

Now the survey question, an *estimated percentage of all litigation costs, internal and external, including legal fees, vendors, spent on preserving or reviewing electronic information.*

“[T]his is not about a ‘gotcha’ game. This is not about trying to create satellite litigation.”  
– Robert Levy

## Work Leading up to Rules Advisory Committee Meeting

As that tallies, I want to give you a perspective of some of the work that we've been doing in relation to the issues leading up to the Rules Advisory Committee's mini conference. There have been a number of efforts under way to try to address and quantify the issue of preservation. Surveys have been taken, in fact I'll quote a survey that the CGOC, Corporate Governance Oversight Counsel put together, to try to address preservation and the impact on companies, and many of you might have participated in that survey. We also have had a survey under way by Prof. William Hubbard at the University of Chicago School of Law, and he is focusing on a two-phase level to try to address preservation costs, and the impact of preservation on companies.

## Rand Corporation Institute on Civil Justice – Difficult to Quantify Impact of Preservation

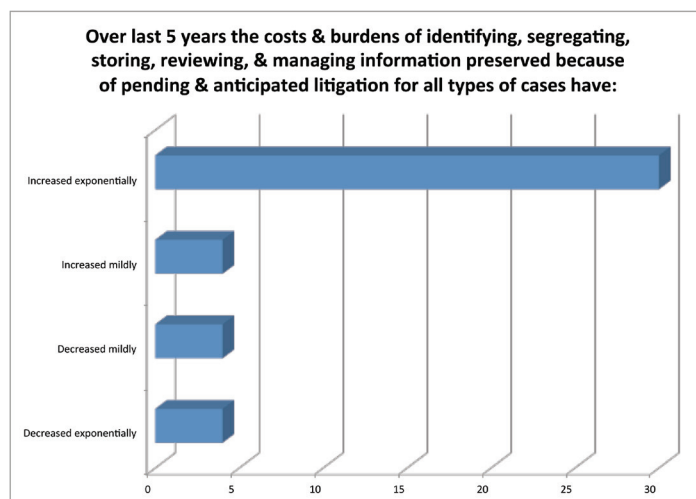
One of the things that was discovered, and in fact the Rand Corporation's Institute on Civil Justice made this point, that it's very difficult for companies to quantify the impact of preservation. It's easy to say that the costs of discovery and review of information costs X, because you can look at your outside spend, what you spend on vendors, what you spend on your outside counsel, but the cost of preservation is much more

difficult to ascertain. By the way, Rand's conclusions, which hopefully will come out in a cover letter this week I think will indicate that companies definitely see an issue about preservation but there are issues related to, trying to quantify it.

## Limits on Effectiveness of Collaboration

This is an interesting slide. This came from the CGOC study that said, I just pulled this one out because I thought it was particularly of note. One of the points that's made, and I think we'll hear on Friday by some of the participants, is “Preservation can be solved just like most of our problems by collaboration. Pick up the phone, call your opposing counsel, and they'll help work out the issue, because the opposing lawyer doesn't have any incentive to make you over preserve and spend a lot of money and want to settle the case. They're going to be reasonable. And so pick up the phone and everything will work out.” The respondents note that they don't see that collaboration is an answer, and in fact I think the truth is we have to make decisions very early on, long before we even know who our opposing lawyer is, much less when we're in a position to call them, and certainly I don't want to call a lawyer when I'm preparing to sue them and say by the way, can we agree on a preservation strategy, and the lawsuit will be in the mail?

This question, just in general, “Where do you see the costs and burdens of preservation over the course of the last years, over the course of the last five years?” How many of you see this as increasing exponentially? Number of people?



## Trends

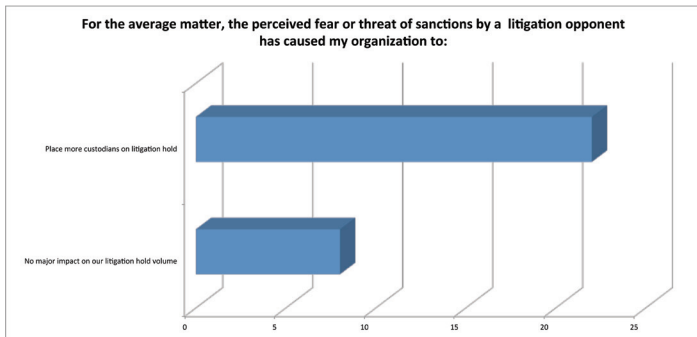
I think that not only the costs are increasing for most, but also the volume is increasing. In our company we've seen the the number of holds go up substantially, the people on hold, it keeps going up.

You would think that it would flat line but it actually doesn't. We have seen an actual reduction in the volume of cases where we are named as a party, but yet the percentage of people and the number of people on hold is increasing every year.

### Fear of Sanctions

The questions here relate to the fear or threat of sanctions. *Are these drivers for you in terms of the number of people that you put on hold? Are you putting more people on hold, or less people on hold or is it not having an impact?*

Let me just ask it this way: Are you placing fewer people on hold based upon a particular concern about potential sanctions? Anyone putting less people on hold? What about putting more people on hold?



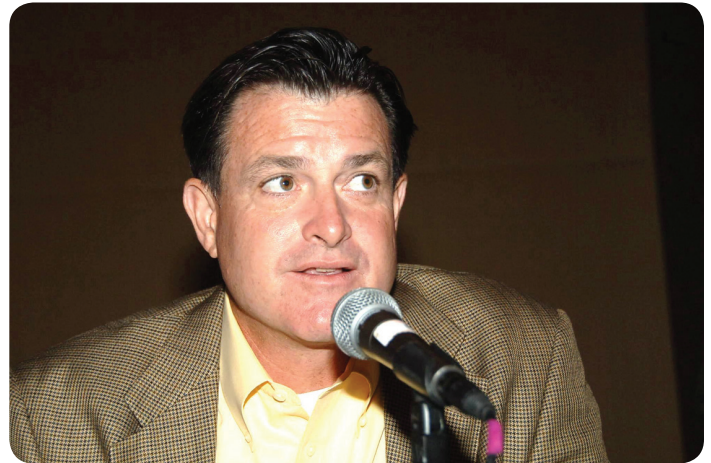
### 99% of Custodians Put on Hold Never Get Collected

One of the things that we have found, and I think John will go into this in startling detail, that we are vastly over-holding people and cases based upon these issues. Just in a general sense, we have seen that in some situations depending on how you look at the numbers, about one percent of the people that we put on hold ever actually get their material collected and reviewed in a particular litigation. So 99% of the data or people that we put on hold never have to go into a review process. It suggests that we have a significant problem with the way our system works. We are over-preserving and that is creating a significant drag on the efficiency of our businesses, and it's causing an impact, a negative impact in our legal system. I think we get the LCJ proposal again, now I'm going to turn it over to John.

### John Palmer, Microsoft Impact of Over-Preservation – Micro-view

Thank you, Robert. So, Robert and Bob have laid out the problem, I think, very nicely, and the way I'd like to spend my time is actually look at the impact of the problem of over-preservation through the eyes of one company,

and use Microsoft as a case study, and use real-life, current data actually to look, to look at this problem.



### The e-Discovery Funnel

Very briefly at a high level, I think of Microsoft's e-discovery processes as like a funnel, not terribly different from most companies. We have some unique features, I'm sure, but I think we are not unique in the way we experience the general process.

At the top of the funnel we preserve a great deal of source information, source material, we then collect subset of that material when necessary. That material then is narrowed through a data minimization process using data minimization tools, and that spits out a much narrower set of data which is then reviewed, again, a subset of that is harvested and then ultimately produced. That's the way our system generally works, and let me try to put some numbers with that.

### Microsoft Snapshot - 329 Matters

Let's start with the top of the funnel. And let me say this is a snapshot, a current snapshot. We have 329 matters where we have issued litigation holds. That means there is a trigger event that has caused us to conduct an inquiry, and then issue written hold notices out to a set of custodians, also to activate a retention function in our exchange servers, and preserve data from other sources such as SharePoint sites, enterprise databases, shared file servers, etc.

### Average 45 Custodians per Matter, 17.5 GB Each

Now, for the average Microsoft matter, we will put 45 custodians under hold. Each of our custodians on average, we are preserving 17.5 gigabytes of data.

### 253 TB of Data

So just if you want to look at this in a rough sense, current snapshot, this may be different six months from



now, it was different six months ago, current snapshot is we are preserving about 253 terabytes of data.

### One-Third for Active Litigation

Now let me make a couple observations. One observation is, only one third of these matters represent holds for active litigation. That means for two thirds of the matters, we have custodians, a bunch of custodians under hold based on a trigger event that is something other than a filing of a lawsuit.

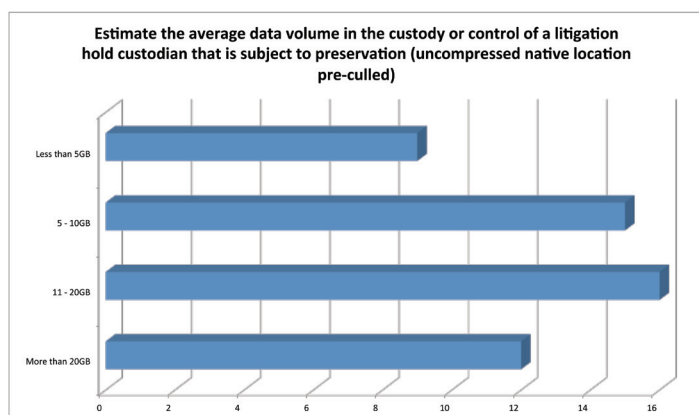
### Trend: More GBs per Custodian

Another observation I want to make is 17.5 gigabytes per custodian, my belief is that number is going to go up. Three years ago it was seven gigabytes. So I think that's a growing number.

So let me ask you for some numbers. I've given you some numbers. *Estimate the average data volume in the custody or control of a litigation hold custodian that is subject to preservation.*

Everyone put in, I'm going to try to hustle through this and not wait for the results. Has everybody submitted their responses, can I get a show of hands? People still working on it? Because the data is valuable. Interesting comment, kind of an even distribution based on this sample set.

**Robert Levy:** John, what you're talking about there, you're talking about the difference between material put on hold vs. what you would collect from an average custodian?



**John Palmer:** Yes, this is not data that's ultimately collected, it's data that you're preserving on a custodial basis. Microsoft would be at the high end of that scale, which is not surprising, given the nature of company.

Next question, *for an average matter in federal court, my organization places how many custodians on legal hold?* I've told you that for us, based on current data,

we average 45. For an average matter in federal court how many custodians do you place on legal hold?

**Audience:** When you say average, are you including in the average, you know, employment matters ...

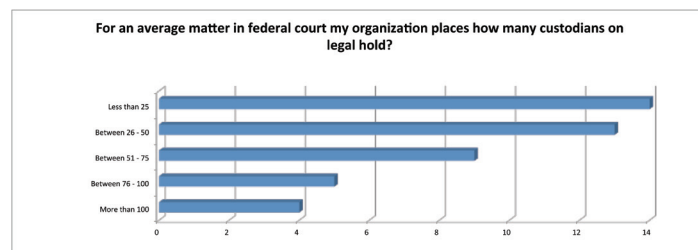
**John Palmer:** Yes. I am looking at the number of matters, and how many holds we put out, and just taking the average. Having the number of holds you put out in total, and then just calculating the average.

Interesting. All right, I'm going to move on. Anyone still working on this one? Okay let me move on ...

Again, the data is very useful. My last question: *If you are placing more custodians on legal holds for fear or threat of sanctions, how many additional custodians does this involve on average?*

### Collecting from Custodians

This is a good segue for me to my next slide, which addresses that directly. So I told you that we place 45 custodians on hold in the average matter. Now when it comes time to collect, on average we collect from only 12. So that variance, I would suggest to you, is the type of insurance policy that Robert mentioned, and Bob mentioned, because of the new liabilities and risks that Bob put on his slide, we are being overly conservative in identifying custodians to put under hold in the first instance.



### Filtering Collections

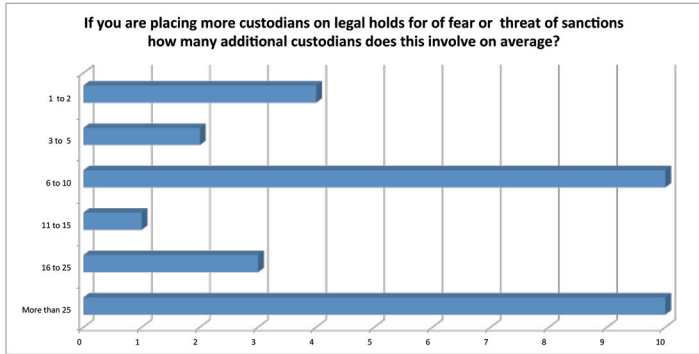
Now we clearly don't need to collect from 45 custodians, we only need to collect from 12, and that takes the number down to 200 gigabytes in terms of actual data that we collect, we put that up on a data repository and then we use our filtering tools to filter that down to 10.5 gigabytes of data. That then becomes, yes, sir?

[Question from audience relative collection practices]

### 90-95% Cull Rate

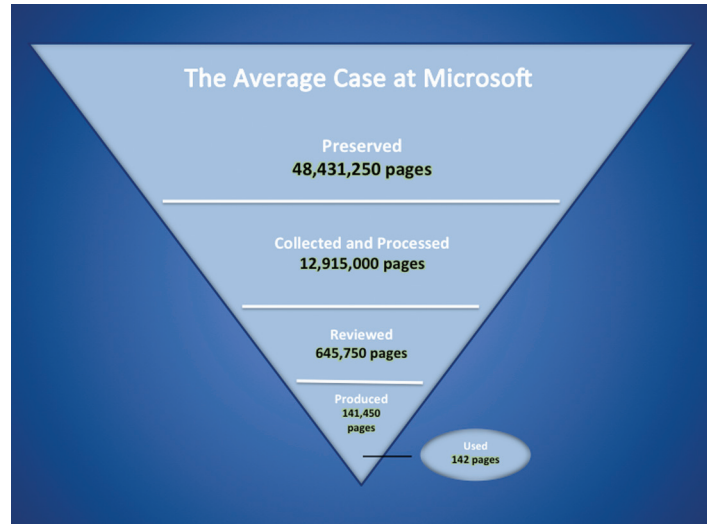
We collect the entire exchange mailbox, hard drive, relevant hard drives, and any additional hard copy data. So we're talking about very broad set that we then filter. And that's why we have a 90 to 95 percent cull rate at

that stage, and then we submit that set which is now 10.5 gigabytes to manual review, and we further harvest relevant documents or responsive documents out of that, and that becomes a production set.

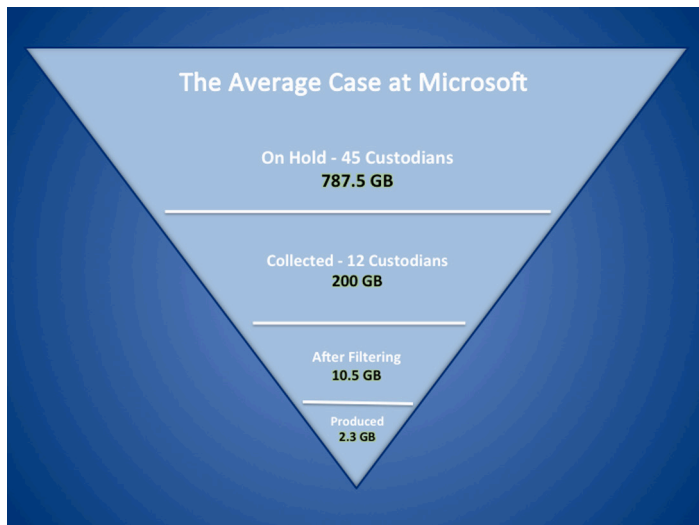


### Page Equivalentents

Now for those of us who have been practicing for more than ten years, we sometimes like to think in terms of pages, so let me put this in a, roughly in terms of pages, that means we're preserving 48 million plus pages, per matter, this is the average matter, average case in litigation, collecting almost 13 million, reviewing about 650 thousand, producing 141 thousand, and you'll see that little point at the bottom, 142 pages are getting used.



deposition exhibit, Microsoft is producing a thousand pages, reviewing four and a half thousand pages, collecting 90 thousand pages and preserving 340 thousand pages. And that 340 thousand to one ratio still, in my view, understates the problem because recall, only one third of our current matters are actually in active litigation. This 341 thousand to one ratio applies only to those matters that are actually being litigated. So we're preserving far more than that.



### Searle Study

Now that is, that's data that's consistent with Microsoft's experience, but I took that ratio from the Searle study data, Searle Center did a survey a couple of years ago of major corporations, and the data in that study showed that only one out of every 1,000 pages that are produced are actually used in litigation meaning they're marked as an exhibit in a deposition or as a trial exhibit. So let me put this all into context.

Preserved: Used Ratio = 340,000:1

At Microsoft that means for every one-page trial or

### The Bucket and Swimming Pool Metaphor

The metaphor I would use is that means that every time someone wants to fill up a pail of water, we're filling an Olympic-sized swimming pool. That's about the same ratio in terms of volume. So this does impose a cost, as Robert said, not only in terms of hard cost, but an enormous impact on the productivity of the company. And I suggest it's similar for my colleagues here, and for others who represent large corporations.

### Root Causes – Uncertainty, Lack of Proportionality, Sanctions

So why do we do it? Well, the answer, really, is simple. These are at least the root causes that I think of, that keep me up at night. I'm sure there are others; but they've all been touched on, I'm not going to dwell on them, but (1) the law is uncertain and we over preserve for that reason. Clearly, we have to calibrate the lowest common denominator as (2) courts have been unwilling or unable to apply any sense of proportionality.

I suggest the numbers that I gave you are by definition out of proportion to the cases in every instance. Certainly on an average basis. (3) The sanctions are disproportionate to the level of culpability. Bob has talked about that, where mere negligence can expose you to sanctions, what do you do? You take out an insurance policy. You end up producing almost everything or you get very conservative about what you produce.

## Asymmetrical Litigation

And then finally, and this is the big one. The first three root causes are not lost on plaintiffs, particularly in asymmetrical litigation. Plaintiffs are well aware, and plaintiffs I'm talking about here in class actions or patent troll cases, or you know, cases where they have very little or nothing to preserve. They are well aware of the fact that there is uncertainty in the law. They are well aware of the fact that courts don't apply concepts of proportionality. They are well aware of the fact that sanctions are a big hammer, and so they make tactical use of those facts, and that keeps us up at night and that's why we over preserve.

### Preservation (i.e. Over-Preservation) at Microsoft

- Root Causes:
  - Lack of certainty; lack of guidance
  - Courts unable/unwilling to apply concepts of proportionality
  - Sanctions are disproportional to level of culpability
  - Tactical use of broad discovery, spoliation claims
- What's the Cure?

## The Cure

So what is the cure, as I pass the baton, the cure, I would suggest to you, is reform in the rules of the type that we've been talking about today. So with that, let me pass to my colleague to Tim.

### Tim Crouthamel, State Farm Company

To further illustrate what John was talking about, John and I are going to focus on the three items in the LCJ proposal, trigger, scope and sanctions.

### Preservation Trigger - Practical Problems

Let's talk about trigger for a second, and some of the practical problems that hurt us as an organization. You heard a little bit about State Farm this morning, and some of the problems we have in litigation, very public litigation, but just imagine that you are advising the enterprise, the general counsel on what you should do with this situation.

### Scope of Problem for State Farm

You have over a hundred million policies in force in 50 states, they are serviced by over 30 thousand agents

in every jurisdiction in this country. You have about 35 thousand claims that are made on you every single day of the year. Of those 35 thousand claims 15 thousand at any time are in active litigation.

### Impossibility of Case-by-Case Approach

Of those 150 thousand claims, maybe 5 to 6 thousand of them are direct suits against the company. So when someone comes to you and says okay, when does the trigger apply to a defendant like State Farm in litigation? What do you say to that person? How many here think that you can manage that kind of volume on a case-by-case, individual basis? Anybody? If you could, think of the inefficiencies, and the way that would shut down your business if you had to have people thinking about, in every one of those situations what you would do. Of course we can't do that.

We have to, we're probably on the fringe of the pre-suit preservation obligations that John outlined, we're probably, we have not measured it, but we're probably ridiculously insane about the amount of stuff we preserve pre-suit, just because we have so much stuff, we can't tell and we can't administer the number of the triggers that may potentially apply in this current environment.



### Timing and Level of Trigger Decision-Making

Somebody talked a little bit about cooperation. I mean, these decisions have to be made as you're rolling these technologies out in a big organization like State Farm. We can't decide once a suit is filed whether you should preserve somebody's e-mail. That trigger's probably already tripped months, years ago, and, so, and it's probably triggered down in the organization with somebody that's probably not a lawyer, somebody that's not trained necessarily to look for these things, somebody that's trying to handle a customer's claim, and has to stop and think, has a litigation trigger occurred here that I need to preserve documents?

## Time Pressures in Real World

That just doesn't happen in the real world and especially in the real world where we heard this morning our biggest risk environment is a catastrophe situation where we have people that have been wiped out, they have nothing, you know, in the Mississippi situation when all you're left with is a slab. Your choices about what you do with that claim are fairly limited, and they can lead to some kind of litigation against us. So I mean, these people are working a high volume of claims in a high-pressure situation and they can't stop and think about these issues.

## Proactive Approach

So we have to do things more proactively, and the pressure's on us to get it right. So we're preserving things that we definitely know aren't going to be in litigation. Now the benefit we get being an insurance company is that most of our litigation is claims-based litigation, and we can use the claim number to kind of identify specifically what things we want to do, but we also have broad class actions on a number of different insurance-related issues that we can't do that for. So the need for certainty, you know, we're living in a world that seems to depend on the facts and circumstances of each particular case.

## Institutional Litigators: Chapters vs. Books

For us that just means we've got to have this massive infrastructure in place to preserve all this information, because we don't know when it's going to be relevant in a particular case or when it's going to be public information and we're going to be held to account for it. If you are an institutional litigator like us, we talked about this a little bit this morning, these instances of litigation are like chapters in book. I mean if you make a wrong decision in one case, it doesn't go away with that one case those instances are brought back to you again and again in discovery and in expert testimony from the other side. So you've got to get it right.

So for us the risk is just too great to try to manage this on a case-by-case basis right now, and if something like the reasonable certainty of litigation would help us to a certain degree. Would it solve all of our problems? Probably not, but it would certainly help, and I don't know if the rest of you have that experience as well.

**Bob Owen:** Tim, as long as we're on trigger, I'd like to ask Robert and John: If the trigger was, "reasonable expectation of the certainty of litigation," would Exxon be able to reduce that 40 percent of your holds that never go to litigation? Would Microsoft be able to

reduce the two thirds of your litigation holds that aren't in litigation, and if so by how much?

**Robert Levy:** I know we would. We would reduce the number of pre-lawsuit cases on hold. Some of those are ones where we might be the party thinking about suing, so in some cases, it would still need to be on hold, but it's just the uncertainty principle about other matters. So I would guess probably 40 percent, maybe, 20 to 25 percent of those we would not need to be on hold.

**John Palmer:** Yes, it would reduce it dramatically. It would always be some subset of matters that don't mature into litigation, but I would say it would reduce, the two thirds by half, would be my guess.

**Tim Crouthamel:** How many of you think that changing the trigger to a reasonable expectation of certainty of litigation would reduce the number of holds that you would put in place?

## Scope

The other problem that we're going to talk about is scope, and they kind of interrelate to each other.

## Limits of Paper Metaphor for Electronic Information

When I started in the paper world, you could be sure that a claim file, for example, was a claim file – it was between two manila folders, and everything inside that was a claim file, or an agent's file was the actual file that they had in their desk, or an underwriting file on a policy was a file. Well, as we move into more and more data sources and more and more digital ways of thinking about these things, the question really starts becoming, "What is a claim file? What is an agent's file? What is an underwriting file?", The increasing number of data sources then also creates an over-preservation problem that John's going to start talking about and then we're going to follow up on with some questions.

## John O'Tuel, GlaxoSmithKline Important Topic

What I really want to do first is thank you all again for letting us speak with you. This is an important time, I just want to echo what Bob said earlier, really to initiate any meaningful rules reform, and to determine what is the necessary and proper rules reform, we need the interest and activity of people like you. So thank you again, and in fact, in just a moment we're going to put you to work again in helping with that effort, but I want to cover a couple of background things first before we put you to work.

## Startling but Not Completely Surprising Data

One is, we've seen startling numbers from the very interesting data that John was able to put together and heard some startling numbers from Tim as well, and while they're startling when we see on them paper, for those of us that have actually looked at the numbers for our own companies, they may be startling when seeing that on paper, but they're not that surprising. It is what we see, unfortunately.



## Achieving Proper Scope of Preservation

So what I want to talk is how do we achieve a proper scope of preservation to reduce that amount of over-preservation that we are seeing.

## Background – Relationship Between Scope of Preservation and Scope of Discovery

Two real background points: First, one is, and this is my belief, that the scope of preservation is intimately tied with the scope of discovery. We really can't make meaningful rules reforms to one without making it to the other because we're basically kicking the can down the road. So as we think about this, we need to think about rules reforms that really apply to both.

## Rules Making and Persuading is a Multi-Step Process

Two, as AI mentioned and showed, the rules-making process is a multi-step process and I would go one step further behind that and say that persuading the decision makers that a rules reform effort is necessary is also a multi-step process. We saw this at the very outset of talks with the decision makers in this area. It's not just showing hey, we think that rules are necessary and here's some that might work for us.

## Judicial Awareness of Problem

It's showing that there is problem in the first place, and that may actually come as a surprise; at least it came as

a surprise to me, that judges, some judges and some litigants out there don't believe there's actually a problem. They don't believe there's an excessive cost to discovery, they don't believe there is an excessive cost to preservation and may not believe, that whatever the cost may be, that it's actually not necessary even if it is excessive.

## Poll Question: Percentage of Documents Produced from Documents Preserved

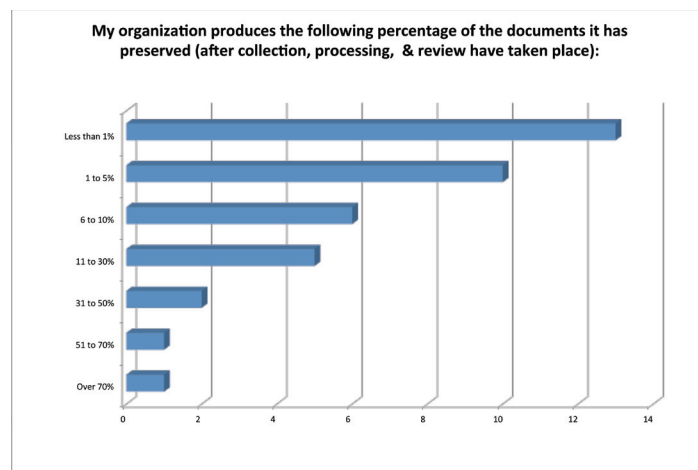
Here's where I think we can help the cause, and that is answering and running through a few of these questions. We saw the sort of inverted pyramid that John showed us earlier and this is going through a section of that pyramid, and the question is what is the percentage of documents that make it from the preservation stage to production, to the other side? So not beyond that point, just from preservation to production, what is the percentage that you see in your cases?

And so if you all could answer that I will run through some other concepts and we will see what the thoughts are.

As I mentioned earlier, that multi-step process is persuading them not only that there's a problem, but that there's cost related to this, that the cost is excessive that it's out of proportion to the utility of the material that's to be put forward.

## Searle Study: 1,000 to 1 Ratio

We saw that as John mentioned earlier, the Searle study, it's the large case study, and it showed the exact ratio John mentioned, basically a thousand to one, basically in the average case, 5 million pages of documents produced, only 4772 pages used either as trial exhibits or listed as trial exhibits or actually used at trial.



## Many People See Numbers Like Searle Study

The Searle results in conjunction with the other numbers John put forward, I think this is just monumental inefficiency. It's a system that is broken and in need of repair, and I think we can see here based on these early results, that many of us are seeing the same thing. We're seeing that there's a very small percentage of the material that's preserved that's actually making it through to production, to the other side.

## Poll Question: Percentage of Produced Documents that are Ever Used

This is going to be the other side of it. After the documents are produced, how many of those that are actually produced to the other side, actually, how many of those actually get used at trial, or listed as trial exhibits in those cases that go to trial. I mean, this is the essentially the same question that was asked of the Fortune 500 companies-- is that right, Robert, or 200? Fortune 200 companies. And again, the numbers we saw were just that 1,000 to one ratio. So, interested in seeing what our thoughts are on this.

## Lack of Clarity

We saw that very interesting memo that Bob put forward by the counsel to the Federal Rules Advisory Committee showing that basically every category of things that we're looking at, there is no clarity. What we have is inconsistent, sort of ad hoc formulations crafted by different, very capable jurists, but unfortunately they're inconsistent.

## Companies Try to Meet Lowest Common Denominator

It doesn't matter how well crafted they are, if they're inconsistent. What we see with companies is that they are conservative. We are going to try to meet the requirements of the lowest common denominator and so what we see are things like this. Less than one percent of the actual material produced to the other side going forward and being used at trial.

## Benefits of Rules Targeting Materials That Will Actually Be Used

And so I submit to you that what we should be trying to do is targeting for preservation and discovery those materials that are actually going to be used at trial, those materials that are going to be important to the determination, the determination of the case itself, instead of over-preserving this wide range of material that's helpful to no one. We need clarity for that, and the only clarity or the only way that clarity can be provided is via rules reform. Clarity will reduce cost and

burden. It will also reduce disputes in front of the court. It will increase judicial efficiency.

## Presumptive Limits

And presumptive limits will work towards that end. We've seen them work where we have presumptive limits on, say, interrogatories or time for deposition. How many, real, full-blown disputes do we get into with the other sides on those issues? We do every now and then, but it's rare.

Presumptive limits can work, and I think we went through some of them that the LCJ has proposed: Presumptive limits as to the number of custodians in a case, as to the time period that's covered, as to a variety of issues that can really reduce that amount of material that's preserved and get that ratio back to where it should be something closer to one to one.

## Poll Results

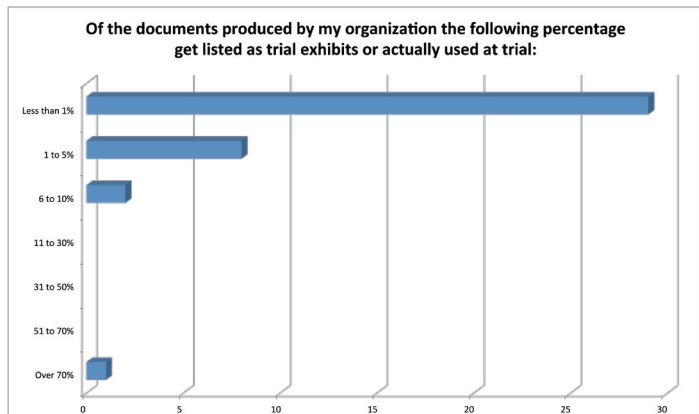
So having said that, and now having seen what everybody else or at least one other person thinks, maybe a show of hands here? How many are say, in that range of something less than ten percent of produced material actually making it to trial. Just anything less than ten. I'd figured that would probably be the vast majority and it seems like it is. And now we're getting more in. So this shows us really what the current state of the scope of preservation issues are. I'm going to turn it back over to Tim so we can talk about the future, where we're going.

## Tim Crouthamel, State Farm Company



## Poll Question: Social Media and Mobility

As we referenced before, a lot of these decisions that companies make are happening way before we ever get litigation, and really, what's happening if your company is like mine, there's another revolution afoot that's going to only, I think, increase the scope of these



duties for us, and that's in social media and mobility. So we're going to have a couple survey questions to kind of set the standard here, and see where everybody is. First question, does your company have a public social media site?

**Bob Owen:** So typically that would be a Facebook?

**Tim Crouthamel:** Facebook, Twitter. How about a show of hands, before we move on to the next one? Yes? Almost everybody now.

### Questions on Form of Production from Social Media

Has anybody tried to produce out of those sites? Yes? You know, one of challenges we hear all of the time in my organization, we want to be where the customer is. Well, the customers are on these sites now, and we've got to put increasing resources in place to try to preserve information that we put out there.

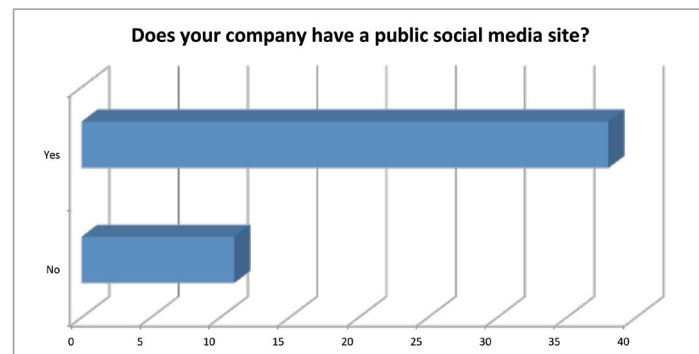
It's interesting, we have not had a lot of productions going on. We do have a preservation plan in place, but some interesting questions concerning, you know, what is the actual form of production for a Facebook site? Do you have to link back to the original Facebook site? Is an Excel spreadsheet of the words of that Facebook site going to be good enough? I don't know, I haven't seen any cases on point on that, but they're going to create some additional issues as well as start looping back into privacy concerns. If you do too much, perhaps you're going to be violating somebody's privacy right.

### Poll Question: Internal Social Media

Next question? Does your company use an internal social media application like Sharepoint within your company to collaborate on information? Show of hands: How many organizations are using, actively using Sharepoint? Sharepoint 2010?

### Determining Scope in SharePoint

Well, what we're finding is again, we have the same preservation scope, but it's a lot harder, you know an e-mail, you know by looking at the e-mail who sent it, who received it, a lot of information about the source of that communication. In a Sharepoint site, not so clear. You've got different analogies for custodians and authors, you've got different date ranges that really aren't in an e-mail, so it's a lot harder to identify specifically where something perhaps originated, and who has seen it, and all the people that perhaps need to testify about what that document meant to them. What we're finding is that it's really becoming an attachment repository for us at State Farm.

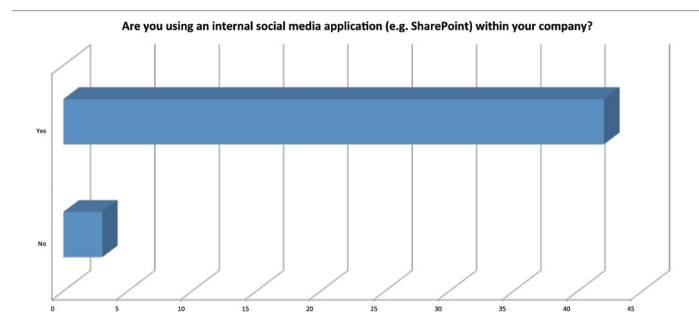


**Bob Owen:** Tim, we have about 5 minutes left and I'd like you and John to finish up what you all wanted to cover. I'd like to reserve a couple minutes for a question or two from the audience. So be thinking about something you'd like to ask.

**Tim Crouthamel:**

### Poll Question: Preservation Plan for Social Media

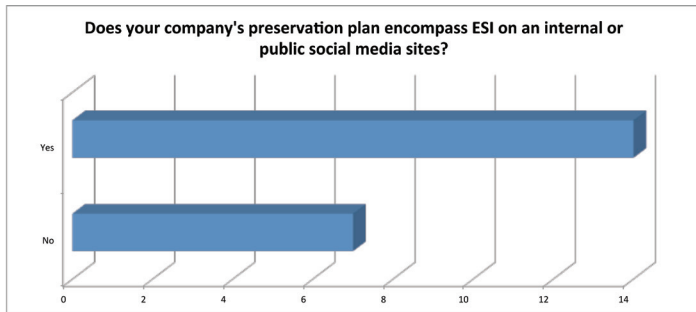
Does your company's preservation plan encompass ESI on a public social media site? Show of hands. Yes? No? We'll move on.



### Mobility

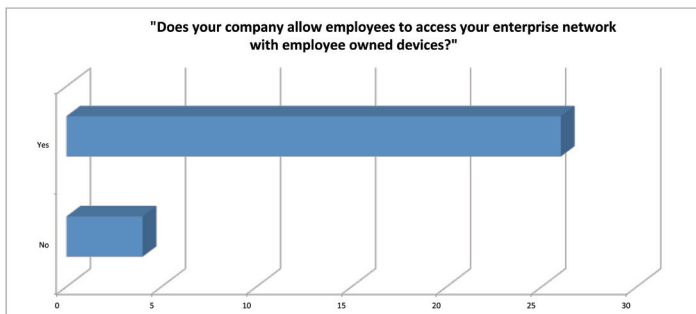
And the next wave that we're dealing with is mobility, which is just starting for us, anyways, at State Farm, the idea being that at some point in time everybody in your company is going to have one of these devices

and how do you regulate and separate the personal from the business, and how do you deal with preserving this information, collecting it, dealing with privacy concerns, all those kinds of things?



### Poll Question on Employee-Owned Mobile Devices

Again, just an expanding example of the scope. So does your company allow access to your enterprise network with employee-owned devices? Yes? Not as many. No? You know, this is one of the areas where we actually see it being driven by executive-level employees down. Everybody wants their iPad hooked up to the network some way, and this is really an interesting push that really doesn't occur with some other technologies. And with that, I'll pass it back John to talk about proportionality.



### John O'Tuel, GlaxoSmithKline Cooperation or Collaboration

All right we'll fly through most of these, keeping in mind Bob's admonition we only have a few minutes left, but I think you heard earlier, one of the things that will probably be proposed or mentioned on Friday is cooperation or collaboration as a solution to some of these problems. Another thing that will be mentioned is proportionality. And, is it the solution? I think a quick answer to that is well, if it is the solution, why hasn't it worked so far? It's been in the rule books for a good while and it simply is not used in general, and to the extent it is used, it's not used in a way that creates any certainty for the litigants.

### Proportionality Should Necessarily Not Be Linear

Another couple of concepts that we should keep in mind is that when I hear people formulate proportionality, I usually hear, one is we're talking the value of the case, so a bigger case something that has a bigger dollar amount on it justifies greater efforts in discovery and preservation. The text of the rule doesn't limit it to value. One, it is not a proxy for the perceived value of the case, and two, if you think of this, it's not linear in fashion. It can't be that the bigger and the bigger the case goes, the more money you should be justified in spending on discovery efforts.



### Complexity

There are thresholds, and those thresholds should be related not just to the value of the case, but also to the complexity and really what's pertinent to the case. You may have a \$5 billion case that really is over a simple contractual provision and requires very little discovery at all.

### Utility of the Documents

So even though the value of the case may be high, we have to think of proportionality not in a linear fashion, that may actually, using true proportionality for the utility of the documents, say not much discovery should be allowed in this case.

### Timing of Administration of Proportionality

And then finally, there's a timing issue here as well. Can proportionality as administered by the courts ever provide clear guidance as to preservation issues, all of which or many of which have to take place long before the suit is ever filed, and before you ever get in front of a judge?

### Disproportionately High U.S. Litigation Costs

So a couple quick thoughts on the effects on a global company like mine and like many of yours, I'm sure.



One is that the costs of discovery and preservation as well, are disproportionately high in the U.S. compared to the rest of world. That's a finding that came out of the Searle study as well. Four to nine times higher, and for individual companies it got up to 40-plus times higher. So, obviously it can be done in a different way, and can be done in an effective way that we're not currently utilizing.

### Lost Investment in U.S.

Two, is this driving companies to forgo investment opportunities here? And unfortunately I think the answer is yes. In fact we heard at the Duke conference, that many companies were actually thinking of this as the land of litigation as opposed to the land of opportunity, and in fact, you know, we're getting frequent questions as in-house counsel, should we continue to investigate if U.S. operations, or should we move out into other areas?

“[M]any companies were actually thinking of this as the land of litigation as opposed to the land of opportunity.”

– John O'Tuel

### Privacy – EU Implications

And finally, privacy concerns, in the EU states especially, there are privacy issues, either for processing or transferring of information, that are implicated by preservation. You know, just the act of preserving documents in a foreign land, if, say we have a case that involves our Belgian employees, the act of preserving their documents is considered to be processing under the EU privacy restrictions and therefore sets in place a whole range of limitations that are in conflict with our obligations here in the U.S. So anything that limits the scope of preservation, the number of documents that are attached, the number of custodians that are affected, helps in that area as well.

So finally, very quickly running through sanctions, because we hit two parts of the three-legged stool here: Trigger, scope and then sanctions.

### Sanctions

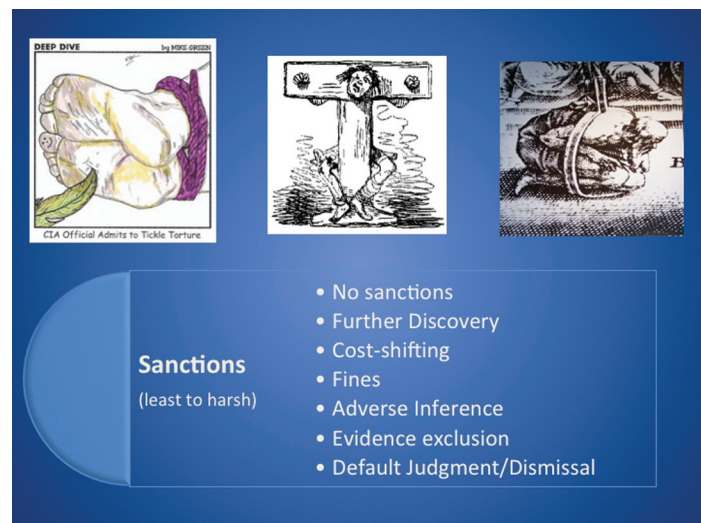
The formulation of what triggers a sanction and what level of sanctions is very important, and really is what sort of leads to over preservation.

### Airline Pilots Association

So we'll run through this very quickly, but how would you decide this despoliation case?

Some former airline pilots got into a dispute with the airline pilots association, actually said that they actively destroyed or failed to implement proper litigation holds and allowed thousands of documents to be destroyed, and in fact, some things were destroyed. It was clear that some documents were actually destroyed. The claim was that the sanctions were necessary because spoliation was so widespread that something pertinent must have been destroyed. The court actually found, that there was begrudging compliance with preservation obligations, the date of the trigger date was actually when the suit was filed, they waited over a year to implement any meaningful litigation hold, and actually did not preserve from two key employees, and that some boxes of preserved documents were actually destroyed, 269 to be precise, a large number of documents were destroyed in the case. So this sort of makes me cringe when I look at it, actually getting some sort of factual findings like this.

But before I give you the answer, though, let me see what you all think and I'll give a little bit of attribution back to Bob Owen and Amor Esteban who I believe is in the audience as well, this is a slide we've used in some prior presentations.



**Sanctions**  
(least to harsh)

- No sanctions
- Further Discovery
- Cost-shifting
- Fines
- Adverse Inference
- Evidence exclusion
- Default Judgment/Dismissal

### Gamut of Sanctions

Tickling feet so far has not been set up as a sanction by the courts, but it does run the gamut. You have sanctions leaning from basically nothing, to sort of remedial-type sanctions, further discovery, some sort of cost shifting, on down to the punitive types of sanctions, either an adverse inference, some sort of monetary sanction or a default judgment.

So for the case we just talked about, where 269 boxes were destroyed, two employees that had some interactions weren't actually given the litigation hold and a variety of other begrudging compliance with their obligations, where do we think the sanctions would be on the gamut?

How many people think we're in no sanctions? Nobody. How many people think we're in the remedial sanctions territory? Okay. How many think that some sort of punitive sanctions were issued by this court? That's what I thought when I first saw this.

### 2010: The Year of Sanctions

All right. We're really not going to spend time on this. Everybody knows *Pension Committee*. The next two slides are just to show here were a lot of cases came out about sanctions. One noted judge called 2010 the year of sanctions. *Pension Committee*, we all know, said basically that negligence is sufficient to support a finding of some sort of pretty serious sanctions.

We won't go through it in any detail we are low on time. *Rimkus* came out following that. That is Judge Rosenthal's opinion and actually if you look at the facts, the facts are pretty bad, probably worse than they were in *Pension Committee*, but the formulation was much better – you actually have to have some showing of bad faith to get to the sanctions area. I think Judge Rosenthal said this very well, that the frequency with which we see court decisions based on spoliation allegations can lead to decisions about preservation based on fear rather than what we really should be worried about, and that leads to over preservation, which is what we've been talking about the entire day.

### Actual Result in Airline Pilots Association Case

So the actual case, what actually happened was no sanctions. This is a case out of the Third Circuit, and basically they didn't demonstrate bad faith and that was, there was a lot of factors that are considered under the Third Circuit law, but that is where it came out.

### Poll Question on State of Mind Required for Sanctions

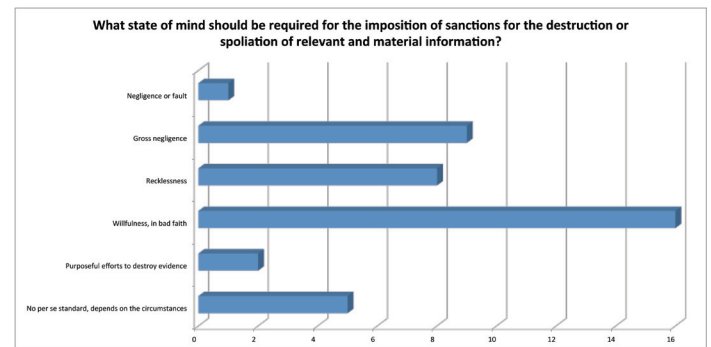
So, it really brings us to the last question I believe before we get to the end of the presentation, which is what state of mind do you think should be required before the imposition of sanctions for the destruction or spoliation of any evidence?

The first one is purposeful efforts to destroy evidence. Sort of a step above wilfulness. The next one is wilful-

ness in bad faith, then recklessness, then gross negligence, down to a simple negligence or fault standard, and finally no per se standard, but just let it depend on the circumstances of each individual case and we'll see where we come out there.

We didn't divide it up between remedial or punitive. I would just say any sanctions. What do you need to get to the point of sanctions?

All right so, answers are trickling in, but it looks like so far on the upper end of it, recklessness and above, maybe by show of hands, how many think that we need some sort of bad faith standard before the imposition of sanctions? Let's say any sanctions first, how about that. Now, how many think that a bad faith standard should be the standard for the imposition of punitive type or serious sanctions.



### Bob Owen

We're out of the time; and so we're going to bring this to a close, we don't have time for a question, unfortunately, but we invite your questions afterwards during the break afterwards or later in the day. I just have a couple of concluding thoughts.

### Civil Standard: Preponderance

One thing to remember is the standard in civil litigation is preponderance of the evidence, not perfection, and I think a lot of us and the judges lose sight of the fact that a state of perfection is not what's required by this system. Presumptive limits have been shown to work and the world still turns and we still resolve our disputes even though we can only take seven hours' worth of depositions from any one witness.

### FJC Study

And the last data point I want to give you is that a study by the Federal Judicial Center which has been submitted to the committee shows that in a study of 131 thousand cases in 16 different federal judicial districts between 2007 and 2008, there were only 200 spoliation

motions made out of 131 thousand cases on file. And a very small number of those led to sanctions. So the question that I leave you with is, “Is preservation, is this entire preservation system a solution in search of a problem? Is this the system we would design from scratch if we were a legislator looking at this, rather than a judge looking at the one case before him or her?”

Anyway, please join me in thanking the panelists for their contributions.

“Is preservation...the system we would design from scratch if we were a legislator looking at this, rather than a judge looking at the one case before him or her.”

– Bob Owen

## References for Further Reading

### Court Opinions

Judge Shira Scheindlin’s *Zubulake* opinions:  
*Zubulake I: Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)  
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