

# 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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## TABLE OF CONTENTS

Introduction.....	2
The Principles Underlying the Pilot Project .....	3
General Principles.....	3
Principle 1.01 (Purpose).....	3
Principle 1.02 (Cooperation).....	4
Principle 1.03 (Discovery Proportionality) .....	7
Early Case Assessment Principles .....	9
Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution) .....	9
Principle 2.02 (E-Discovery Liaison(s)) .....	11
Principle 2.03 (Preservation Requests and Orders).....	13
Principle 2.04 (Scope of Preservation) .....	15
Principle 2.05 (Identification of Electronically Stored Information) .....	19
Principle 2.06 (Production Format) .....	21
Education Principles .....	23
Principle 3.01 (Judicial Expectations of Counsel) .....	24
Principle 3.02 (Duty of Continuing Education) .....	24
Other Hopes for Empirical Information From Phase Two of the Pilot Project.....	25
An E-Discovery Model Order?.....	25
Impacts of the Principles on Cost-Shifting .....	28
Impacts of the Principles on Subpoena Disputes .....	29
Impacts of the Principles on Taxing Costs .....	29
Use of Federal Rule of Evidence 502(d).....	31
Conclusion .....	33
Appendix I – Courts Endorsing the Cooperation Proclamation.....	34

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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 pre-filing 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. Pre-litigation demand letters have vexed courts and litigants.<sup>24</sup> A pre-litigation 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 make-up 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 be 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.”