Changing the Culture of Discovery

Philip J. Favro[†]
Mitchell D. Dembin[††]

Abstract

The recently proposed amendments to the Federal Rules of Civil Procedure are intended to address certain problems posed by discovery in the digital age. The proposed changes will have little, if any, effect on how discovery actually is conducted without a corresponding change in discovery culture. This Article explores the steps that in-house counsel should take to effect a change in discovery culture that could result in reduced costs, speedier resolutions, and better traction in court.

Introduction

"[S]ensible behavior by lawyers and judges may well be much more useful" than Rules amendments in addressing the challenges posed by computers and electronically stored information.[1]

[†] B.A. (1994), Brigham Young University; J.D. (1999), Santa Clara University School of Law. Philip Favro is Senior Discovery Counsel, Recommind, Inc.

[††] B.A. (1975), Brooklyn College of the City University of New York; J.D. (1979), Western New England College School of Law. The Honorable Mitchell Dembin is a United States Magistrate Judge, Southern District of California.

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[1] *See* Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 184 (2013) (quoting Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 L. & CONTEMP. PROBS. 253, 281 (2001)).

Most lawyers and judges know that the Judicial Conference Advisory Committee on the Civil Rules has proposed another round of amendments to the Federal Rules of Civil Procedure (Rules).[2] Designed to address the continuing challenges posed by the digital age to federal discovery practice, the proposals would touch many aspects of the discovery process.[3] Much of the commentary on the draft Rules changes suggests that they would cure the present ills afflicting discovery—a Pollyannaish view, we think. No doubt, the proposed amendments—particularly the renewed emphasis on proportionality standards—represent enlightened improvements to the current Rules regime.[4] However, without a corresponding change in discovery *culture* by courts, counsel and clients alike, the proposed Rules modifications will likely have little to no effect on the manner in which discovery is conducted today.[5]

For a shift in discovery culture to occur, the most important changes must begin with in-house counsel.[6] More than outside counsel or the courts, in-house lawyers can have the greatest impact on decreasing the costs and reducing the delays that are overwhelming discovery.[7] The approach that in-house counsel adopts can directly affect its own litigation fortunes, along with the case strategy and decision-making of retained counsel.[8]

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[2] Mitchell Dembin & Philip Favro, *Changing Discovery Culture One Step at a Time*, L. TECH. NEWS (Dec. 5, 2013), http://www.lawtechnologynews.com/id=1202630168239/Changing-Discovery-Culture-One-Step-at-a-Time?slreturn=20140326114522.

[3] *See* Shaffer & Shaffer, *supra* note 1, at 178-79 (describing generally the factors driving the demand for additional amendments to the Federal Rules of Civil Procedure).

[4] *See* Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 966 (2012) (proposing modest changes to the Federal Rules to better emphasize that proportionality standards are the touchstone of federal discovery).

[5] *See* Charles R. Ragan, *Information Governance: It's a Duty and it's Smart Business*, 19 RICH. J.L. & TECH. 12, 16 (2013) (describing the role of information governance in addressing the legal and logistical challenges associated with the exponential growth of information).

[6] *See* Shawn Cheadle & Philip J. Favro, *How Much Oversight Is Required by In-House Counsel?*, 31 NO. 4 ACC DOCKET 82, 89 (2013) (describing some of the ways that in-house counsel can obtain better advocacy from its retained outside counsel).

[7] *Id*.

[8] *Id*.

In this Article, we discuss the steps that in-house counsel can take to change their discovery culture and how such measures can lead to reduced costs, speedier resolutions, and better traction in court. In Part I, we spotlight the importance of improving the information governance plan of in-house counsel's organizational client. This includes developing reasonable information retention policies, a workable litigation hold process, and effective policies for mobile device use. Part II emphasizes how in-house counsel should recognize and observe the value of adversarial cooperation in discovery. Finally, in Part III, we highlight the need for in-house lawyers to provide better management of outside counsel.

I. Improved Information Governance

A. Developing Reasonable Information Retention Policies

If a goal of in-house counsel is to obtain more cost-effective results in discovery, then it behooves counsel to examine the organization's information governance plan.[9] The time to conduct this examination is not in the crisis atmosphere of complex litigation; it should be part of the routine business plan for the organization.[10] Effective information governance requires each business unit to identify the records that it creates, why it creates them, whether to retain them and for how long, who gets access to these records, and where the records are stored.[11] In-house attorneys who can easily determine whether relevant records exist and where they should be located are clearly ahead of the game.

This, in turn, should lead to the development of top-down information retention policies.[12] Counsel can hardly hope to decrease the company's discovery costs if its retention policies are antiquated, inadequate, or

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[9] *See* Ragan, *supra* note 5, at 41-43.

[10] *See id* at 42-43.

[11] *See id* at 43.

[12] *See* Dean Gonsowski, *Inside Experts: Information Governance Takes the Stage in 2012*, INSIDE COUNS. (Jan. 27, 2012), http://www.insidecounsel.com/2012/01/27/inside-experts-information-governance-takes-the-st.

arbitrarily observed.[13] The casebooks are replete with examples of organizations whose discovery costs skyrocketed because they failed to properly manage their data with reasonable retention protocols.[14] The case of *Northington v. H&M International*[15] is particularly instructive on this issue.

In *Northington*, the court issued an adverse inference instruction to address the defendant company's destruction of key emails and other electronically stored information (ESI).[16] The company failed to preserve those records because it did not have a pre-litigation information retention strategy.[17] Among other deficiencies, the company had not established a formal document retention policy.[18] Instead, "data retention . . . was evidently handled on an ad hoc, case-by-case basis."[19] This lack of organization eventually led to the loss of key data, costly motion practice, and the award of sanctions against the company.[20]

To avoid these negative consequences, in-house counsel should work with its organizational client to establish a top-down information retention strategy.[21] This typically requires counsel to work with IT professionals, records managers and business units to identify the data being created, classify that data in terms of importance and then decide what data must be kept and for what length of time.[22] By so doing, counsel can spearhead the development of retention policies that are reasonable in relation to the enterprise's business needs and its litigation profile.[23]

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[13] *See* Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 378 (D. Conn. 2007) (denying defendants' request to invoke the so-called "safe harbor" provision under Rule 37(f) where the defendants failed to observe their own document retention policies).

[14] *See*, *e.g.*, *id*.; United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 274 (2007) (sanctioning defendant for allowing materials to be destroyed by its "antiquated" retention policies).

[15] No. 08-CV-6297, 2011 WL 663055 (N.D. Ill. Jan. 12, 2011).

[16] *Northington*, 2011 WL 663055, at *22.

[17] *Id*. at *7.

[18] *Id*.

[19] *Id*. at *8.

[20] *Id*. at *16-17, *21.

[21] *See* Gonsowski, *supra* note 12.

[22] *See* Ragan, *supra* note 5, at *33.

[23] *See* Gonsowski, *supra* note 12.

To better enforce compliance with those policies, in-house counsel should consider the availability and value of technologies to assist in information governance.[24] Today's options include automated services, such as classification tools that analyze data content and then assign a particular retention period to the data or flag it for deletion.[25] Automated expiration tools help companies consistently eliminate data in accordance with retention policies.[26] In each instance, these automation technologies can help ensure that the company keeps information that is significant or that otherwise must be maintained for business, legal or regulatory purposes—and nothing else.[27] By so doing, data that has little to no business value can be segregated and destroyed before a litigation event arises.[28] This, in turn, will obviate the costs associated with searching for, reviewing, and analyzing that data in discovery.[29]

B. Preparing an Effective Litigation Hold Process

In-house counsel should also seek to develop a reasonable and practical litigation hold process as part of the client's information governance plan. Litigation without having deployed a defensible litigation hold may result in catastrophe.[30] Documents must first be preserved if they are to be produced in litigation.[31] If key players and data custodians are unaware that certain documents must be retained, those documents may be unavailable for discovery.[32] Indeed, employees

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[24] *See* Ragan, *supra* note 5, at *35.

[25] Dembin & Favro, *supra* note 2.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See generally* E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 500, 509 (E.D. Va. 2011) (issuing an adverse inference jury instruction as a result of the defendant's failure to distribute a timely and comprehensive litigation hold after its obligation ripened to retain relevant ESI).

[31] *Id.* at 508-10.

[32] *Id.*

and data sources may discard or overwrite ESI if they are oblivious to a preservation duty.[33] This would leave clients vulnerable to data loss and court sanctions.[34] Perhaps no case is more instructive on this issue than *E.I. Du Pont de Nemours v. Kolon Industries*.[35]

In *Du Pont*, the court stiffly rebuked Defendant Kolon Industries for failing to issue a timely and proper litigation hold.[36] The rebuke came in the form of an instruction to the jury that Kolon executives and employees deleted key evidence after the company's preservation duty was triggered.[37] The jury responded by returning a $919 million verdict in favor of Du Pont.[38]

The destruction occurred when Kolon deleted emails and other records relevant to Du Pont's trade secret claims.[39] After being apprised of the lawsuit and then receiving multiple litigation hold notices, various Kolon executives and employees met together and identified ESI that should

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[33] *See* Oleksy v. Gen. Elec. Co., No. 06 C 1245, 2013 WL 3944174, at *9-11 (N.D. Ill. July 31, 2013) (ordering the production of defendant's litigation hold instructions as a discovery sanction for failing to preserve relevant evidence that was purged from a database).

[34] *See* Micron Tech., Inc. v. Rambus Inc., 917 F. Supp. 2d 300, 327-28 (D. Del. 2013) (declaring defendant's patents unenforceable as a discovery sanction to address its failure to preserve email backup tapes, paper documents, and other ESI). *But see* Brigham Young Univ. v. Pfizer, Inc., 282 F.R.D. 566, 572-73 (D. Utah 2012) (denying plaintiffs' fourth motion for doomsday sanctions since evidence was destroyed pursuant to defendants' "good faith business procedures").

[35] 803 F. Supp. 2d 469 (E.D. Va. 2011).

[36] *Du Pont*, 803 F. Supp. 2d at 500, 509.

[37] *Id*. at 509.

[38] *See* E.I. Du Pont De Nemours & Co. v. Kolon Indus., 894 F. Supp. 2d 691, 694, 721 (E.D. Va. 2012) (entering a twenty-year product injunction against the defendant). Just before this Article was published, the United States Court of Appeals for the Fourth Circuit vacated the court's judgment against Kolon. *See* E.I. Du Pont De Nemours & Co. v. Kolon Indus., No. 12-1260, 2014 U.S. App. LEXIS 6163 (4th Cir. 2014) (holding that the district court improperly excluded evidence that Du Pont had failed to maintain the confidentiality of its trade secrets at issue in the case). The Fourth Circuit's decision left untouched the trial court's instruction to the jury that Kolon destroyed key evidence after the company's preservation duty was triggered. *See* Philip Favro, *Fourth Circuit Vacates DuPont Verdict, Leaves eDiscovery Sanctions Untouched*, IT-LEX TECH. L. (Apr. 21, 2014), http://it-lex.org/fourth-circuit-vacates-dupont-verdict-leaves-ediscovery-sanctions-untouched.

[39] *Du Pont*, 803 F. Supp. 2d at 479-94.

be deleted.[40] The ensuing destruction was staggering.[41] Nearly 18,000 files and emails were destroyed.[42] Much of that information went to the heart of Du Pont's claim that key aspects of its Kevlar formula were allegedly misappropriated to improve Kolon's competing product line.[43]

The court did not identify Kolon's employees as the principal culprits for spoliation.[44] Instead, the court criticized the company's attorneys and executives, reasoning they could have prevented the destruction at issue with an effective litigation hold process.[45] The court found that the three hold notices circulated to the key players and data sources either were too limited in their distribution, ineffective since they were prepared in English for Korean-speaking employees, or were too late to prevent or otherwise alleviate the spoliation.[46]

The *Du Pont* case spotlights the need for in-house counsel to develop a workable litigation hold process as part of the client's overall information governance plan.[47] The process requires organizations to identify the key players and data sources possessing potentially relevant information.[48] Designated officials who are responsible for preparing the hold should draft the hold instructions in an intelligible fashion.[49] The hold should be circulated immediately afterwards to prevent data loss.[50] It is only by following these suggestions that in-house lawyers can ensure that information subject to a preservation duty is actually retained.[51]

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[40] *Id*. at 478-79, 501.

[41] *Id*. at 480.

[42] *Id*.

[43] *Id*. at 502.

[44] *Id*. at 501.

[45] *Du Pont*, F. Supp. 2d at 501 (holding that Kolon's "counsel and executives should have affirmatively monitored compliance with the [litigation hold] orders").

[46] *Id*. at 494, 501.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *See* Viramontes v. U.S. Bancorp, No. 10 C 761, 2011 WL 291077, at *4-5 (N.D. Ill. Jan. 27, 2011) (denying the plaintiff's sanctions motion since defendant issued a timely litigation hold to preserve relevant documents once a preservation duty attached).

As a final part of this process, in-house counsel should consider using automated hold technology, which enables the placement of litigation holds on various custodians across multiple cases.[52] These tools better ensure that ESI subject to a preservation duty is actually retained and thereby help a company avoid the preservation missteps that result in costly satellite litigation.[53]

C. Creating Policies Governing Mobile Device Use

Information governance in the digital age also requires in-house counsel to insist on the development of policies governing employee use of mobile devices.[54] These devices—especially smartphones and tablet computers—are at the forefront of innovations affecting businesses today.[55] While these mobile devices have revolutionized the way in which business is conducted, they have also introduced a myriad of security, privacy, and discovery complications for enterprises.[56]

In particular, mobile device use lessens the extent of corporate control over confidential business information.[57] Whether that information

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[52] *See* Ben Kerschberg, *Automated Management of Legal Holds*, FORBES (July 6, 2011), http://www.forbes.com/sites/benkerschberg/2011/07/06/automated-management-of-legal-holds/.

[53] *See id*.

[54] Susan Ross, *Unintended Consequences of Bring Your Own Device*, L. TECH. NEWS (Mar. 18, 2013), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202591156823&thepage=1 (discussing the role of company policy and potential loss of personal information stored on a mobile device).

[55] *See* Greg Day, *Overview from Greg Day on the Topic of Bring Your Own Device—The Challenges Customers are Facing Today and How This Trend Will Evolve in the Future*, SYMANTEC, http://www.symantec.com/tv/news/details.jsp?vid=1555866669001 (last visited Dec. 19, 2013) (describing the various challenges associated with mobile devices in the workplace).

[56] *See* Gary G. Mathiason et al., *The "Bring Your Own Device" to Work Movement: Engineering Practical Employment and Labor Law Compliance Solutions*, LITTLER REP. 10, 12, 24, 27 (May 2012) (detailing legal challenges regarding mobile device use such as implementing legal holds, protecting trade secrets, and proving misappropriation).

[57] *See* Henry Z. Horbaczewski & Ronald I. Raether, *BYOD: Bring Your Own Device Know the Privacy and Security Issues Before Inviting Employee-Owned Devices to the Party*, ACC DOCKET, Apr. 2012, at *71, *72 ("Security starts with knowing what data resides where, and who has access to that data. With employee-owned devices, the main unique issue from a security perspective is loss of control.").

consists of trade secrets, proprietary financial information, or attorney-client privileged communications, difficulties in policing mobile devices allow employees the opportunity to misappropriate data more easily.[58] The commingling of personal and business information also leads to an environment in which employees may disclose sensitive and confidential information regardless of malicious intent.[59] With a single touch of a smartphone screen, an employee can direct sensitive company data to personal cloud providers, social networking sites, or Wikileaks pages.[60] Any of these scenarios could prove disastrous for an organization.[61]

Organizations have the additional challenge of preserving and producing relevant data stored on a mobile device.[62] The logistical challenges of locating, retaining, and turning over that data—all while trying to observe employee privacy—present complications for satisfying the company's discovery obligations, among many other things.[63]

To address the problems associated with these devices, in-house counsel will need to collaborate with its IT and information security colleagues to develop manageable use policies.[64] Such policies will need to address how employees should handle company data on mobile devices. They should also delineate the nature and extent of the enter-

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[58] *See id*. at *72.

[59] *See id*.

[60] *See* Lisa Milam-Perez, *Littler Mendelson Attorney Warns of Pitfalls of "BYOD"*, WOLTERS KLUWER (July 29, 2012), http://www.employmentlawdaily.com/index.php/2012/07/29/littler-mendelson-attorney-warns-of-pitfalls-of-byod (The article describes several practices for workplace policies regarding mobile device use, including: "No use by friends and family members! 'I got the most guff for this one . . . and I imagine you probably will too. I know your kid likes to play Angry Birds, and I know you bought it with your own money,' but it's an essential control . . . ."); *Privacy Roundtable Highlights*, RECORDER (Mar. 5, 2013), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202591017099 (discussing the risk of misappropriation of company data by family members sharing devices that may also be used for work under an employer's mobile device policy).

[61] *See* Milam-Perez, *supra* note 60.

[62] *See* Ragan, *supra* note 5, at 17.

[63] *See id*. at 16; *see also* Greg Buckles, *A Quick Forensics Lesson: The Smart Phone Is Much More than Just a Hard Drive*, LEGAL IT PROF'LS (July 17, 2012), http://www.legalitprofessionals.com/index.php/col/guest-columns/4471-a-quickforensics-lesson-the-smart-phone-is-much-more-than-just-a-hard-drive (describing various challenges surrounding the preservation and collection of ESI from mobile devices).

[64] Ross, *supra* note 54, at 2.

prise's right to access data on the employee devices, particularly for discovery purposes.[65]

In-house counsel should also consider—before a litigation event arises—the question of whether an employee has a reasonable expectation of privacy in data stored on a device.[66] Regardless of who owns the device, privacy issues must be addressed.[67] An organization that has the unfettered right to obtain relevant ESI from mobile devices is better prepared to meet its preservation, proportionality and production requirements.[68] There is case authority suggesting that a company can eliminate an employee's reasonable expectation of privacy by policy or with the employee's written consent.[69] Other cases have held otherwise, frustrating company efforts to obtain ESI for purposes of discovery.[70] Perhaps the best way to navigate this issue is for in-house counsel to develop a policy that expressly delineates the company's right to protect and obtain information stored on the device while also outlining the extent (if any) of the employee's privacy rights.[71] Companies could also explore the availability and feasibility of technologies to segregate and encrypt company information from personal materials on mobile

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[65] *See* Day, *supra* note 55.

[66] Michael Z. Green, *Against Employer Dumpster-Diving for Email*, 64 S.C. L. REV. 323, 342 (2012).

[67] *See* Milam-Perez, *supra* note 60, at 2; *see also Privacy Roundtable Highlights*, RECORDER (Mar. 5, 2013), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202591017099.

[68] *See* Howard Hunter, *Social Media and Discovery*, 24-AUT INT'L L. PRACTICUM 117, 117 (2011) (describing generally the interplay between privacy strictures and discovery obligations).

[69] *See, e.g.*, *In re* Royce Homes, LP, 449 B.R. 709, 744 (Bankr. S.D. Tex. 2011), *appeal dismissed*, 466 B.R. 81 (S.D. Tex. 2012) (holding that an employee's assertion of privacy was overcome by the company's electronic communications policy).

[70] *See*, *e.g.*, Curto v. Med. World Commc'ns, Inc., No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at *3, *8 (E.D.N.Y. May 15, 2006) (finding the plaintiff had a reasonable expectation of confidentiality in certain emails since her employer generally neglected to monitor worker e-mail usage consistent with its stated policy of doing so).

[71] *See Royce Homes*, 449 B.R. at 744; Hanson v. First Nat'l Bank, No. 5:10-0906, 2011 WL 5201430, at *6 (S.D. W. Va. Oct. 31, 2011) (finding that a party, knowing that his employer "could access and monitor his e-mail communications with his criminal attorney, had no objectively reasonable expectation of privacy or confidentiality in them and effectively waived the attorney-client privilege" in using his employer's computer system to communicate with his attorney).

devices.[72] Such measures may also serve to prevent family members or friends of the employee from accessing proprietary company information.[73]

II. Adversarial Cooperation

After working to improve the client's information governance plan, the next step that in-house counsel can take to change its discovery culture is to embrace the principal of adversarial cooperation in litigation.[74] Adversarial cooperation is not just a trendy litigation tactic touted by the e-discovery cognoscenti.[75] It is a valuable strategy that can frequently advance the merits of a party's claims or defenses at a greatly reduced cost.[76] Indeed, standing orders, local rules, and other judicial practices routinely spotlight the importance of cooperating—not clashing—over both administrative and substantive matters.[77] The decision in *Pippins v. KPMG LLP*[78] exemplifies this principle.

In *Pippins*, the court ordered the defendant accounting firm to preserve thousands of employee hard drives.[79] The firm had argued that the high cost of preserving the drives was disproportionate to the value of the ESI stored on the drives.[80] Instead of preserving all of the drives, the firm hoped to maintain a reduced sample, asserting that the ESI on the sample drives would satisfy the evidentiary demands of the plaintiffs' class action claims.[81] The court rejected the proportionality argument primarily

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[72] *See* Philip Favro, *Inviting Scrutiny: How Technologies Are Eroding the Attorney-Client Privilege*, 20 RICH. J.L. & TECH. 2, 158 (2014).

[73] *See id*.

[74] *See generally* David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 8 (2012).

[75] *See id.*; *accord* FED. R. CIV. P. 26(b)(1) advisory committee's note ("In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.").

[76] *See* Waxse, *supra* note 74, at 12.

[77] *See, e.g.*, S.D. CAL. CIV. LOCAL R. 16.1(d)(1), 83.4(a)(1), (2) (2014), *available at* https://www.casd.uscourts.gov/Rules/SitePages/LocalRules.aspx.

[78] 279 F.R.D. 245, 254 (S.D.N.Y. 2012).

[79] *Pippins*, 279 F.R.D. at 251.

[80] *Id*. at 250.

[81] *Id*.

because the firm refused to permit the plaintiffs or the court to analyze the ESI found on the drives.[82] Without any visibility into the contents of the drives, the court could not weigh the benefits of the discovery against the alleged burdens of preservation.[83] The court was thus left to speculate about the nature of the ESI on the drives, reasoning that it went to the heart of the plaintiffs' class action claims.[84] As the district court observed, the firm may very well have obtained the relief it requested had it engaged in "good faith negotiations" with the plaintiffs over the preservation of the drives.[85]

The *Pippins* decision reinforces the judicial refrain that parties should engage in reasonable, cooperative discovery conduct.[86] Staking out uncooperative positions in the name of zealous advocacy stands in sharp contrast to the proportionality standards emphasized in the proposed Rules amendments.[87] Moreover, such a tactic may very well foreclose proportionality considerations and increase the cost of discovery through needless motion practice, just as it did in *Pippins*.[88]

To avoid the costly results of uncooperative discovery tactics, in-house counsel must abandon the attitude often held by internal company lawyers and their business colleagues that discovery tools should be used to "beat

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[82] *Id.* at 252, 254 ("It smacks of chutzpah (no definition required) to argue that the Magistrate failed to balance the costs and benefits of preservation when KPMG refused to cooperate with that analysis by providing the very item that would, if examined, demonstrate whether there was any benefit at all to preservation.").

[83] *Id*. at 252.

[84] *Id.* at 254.

[85] *Id*.

[86] *See* Escamilla v. SMS Holdings Corp., No. 09-2120 ADM/JSM, 2011 WL 5025254, at *5-6 (D. Minn. Oct. 21, 2011) (foreclosing the defendant's proportionality argument regarding the financial burdens of certain ordered discovery since those burdens were "self-inflicted" due to the defendant's failure to observe his preservation duties).

[87] *But see* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 539-40 (2009) (stating some commentators have argued that over-aggressive positions are taken not because they are tactically sound, but because attorneys believe that their clients expect such tactics).

[88] *Pippins*, 279 F.R.D. at 252. It should be noted that the firm's initial motion for protective order was denied without prejudice to allow the firm to negotiate a cooperative preservation arrangement regarding the drives with the plaintiffs. *Id.* The defendant was nonetheless unable to do so, which ultimately led the district court to conclude that the firm was "hoist on its own petard." *Id*. at 256.

up" the opposition.[89] Beating up the other side by "wag[ing] litigation" simply increases discovery costs—often without substantive results—while damaging cooperation opportunities.[90] Although in-house counsel must insist on zealous advocacy, it should also seek to speedily dispose of issues through cooperation where possible.[91] This could include any of the following, depending on the circumstances of a case:

- Disclose the nature of the client's electronic information systems during the Rule 26(f) conference to facilitate the exchange of relevant ESI during discovery;[92]
- Negotiate a stipulation with opposing counsel that limits or eliminates the scope of the parties' privilege log obligations;[93]
- Execute a clawback agreement and obtain an order pursuant to Federal Rule of Evidence 502(d) to minimize the endless wrangling that often ensues over the inadvertent disclosure of attorney-client privileged information;[94] and
- Determine during the Rule 26(f) conference whether and when certain custodians for either party can come off of legal hold.[95]

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[89] *See* Gensler, *supra* note 86, at 540 ("[T]here is some sense that lawyers take needlessly adversarial positions in discovery not because they want to but because they think their clients want or expect that type of behavior."); Waxse, *supra* note 74, at 16 ("Some lawyers may also be operating under the impression that their clients are impressed by shows of aggression."); Shaffer & Shaffer, *supra* note 1, at 186.

[90] Calcor Space Facility, Inc. v. Superior Court, 61 Cal. Rptr. 2d 567, 570-71 (Cal. Dist. Ct. App. 1997) (urging courts to aggressively curb "cancerous" discovery abuses, curtail "promiscuous" discovery, and insist that "discovery devices be used as tools to facilitate litigation rather than as weapons to wage litigation"); 7TH CIR. ELEC. DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, at princs. 1.02 (2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

[91] *See* Waxse, *supra* note 74, at 12.

[92] *See* 7TH CIR. ELEC. DISCOVERY COMM., *supra* note 90, at princ. 2.05-06.

[93] *See* Favro, *supra* note 72, at 151.

[94] *See* John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589 (2013) (discussing the importance of Federal Rule of Evidence 502(d) in reducing the costs and burdens associated with attorney-client privilege reviews in discovery); Richard Marcus, *The Rulemakers' Laments*, 81 FORDHAM L. REV. 1639 (2013) (describing the underuse of Federal Rule of Evidence Rule 502(d)).

[95] *See* 7TH CIR. ELEC. DISCOVERY COMM., *supra* note 90, at princ. 2.04(a).

Taking any of these steps would likely advance a matter toward disposition on the merits while reducing associated discovery costs.

III. Better Management of Outside Counsel

A final, culture-changing measure that in-house counsel should implement is to better manage its relationship with the client's retained outside counsel.[96] Without the framework of a litigation budget or appropriate direction on issues such as proportionality and reasonableness, outside counsel's fees could quickly become excessive.[97] In contrast, proactive guidance from in-house counsel will likely keep client discovery costs more reasonable.[98]

The first step that in-house counsel can take in this regard is to state the client's expectations for how discovery should be conducted at the time of retention or at the commencement of a suit.[99] A realistic budget and staffing, considering the client's expectations, need to be addressed.[100] Counsel should emphasize to its engaged lawyers the importance of reasonableness and proportionality in the discovery process.[101] Although these requirements may be overlooked or even unknown to many attorneys, in-house counsel is duty bound—under penalty of sanctions—to ensure that the client's discovery efforts meet these standards.[102] Moreover, in-house counsel's efforts to insist on proportional discovery may be rewarded with decreased preservation and collection costs.[103]

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[96] *See* Cheadle & Favro, *supra* note 6, at 89.

[97] *Id*.

[98] *See* Gensler, *supra* note 87, at 564-65.

[99] Dembin & Favro, *supra* note 2.

[100] *Id*.

[101] *Id*.

[102] *Id.*; *see also* FED. R. CIV. P. 26(g); Qualcomm, Inc. v. Broadcom, Corp., No. 05CV1958-B(BLM), 2008 WL 66932, at *9 (S.D. Cal. Jan. 7, 2008) (issuing sanctions against counsel and client for, among other things, failing to meet the certification requirement under Rule 26(g)).

[103] *See, e.g.*, Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JLC), 279 F.R.D. 245, 254 (S.D.N.Y. Oct. 7, 2011); Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2012 WL 1299379 (D.N.J. Apr. 16, 2012).

It is also crucial that in-house counsel consistently communicate with its outside lawyers about pertinent aspects of the client's information governance plan.[104] To minimize miscommunications, in-house counsel should provide ready access to appropriate IT personnel and relevant business leaders (the owners of the relevant information) to outside counsel.[105] Outside counsel cannot be effective, and may get in-house counsel and the client into hot water, without knowing the client's information retention and governance policies.[106] In contrast, such information will help outside counsel to more easily negotiate key issues surrounding the discovery of ESI at the Rule 26(f) conference and Rule 16(b) scheduling conference.[107] Moreover, open communication regarding this matter will facilitate strategy and logistics regarding the preservation and collection of relevant information.[108]

By taking these steps, in-house counsel will likely improve its working relationship with outside counsel. In addition, having such an organized strategy and partnership will reduce discovery delays and related legal fees that typically result from poor planning.

Conclusion

By following the suggestions we propose in this Article, in-house counsel will likely decrease its client's discovery costs in a given case. The impact of the culture change likely will be more far reaching. By engaging in proactive, proportional, and reasonable discovery conduct, the client will be prepared to litigate in the manner contemplated by the proposed Rules amendments. This should lead to better discovery

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[104] *See Qualcomm, Inc.*, 2008 WL 66932, at *9.

[105] *See id*.

[106] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., 113TH CONG., REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 320 (2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks (observing that "[i]t is important that counsel become familiar with their clients' information systems and digital data" in order to properly address ESI preservation issues).

[107] *See Qualcomm, Inc.*, 2008 WL 66932, at *9.

[108] *See id*.

practices among outside counsel and could even yield more favorable court rulings. All of which could herald a new era of reduced costs and delays in discovery, a welcome prospect for courts, clients, and counsel.