On September 9, 2011, The Civil Rules Advisory Committee of the U.S. Judicial Conference met in Dallas to discuss changing the Federal Rules of Civil Procedure related to electronic discovery, preservation of electronic evidence and sanctions related to electronic discovery.

As a member of the Sedona Conference® Working Group on Electronic Document Retention and Production, we were afforded the opportunity to make comments to the Rules Committee prior to the conference. We were happy to do so, but we are ambivalent as to whether the rules as considered should be amended.

The Rules Committee is considering three different amendment approaches. One approach is to create a specific rule that would provide detailed explanations of the duty to preserve electronic evidence, the scope of the duty to preserve, triggering events, and sanctions. The second approach is a general preservation rule. The third approach solely addresses sanctions as a way of influencing litigant and counsel behavior. The sanctions based rule would not provide specific guidance about preservation.

The specific rule approach includes many lists of examples and is an attempt to foresee all the e-discovery challenges in the future. The draft rule provides an extensive list of events that trigger a duty to preserve electronic evidence. We believe the list of information types that are presumptively excluded from a duty to preserve is particularly helpful and could certainly assist in reducing costs of e-discovery. Examples of data that would be presumptively excluded data includes deleted data on hard drives, temporary internet files, and physically damaged media.

We have two main issues with the specific rule approach. First, it is not possible to foresee all future developments in any area of the law and this is especially the case with electronic evidence where rapid technological change rules the day. Second, all of the lists contain catch all provisions to address unforeseeable scenarios. In our opinion, the catch-all would swallow the specific portions of the rule defeating its purpose.

The general rule approach bases the triggering of a duty to preserve on a reasonable person standard. Similarly, the ongoing duty to preserve evidence is to be evaluated by applying a reasonable period standard. This is our least favorite of the approaches. The results of applying this rule will differ across districts, judges and magistrates. The lack of guidance present in the current rules is the reason that new rules are being debated. The general approach would not appear to provide better guidance than the current regime.

The sanctions based rule would be helpful in providing guidance to attorneys and some certainty. In our opinion, the lack of knowledge of the rules by attorneys is widespread. Frankly, it is also appalling considering that the federal rules governing e-discovery have been on the books for almost 5 years and have been adopted widely by the states. We do believe that specifics regarding sanctions could be beneficial in that it may provide an impetus for more attorneys to take e-discovery seriously. However, they should be doing this already and there is a danger that the rule will be too lenient. For example, sanctions

that are somewhat trivial in nature are not going to lead parties and/or counsel to take their preservation responsibilities seriously. Serious sanctions would lead to taking the obligations seriously. We believe the current case law provides ample examples of why preservation responsibilities seriously.

Importantly, any new e-discovery rules will not likely go into effect until 2013 or 2014. Therefore, this is the first of the discussion and a lot is likely to change between now and adoption.