

**SEVENTH CIRCUIT  
ELECTRONIC DISCOVERY  
PILOT PROGRAM**

**REPORT  
ON  
PHASE ONE**

**MAY 20, 2009 – MAY 1, 2010**

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## 1. EXECUTIVE SUMMARY

The Seventh Circuit Electronic Discovery Pilot Program was initiated in May 2009 as a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure.

The Seventh Circuit Electronic Discovery Pilot Program Committee (“Committee”) targeted its schedule so it could prepare this Report on Phase One for presentation at the Seventh Circuit Bar Association’s Annual Meeting and Judicial Conference on May 3, 2010. This Report contains an explanation of the process and reasoning behind the Committee’s Principles Relating to the Discovery of Electronically Stored Information (“Principles”). It also provides a preliminary, anecdotal “snapshot” of the information gathered regarding the application of the Principles in cases during Phase One of the Pilot Program. In May 2010, the Committee will review the feedback it receives regarding Phase One and this Report. It will then commence Phase Two of the Pilot Program, which will run from July 1, 2010 to May 1, 2011. The Committee intends to present its Report on Phase Two in May 2011, before moving on to Phase Three.

The Committee consists of a diverse and growing group of attorneys, non-attorneys, and judges experienced with the discovery of electronically stored information (“ESI”). The Principles were developed and drafted throughout the summer of 2009. During that time, there were numerous meetings, which included substantial discussion and debate among the members of three subcommittees — the Preservation Subcommittee, the Early Case Assessment Subcommittee, and the Education Subcommittee — to address the key ESI issues identified at the Committee’s first meeting on May 20, 2009, and draft proposed principles in response to these issues. In September 2009, the full Committee reviewed and adopted the Principles, which became effective October 1, 2009, as a part of Phase One. The Principles are contained in Section 2 of this Report.

From October 2009 through March 2010, the Principles were tested in practice. Thirteen (13) judges of the U.S. District Court for the Northern District of Illinois, including five (5) district judges and eight (8) magistrate judges, implemented the Principles in ninety-three (93) civil cases pending on their individual dockets. In March 2010, survey questionnaires were sent to two hundred eighty-five (285) attorneys involved in the Phase One cases as well as to the participating judges. All thirteen (13) judges responded to the Judge Survey Questionnaires, and one hundred and thirty-three (133) attorneys responded to the Attorney Survey Questionnaires. The Committee’s Survey Subcommittee worked closely with the Institute for Advancement of the American Legal System at the University of Denver, and the Federal Judicial Center in Washington, D.C., which is the educational arm of the U.S. Courts, in designing and administering the Surveys. Data analyses of both Surveys are in the Appendix in Section 12.E. and available on-line at [www.7thcircuitbar.org](http://www.7thcircuitbar.org).

Because a limited number of judges participated in Phase One, a reader of this Report should be cautious in extrapolating the judges' responses to the questions posed on the Phase One Judge Survey Questionnaire to the larger population of judges throughout the Seventh Circuit or the country. It would be best for the reader to treat the responses to the Judge Survey as anecdotal expressions of experienced observers. The particular district judges and magistrate judges participating in Phase One, however, were generally positive about the effectiveness of the Principles.

One hundred percent (100%) of the judges either “agreed” or “strongly agreed” that the involvement of e-discovery liaisons required by Principle 2.02 (E-Discovery Liaisons) contributed to a more efficient discovery process.

Over ninety percent (90%) of the judges thought the Principles “increased” or “greatly increased” counsels' level of attention to the technologies affecting the discovery process and the demonstrated familiarity counsel had with their clients' electronic data and data systems. Ninety-two percent (92%) of the judges agreed that the Principles had a positive effect on counsels' ability to resolve discovery disputes before requesting court involvement and reach agreements on how to handle the inadvertent disclosure of privileged information or work product. A summary of these and other survey responses by the participating judges, along with the judges' specific anecdotal comments and opinions, is contained in Section 9.A. of this Report.

The one hundred and thirty-three (133) attorneys who responded to the Attorney Survey Questionnaire constituted slightly more than forty-six percent (46%) of the two hundred and eighty-five (285) counsel for the parties in the Phase One cases. Each attorney was asked to respond with regard to his or her experience in connection with the single Phase One case in which he or she served as counsel of record. The attorneys responding to the Attorney Survey Questionnaire were fairly evenly divided as to the role of their respective clients regarding e-discovery in their Phase One case. Thirty-three percent (33%) identified themselves as representing a party primarily requesting ESI. Thirty-five percent (35%) represented a party primarily producing ESI. Twenty-five percent (25%) represented a party equally requesting and producing ESI. Seven percent (7%) represented a party neither requesting nor producing ESI. The cases that were selected by the participating judges to be a part of Phase One were at various stages in the litigation process when the Phase One Principles went into effect on October 1, 2009. Consequently, because the discovery phase had already commenced in some of the Phase One cases, not all of the questions posed in the Attorney Survey Questionnaire were applicable to all cases.

A substantial portion of the responding attorneys, forty-three percent (43%), reported that the Principles “increased” or “greatly increased” the fairness of the discovery process. Fifty-five percent (55%) stated they believed the Principles had no effect on the fairness of the discovery process, and just under three percent (3%) felt that the Principles decreased the fairness.

More than thirty-eight percent (38%) of the responding attorneys stated that the Principles increased the parties' ability to resolve e-discovery disputes without court involvement, sixty-one percent (61%) stated the Principles had no effect on this, and less than one percent (1%) stated the Principles decreased their ability to resolve e-discovery issues without court involvement.

When asked whether the application of the Principles affected their ability to zealously represent their clients, seventy-four percent (74%) of the responding attorneys indicated "no effect" and twenty-two percent (22%) said the Principles increased their ability to zealously represent their clients. Only four percent (4%) of the attorneys indicated a negative effect.

A further summary of these and other survey responses by the participating attorneys, along with those attorneys' specific anecdotal comments and opinions, is contained in Section 9.B. of this Report.

In addition, during Phase One of the Pilot Program, the Committee's Education Subcommittee developed an "E-Discovery Program" section on the Seventh Circuit Bar Association's website (<http://www.7thcircuitbar.org>) as a resource to assist lawyers in accessing the case law addressing e-discovery issues. The Education Subcommittee has presented two national broadcast webinars, the first on February 20, 2010, titled "Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program," and the second on April 28, 2010, titled "You and Your Clients: Communicating About Electronic Discovery." Both webinars were free of charge to the more than 1,000 participants. More webinars are planned.

The Seventh Circuit Electronic Discovery Pilot Program was featured in the November 2009 edition of *The Third Branch*, which is the newsletter of the federal judiciary. The Pilot Program was also highlighted in numerous privately sponsored seminars and programs across the country. As demand for information about the Pilot Program continued to grow, the Committee established the Communications and Outreach Subcommittee to oversee the flow of information about the Pilot Program to persons or entities planning presentations and seminars regarding the Pilot Program.

During Phase Two, the Committee hopes to expand the geographic reach of the Pilot Program and increase the number of cases and participating judges. The Committee also intends to lengthen the implementation period for Phase Two so the Principles will be tested more comprehensively than in Phase One. The Committee may also modify the Principles based on the Phase One feedback. Additionally, the Committee may establish more subcommittees to address other identified areas of ESI discovery as the Pilot Program continues.

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

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

### **Seventh Circuit Electronic Discovery Pilot Program (Phase One Implementation Period October 1, 2009 to May 1, 2010)**

#### ***General Principles***

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

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

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

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

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

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

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

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

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

- (1) the identification of relevant and discoverable ESI;
- (2) the scope of discoverable ESI to be preserved by the parties;
- (3) the formats for preservation and production of ESI;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and



- (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

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

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

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

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

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

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

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

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

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and

parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

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

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

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

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

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

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

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

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

may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

- (1) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives;
- (2) random access memory (RAM) or other ephemeral data;
- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

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

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

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

- (b) Topics for discussion may include, but are not limited to, any plans to:
- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians;
  - (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
  - (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

**Principle 2.06 (Production Format)**

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

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

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

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

## ***Education Principles***

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

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

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

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

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

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

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

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

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

### **3. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE MEMBERS AS OF MAY 1, 2010**

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## **4. BACKGROUND OF PHASE ONE**

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

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

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

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

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

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

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

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

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

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

As ESI has become a source of discovery disputes, there have been calls for cooperation in the pretrial discovery process, such as The Sedona Conference® Cooperation Proclamation. The Principles are intended not just to call for cooperation but also to incentivize the cooperative exchange of information on evidence preservation and discovery. They do so by providing guidance on common preservation and discovery issues and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court. Many of these issues are readily identifiable before the initial Rule 16 conference and should be raised then. Other preservation and discovery issues that become apparent only after the case has progressed should be raised as soon as practicable after they arise.

The Principles also provide guidance on education. The Committee has been and will continue providing education to the judiciary and the bar concerning the procedural framework for electronic discovery, the Principles, and the technical aspects of electronic information storage, preservation, and discovery through up-to-date case law cited on the [www.7thcircuitbar.org](http://www.7thcircuitbar.org) website, through the free webinars, through the live seminar presentations and panel discussions in which the Committee’s members have and will continue to participate during the Pilot Program, and through the on-line blog and chat room, [www.7thcircuitbar.org/forum.cfm](http://www.7thcircuitbar.org/forum.cfm), established exclusively for on-line comments and discussion regarding the Principles and all other aspects for the Pilot Program as it progresses.

## 5. SUBCOMMITTEES’ STRUCTURE AND RESPONSIBILITIES

### A. Education Subcommittee

#### 1. Members

Kathryn A. Kelly (Co-Chair)	
Mary M. Rowland (Co-Chair)	
Michael Bolton	Valarie T. Bomar
Kevin Brown	Sean Byrne
Timothy J. Chorvat	Chrstina Conlin
Brian D. Fagel	Tiffany M. Ferguson
Colleen Kenney	Christopher Q. King
Natalie J. Spears	Tomas Thompson
Martin Tully	P. Shawn Wood

#### 2. Overview of Subcommittee’s Charge

Early on in the discussion, members of the Committee agreed that one of the major obstacles to efficient and cost-effective electronic discovery was the lack of knowledge by members of the bar about basic ESI concepts. Many lawyers are simply not technologically savvy enough to have a productive “meet and confer” about ESI, let alone to properly focus electronic discovery requests and/or to adequately gather responses. The perception of the Committee was that overly broad preservation letters and requests for ESI, and refusal to produce responsive discovery, were often the result of lawyers not understanding what ESI is, what ESI their clients possess, or how that is stored. The subcommittee was also charged with providing education about the Principles themselves.

To address these distinct but complementary needs, the Education Subcommittee established a partnership with the Seventh Circuit Bar Association, allowing the Pilot Program to have an internet home. The Principles were posted on the internet site at [www.7thcircuitbar.org](http://www.7thcircuitbar.org). Next, the subcommittee surveyed case law in the Seventh Circuit, including the district courts, pertaining to e-discovery. The case law has been organized by topic and is posted on the Seventh Circuit Bar Association’s website. The subcommittee will update these cases on a quarterly basis. In addition, the subcommittee has posted a list of links that provide a wealth of information and training materials regarding ESI. Finally, the subcommittee has created a “glossary” of basic terms used in e-discovery. The glossary, also posted on the Seventh Circuit Bar Association’s website, sets out definitions to enhance the bar’s ability to understand e-discovery.



In addition to the “static” methods of educating the bar about the Principles specifically and ESI more generally, the subcommittee partnered with the Seventh Circuit Bar Association and Technology Concepts & Design, Inc. (TCDI®) to produce a one-hour webinar, in a question-and-answer format, that describes the highlights of the Principles and the motivation behind several of the provisions. The webinar is titled “Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program.” To reach the maximum number of lawyers, the subcommittee partnered with LAW.COM to broadcast the webinar in February 2010. Over 1,000 registrants heard from Chief Judge James F. Holderman, Magistrate Judge Nan R. Nolan, and Committee members Thomas Lidbury of Mayer Brown and Alexandra Buck of Bartlit Beck Herman Palenchar & Scott. The panel not only described the Principles, but also explained the impetus for certain provisions and highlighted the requirements of others. Attendees, who received CLE credit, had an opportunity to ask questions, and the subcommittee provided a written response to every question submitted. Attendees were also encouraged to comment on the quality of the webinar and to propose future topics. This webinar is and will remain available for viewing on the Seventh Circuit Bar Association’s website.

Given the overwhelming response to the initial webinar and based upon a thorough review of the written comments from the attendees, the subcommittee produced a second webinar with TCDI, focusing on a lawyer’s obligation to understand a client’s systems and use that knowledge to facilitate the e-discovery process. The webinar, titled “You and Your Client: Communicating about E-Discovery,” aired in April 2010. Participants heard, again in a question-and-answer format, from Committee members Chris King of Sonnenschein Nath & Rosenthal, LLP, Tiffany Ferguson of Pugh, Jones, Johnson & Quandt, P.C., Tom Staunton of Miller Shakman & Beem, LLP, and Michael Bolton of Baxter Healthcare Corp., about the initial and essential steps counsel must take in order to understand his or her clients’ electronic data and the discovery obligations which flow from it.

### 3. Subcommittee’s Continuing Role

The subcommittee believes that education is a critical component to reforming discovery. The possibilities for the subcommittee are limited only by the volunteer time available. At present, the subcommittee plans to continue producing programs in the webinar format with a goal of creating four one-hour webinars every calendar year. Upcoming webinar topics include The Basics of ESI; Ethical Issues in ESI; Culling and Search Techniques; The Use of an ESI Liaison; Creating and Maintaining an ESI Privilege Log; Issues Surrounding Cost Sharing; ESI Case Law Overview; Sanctions Imposed in ESI Disputes; and Judicial Views on the Pilot Program Phases One & Two. The subcommittee also hopes to present, in conjunction with the Communication and Outreach Subcommittee, an in-person presentation for the fall of 2010 regarding the Principles and Phase Two of the Pilot Program. Finally, the subcommittee will continue to update the case log on the Seventh Circuit Bar Association’s website as a quick reference for judges and practitioners.

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

### **1. Members**

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Karen Quirk (Co-Chair)  
George S. Bellas  
Debra R. Bernard  
Kevin S. Brown  
Alexandra G. Buck  
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Daniel Graham  
Marie Halpin  
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Pauline Levy  
Joanne McMahan  
Anupam Razdan-Anupam  
Thomas Staunton  
Marni Willenson

### **2. Overview of Subcommittee's Charge**

The charge of the Early Case Assessment Subcommittee was to draft principles to address ways of ensuring that parties meet early in litigation to discuss a variety of issues relating to electronic discovery, including budgeting, proportionality, opportunities for staged discovery, periodic assessments of discovery plans, and the best ways to exchange information regarding electronic systems. The Early Case Assessment subcommittee drafted General Principles 1.01-1.03 and worked closely with the Preservation Subcommittee in drafting the Early Case Assessment Principles 2.01-2.06.

### **3. Subcommittee's Continuing Role**

The Early Case Assessment Subcommittee will be evaluating the Phase One survey responses to determine if the Principles should be refined as part of Phase Two of the Pilot Program.

**C. Preservation Subcommittee**

1. Members

James S. Montana, Jr. (Co-Chair)  
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Timothy J. Chorvat  
Arthur Gollwitzer III  
Marie Halpin  
Reuben L. Hedlund  
Arthur J. Howe  
Michael Kanovitz  
Pauline Levy  
Ronald L. Lipinski  
Bruce A. Radke

2. Overview of Subcommittee’s Charge

The charge of the Preservation Subcommittee was to draft principles to guide litigants on constructive demands for evidence preservation, responses, and even unilateral preservation disclosures. The Preservation Subcommittee principally drafted Principle 2.03 and worked closely with the Early Case Assessment Subcommittee in drafting Principles 2.01 and 2.04.

3. Subcommittee’s Continuing Role

The Preservation Subcommittee will be evaluating the Phase One survey responses to determine if the Principles should be refined as part of Phase Two of the Pilot Project.

**D. Survey Subcommittee**

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Natalie J. Spears (Co-Chair)  
Debra Bernard  
Karen Coppa  
Rebecca Elmore  
Marie Halpin  
Tiffany Ferguson  
Richard Moriarty  
Thomas Staunton

2. Overview of Subcommittee’s Charge

The Survey Subcommittee was formed immediately following the adoption of the Principles on September 16, 2009, and was tasked with developing a survey to assess the initial effectiveness of the Principles and gather feedback and information from the lawyers and judges participating in Phase One of the Pilot Program. The Survey Subcommittee worked closely with the Federal Judicial Center in Washington, D.C., which is the educational arm of the U.S. Courts, in designing and administering the survey questionnaires.

3. Subcommittee’s Continuing Role

The Survey Subcommittee will work closely with the Federal Judicial Center in developing and implementing the evaluation processes for Phase Two of the Pilot Program.

**E. Communications and Outreach Subcommittee**

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Allison Walton

2. Overview of Subcommittee’s Charge

The charge of the Communications and Outreach Subcommittee is to promote awareness of and provide education about the Seventh Circuit’s Electronic Discovery Pilot Program to attorneys and judges throughout the various federal district courts within the Seventh Circuit, to the Illinois state courts, and to the bench and bar of other federal and state jurisdictions. The

subcommittee generates and provides a repository for presentations and other educational material in connection with the Pilot Program, and functions as the point-of-contact for media inquiries and speaker referrals.

### 3. Subcommittee's Continuing Role

The Communications and Outreach Subcommittee will continue to function as the point-of-contact for media inquiries, speaker referrals, and education about the Seventh Circuit Electronic Discovery Pilot Program.

## **6. DEVELOPMENT OF PHASE ONE PRINCIPLES AND STANDING ORDER**

### **A. Process of Formulating the Principles.**

Chief U.S. District Judge James F. Holderman and U.S. Magistrate Judge Nan R. Nolan assembled the Committee with leading lawyers in the area of electronic discovery from diverse backgrounds including defense and plaintiff attorneys, private and government lawyers, and in-house and outside counsel. The Committee also included technical experts from leading electronic discovery consultants and vendors. At the Committee's first meeting, the initial members listened to commentary from Kenneth Withers, the Director of Judicial Education and Content for The Sedona Conference®. A lively discussion ensued concerning the most vexing problems of electronic discovery. The result of the discussion was the identification of three major areas of concern:

- (1) generic “preservation letters” sent before or shortly after commencement of litigation that do nothing more than list the various kinds of computers and data storage devices that exist in the world, and the inevitable and equally pointless responses they invite;
- (2) the tendency for litigants to put off potentially troublesome electronic discovery issues that could be dealt with more efficiently and constructively if they were raised, assessed, and resolved earlier; and
- (3) the lack of technical expertise among many lawyers involved in electronic discovery disputes.

Therefore, the Committee created three subcommittees: the Preservation Subcommittee, the Early Case Assessment Subcommittee, and the Education Subcommittee. These subcommittees developed and drafted the Phase One Principles.

Over a period of several months, the Preservation, Early Case Assessment, and Education Subcommittees held dozens of meetings and exchanged numerous drafts of various proposed principles. Each subcommittee completed a working draft of principles in their respective areas. Notably, the Preservation and Early Case Assessment Subcommittees recognized that their subjects necessarily overlapped in many ways. These subcommittees therefore appointed liaisons who were on both subcommittees and coordinated closely in drafting. After each subcommittee had developed working drafts of proposed principles, the separate drafts were merged into a single set of proposed principles.

The subcommittees benefited from the wealth of diverse backgrounds and experiences of their members. Certain core ideas emerged and were refined through thoughtful and often vigorous debate. Lawyers from opposing points of view spent time together discussing intricate electronic discovery issues and found that, while there will always be areas of philosophical disagreement, there are many areas in which they could find common ground. To be sure, there were difficult drafting issues and every subcommittee member who participated in this process

can point to language that they feel could be improved. Indeed, some issues proved very difficult to resolve and were settled only after a mediation session with Magistrate Judge Nolan. But it is fair to say that all are satisfied that the final product promises to improve many of the common problems of electronic discovery today.

**B. Mediation by Magistrate Judge Nolan to Obtain Compromises**

At the conclusion of the drafting and merger phase, there remained several disagreements regarding the language of the proposed principles, which the Early Case Assessment and Preservation Subcommittees were unable to resolve. The members of these subcommittees agreed that a mediation with Magistrate Judge Nolan might be useful in resolving their differences. On September 4, 2009, Magistrate Judge Nolan met with members of the Early Case Assessment and Preservation Subcommittees in her chambers to discuss the remaining issues. Twenty subcommittee members participated in person or by phone. There was an effective and cooperative exchange on the hardest issues. After vigorous discussion, all of the outstanding issues were resolved and agreement was reached on the language of the proposed principles. Thomas Lidbury incorporated the agreed-upon language and created the draft of the proposed principles (and corresponding standing order) to be implemented during Phase One. The mediation between these subcommittees was a real lesson in the effectiveness of cooperation.

**C. Adoption by Full Committee of the Phase One Principles**

After the final mediation session, the revised Principles were presented to the full Committee and put to a vote. The Committee approved the Phase One Principles unanimously on September 16, 2009, after which the Committee's Pilot Program Phase One Principles and Standing Order were posted electronically on the [www.7thcircuitbar.org](http://www.7thcircuitbar.org) website. The Phase One Principles were thereafter implemented by orders of the participating judges in pending civil cases, as explained in Section 7.

## **7. IMPLEMENTATION OF PHASE ONE PRINCIPLES AND STANDING ORDER BY JUDGES IN SELECTED CIVIL CASES**

Starting on October 1, 2009, thirteen (13) judges implemented the Committee’s Phase One Principles by entering the Standing Order in ninety-three (93) federal civil cases selected to be part of Phase One of the Pilot Program. Each judge used his or her individual criteria for selecting participating cases from among the cases on the judge’s docket, with an average of seven (7) cases per judge. The testing period of Phase One ran through March 2010, when surveys were administered to the judges and attorneys in the Phase One cases.

### **A. Phase One Judges**

James F. Holderman, Chief District Judge  
Nan R. Nolan, Magistrate Judge

#### Participating District Judges

Ruben Castillo  
Robert M. Dow  
Virginia Kendall  
Amy St. Eve

#### Participating Magistrate Judges

Sidney I. Schenkier  
Martin C. Ashman  
Geraldine Soat Brown  
Susan E. Cox  
Morton Denlow  
Michael T. Mason  
Maria Valdez

Only active U.S. District Judges and U.S. Magistrate Judges of the Northern District of Illinois participated in Phase One of the Pilot Program. No district judge who announced retirement, took senior status, or was on senior status during the Phase One period participated. The five (5) district judges who participated in Phase One represent thirty-one percent (31%) of the sixteen (16) remaining district judges in the Northern District of Illinois who were on active status during the Phase One period.

The eight (8) magistrate judges who participated in Phase One represent seventy-two percent (72%) of the eleven (11) designated magistrate judges in the Northern District of Illinois during the Phase One period.



The reader of this Report should be cautious extrapolating the results of the Judge Survey to a larger population of judges, and should only consider that information regarding the judges to be anecdotal expressions of experienced observers.

## **B. Phase One Cases**

<u>Number</u>	<u>Title</u>
05-cv-04095	Phoenix Bond & Indemnity Co. v. Bridge
06-cv-04879	Zimnicki v. Cornerstone Brands Inc.
07-cv-01367	BCS Services, Inc. v. Heartwood 88, Inc.
07-cv-04202	Walsh v. BMO Capital Markets Corp.
07-cv-04684	United States Securities and Exchange Commission v. Sentinel Management Group, Inc.
07-cv-06174	City of St. Clair Shores General Employees Retirement System v. Inland Western Retail
07-cv-07014	Norfolk County Retirement System v. Ustian
08-cv-01225	Thorncreek Apartments III, LLC v. Village of Park Forest
08-cv-01531	DSM Desotech, Inc. v. 3D Systems Corporation
08-cv-02410	Commodity Futures Trading Commission v. Sentinel Management Group, Inc.
08-cv-02746	Howard v. Secuitas Security Services, USA Inc.
08-cv-03799	George v. Kraft Foods Global, Inc.
08-cv-04468	Antonov v. Thumbplay, Inc.
08-cv-04883	In Re: Aftermarket Filters Antitrust Litigation
08-cv-04986	Conrad v. Virgin Mobile USA, Inc.
08-cv-05123	Brown v. WMC Mortgage Corp.
08-cv-05202	The Ticketreserve, Inc. v. Viagogo, Inc.
08-cv-05867	Medline Industries, Inc. v. Kelly Lizzo nee Sullivan
08-cv-06158	Palmer v. Southwest Airlines Co.
08-cv-06297	Northington v. H & M International
08-cv-06584	McDavid Knee Guard, Inc. v. Nike USA, Inc.
08-cv-06753	Drake Enterprises, Inc. v. Colloid Environmental Technologies Company
08-cv-06910	In Re: Potash Antitrust Litigation (No. II)
08-cv-06912	Makowski v. SmithAmundsen, LLC
08-cv-06979	Tabfg, LLC v. Pfeil
08-cv-07018	Leach v. SSC Westchester Operation Company, LLC
08-cv-07145	Tanita Corporation v. Homedics-U.S.A., Inc.
08-cv-07231	Pfizer Inc. v. Apotex Inc.
08-cv-07252	Memory Control Enterprise, LLC v. Officemax Inc.
08-cv-07323	Centimark Corporation v. Tecta America Corp.
08-cv-07463	Varey v. United States of America

09-cv-00573 Campanella and Sons, Inc. v. Massachusetts Mutual Life Insurance Company

09-cv-00779 Corus International Trading Limited v. Concrete Reinforcements, Inc.

09-cv-00846 National Processing Company v. Gillman

09-cv-00962 Domerchie v. Portage Plastics Inc.

09-cv-01162 Gardunio v. Town of Cicero

09-cv-01425 Bajer Design & Marketing, Inc. v. Ware Manufacturing, Inc.

09-cv-01706 Rosales v. Randstad North America, L.P.

09-cv-01711 Johnson v. Harrahs Illinois Corporation

09-cv-01973 Zep Inc. v. First Aid Corporation

09-cv-02046 Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust v. Walgreen Company

09-cv-02102 White v. Doe 1-5

09-cv-02320 Anders v. BankAmerica Corporation

09-cv-02602 Campanella and Sons, Inc. v. RSM McGladrey, Inc.

09-cv-02968 Andrews v. Proficient Business Systems

09-cv-03039 Sara Lee Corporation v. Kraft Foods Inc.

09-cv-03065 Villa v. Wal-Mart Stores, Inc.

09-cv-03112 Data Connection Limited v. Great America Networks Conferencing, LLC

09-cv-03275 Jackson v. Carniceria Jimenez, Inc.

09-cv-03283 Swanson Tool Company, Inc. v. Illinois Industrial Tool, Inc.

09-cv-03368 Kernats v. Comcast Corporation

09-cv-03547 Barkauskas v. Blackstone Medical, Inc.

09-cv-03567 Johnston v. I-Flow Corporation

09-cv-03643 ISB Development Corp. v. Kopko

09-cv-03789 Clean Harbors Environmental Services, Inc. v. ESIS, Inc.

09-cv-03801 AEP River Operations, LLC v. Emesco Marine Services Corporation

09-cv-04008 System Development Integration, LLC v. Computer Sciences Corporation

09-cv-04266 Gorsky v. Joliet Professional Baseball Club, LLC

09-cv-04295 Rodriguez v. Contractor

09-cv-04310 Furnace Brook LLC v. Aeropostale, Inc.

09-cv-04529 Vasquez v. Parker

09-cv-04732 Houghton Mifflin Harcourt Publishing Company v. Larson Texts, Inc.

09-cv-04934 Dominguez v. Village of Summit

09-cv-04974 Annen v. Midland National Life Insurance Company

09-cv-04987 Wierdak v. Kennedy

09-cv-04999 Nycomed GmbH v. Apotex Inc.

09-cv-05031 Goree v. Cappello  
09-cv-05108 Bank of America, N.A. v. First Mutual Bancorp of Illinois, Inc.  
09-cv-05109 Bank of America, N.A. v. Veluchamy  
09-cv-05114 Geismann, M.D., P.C. v. Allscripts Healthcare Solutions, Inc.  
09-cv-05275 Jackson, Jr. v. Home Depot U.S.A.  
09-cv-05290 DLJ Mortgage Capital, Inc. v. Chicago Title Insurance Company  
09-cv-05831 JAB Distributors, LLC v. London Luxury, LLC  
09-cv-05833 Lookout Windpower v. Edison Mission Energy  
09-cv-06053 Pfizer Inc. v. Apotex Inc.  
09-cv-06095 Theracore, Inc v. Theracore Management Group LLC  
09-cv-06145 Meehan v. Asset Acceptance, LLC  
09-cv-06266 Dye v. Foot Locker, Inc.  
09-cv-06344 Lozano v. Twentieth Century Fox Film Corp.  
09-cv-06377 ACE Hardware Corporation v. Neighborhood Shopkeepers  
09-cv-06434 Hawkins v. City of Chicago  
09-cv-06455 Goldberg v. 401 North Wabash Venture LLC  
09-cv-06459 American Hotel Register Company v. American Hotel Equipment Corp.  
09-cv-06494 Melnik v. New West Realty Group LLC  
09-cv-06500 I Cant Believe Its Yogurt, Ltd. v. The Grove, Inc.  
09-cv-06566 Tate v. United Air Lines, Inc.  
09-cv-06600 Green v. United Air Lines, Inc.  
09-cv-06640 Solsberry v. United Air Lines, Inc.  
09-cv-06726 Sherline v. Genentech, Inc.  
09-cv-06821 First National Bank of LaGrange v. The Sherwin-Williams Company  
09-cv-06939 SG Equipment Finance USA Corp. v. Grind-Rite Grinding & Mfg. Co.  
09-cv-07156 Rutherford v. Xtra Lease LLC  
09-cv-07803 Murray v. Snapple Beverage Corp.

## 8. PHASE ONE SURVEY PROCESS

Immediately following the adoption of the Principles on September 16, 2009, the Committee formed the Survey Subcommittee, co-chaired by Joanne McMahon of General Electric Company and Natalie Spears of Sonnenschein Nath & Rosenthal LLP. The Survey Subcommittee was tasked with developing a survey to assess the initial effectiveness of the Principles and gather feedback and information from the lawyers and judges participating in Phase One of the Pilot Program. During Phase Two, the Survey Subcommittee will continue its work to help determine whether refinements, enhancements, or adjustments are needed.

The Survey Subcommittee's work would not have been possible without the dedication, assistance, and support of the Institute for Advancement of the American Legal System at the University of Denver ("IAALS"), which led the development of the Phase One Survey and analysis of the Survey results, and the Federal Judicial Center ("FJC"), which administered the Survey and provided vital input during the questionnaire development process. The entire Committee extends its utmost gratitude to Rebecca L. Kourlis, Executive Director of the IAALS, Corina D. Gerety, IAALS Research Analyst, James Eaglin, Director FJC Research Division, Dr. Meghan Dunn, PhD, FJC Research Division, and Emery Lee and Tom Willging, also of the FJC Research Division.

The subcommittee worked closely with Corina Gerety of IAALS to develop the Phase One Survey, including extensive group drafting sessions of the questionnaires. The work began with the drafting of hypotheses based on the Principles themselves. Those hypotheses were then translated into draft survey questions by IAALS. Following an initial draft by IAALS of the Phase One Survey questions, the subcommittee members met to further refine and supplement the draft questions. The FJC Research Division also provided invaluable guidance and recommendations during the development of the Survey.

As part of the Phase One Survey development process, the Survey Subcommittee addressed a number of issues regarding the scope and substance of the Survey, as well as the goals of the survey process. Given the nature and brief length of this first phase of the Pilot Program, the Phase One Survey was not designed to be a comparative or statistical research study, but was designed to be an evaluation and information-gathering tool. Accordingly, as noted above, the goal of the Phase One Survey was to assess the effectiveness of the Principles and Phase One of the Pilot Program by gathering opinion data through a self-report questionnaire to obtain perceptions of the procedures from the participants in the Program and assess satisfaction with the Principles and processes surrounding the Principles.

To this end, the Survey Subcommittee ultimately designed two survey questionnaires for Pilot Program participants — the Judge Survey Questionnaire and the Attorney Survey Questionnaire. The subcommittee opted not to send a survey questionnaire directly to parties to the lawsuit at this phase of the Pilot Program based on a number of considerations, including overlap with the Attorney Survey Questionnaire. However, the subcommittee anticipates, and

has recommended, that a party/client survey be considered in the later phases of the Pilot Program.

A number of considerations affected the form of the Survey questionnaires sent to judges and attorneys. For example, given that the majority of the participating judges had numerous cases in the Pilot Program, the Survey was designed to ask each of the judges to complete one Survey questionnaire covering all of their cases in the Program, with the narrative portion of the Survey questionnaire providing judges an opportunity to provide information on specific cases or types of cases, where appropriate. In contrast, the vast majority of attorneys with cases in the Pilot Program had only one case in the Pilot Program, and thus were asked to fill out a separate Survey questionnaire based on the application of the Principles for each specific case in the Pilot Program.

Before completion, the Survey Subcommittee's draft questionnaires were distributed to the full Committee. On January 27, 2010, the Committee met to discuss recommended changes for improving, and in some cases expanding, the Survey questionnaires to include additional perspectives. By way of example, after receiving comments from Committee members, subsection 17(f) was added to the Attorney Survey Questionnaire to gauge information about the perceived impact of the Principles on "[t]he parties' ability to obtain relevant documents." Following the full Committee's review and comment, the Survey questionnaires were then finalized by IAALS. The final Phase One Survey questionnaires are attached to this Report in the Appendix in Sections 12.D.1. and 12.D.2.

Once the Survey questionnaires were finalized, the subcommittee worked closely with Dr. Meghan Dunn of the FJC, who led the digitization and online electronic administration of the Phase One Survey. Beginning on February 16, 2010, the Phase One Survey questionnaires were sent by email to the lead counsel listed for each party in the Pilot Program cases, as well as the thirteen (13) judges of the U.S. District Court for the Northern District of Illinois who implemented the Principles in those cases. A total of two hundred eighty-five (285) lead attorneys received an email with a link to the Attorney Survey Questionnaire; the Survey instructions requested that only one counsel per party respond for each case, and, accordingly, that either the lead attorney or the lawyer on the team with the most knowledge of the e-discovery in the case complete the Survey.

Survey responses were collected until March 7, 2010. All thirteen (13) judges responded. One hundred and thirty-three (133) attorneys, approximately forty-six percent (46%) of the attorneys, also responded to the Survey. The completed questionnaires were then sent by the FJC to the IAALS in Denver for processing and analysis. Identifying information included in response to the Survey was maintained strictly confidential by the FJC Survey administrators. Neither the court, the Seventh Circuit Electronic Discovery Pilot Program Committee, nor any other judges or attorneys had access to any identifying information.

## 9. SURVEY RESPONSES AND SUMMARY OF RESULTS

Phase One included a total of ninety-three (93) cases selected by the participating U.S. District Judges and U.S. Magistrate Judges from among the cases on their respective dockets as explained in Section 7. Following the conclusion of Phase One, surveys were sent to the participating judges and attorneys as addressed more thoroughly in Section 8. Selected Phase One Survey results are discussed, summarized, and reported below. The Judge Survey Questionnaire and question-by-question results are set out verbatim in the Appendix in Sections 12.D.1. and 12.E.1. The Attorney Survey Questionnaire and question-by-question results are set out verbatim in the Appendix in Sections 12.D.2. and 12.E.2.

### A. Judge Survey

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

Thirteen (13) federal judges, including five (5) district judges and eight (8) magistrate judges, participated in Phase One of the Pilot Program by implementing the Principles through orders they entered in each Phase One case, an average of about seven (7) cases per judge.

One hundred percent (100%) of the judges participating in Phase One responded to the Judge Survey Questionnaire administered in March 2010. The judges were asked to consider all of the Phase One cases over which they individually presided in answering the Phase One Judge Survey Questionnaire. Even though all of the participating judges responded, it would be best for the reader to treat the judges' Survey responses as anecdotal expressions of opinion from expert observers, and some caution should be taken in extrapolating the participating judges' responses to the larger population of judges in the Seventh Circuit or in the country.

#### (2.) Summary of Results

Overall, the results of the Judge Survey Questionnaire were positive toward the application of the Principles. Sixty-seven percent (67%) of the judges responding indicated that the proportionality standard set forth in Federal Rule of Civil Procedure 26(b)(2)(C) and in Principle 1.03 (Discovery Proportionality) played a significant role in the development of discovery plans for their Phase One cases. (App. E.1. at 10.) Reflecting a difference in the perception between the judges and the attorneys, only twenty percent (20%) of the attorneys stated in response to a question on the Attorney Survey Questionnaire that the proportionality factors set forth in Rule 26(b)(2)(C) played a significant role in the development of the discovery plan for their particular Phase One case. (App. E.2. at 30.)

Eighty-four percent (84%) of the judges indicated that the application of the Principles, including Principle 1.02 (Cooperation), “increased” or “greatly increased” the level of cooperation exhibited by counsel to efficiently resolve the case. (App. E.1. at 11.) Reflecting an additional difference in perception between the judges and the attorneys, only approximately one-third of the attorneys responding, thirty-four percent (34%), stated that the Principles “increased” or “greatly increased” the level of cooperation exhibited by counsel to efficiently

resolve their respective Pilot Program case. (App. E.2. at 35.) Sixty-five percent (65%) of the responding attorneys indicated that the Principles had “no effect” on the cooperation among counsel to efficiently resolve the case. (*Id.*) It should be noted that less than one percent (1%) of the attorneys responding to the question stated that the Principles had a negative effect on the cooperation among counsel to resolve the case. (*Id.*)

Ninety-two percent (92%) of the judges indicated that the Principles had a positive effect on counsels’ meaningfully attempting to resolve discovery disputes before requesting court involvement. (App. E.1. at 12.) Eighty-four percent (84%) of the participating judges indicated that the Principles decreased the number of discovery disputes brought before the court. (*Id.* at 16.) Thirty-nine percent (39%) of the attorneys indicated that the Principles had a positive effect on their ability to resolve discovery disputes without court involvement. (App. E.2. at 37.) Sixty-one percent (61%) of the attorneys responding said the Principles had no effect in this area. (*Id.*) Less than one percent (1%) of the attorneys responding said the Principles had a negative effect on resolving discovery disputes without the court. (*Id.*)

Over ninety percent (90%) of the judges indicated that the Principles “increased” or “greatly increased” counsels’ attention to the technologies affecting the discovery process and counsels’ demonstrated familiarity with their clients’ electronic data and data systems. (App. E.1. at 18-19.) One hundred percent (100%) of the judges either “agreed” or “strongly agreed” that the involvement of e-discovery liaisons required by Principle 2.02 (E-Discovery Liaisons) contributed to a more efficient discovery process. (*Id.* at 21.)

These responses by the participating Phase One judges, when coupled with those of the responding counsel in the Phase One cases, indicate that the Principles were a good step in the right direction with minimal negative consequences toward reaching the Committee’s goals of reducing the cost and burden of electronic discovery while still providing fairness and justice for all the participants in litigation where ESI is relevant to the discovery phase of a case.

### (3.) Judges’ Comments and Opinions

Ten (10) of the Phase One judges expressed an opinion to Judge Survey Question 10, **“Did the Principles work better in some cases than in others?”** (App. E.1. at 22.) Nine (9) answered “yes,” indicating that the Principles had varying rates of success in different cases. (*Id.*)

In response to the follow-up survey question, Question 11, **“What factors influenced their efficacy from case to case?”** the ten (10) judges answering the question gave the following respective comments:

- “Complexity and resources of case.”
- “Familiarity of individual counsel with the E discovery process & governing rules and ability to effectively compromise. We believe that on a long term basis,

application of the principles will decrease the number of disputes (and in particular petty disputes) that require court attention.”

- “I think in cases where each side is sophisticated and/or each side has substantial ESI collections, the parties seem already to have been working out ESI matters. The Principles have the most effect for those lawyers/clients who are not familiar with ESI issues, and on ‘asymmetrical’ cases where one side has a substantial ESI collection and the other does not.”
- “Some cases have more inherent ESI problems than others due to the nature of the parties’ allegations and the nature and availability of the relevant ESI.”
- “Some cases, such as civil rights cases against municipalities, historically have involved very little ESI. It’s possible that will change as records become more automated.”
- “The amount/degree of e-discovery in the case had an impact of the success of the principles.”
- “The principles are most effective in cases that are referred at the beginning of discovery.”
- “Too early to tell.”
- “Too soon to tell, because I have had motions to dismiss pending and not much discovery has gone forward yet.”
- “Whether the entity has access to an effective IT person; whether the attorneys were able to translate their needs to the IT person.”

(*Id.* at 23.)

When asked Question 12 of the Judge Survey Questionnaire, “**What aspects of the Pilot Program Principles are the most useful?**” twelve (12) of the participating Phase One judges respectively stated:

- “2.01 - the duty to meet and confer. Requiring early discussion and agreement on ESI, which, if necessary, fleshes out unavoidable e-discovery issues / disputes earlier in the discovery process.”
- “Ability to generate agreements.”
- “Any time parties are directed to cooperate helps the discovery process.”
- “Designating liaison is the single best idea--it helps focus the discovery requests.”
- “For a person experienced and skilled in ESI issues, I believe the most useful aspects are early case assessment requirements, the reasonableness requirements



of the preservation requests and obligations, and the liaison provision. For the unsophisticated, the education aspect may be most useful and should be emphasized.”

- “In my opinion, the most useful aspect of the Principles is to give the parties a sense of the Court’s expectations at the very outset of the case. It focuses their attention right from the start on e-discovery, lets them know that we expect cooperation and involvement of advisers and experts, and gives them comfort (I think) that we’ve thought through these issues and they can expect quick, fair, and efficient rulings based on the Principles.”
- “Liaison.”
- “Proportionality is a key concept that will help the lawyers keep their eyes on the ball. Also, the specific listing about what elements of ESI are presumptively not reasonably accessible and thus not subject to discovery.”
- “Requirement to talk early and often.”
- “Requiring the parties to meet in advance and to discuss the ‘technical’ aspects of e-discovery.”
- “The meet and confer with the specialist and the discussion regarding proportionality.”
- “The requirement to designate an e-discovery liaison is a great innovation. It will assist both the attorneys and the court in the event of a dispute. Additionally, the fact that the Principles reflect the perspective of in house counsel as well as litigation counsel is extremely valuable.”
- “The role of the e-discovery liaison; the preservation section.”

(*Id.* at 24.)

To Question 13, “**How could the Pilot Program Principles be improved?**” nine (9) of the participating Phase One judges responded:

- “Further experience may suggest some improvement. I can’t think of one now.”
- “I believe the Principles are very good as they are, but I guess could be improved by incorporating the improvements suggested by the various counsel who respond to this survey.”
- “More specific directions.”

- “Numerous litigants have requested model agreements - it might be helpful if those were available through the court’s website as a starting point for discussion.”
- “Perhaps some more attention should be paid to the role of metadata, and whether it should be presumptively non-discoverable.”
- “The standing order should be a separate document.”
- “Too early to tell.”
- “Too soon to tell, from my limited experience thus far.”

(*Id.* at 25.)

## **B. Attorney Survey**

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

One hundred and thirty-three (133) attorneys responded to the Attorney Survey Questionnaire out of the two hundred and eighty-five (285) counsel for the parties in the Phase One cases to whom questionnaires were electronically sent. This constitutes a response by forty-six percent (46%) of the attorneys in the Phase One cases. Each attorney was asked to respond with regard to his or her experience in connection with the single Phase One case in which he or she served as counsel of record. The attorneys responding to the Attorney Survey Questionnaire were fairly evenly divided with regard to the role of their respective clients regarding discovery of ESI in their respective Phase One case, with thirty-three percent (33%) identifying themselves as representing a party primarily requesting ESI; thirty-five percent (35%) representing a party primarily producing ESI; twenty-five percent (25%) representing a party equally requesting and producing ESI, and seven percent (7%) representing a party neither requesting nor producing ESI. (App. E.2. at 19.)

The Phase One cases were at various stages in the litigation process when the Principles went into effect on October 1, 2009. Because some stages of the litigation had already occurred in some of the cases, some of the questions posed in the Attorney Survey Questionnaire were not applicable to all cases. By looking at the responses of those attorneys with cases in which the Phase One Principles did apply, a snapshot of information emerges from the attorneys’ responses. As with the Judge Survey Questionnaire, however, caution should be exercised in extrapolating the attorneys’ responses to a larger population.

### (2.) Summary of Results

The attorneys’ Survey responses are generally supportive of the Principles. Respondents frequently identified the most useful aspects of the Principles as the encouragement of early

focus on e-discovery issues, the focus on proportionality, and e-discovery liaisons. (App. E.2. at 50-53.) A representative respondent stated that the most useful aspect of the Principles is that it “forces the part[ies] to discuss e-discovery at the beginning of the case.” (*Id.*) Another respondent reported that “[m]erely focusing the parties’ and the Court’s attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.” (*Id.*) Given the brief length of Phase One of the Pilot Program and the various stages of litigation at which many of the cases were selected to participate many felt it was too early to draw conclusions, which is understandable. Of those respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on a wide range of ESI fronts, including levels of cooperation, ability to zealously represent clients, fairness, amicable resolution of issues, ability to get needed discovery, and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 35-40.) The Principles appear to be generally effective at improving discovery practices and promoting the just, speedy, and inexpensive resolution of cases.

The two hundred and eighty-five (285) attorneys who were electronically sent the Attorney Survey Questionnaire were asked to assess among other things how the application of the Principles affected or likely will affect specific aspects of litigation as to costs and duration in their respective Phase One case. Regarding discovery costs, a majority of the attorney respondents, fifty-seven percent (57%), reported that the Principles had a neutral effect. (*Id.* at 41.) The remaining attorney respondents were fairly evenly split between reporting a beneficial (decrease) effect (twenty-two percent (22%)) and a detrimental (increase) effect (twenty-one percent (21%)). (*Id.*) As to total litigation costs, a majority of attorney respondents, fifty-eight percent (58%), reported that the Principles had a neutral effect. (*Id.* at 42.) The remaining respondents were evenly split between reporting a beneficial (decrease) effect (twenty-one percent (21%)) and a detrimental (increase) effect (twenty-one percent (21%)). (*Id.*) Therefore, approximately eighty percent (80%) indicated the Principles had either a neutral or a beneficial effect on total litigation costs.

Regarding the length of discovery, over seventy-five percent (75%) of the attorney respondents reported that the Principles had a neutral effect on the length of the discovery period. (*Id.*) The remaining attorneys responding were split between reporting a beneficial (decrease) effect (ten percent (10%)) and a detrimental (increase) effect (fourteen percent (14%)). (*Id.*) Regarding the length of time to resolve their Phase One case, as with the length of the discovery period, over seventy-five (75%) of the attorney respondents reported that the Principles had a neutral effect on the length of the litigation. (*Id.* at 43.) The remaining respondents were split between reporting a beneficial (decrease) effect (ten percent (10%)) and a detrimental (increase) effect (fourteen percent (14%)). (*Id.*)

With regard to the number of discovery disputes, over sixty-three percent (63%) of the attorney respondents reported that the Principles had a neutral effect on the number of discovery disputes. (*Id.* at 44.) More respondents reported a beneficial (decrease) effect (twenty percent

(20%)) than a detrimental (increase) effect (fifteen percent (15%)). (*Id.*) Therefore, over eighty-five percent (85%) indicated either a neutral or a beneficial effect.

When asked how the Principles could be improved, a few attorneys called for more “teeth” or more “effective sanctions.” (*Id.* at 54.) Others, in stark contrast, called for making discovery “less adversarial” and to “diminish fear of immediate adverse resolution of case[s] because of discovery.” (*Id.*) The Principles do not rule out sanctions and, in fact, specifically warn of sanctions in places. Nevertheless, the Principles intentionally tend to focus more on constructive guidance that should help litigants avoid sanctions problems. Whether the Principles strike the appropriate balance in this regard will need to be further considered as the Pilot Program proceeds through Phase Two.

Several attorneys felt that the Principles would be detrimental and should not be applied to “simple cases” and “smaller cases.” (*Id.* at 56.) It is unclear why this perception arose. The Principles, by their terms, should not make ESI an issue in cases that do not involve ESI. It is only where ESI discovery is involved that the Principles seek to ensure that e-discovery is addressed early and appropriately, with proportionality being a primary consideration. Where ESI discovery is involved, the instinct some attorneys have to avoid addressing that discovery is precisely what the Principles seek to change. The Committee will continue to evaluate whether the Principles are appropriate for simple or smaller cases as the Pilot Program proceeds through Phase Two.

### (3.) Attorneys’ Comments and Opinions

Question 22 of the Attorney Survey Questionnaire asked: “**Which aspects of the Pilot Program Principles are the most useful?**” (*Id.* at 50.) Of the fifty-seven (57) attorneys who provided a response, thirty-nine (39) respondents (sixty-eight percent (68%)) commented on the substance of the Principles, and eighteen (18) respondents (thirty-two percent (32%)) did not comment on the substance of the Principles, but rather indicated why a comment could not be provided (no e-discovery in the case, too early to tell, etc.). (*Id.* at 53.) The specific comments were:

- “Address issues early; avoid spoliation; forces parties to focus e-discovery and preservation letters.”
- “Appointment of liaison.”
- “Assignment of costs for unnecessary/special processing of ESI to the requesting party.”
- “Before we received notification of the Pilot Program, the parties began extensive discussions regarding the cost and procedures for mirroring the individual defendants computers. Those discussions eventually resulted in an agreed protocol that was submitted to the court for an order, which the court entered. The mirroring of all 5 individual defendants’ occurred; and searches were begun on 4 individual defendants’ mirror images (but not of the image of my

client’s hard drive); however, the case settled before any review by defendants for privilege and before plaintiff received the results of the searches.”

- “Better understanding of not reasonably accessible ESI.”
- “Both program manual as well as standing order are excellent.”
- “Clear expectations are set out.”
- “Discussions re production, searches, spoliation.”
- “Don’t know much about it. This was a very limited case and e-discovery was not driven by the principles.”
- “E-discovery liaisons.”
- “Early involvement of the magistrate Judge assigned to handle discovery.”
- “Encouraging the parties to deal with E-discovery at an early stage.”
- “Endorsement of proportionality principles.”
- “Explicit discussion of the need to ensure proportionality -- in our cases, the burden of ESI discovery falls almost exclusively on the defendants and the Court needs to recognize that and take steps to actively restrict plaintiff discovery, which the Pilot Program encourages.”
- “Focusing lawyers on the correct issues and the likely judicial responses to those issues.”
- “Getting parties to focus on e-discovery early by highlighting issues in a case up front.”
- “I do not feel that the Pilot Principles changed the ESI issues in my cases(s). The designated person to address these issues was helpful.”
- “I think in the right kind of cases this makes sense, but not all.”
- “If e-Discovery is anticipated, the Principles must be disseminated immediately.”
- “In the case I am handling, e-discovery is not a major factor so the Pilot Program Principles have not been tested.”
- “Increase of transferable data by email.”
- “Insufficient experience with them to comment meaningfully.”

- “It forces the party to discuss e-discovery at the beginning of the case and will probably help to reduce discovery disputes later on in litigation.”
- “It really is not applicable to this case.”
- “It simple message that counsel should make every effort to agree to the process; and consequent fear that if counsel is not cooperative, he might be disciplined by a magistrate.”
- “It streamlined the process.”
- “Mandatory cooperation amongst counsel.”
- “Merely focusing the parties’ and the Courts’ attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.”
- “N/A”
- “N/A in this case. Could certainly use it in other cases.”
- “No comment.”
- “No comment at this time.”
- “No comment, the case settled before any meaningful e-discovery issues were addressed.”
- “Not applicable. The case that was initiated was dismissed on motion.”
- “Our case ended up having no e-discovery issues.”
- “Principle 2.01(a)(1)-(2).”
- “Production format.”
- “Promoting cooperation and understanding before disputes arise and when egos have flared.”
- “Prompting discussion amongst the parties at an early stage about e-discovery.”
- “So far, I like them all.”
- “The detailed clarification of the obligations of the parties is helpful.”
- “The focus on proportionality actually caused the parties in my case to determine that e discovery would not be necessary except on limited issues as the expense of

retrieving emails would not likely be justified by the information they would contain. Obviously not a typical case.”

- “The initial discussions between and among counsel are the most useful.”
- “The Pilot Program gives litigants some much needed direction and standards in what previously was uncharted territory. Hopefully other districts will follow the 7th Circuit’s lead.”
- “The pilot program is only useful in that it can be used to identify only the needed ESI, and can be used to weed out e-discovery gibberish and empty files. Thus, for cases that anticipate large amounts of ESI, it is useful.”
- “The program principles have not had any material effect since most of the discovery in this litigation has not been ESI.”
- “The proportionality standards.”
- “The repeated encouragement of the parties to work together without the court’s involvement.”
- “The willingness of the Magistrate Judge to really take on the issue and focus the parties.”
- “Their mere existence provides a welcome framework that helps structure e-discovery dialogue between counsel.”
- “Unable to determine at this time.”
- “Unknown at this time.”
- “We are very early in the process, so how the Principles bear out in the case remain to be seen.”
- “We became part of the Pilot Program after much of the early planning was done, after the original data collection was done, and after the parties had negotiated custodians and some preliminary keyword searches. Thus it did not have as much of an effect as it might otherwise have had.”
- “We better focused the hard drives we wanted to search for deleted information as a result of the Principles.”
- “While my pilot case does not really require intensive ESI discovery, my general experience in business litigation makes me a great supporter of these sorts of efforts.”
- “Your survey form did not allow me to select the correct stage of proceeding for when case became part of program. The answer to both was “discovery” but

survey did not allow this. The opposing counsel, who represent a large corporation, have generally refused to follow any established e-discovery procedures. Because of the nature of the disputes, we have not been able to resolve them comprehensively.”

(*Id.* at 50-53.)

Question 23 of the Attorney Survey Questionnaire asked: “**How could the Pilot Program Principles be improved?**” (*Id.* at 54.) Of the forty-eight (48) attorneys who responded, thirty-two (32) respondents (sixty-seven percent (67%)) provided feedback on the Principles, and sixteen (16) respondents (thirty-three percent (33%)) did not provide feedback on the Principles. (*Id.* at 58.) The specific comments were:

- “A party must be allowed to get very detailed meta-data in appropriate cases.”
- “Availability of a special master type of advisor for developing keywords for ESI searches.”
- “Continue to educate the Judges and the Bar about creative ways to make ESI discovery fair to both sides and reduce costs.”
- “Discovery in my case has been stayed pending ruling on a motion. I will better be able to answer this question when discovery starts back up.”
- “Don’t force the Program on all cases; this case, for example, is not an ideal case for the application of the Principles.”
- “Effective sanctions for non-compliance.”
- “Figuring out a way to put some additional teeth into noncompliance would improve the Principles. The biggest challenge that we have had in conducting e-discovery in our case has been the other side’s lack of cooperation in collecting and appropriately producing ESI.”
- “Find some way to make discovery less adversarial, diminish fear of immediate adverse resolution of case because of discovery.”
- “Giving specific examples of how to come up with specific word searches.”
- “Greater enforcement penalties.”
- “I did not even know it existed.”
- “In the case I am handling, e-discovery is not a major factor so the Pilot Program Principles have not been tested to determine how it could be improved.”
- “Include a presumption that costs will be shared.”



- “Insufficient experience with them to comment meaningfully.”
- “It is too early in my litigation to provide meaningful feedback on this issue right now.”
- “It would be helpful to have the Court take a more active role early on in developing an e-discovery protocol rather than having the parties try and do it, with set dates by which e-discovery is completed.”
- “It would be unfair to comment without more experience because the perceived shortcomings that I see in the rules may be overcome by the way they are applied and the willingness of the court to make parties (particularly when they are disproportionately impacted by the burdens of e-discovery) limit the scope of requests depending on the gravity of the issues involved.”
- “It’s probably too costly, but I believe that it would be helpful to require counsel to sit down together with a mediator - before they serve their discovery requests - in order to verbally justify each and every request with respect to scope and with respect to how or if each request will produce information related to the claims. We play too many discovery games. We need to be forced to make the discovery process ‘lean and mean’ so that it will become reasonable and cost efficient.”
- “Make it a Local Rule as soon as possible. This would greatly help in other cases. It just was not as applicable in this case.”
- “More active court management of discovery and imposition of limits; discovery is a privilege, not an entitlement.”
- “More cost shifting in whole or in part. Still too easy for a party to ask for mountains of information that costs the other side too much. 50/50 splits would curtail abuse more and cause parties to work together better and get to the real information quicker and more efficiently.”
- “More educational programs without intensive and boring readings.”
- “N/A”
- “Need to address a deadline/methodology for outstanding search term and other challenges to be brought to the court’s attention.”
- “No comment.”
- “No comment, the case settled before any meaningful e-discovery issues were addressed.”
- “No e-discovery complications in our case to date, so we haven’t had to apply them beyond the parties’ Rule 26(f) conference.”

- “No recommendations.”
- “No suggestions so far. It is a good follow on to the Sedona principles.”
- “No suggestions, at this point in time.”
- “Not applicable as the case was dismissed on motion.”
- “Our case ended up having no e-discovery issues.”
- “Provide clear guidance on principles at outset of case, as a model if not selected for the Pilot Program.”
- “Provide sample discovery requests and a sample protocol for the production of ESI.”
- “Putting penalties on a party that uses it, technically, to stall and try to thwart release of documents in custody and control that are vital to the opponent’s case.”
- “Refine standing order to reflect current technology trends.”
- “Selective application to complex cases only. Simple cases do not need to be made more complicated.”
- “Since the discovery in this case is not ESI the Program Principles have not been involved to any large extent and therefore it is hard to assess how they can be improved based on this case.”
- “Smaller cases and clients will suffer dramatically from this program. In two cases that I have had, we sought very specific metadata that proved to be lynchpins in the litigation. None of this data was sought from the beginning because its existence was unknown, and, had it been known, we did not have enough information at the outset of the litigation to justify any order to protect the information. Thus, the biggest problem I have with the pilot program is that is almost impossible to determine the scope of e-discovery at the rule 16 conference because the parties are basically being asked to determine what, if any ESI will be RELEVANT, in terms of rule 34, not what is discoverable under rule 26. Further, another problem that I would anticipate from making e-discovery determinations at the beginning of litigation a required component of a rule 16 conference is that it will give some counsel the idea that he/she needs the electronic information when he/she does not. There are many municipalities that will suffer greatly in this regard. Either way, the program as a whole is not well suited for cases other than those involving corporate giants.”
- “The pilot program principles are not applicable in all cases, especially less complex cases where none of the parties intend on engaging in e-discovery. The program should be targeted to cases in which e-discovery is likely to take place.”

- “The Pilot Program Principles could be improved in several ways, as suggested below: 1. Only one good faith effort to confer required per discovery dispute; 2. The court must expeditiously rule on any dispute brought to its attention after efforts to confer have failed. The Principles must take into consideration that there are times when one party refuses to answer discovery, efforts to cooperate become fruitless, and a ruling is needed from the court. The Principles emphasize that zealous advocacy and cooperation between parties are not mutually exclusive, which is an excellent point. The problem remains, however, that many judges now equate a failure to resolve issues with recalcitrance and unprofessionalism, and just as zealous advocacy and cooperation are not mutually exclusive, so a failure to resolve issues without the court’s assistance is not always tantamount to a lack of professionalism. Sometimes, like it or not, judges have to decide discovery disputes; sometimes parties have genuine disagreements; and often, despite the best efforts of counsel, parties will see it as in their interest to stonewall and avoid discovery obligations, especially where that stonewalling has no meaningful consequence. When judges abdicate their role in deciding discovery disputes as many of them now do - as, for example, by always assuming that calling on the court’s resources and assistance means that both parties have failed to work cooperatively - they give inordinate power to a party who wants to resist discovery, and at the same time they demean the integrity of the entire discovery process. The Principles should not be used as an excuse to abdicate judicial supervision of discovery. For this reason, we suggest that only one good faith effort to confer be required per discovery dispute and that the court must expeditiously rule on any dispute brought to its attention after efforts to confer have failed. The court must take into consideration which party has control of most of the proof in determining what electronic discovery to allow and must be particularly careful when ruling in a type of case in which many summary judgment motions are granted, such as employment discrimination cases. There is another problem with the Principles, and with discovery in the Seventh Circuit in general. A large part of the reason that discovery has become so expensive and time-consuming is that the courts, particularly in employment disputes, now routinely grant summary judgment to defendants - especially in employment cases - unless the plaintiff has a fully developed record with which to meet a summary judgment motion. This practice, and Local Rule 56 and its requirements, effectively requires that plaintiffs try their case twice - once on paper at the summary judgment stage to get to the jury, and again to the jury. Judges should not be surprised that, especially in cases where evidence is often circumstantial, plaintiffs and their lawyers are taking care to be very thorough in discovery, and judges must be particularly careful about denying electronic discovery to plaintiffs in such cases.”
- “The principles must be discussed at the first status conference if not raised by the parties during their Rule 26(f) report.”
- “There is a lot of emphasis on cooperation, but not as much on proportionality, and proportionality is the very difficult issue. We ended up with over 4000 keywords over my client’s repeated objections, but a judge has very little to rely on in attempting to pare down such mammoth requests.”

- “Unable to determine at this time.”
- “Unknown at this time.”
- “Wider dissemination.”
- “With the scope of discovery so broad, but the cost of e-discovery so burdensome, the Principals should do more to ensure that the requesting party bears a fair portion of the cost of what they are seeking.”

*(Id.* at 54-58.)

## 10. ASSESSMENT OF EACH PHASE ONE PRINCIPLE

Section 9 of this Report summarizes the results of Phase One in a global “snapshot.” This Section, in contrast, matches the Phase One Survey results with particular Principles being tested. As explained in Section 9, caution should be exercised in extrapolating the results of the Survey to a larger population of attorneys or judges. Because of the limited duration of Phase One, the participating cases were captured at various states of litigation. Consequently, many attorneys and judges felt it was too early to draw conclusions. Indeed, a majority of the responding attorneys reported that the Principles had a neutral effect on discovery costs, length of discovery, and the number of discovery disputes. (App. E.2. at 41-44.) However, as explained in detail below, the attorneys who did report an impact on their cases generally felt that the Principles were having a positive effect on a wide range of ESI discovery issues.

### A. Principle 1.01 (Purpose)

*The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.*

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

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

The Committee also felt it important to observe that many disputes regarding ESI, and spoliation in particular, are caused or exacerbated by parties’ reluctance to discuss potentially controversial issues at the outset. The Committee felt that early discussion was more likely to lead to amicable resolution of most issues and, where amicable resolution is not possible, to fewer complex and contentious issues being presented to the courts. Often parties or counsel hope the issue will be mooted by the passage of time. Perhaps the discovery issues will be avoided by a successful motion to dismiss or settlement or will simply never percolate to the surface. However, it is the nature of ESI that the passage of time tends to make issues more difficult to resolve. If issues regarding preservation are not promptly addressed with the opposing party and any remaining disputes presented to the court, then it is often the case that the

disputed ESI will be lost. As a result, the delayed identification of these disputes is more likely to require court intervention and often quickly escalates into a spoliation issue. Similarly, issues concerning whether to search and produce certain sources of ESI also tend not to improve with age. Indeed, many ESI sanctions cases have involved preserved, but belatedly identified, sources of ESI. Accordingly, a key purpose of the Principles, stated expressly in Principle 1.01, is to encourage the early discussion and resolution of disputes concerning discovery of ESI.

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

## (2.) Survey Results on Principle 1.01

The Survey responses do not suggest any controversy over the aspirational statements set forth in Principle 1.01. The Survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and the focus on proportionality. A representative respondent stated that the most useful aspect of the Principles is that it “forces the part[ies] to discuss e-discovery at the beginning of the case.” (App. E.2. at 51.) Another respondent reported that “[m]erely focusing the parties’ and the Court’s attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.” (*Id.*) Given the brief length of Phase One of the Pilot Program and the various stages of litigation at which many of the cases were selected to participate many felt it was too early to draw conclusions, which is understandable. Of those attorney respondents who felt there was or likely would be an impact on their cases, the vast majority thought the Principles were having a positive effect on a wide range of ESI fronts, including levels of cooperation, ability to zealously represent clients, fairness, amicable resolution of issues, ability to get needed discovery, and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 35-40.) The goals stated in Principle 1.01 appear to be well received.

While the Committee hoped the Principles ultimately would lead to better cooperation and less discovery motion practice, the Committee suspected that the Principles initially might increase the number of disputes by forcing parties to more proactively confront potentially contentious issues. Most attorney respondents, over seventy percent (70%), felt that the Principles had no effect on the incidence of allegations of spoliation and other sanctionable conduct. (*Id.* at 39.) However, of those attorneys who thought the Principles were having an effect, more felt that the Principles increased (or were likely to increase) such allegations than felt the Principles decreased (or were likely to decrease) such allegations. (*Id.*) The judges overwhelmingly (eighty-five percent (85%)) felt that the Principles were reducing discovery disputes brought before the court. (App. E.1. at 16.) Whether the Principles ultimately will reduce the incidence of discovery disputes, in particular sanctions disputes, after Phase One remains to be determined. Also, any reduction in the number of disputes coming before the

courts will only be a positive change if the parties are cooperating and constructively resolving discovery issues, and not if the reduction occurs because the parties are being discouraged from seeking relief when needed.

(3.) Committee’s Recommendation as to Principle 1.01

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

**B. Principle 1.02 (Cooperation)**

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

(1.) Committee’s Reasoning for Principle 1.02

The Committee believes that the culture of our adversarial system tends to result in overly combative discovery that is often counterproductive to the stated purpose of the Federal Rules of Civil Procedure: securing the “just, speedy, and inexpensive” determination of cases. Fed. R. Civ. P. 1. Principle 1.02 echoes The Sedona Conference® Cooperation Proclamation,<sup>5</sup> a proclamation adopted by numerous judges that calls for intelligent cooperation among counsel on discovery. Lawyers are advocates and take justifiable pride in zealously representing their clients. But “[a]s officers of the court, attorneys share this responsibility [to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay] with the judge to whom the case is assigned.” Fed. R. Civ. P. 1, Advisory Committee Notes. Lawyers are officers of the court and should not use discovery as a weapon in ways that undermine resolving cases timely, efficiently, and on their merits.

(2.) Survey Results on Principle 1.02

The survey responses do not suggest any controversy over Principle 1.02’s call for cooperation. In fact, many survey responses identified the call for cooperation as the most useful aspect of the Principles. In one attorney’s assessment, the Principles are useful in “[p]romoting cooperation and understanding before disputes arise and when egos have flared.” (App. E.2. at 51.) Of those respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level

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<sup>5</sup> [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation/proclamation.pdf](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf).

of cooperation between counsel and on the attorney’s ability to zealously represent his or her client. (*Id.* at 35-36.) The judge respondents agreed on both points. (App. E.1. at 11, 17.) This tends to confirm that there is not a conflict between these two concepts.

(3.) Committee’s Recommendation as to Principle 1.02

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

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

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

(1.) Committee’s Reasoning for Principle 1.03

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

(2.) Survey Results on Principle 1.03

Attorney respondents frequently identified the focus on proportionality as the most useful aspect of the Principles. One attorney praised the Principles’ “[e]xplicit discussion of the need to ensure proportionality,” while another noted “[t]he focus on proportionality actually caused the parties in my case to determine that e[-]discovery would not be necessary except on limited issues.” (App. E.2. at 50, 52.) Of those respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the ability to zealously represent clients, fairness, the ability to get needed discovery, and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 36-40.) This suggests that the call for a significant focus on proportionality of discovery is welcome and generally is not seen as impeding the just determination of cases.



(3.) Committee’s Recommendation as to Principle 1.03

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

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

(a) *Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are: (1) the identification of relevant and discoverable ESI; (2) the scope of discoverable ESI to be preserved by the parties; (3) the formats for preservation and production of ESI; (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.*

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

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

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

(1.) Committee’s Reasoning for Principle 2.01

The Federal Rules of Civil Procedure already require parties to meet and confer at the outset of cases, and throughout the progress of cases, on discovery matters. Principle 2.01(a) reinforces these requirements and sets the stage for subsequent Principles which elaborate on the topics of discussion for which, in some cases, the Rules provide little in the way of specifics. The “identification” of relevant and discoverable ESI is addressed in more detail in Principle 2.05. The “scope of discoverable ESI to be preserved” is addressed in more detail in Principle 2.04. The “format[] for preservation and production of ESI” is addressed in more detail in Principle 2.06. Principle 2.01(a) also reinforces the requirement in the Rules to consider the potential for conducting discovery in phases or stages, with an emphasis on using this procedure as a method for “reducing costs and burden.” Finally, Principle 2.01(a) draws attention to Rule

502 of the Federal Rules of Evidence and encourages parties to consider whether they can reduce costs by taking advantage of a Rule 502(d) order providing for non-waiver of privilege despite even intentional disclosure.

Principle 2.01(b)'s requirement that parties "shall" promptly raise disputes that have been, or should have been, identified in the meet and confer process adds teeth to Principle 1.01's stated goal of encouraging "the early resolution of disputes regarding the discovery of ESI." Both parties to a case too often perceive an advantage in putting off difficult issues concerning preservation and discovery of documents and ESI. This attitude undermines the Principles' goals of encouraging the early identification and resolution of disputes and changing the adversarial culture of discovery. Principle 2.01(b) therefore seeks to incentivize parties to discuss and raise such issues promptly. The risk of ignoring the mandate is that the presiding judge may refuse to hear an issue that should have been raised earlier. This potential for waiver incentivizes parties to make their opponents aware of thorny issues as soon as possible so that, if the opponents do not raise the issue with the court promptly, they can invoke Principle 2.01(b) in their waiver argument. By the same token, Principle 2.01(b) discourages lying in wait concerning a perceived shortfall of one's opponent.

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

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

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

## (2.) Survey Results on Principle 2.01

The Survey responses do not suggest any controversy over the purpose of Principle 2.01. Indeed, the Survey responses frequently identified the most useful aspects of the Principles as the

encouragement of an early focus on e-discovery issues, and one attorney specifically named Principle 2.01(a) as the most useful aspect of the Principles. (App. E.2. at 51.) A representative respondent stated that the most useful aspect of the Principles is “[g]etting parties to focus on e-discovery early by highlighting issues in a case up front.” (*Id.*) Another respondent reported that “[m]erely focusing the parties’ and the court’s attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.” (*Id.*) More generally, one respondent praised “[t]he detailed clarification of the obligations of the parties.” (*Id.* at 52.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the amicable resolution of issues and the ability to get information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 37, 40.) More than nine out of ten judge respondents indicated that the Principles had a positive effect on counsels’ demonstrated level of attention to the technologies affecting the discovery process and counsels’ familiarity with their own clients’ electronic data and data systems. (App. E.1. at 18-19.) A solid majority of judge respondents also indicated that the Principles had a positive effect on the judges’ understanding of the parties’ electronic data and data systems for the appropriate resolution of disputes. (*Id.* at 20.) Principle 2.01 appears to be having a positive effect. However, there appears to be room for improvement in compliance.

While most attorneys are following the guidance of Principle 2.01(a) and (c), a significant minority still is not. Where applicable, a majority of attorney respondents reported that they familiarized themselves with their clients’ information systems and had early discussions with their opponents about ESI preservation issues and methods for identifying relevant ESI. (App. E.2. at 22-23.) The judges also reported that these things appeared to be occurring. (App. E.1. at 18-20.) Curiously, though, a substantial minority of attorneys reported that they did not do these things despite acknowledging that the issues were applicable to their case. (App. E.2. at 22-23.)

The requirement of Principle 2.01(b) that disputes be raised with the court promptly does not appear to be followed regularly. To the extent there were unresolved issues at the time of the initial status, only twenty-five percent (25%) of respondents reported that they were raised at the initial status. (App. E.2. at 24-25.) To the extent that issues arose after the initial status hearing, only fifty-six percent (56%) reported that the issues were raised promptly thereafter. (*Id.*) A majority of judge respondents indicated that the Principles had a positive effect on the promptness with which the parties raised unresolved discovery disputes with the court and the parties’ ability to obtain relevant documents. (App. E.1. at 13-14.) According to the attorneys, however, there remains room for more improvement.

### (3.) Committee’s Recommendation as to Principle 2.01

Principle 2.01 seems to be on the right track encouraging an early focus on issues concerning preservation and discovery of ESI, where applicable. However, Principle 2.01 may be only partially effective in achieving its aims. The Committee might consider strengthening Principle 2.01 in Phase Two of the Pilot Program.

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

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

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

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

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

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

should be reasonably prepared on the matters at hand and be prepared to contact the relevant subject-matter experts as necessary.

(2.) Survey Results on Principle 2.02

Almost ninety percent (90%) of attorney respondents who had a discovery liaison, and all of the judge respondents, felt that liaisons made for a more efficient discovery process. (App. E.2. at 47; App. E.1. at 21.) About seventy-five percent (75%) of the attorneys felt the same way about their opponent’s liaison. (App. E.2. at 48.) Discovery liaisons included technical employees (twenty-eight percent (28%)), inside counsel (twenty percent (20%)), outside counsel (fifteen percent (15%)), and consultants (ten percent (10%)). (*Id.* at 45.) Not surprisingly, this Principle was mentioned positively in many of the written comments to the question regarding which aspects of the Principles were most useful. As one judge wrote, “[d]esignating liaison is the single best idea — it helps focus the discovery requests.” (App. E.1. at 24.)

(3.) Committee’s Recommendation as to Principle 2.02

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

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

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

(b) *To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to: (1) names of the parties; (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action; (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence; (4) relevant time period; and (5) other information that may assist the responding party in assessing what information to preserve.*

(c) *If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that: (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter; (2)*

*identifies any disagreement(s) with the request to preserve; and (3) identifies any further preservation issues that were not raised.*

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

(1.) Committee’s Reasoning for Principle 2.03

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

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

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

Whereas Principle 2.03(a) seeks to identify and discourage unhelpful practices, Principle 2.03(b) is intended to identify potentially productive uses of preservation demands. The duty to preserve evidence is triggered by knowledge of actual or reasonably anticipated litigation. One productive use of a preservation demand is to make one’s opponent aware that future litigation is likely. Receipt of a letter threatening suit or demanding preservation of evidence can be a factor in determining whether a pre-litigation duty to preserve evidence has been triggered.

Another productive use of a preservation demand is to provide information that helps one’s opponent identify the scope of evidence that is likely to be relevant and discoverable in the case. Principle 2.03(b) identifies a number of examples of the sort of specific and actionable

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

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

Principle 2.03(d) makes very clear that the Principles do not require that a party send a preservation demand or respond to one. The Committee clarified this point out of concern that the guidance on how to effectively utilize preservation demands and responses might lead some readers to believe that such letters and responses were required or encouraged. Quite the contrary, the Committee believes that preservation demand letters are usually unnecessary and only rarely can be constructive. Similarly, there is little purpose in responding to preservation demand letters, at least where they are of the generic, laundry list variety.

## (2.) Survey Results on Principle 2.03

In only seven percent (7%) of the cases did the respondents report some effect on preservation letters. (App. E.2. at 49.) Given the short time period of Phase One implementation and Survey evaluation, as well as the stage at which many cases entered the Pilot Program, this is not surprising. Of those attorneys who did report an effect, all indicated that the Principles resulted in more targeted letters.

(3.) Committee’s Recommendation as to Principle 2.03

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

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

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

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

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

(d) *The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable: (1) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives; (2) random access memory (RAM) or other ephemeral data; (3) on-line access data such as temporary internet files, history, cache, cookies, etc.; (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.*



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

(1.) Committee’s Reasoning for Principle 2.04

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

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

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

Principle 2.04(c) echoes Federal Rule of Civil Procedure 26 in instructing litigants to come to the meet and confer sessions prepared to address reasonably foreseeable evidence preservation issues. Failing to identify such issues as they relate to one’s adversary may result in

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

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

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

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

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

The fifth category is backup data that is “substantially duplicative of data that is more accessible elsewhere.” Here the Committee had in mind backup tapes that contain snapshots of active systems a short period of time before the litigant implemented a reasonable and proportionate legal hold to preserve data on the active systems, as well as backups that will subsequently take snapshots of those active systems as the case proceeds. Absent unusual circumstances, such as a recent crash or purge of the active systems, the ESI contained on such

backup tapes is unlikely to contain substantially more relevant and discoverable ESI than is available from the more readily searchable, active computer systems. Retaining substantially duplicative backup tapes adds costs. But even more importantly, forcing a party to retain backup tapes unnecessarily leads to those tapes aging to a point where they can contain data that is substantially different from the data available on the active system which can make these tapes difficult or impossible to ever recycle. This defeats a company’s legitimate records management program and potentially drives up the costs of unrelated, future litigation.

The sixth category is a catchall: “other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.” The Committee has in mind specific examples that fall within this category but, in light of the rapidly evolving technology sector, decided to state the concept in general terms so as to avoid technical obsolescence over time. The specific examples the Committee has in mind are email “journaling” and IM “logging.” These are processes that capture all email and IM as they are sent or received on a company’s computer systems. These processes are rarely used outside of financial services firms, which are subject to specific regulatory retention requirements with respect to their communications. The Committee believes that companies ordinarily should not be expected to adopt such technology solely for litigation purposes.

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

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

## (2.) Survey Results on Principle 2.04

The survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and on the “detailed clarification” they provide. (App. E.2. at 52.) One attorney respondent, for example, found that the Principles “[e]ncourag[ed] the parties to deal with E-discovery at an early stage.” (*Id.* at 50.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level of cooperation between counsel and on the counsels’ ability to get needed discovery and information about their opponents’ efforts to preserve and collect ESI. (*Id.* at 35, 40.) A majority of judge respondents indicated that the Principles reduced the number of requests for

formal discovery into another party’s ESI preservation and collection efforts. (App. E.1. at 16-17.) Principle 2.04 appears to be promoting some of its goals so far but further testing is needed.

(3.) Committee’s Recommendation as to Principle 2.04

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

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

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

(b) *Topics for discussion may include, but are not limited to, any plans to: (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians; (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.*

(1.) Committee’s Reasoning for Principle 2.05

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

(2.) Survey Results on Principle 2.05

Where applicable, over two-thirds of attorney respondents reported discussing methods for identifying ESI around the time of the Rule 26(f) conference. (App. E.2. at 23-24.) There were several attorney respondents who called for more guidance on the development of search terms. One responding attorney, for example, suggested “a special master type of advisor for developing keywords for ESI searches.” (*Id.* at 54.)

(3.) Committee’s Recommendation as to Principle 2.05

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

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

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

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

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

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

(1.) Committee’s Reasoning for Principle 2.06

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

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

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

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

## (2.) Survey Results on Principle 2.06

It is not clear yet how effective Principle 2.06 is in encouraging early discussion of the format for producing ESI. Only about half of the attorney respondents indicated that the parties discussed production format before commencing discovery. (App. E.2. at 27.) It is also unclear so far what effect the cost allocation aspects of Principle 2.06 are having.

(3.) Committee’s Recommendation as to Principle 2.06

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

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

*Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance: (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure; (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf); and (3) Familiarize themselves with these Principles.*

(1.) Committee’s Reasoning for Principle 3.01

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

(2.) Survey Results on Principle 3.01

The survey responses do not provide data on Principle 3.01.

(3.) Committee’s Recommendation as to Principle 3.01

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

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

*Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating*

*to electronic discovery<sup>6</sup>, additional materials available on web sites of the courts<sup>7</sup>, and of other organizations<sup>8</sup> providing educational information regarding the discovery of ESI.<sup>9</sup>*

(1.) Committee’s Reasoning for Principle 3.02

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

(2.) Survey Results on Principle 3.02

The survey responses do not provide data on Principle 3.02.

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

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

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<sup>6</sup> [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)

<sup>7</sup> E.g. <http://www.ilnd.uscourts.gov/home/>

<sup>8</sup> E.g. <http://www.7thcircuitbar.org>, [www.fjc.gov](http://www.fjc.gov) (under Educational Programs and Materials)

<sup>9</sup> E.g. <http://www.du.edu/legalinstitute>



## **11. PHASE TWO (JULY 1, 2010 – MAY 1, 2011)**

As summarized in the Executive Summary at the outset of this Report:

During Phase Two, the Committee hopes to expand the geographic reach of the Pilot Program and increase the number of cases and participating judges. The Committee also intends to lengthen the implementation period for Phase Two so the Principles will be tested more comprehensively than in Phase One. The Committee may also modify certain of the Principles based on the Phase One feedback. Additionally, the Committee may establish more subcommittees to address other, identified areas related to the discovery of ESI as the Pilot Program continues.

Among possible changes the Committee will be considering for Phase Two are promulgating a proposed protocol guiding the production of ESI that will include uniform definitions as a standard starting point, which individual counsel may modify to fit the unique intricacies of each Phase Two case of the Pilot Program. The proposed protocol will include production format, more specific metadata preservation and production procedures, identification of search criteria formats, de-duplicating procedures, production of redacted documents, TIFF Processing Specifications, “Bates” numbering procedures, and specific “clawback” procedures for inadvertent disclosures.

Additionally, the Committee may consider a modified standard Form 52 of the Federal Rules of Civil Procedure that would better address all pretrial procedures, including ESI discovery procedures, for counsel to use in their Fed. R. Civ. P. 26(f) conference at the initial Fed. R. Civ. P. 16 scheduling conference with the court prior to commencement of discovery.

The Committee remains open to suggestions, which may be posted on the Committee’s blog. The blog can be accessed through the “Forum” button on the left-hand side of the Seventh Circuit Bar Association’s home page ([www.7thcircuitbar.org](http://www.7thcircuitbar.org)). General information about the Pilot Program can be found at the “E-Discovery Program” page on the bar association’s website. You may also e-mail the Committee at [E-Discovery.answers@7thcircuitbar.org](mailto:E-Discovery.answers@7thcircuitbar.org).