The State of Preservation Today
Today’s Panelists

Michael Arkfeld  
Director of the Arkfeld eDiscovery and Digital Evidence Program, Sandra Day O’Connor College of Law

Hon. Xavier Rodriguez  
U.S. District Judge, Western District of Texas

Ariana Tadler  
Partner, Milberg LLP

Robert Owen  
Partner, Sutherland Asbill & Brennan LLP
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» A look back… where have we been
» A look forward… the Federal Rules
Amendments to the FRCP

» May 2010: Duke Conference E-Discovery Panel
» October 2012: Mini-Conference on Preservation
» Nov ‘13 – Feb ’14: Public Hearings
» May 2014: Approval by Standing Committee
» April 2015: Approval by U.S. Supreme Court
» December 2015: Implementation
Rule 1. Scope and Purpose

These rules... should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.
Rule 26 & Proportionality

Rule 26 (b) (1) Scope in General.

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
Rule 37 & Sanctions

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

(2) Only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation,

   (A) presume that the lost information was unfavorable to the party;
   (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
   (C) dismiss the action or enter a default judgment.
“We hold that the trial court abused its discretion in submitting a spoliation instruction because there is no evidence that Brookshire Brothers intentionally concealed or destroyed the video in question or that Aldridge was deprived of any meaningful ability to present his claim to the jury at trial.”
Questions?