

JULY 19, 2012

Rich J Law & Tech – Contractual Provisions Article

Companies have long sought to establish predictability and control of litigation through the use of contractual terms. Common examples are establishment of venue and choice of law or the use of alternative dispute resolution methods. In the modern world, where discovery of electronic information has created a new layer of cost and risk of sanction, companies are beginning to take a look at how they can control these risks through the use of contract terms.

A recent article, authored by Jonathan Redgrave and Jay Brudz, in the Richmond Journal of Law & Technology [\[click here to view article\]](#) describes and discusses potential terms that can be written into commercial contracts to help companies bring greater predictability to discovery in some matters. Among the terms discussed, including the benefits and challenges of each, are:

- Establishing a hard preservation trigger, such as a specific notice or request
- Limiting the amount of discovery permitted, including limitations on preservation
- Creating a framework for making decisions on what gets preserved and produced
- Cost allocation procedures for ordinary and extraordinary discovery sought
- Limitations on sanctions for purported discovery failures

The article goes on to discuss the legal authority for supporting such provisions as well as the potential challenges that may be raised against the provisions. The article concludes with sample contract terms that could be used as a framework and starting point for parties.

Federal and state rules of civil procedure are evolving, but they cannot evolve as swiftly as our technology. One vehicle that may offer at least partial relief to the unpredictable nature of discovery is to leverage the contracting process to place the parties on a footing of mutual understanding in advance of a dispute.

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