Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425 USA
tel +1 202.293.4103
fax +1 202.293.4701
www.acc.com

Public Comment of the Association of Corporate Counsel To The Advisory Committee On Civil Rules Concerning the Proposed Amendments To The Federal Rules Of Civil Procedure

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The Association of Corporate Counsel and its Litigation Committee ("ACC") strongly commend the Advisory Committee on Civil Rules (the "Committee") for its efforts to reform the practice of civil discovery in our federal courts. The Committee's proposed amendments to the Federal Rules of Civil Procedure make significant progress toward reducing the exorbitant cost, undue delay, and unseemly gamesmanship associated with federal court litigation today. With a few important improvements, we recommend the formal adoption of the Committee's proposed amendments.

STATEMENT OF INTEREST AND INTRODUCTION

The Association of Corporate Counsel is a global bar association of over 33,000 in-house lawyers employed by more than 10,000 organizations in over 75 countries around the world. ACC's Litigation Committee is composed of in-house counsel who devote a substantial portion of their docket on litigation and other forms of dispute resolution. For more than 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel. In short, ACC serves as the voice of the in-house bar. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations. The majority of ACC members work for corporations that have fewer than 5,000 employees.

ACC's members have a bird's eye view of the costs and burdens of federal discovery that have crippled litigants in the past few decades. Although the broad scope of discovery has also affected individual litigants, it has had a disparate impact on corporations – particularly multi-state and global companies – which are the most frequent victims of far-reaching

discovery requests. As representatives of entities that are just as likely to be a plaintiff as a defendant, ACC's members are uniquely qualified to comment on the desperate need to overhaul the American discovery process. Our members recognize that litigation is an important, necessary and effective tool of dispute resolution with significant benefits for the economy and the society at large. We merely believe that the costs of the current system have swallowed most of its benefits.

These increased costs are not without adverse consequences. In an era of "doing more with less," in-house law departments are being compelled by the extreme costs of unnecessary discovery to make difficult tradeoffs. For instance, instead of devoting additional resources to compliance and reporting systems that will enhance fidelity to the law, in-house lawyers must redirect limited funds to litigation holds that will preserve documents with no material effect on the underlying disputes. Difficult decisions about resource allocation are to be expected in any profession or enterprise, but ACC strongly believes that these tradeoffs are simply unwarranted. By reducing the costs of unnecessary discovery, the proposed amendments will help in-house counsel use their limited resources to proactively ensure that their corporate clients comply with the law.

That there are severe costs caused by unnecessary discovery, especially in light of the explosion in use of electronically stored information ("ESI"), is simply not debatable. As numerous comments already submitted regarding the Committee's proposed amendments reflect, innovations in technology and issues associated with the preservation, collection, processing and production of ESI have caused the existing rules to become inappropriate. The costs and burdens from scorched-earth discovery requests, the resulting over-preservation of information caused by the fear of sanctions for inadvertent losses, and ancillary litigation regarding both the scope of discovery and alleged failures to preserve and produce, plague every complex litigation.

To avoid these costs, in-house counsel are routinely compelled to settle cases without regard to their merit. Indeed, creating leverage in the settlement context is not only the result but all too often the strategic goal of parties' free-wheeling discovery requests. Compounding the high absolute costs of discovery is the inability of counsel to predict those costs. Given the need of corporations and other entities for accurate planning and budgeting,

in-house counsel often have no choice but to settle cases for an excessive amount merely to avoid future uncertainty.

The evidence demonstrating the deleterious effects of the current discovery system is marshaled in numerous other comments and need not be repeated here. We note, however that a survey of ACC members administered by the Institute for the Advancement of the American Legal System found that 97 percent of chief legal officers or general counsels believed that litigation is too expensive and over 70 percent believed that parties "overuse permitted discovery procedures" by going beyond what is necessary.[1] In addition, the survey found that 90 percent of chief legal officers or general counsels disagreed with the statement that "litigation costs are generally proportionate to the value of the case" and that 80 percent disagreed with the statement that "outcomes are driven more by the merits of the case than by litigation costs."[2]

The costs and burdens of American discovery are especially grating to foreign in-house counsel whose local legal systems are much less costly and more efficient. *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011) (explaining U.S. rules on discovery are broader than almost any foreign rules on discovery). Something is rotten in Denmark when businesses based outside the U.S. are forced to devote significant portions of their legal budgets to litigation in the U.S.

The excessive costs and tactical abuse of the current federal discovery system have effectively closed the courthouse doors for many litigants, including plaintiffs and defendants. ACC believes that the proposed amendments are an important step toward reopening those doors and ensuring that no litigant, big or small, is denied a meaningful opportunity to seek justice on the merits in the federal courts.

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[1] *See* Inst. for the Advancement of the Am. Legal Syst., Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel, at 1-2 (2010), available at http://iaals.du.edu/library/publications/civil-litigation-survey-of-chief-legal-officers-and-general-counsel.

[2] *Id.*

STATEMENT REGARDING SPECIFIC PROPOSED AMENDMENTS

I. Proposed Rule 37(e) – Failure To Preserve Discoverable Information

One of the most troublesome problems in-house counsel have faced in recent years is the increasingly inconsistent and unwarranted imposition of sanctions for the failure to preserve information, especially ESI. It is a problem for responsible organizations because these decisions reflect the absence of clear and consistent national guidelines governing the information their organization needs to preserve in anticipation of litigation.

We support the enactment of Proposed Rule 37(e)(1) as a useful attempt to address this problem by providing a uniform, national standard for all discoverable information. Proposed Rule 37(e)(1) provides that "[i]f a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may: (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse inference jury instruction, but only if the court finds that the party's actions: (i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."

Thus, subsection (B)(i) permits a court to impose the sanctions listed in Rule 37(b)(2)(A) (which include the case-dispositive sanctions of dismissal and default) or give an adverse inference jury instruction for the failure to preserve information if and only if (i) the party to be sanctioned acted willfully or in bad faith and (ii) the loss caused "substantial prejudice" in the litigation.

ACC welcomes the subsection as an important tool to ensure that potential litigants who seek to preserve information in good faith may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. In particular, it offers significantly more protection than has been offered by some federal circuits in the past.

What is more, by establishing a uniform, national standard, the rule will help reduce the exorbitant costs and burdens of over-preservation. Currently, the fear of sanctions for inadvertent loss of discoverable information despite reasonable efforts has caused companies to preserve reams of irrelevant information. In particular, companies have been forced to take extraordinary measures at substantial cost to preserve ESI even though the vast majority of such information never ends up actually being used by parties in litigation. In addition, corporations have been compelled to defend against costly allegations of spoliation that are easy to make and difficult to disprove. The inordinate amount of time, effort and money legal departments have had to spend on preservation efforts and ancillary litigation has financially drained many companies, taking money away from important programs like compliance and training.

Although ACC strongly supports the proposed rule change, it recommends a few improvements discussed below.

A. Rule 37(e) Should Require Findings Of Both Willfulness and Bad Faith

The proposed Rule 37(e) would authorize sanctions for the loss of information when the party's actions were "willful or in bad faith." This standard is problematic because some courts have defined "willfulness" as intentional or deliberate conduct that lacks any culpable state of mind.[3] Thus, there is a risk that proposed Rule 37(e) may be construed to permit sanctions for intentional acts – *e.g.,* an existing document retention policy or a standard auto-delete function – even if those acts were conducted in good faith but some information is nonetheless lost after a duty to preserve has attached.

ACC does not agree that an intentional act carried out in good faith is a sufficient basis for sanctions merely because that act does not achieve a

[3] *See e.g., Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, at *4 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

perfect result.[4] To the contrary, sanctions are appropriate only where a party has engaged in intentionally culpable conduct by destroying evidence that it knew was relevant to pending or potential litigation. *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 642-43 (S.D. Tex. 2010) (finding that bad faith, not just intentional conduct, was required to support an adverse inference instruction). In other words, parties should be subject to sanctions only when they intentionally destroy information in an effort to suppress the truth.

Importantly, remedies for failures to preserve discoverable information that are not the result of bad faith can and will be addressed by proposed Rule 37(e)(1)(A), which authorizes a variety of measures to reduce or cure the consequences of loss of information where that loss did not stem from culpable conduct. Those measures can and should be used by courts to ameliorate any harm from the "negligent" or "unreasonable" failure to preserve information that should have been preserved. We would recommend, however, that the Committee adopt a requirement that curative measures be used only if significant prejudice exists, as there is no basis to impose curative measures where there is neither foul nor harm. And, as the Committee recognizes, even if there is culpable conduct, curative measures should be preferred to sanctions if they can substantially undo the litigation harm resulting from the failure to preserve.[5]

With these observations in mind, we join the many parties supporting a revision of proposed Rule 37(3) to clarify that a failure to preserve must be both willful ***and*** in bad faith to justify the issuance of sanctions. A uniform, national rule that sanctions may be imposed only where a party acted willfully and in bad faith and caused substantial prejudice will not only reduce the financial costs and burdens of over-preservation and ancillary litigation but is justified by concerns of fundamental fairness. Such a requirement will also signify to courts that they must engage in a careful

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[4] We note that the Committee Note to Proposed Rule 37(e), subdivision (e)(2) properly stresses that "[t]he fact that some information was lost does not itself prove that the efforts to preserve were not reasonable").

[5] *See* Committee Note, subdivision (e)(1)(B)(i) (if the curative measures identified in Rule 37(e)(1)(A) "can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith").

review of the actions of both in-house and outside lawyers before imposing sanctions for their preservation conduct.

Such review is particularly important with respect to the actions of in-house counsel. In recent years, in-house counsel have seen a marked increase in sanctions against the entities for which they work and against individual in-house attorneys for purported discovery failures and are understandably concerned about the high costs and unfairness resulting from those decisions. The threat of sanctions has put in-house counsel to the impossible task of preserving and producing every potentially relevant document – whether in physical or electronic form.

The requirement of culpable conduct in proposed Rule 37(e) will hopefully encourage courts to tread carefully before imposing harsh sanctions for purported mistakes made by in-house counsel in the preservation and production of documents. Given the staggering volumes of data, particularly electronic data, that are generated today, it is crucial for in-house counsel to be able to make good faith decisions about preservation without the standard being perfection. Decisions are often made in good faith – unilaterally – at times when there is no ability to know exactly what the discovery demands will be. It is not reasonable for organizations to save every document that anyone ever remotely connected to the entity has (or in the case of former employees) had. So long as the preservation decisions were made in good faith, those decisions should be protected.[6]

The need for a more context-sensitive review of the conduct of in-house counsel in discovery is aptly illustrated by *Coquina Inv. v. Rothstein*, No. 10–60786–Civ., 2012 WL 3202273 (S.D. Fla. Aug. 3, 2012). In that case, the district court directed the establishment of certain key facts as a sanction against the defendant bank for the failure of in-house counsel to properly search for, review and produce documents. *See id.* at *13 ("TD Bank acted willfully in failing to comply with its discovery obligations and

[6] The case of *In Re Pradaxa* is a good example of how a company can easily find itself in a preservation disaster. *See In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig., MDL* No. 2385, 2013 WL 6486921, at *19 (S.D. Ill. Dec. 09, 2013) (ordering sanctions, including a $1 million fine, for discovery failures, including defendant's failure "to ensure that the auto delete feature of their employee cell phones, company owned and personal, was disengaged for the purpose of preserving text messages" thus "allow[ing] countless records to be destroyed").

assist its outside counsel to properly litigate this case in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence."). In particular, the court criticized in-house counsel for (i) failing to notice that the form in which the documents were produced hid crucial information, (ii) failing to adequately search for a document contained on an electronic database, and (iii) failing to search certain email-attachments.

As ACC explained in an *amicus* brief to the 11th Circuit, the district court erroneously imposed sanctions based on a generalized view of the role of in-house counsel without analyzing the actual responsibilities of the in-house counsel involved in the case. The thousands of organizations that employ ACC members have legal departments that vary greatly by size, function, expertise, financial constraints, and myriad other factors. As a result, when their organizations sue or are sued, the roles they play vary greatly as well. In some cases – rare ones – in-house counsel may themselves gather, review and analyze all documents.

In others, however, they may largely limit their role to supervising an internal effort to gather documents, possibly using outside vendors to help with the document collection, and may review only those documents that outside counsel identify as important. And in still other cases, legal departments hire vendors and outside counsel to identify, collect and sort documents, while in-house counsel generally supervise and serve as liaisons with senior company management. Any assumption of some uniform practice across all departments and all cases is simply incorrect.

Accordingly, in considering whether to impose sanctions for purported discovery failures by in-house counsel, courts cannot and should not apply a "one-size-fits-all" standard. Instead, they must engage in a rigorous review of the structure of the particular legal department at issue and the actual role and responsibilities of in-house counsel involved in the case to determine whether the discovery failure was really the fault of such counsel and whether sanctions are justified. What is more, courts need to be respectful of the autonomy that in-house counsel must exercise in deciding how to operate their legal departments, including the decision when to hire and rely on outside counsel. Otherwise, courts will effectively be dictating how corporations – both American and foreign – must structure and run their legal departments – a regulation and interference with primary conduct that is supported by neither law nor policy.

In sum, a uniform, national rule that requires proof of both willfulness and bad faith and a finding of substantial prejudice will go a long way toward ensuring that sanctions are not imposed for the actions of in-house counsel and other lawyers without sufficient culpability. In addition, it will ensure that sanctions for the discovery conduct of in-house counsel are based on a rigorous review of the actual responsibilities and actions of the counsel involved in the case as opposed to superficial notions regarding the role of in-house counsel that have no basis in reality.

B. The Rule 37(e)(B)(ii) Exception Should Be Deleted

We also recommend that the Committee delete the exception in proposed Rule 37(e)(1)(B)(ii) that would permit case-dispositive sanctions listed in Rule 37(b)(2)(A) such as a default judgment or a non-rebuttable adverse-inference jury instruction where the loss of evidence "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." This exception – which does not require a showing of any culpable conduct – is based on the Fourth Circuit decision in *Silvestri v. General Motors Corp*., 271 F.3d 583, 590 (4th Cir.2001), where the prejudice from loss of evidence in a products liability case was clear and it was unfair to require the defendant to defend the action.

ACC vehemently opposes the imposition of sanctions based solely on assertions of irreparable prejudice without a finding of willfulness and bad faith. Allowing sanctions against the party that lost the information without such a finding is inherently unfair. Although the exception is intended only for extremely rare situations, there is a significant risk that courts will apply it more broadly. It is also virtually certain that requesting parties will seek sanctions under this exception when information is innocently lost as a means to gain leverage in the proceedings. Furthermore, situations with significant missing evidence with limited culpability typically can and should be addressed by selecting curative measures short of sanctions, such as precluding experts' reports and testimony and allowing comment by counsel at trial.

In addition to being unfair, proposed Rule 37(e)(1)(B)(ii) is likely to encourage over-preservation and increased discovery costs. The circumstances under which a party is "irreparably deprived" of a "meaningful" opportunity to prove or defend a case are inherently difficult to define. Thus, the proposed exception will clearly lead to expensive

satellite litigation over whether a party's loss of information "irreparably deprived" the other side of a "meaningful opportunity" to present or defend against the claims in the case. The prospect of sanctions and related litigation would thus once again put pressure on companies to store every last byte of information, as even good faith, routine destruction of information could result in sanctions in the future. Thus, the new Rule 37 would lead to the same problems that necessitated a reform of the rule in the first place.

In order to ensure a uniform, national standard that provides counsel and their clients with clear and predictable standards for planning and curbs the costs and burdens of over-preservation, the Committee should remove the (B)(ii) exception from proposed Rule 37(e) and make clear that sanctions are never appropriate absent culpable conduct and substantial prejudice.[7]

C. The Factors Listed In Rule 37(e)(2) Are Likely To Do More Harm Than Good

Finally, ACC recommends deletion of proposed Rule 37(e)(2) in its entirety. That section sets forth five factors courts should consider "in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith." By including these factors, the proposed rule encourages courts to conduct a "reasonableness" analysis that is directly at odds with the requirement of bad faith. Indeed, the inclusion of the factors (without any differentiation as to whether the factors apply to curative measures, sanctions or both) suggests that sanctions may be imposed based on factors that look to merely failing to act reasonably. Indeed, one passage in the Committee Note to proposed Rule 37(e) supports that very interpretation. *See* Committee Note, Proposed Rule 37(e) ("The amended rule is designed to ensure that potential litigants who make ***reasonable*** efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts.") (emphasis added). ACC respectfully suggests that the word "reasonable" in the foregoing sentence be changed to "good faith," and that the Committee make clear that sanctions are never appropriate for mere negligence or "unreasonable" behavior.

[7] Given the availability of curative measures, it can be assumed that courts will respect the deletion of the exception and not exercise inherent authority to effectively reinstate it.

The listed factors are also objectionable insofar as they are too vague to guide parties in determining what information they have a duty to preserve. As a result, the factors are likely to perpetuate the prevailing notion that parties are somehow at fault if they failed to preserve every scrap of potentially relevant information. In addition, the factors are likely to promote ancillary litigation over their meaning and application. In-house counsel are particularly concerned about the risk of unwarranted disclosure of pre-litigation work product and attorney-client communications that would be posed by litigation over the reasonableness of preservation efforts. Finally, because the factors are not exclusive, their inclusion invites courts to add additional factors (including 'local rules') to redefine when sanctions can be imposed, returning parties to the current state of inconsistent application of sanctions.

In short, the Committee should delete the factors set forth in proposed Rule 37(e)(2) because they are inconsistent with the Committee's intended purpose of proposed Rule 37(e), and instead should clearly state that a failure to preserve does not, in and of itself, justify sanctions without a separate showing of culpability and substantial resulting prejudice.

D. The Committee Should Clarify The Meaning Of "Anticipation of Litigation"

ACC also recommends that the Committee more precisely define the meaning of "anticipation of litigation" in proposed Rule 37(e)(1). Currently, the proposed rule provides that sanctions may be imposed "[i]f a party failed to preserve discoverable information that should have been preserved in ***the anticipation*** or conduct of litigation" (emphasis added). Although ACC believes that the clearest and fairest rule would be to state that the duty to preserve does not attach until the commencement of litigation, the Committee should clarify that at the earliest, the duty attaches when a party knew that litigation was imminent.

E. Answers To The Committee's Questions

The Committee has invited public comment on five specific questions concerning proposed Rule 37(e). Although our comments above answer most of the questions, we reiterate our positions briefly below:

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary

focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

Response: Rule 37(e) should not be limited to electronically stored information. The rationale underpinning the rule applies to all discoverable information and the existence of two separate rules for ESI and physical evidence will only create confusion for litigants and courts.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

Response: The exception contained in 37(b)(1)(B)(ii) should be deleted because the imposition of sanctions in the absence of culpable conduct is inherently unfair, and will lead to over-preservation, satellite litigation, and inflated discovery costs – the same factors that led the Committee to revise the rule in the first place.

3. Should the provisions of current Rule 37(e) be retained in the rule?

Response: No. As the Committee Notes expressly recognizes, the proposed Rule 37(e) covers all of the conduct that the current rule covers. There is thus no need to retain the current Rule 37(e) language, although, as noted above, the use of the "good faith" standard is a more appropriate description of the type of conduct that the Committee Note should use to illustrate the form of safe harbor the proposed rule is intended to create.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Response: The Committee should add a definition of "substantial prejudice" to ensure a uniform, national standard governing the imposition of sanctions for spoliation. Specifically, ACC recommends that the Committee state that the loss of information must be "material" to the party's claims or defenses. Such clarification is necessary to avoid the extremely weak standards currently applied by some courts to determine whether the loss of information has resulted in prejudice. *See, e.g., Sekisui Am. Corp. v. Hart*, No. 12 Civ. 3479, 2013 WL 4116322, at *4 (S.D.N.Y. Aug. 15, 2013) (prejudice exists whenever a "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense").

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Response: As long at the Committee makes clear that sanctions may be imposed only if a party acted willfully ***and*** in bad faith, there is no need to define the terms "willful" and "bad faith" in the rule.

II. Rules 26(b)(1) And 26(c): Scope And Proportionality Of Discovery

In addition to the proposed reform of the rules governing sanctions for failure to preserve, we applaud the Committee's effort to narrow the scope of discovery by amending Rule 26(b)(1). As explained earlier, there is widespread agreement that the breadth of discovery permitted by the current rules has caused litigation costs to spiral out of control, placing U.S. companies at a distinct disadvantage. In addition, such costs have had a significant financial impact on foreign companies forced to litigate in the U.S. courts. As one commentator noted, a common foreign reaction to American discovery practices is: "Are we nuts?" Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299 (2002). Indeed, many countries have adopted blocking statutes to prevent American discovery from being conducted within their borders. *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 153-54 (1999). ACC strongly supports the effort to bring America's discovery rules more in line with that of other major countries around the world.[8]

[8] The broad scope of U.S. discovery has even been applied to litigation outside this country's borders. *See Heraeus Kulzer, GmbH.*, 633 F.3d at 594 (under 28 U.S.C. § 1782,

In our view, the Committee's proposed amendments to Rule 26(b) will cut down on unnecessary and abusive discovery requests, thereby reducing costs and increasing adjudications on the merits, without in any way impairing the ability of parties to discover the information they need for fair adjudication of their claims and defenses. One cannot ask for more than that.

A. ACC Strongly Supports Proposed Rule 26(b)'s Requirement That Discovery Be Related To Information Relevant To The Particular Claims And Defenses At Issue

To begin with, in-house counsel and their clients welcome the Committee's limitation of discovery in proposed Rule 26(b) to information that is "relevant to a[] party's claim or defense." Although the current rule contains similar language, it specifically allows courts to order discovery of any matter "relevant to the subject matter involved in the action" and contains the well-known phrase that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Courts have misconstrued the language of the current rule to permit discovery not only of relevant information, but potentially relevant information, turning the American judicial system into one of virtually unlimited discovery. [9]

Accordingly, ACC heartily commends the Committee for deleting both the "subject matter" and "reasonably calculated" language from the ambit of Rule 26(b). By making clear to parties and courts alike that discovery must be focused on information relevant to the particular claims

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foreign litigants can compel discovery by U.S. parties under American discovery rules for use in foreign litigation).

[9] *See, e.g., Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991) (parties entitled to discovery of any matter that appears "reasonably calculated to lead to the discovery of admissible evidence"); *Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 356 (W.D.N.Y. 2011) (interpreting the "reasonably calculated" provision to "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case") (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Maryland*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988) (term "reasonably calculated" in Rule 26(b)(1) means "any possibility that the information sought ***may be*** relevant" to a party's claim or defense) (internal quotations omitted) (emphasis added).

and defenses at issue in the litigation as opposed to any matter that "might" be relevant or "could" lead to relevant information, the newly formulated Rule 26(b) should severely cut back on the cost and burden of discovery.

B. Proposed Rule 26(b)(1) Properly Requires That Discovery Be Proportional To The Needs Of The Case

ACC further applauds the requirement in proposed Rule 26(b)(1) that discovery be "proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, 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." Inserting proportionality language into the text of Rule 26(b)(1) will substantially streamline the scope of discovery, ensuring that discovery is focused on the particular needs of the case and the importance of the requested discovery as it relates to claims or defenses actually at issue. Thus, the proportionality requirement should significantly reduce the amount of material parties are required to produce and improve the ability of in-house counsel to predict, plan and budget for the discovery obligations of their clients.

By limiting the amount of permissible discovery, the proportionality requirement will also help alleviate another vexing problem of the current discovery rules, *i.e.*, the risk of unintended disclosure of privileged information to an adverse party. The constant innovations to technology and upsurge in electronic data has not only made it difficult to ensure that all relevant documents are produced, but has caused both in-house counsel and their outside lawyers to spend an inordinate amount of time and money to preserve work-product and the attorney-client privilege. By significantly paring the amount of information that counsel and their clients must search, review and produce, the proposed Rule 26(b)(1) will not only trim the expense of discovery but lessen the risk that privileged material will be disclosed.

Finally, as part of the proportionality analysis, ACC emphasizes that courts can and should take into account the global aspects of a case. The fact that documents and other information are maintained abroad or are not in English may justify a narrower scope of discovery than might otherwise apply, particularly with respect to cumbersome searches of ESI. As an example, ACC has heard from many of its members that due to semantic

differences in many foreign languages, broad keyword searches are not as relevant as they are for English-language documents. Accordingly, the "needs of the case" in situations involving foreign documents may call for a more limited scope of discovery.

C. Rule 26(b)(1) Should Include A Materiality Requirement

Although the proposed Rule 26(b)(1) substantially narrows the scope of permissible discovery, we believe that the Committee should go even further by adding a materiality requirement providing that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant **[and material]** to any party's claim or defense." Such a materiality standard would promote proportionality in both preservation and production while still ensuring that parties can obtain the information they need to bring or defend against any claim. Adoption of such a proposal would serve to connect discovery more closely to the needs of particular cases.

D. Rule 26(c) Properly Includes An Express Cost-Shifting Provision

Finally, ACC welcomes the inclusion in Rule 26(c)(1)(B) of an explicit recognition of existing judicial authority to enter a protective order that allocates the expenses of discovery. By placing parties on notice that they may be required to bear the costs of responding to their discovery requests, a cost-shifting rule will encourage parties to focus discovery requests on evidence that is important to proving or defending against the claims at issue in the case. It will also significantly discourage parties from conducting mere fishing expeditions and reduce any tactical reason to engage in overbroad discovery. Although the power to shift costs is implicit in present Rule 26(c), the explicit authorization of such power will eliminate any doubt that such power exists and encourage more frequent use of such power.[10]

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[10] ACC further supports the Committee's other proposed attempts to limit the cost and burden of discovery by limiting the number of depositions, interrogatories, and requests for admissions, and reducing the presumptive duration of depositions. These proposed changes will similarly streamline civil discovery without denying a party the ability to gather information for its claims or defenses. Under the proposed version of Rule 26(b)(2), like the current one, the court retains discretion to modify or alter these numerical limits.

CONCLUSION

The current discovery system in the United States is unnecessarily depleting the energy and financial coffers of corporations and other organizations that do business in the U.S. Not only does it subject entities to prohibitive costs and burdens in responding to voluminous discovery requests, it subjects in-house counsel and the organizations for which they work to unclear preservation obligations and unfair sanctions for purported violations of those obligations. Perhaps most egregiously, the discovery process effectively deprives litigants of having their day in court by coercing parties to settle claims simply to avoid the expense of discovery.

We support the efforts in the proposed amendments toward fixing these ills, but they are far from a panacea. Much will depend on how courts implement the new rules in practice. ACC hopes that the Committee's reforms will send a message to judges that it is time to jettison overly broad notions of discovery and relevance in favor of a sensible, streamlined and targeted approach that arms in-house counsel with the guidance they need to advise their clients, whether as plaintiffs or defendants. In doing so, the Federal Rules of Civil Procedure will truly advance the goal set forth in Rule 1: "to secure the just, speedy, and inexpensive determination of every action and proceeding."

Respectfully submitted,

Amar D. Sarwal
Vice President & Chief Legal Strategist

Wendy Ackerman
Senior Counsel & Director of Advocacy

Evan Slavitt
Advocacy Chair
Litigation Committee