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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Comments on proposed amendments to the Federal Rules of Civil Procedure

Dear Committee Members:

The City of New York, New York, joined by the Cities of Chicago, Illinois and Houston, Texas, along with the International Municipal Lawyers Association ("IMLA") ("the Cities") respectfully submit the below comments on the proposed amendments to the Federal Rules of Civil Procedure. We understand that the City of Phoenix, Arizona has commented in a separate letter agreeing with many of the principles stated herein. In summary, the Cities support almost all of the proposed amendments. In particular, the Cities submit that:

- The Rule 26 amendments reflect the critical need to emphasize proportionality in discovery.
- The proposed Rule 30, 31, 33, 34, and 36 reductions in numerical limits will encourage more responsible use of these discovery devices.
- The Rule 37 amendments will bring more sensible proportionality to huge preservation expenses and will mitigate some of the *in terrorem* effects of existing spoliation and sanctions law.

I. Municipalities' E-Discovery Burdens Drain Resources from Services to the Public

Municipalities are non-profit entities created to serve the common good of their residents. In the case of large cities, this is an especially complex, never-ending mission. Responsibilities range from the maintenance of hospitals, schools, roads, sewers, public transportation systems and other elements of the physical and social infrastructure necessary for

daily life to protection against crime, terrorism, fire, and public health hazards to the assistance of the indigent, elderly, and other vulnerable populations.

The City of New York has a population of about 8.3 million people, and unsurprisingly they depend on the provision of government services described above. City government is divided into dozens of agencies with about 300,000 employees, plus separately elected officials like the Comptroller, members of the City Council, district attorneys for each of the five boroughs, and the like. The City's Law Department (also known as the Office of the Corporation Counsel) represents the City and its agencies in substantially all civil litigation.

The City of New York has approximately 1,700 open cases in federal district court alone. Of these, roughly 70% are resolved (judgment or settlement) at the low end: only $0 - $25,000. And since the Law Department necessarily represents a host of different client agencies and indeed many independently elected public officials, the representation can be more complex than in much purely private litigation.

Municipal governments are routinely involved in a significant amount of litigation related to their operations and services.

As the Committee has heard, e-discovery is extremely expensive.[1] The sheer volume, pervasiveness, dispersion, and potential evanescence of ESI (particularly email) elevate e-discovery cases to a wholly new level of effort compared to conventional paper cases. The hard and soft costs include: identification of the (numerous) likely custodians at one or more agencies and the IT systems in which they may have stored discoverable ESI; communication and explanation of litigation holds (and follow-up communication); the disruption of the work of custodians, whose jobs are to deliver services to the public, and of the supporting agency IT staff;[2] preservation of far more than merely discoverable ESI, sometimes by collection to avoid spoliation risks (because of the *in terrorem* effect of sanctions); collection,[3] sometimes by an outside vendor; processing, almost always by an outside vendor; hosting; attorney review; and production.

Discovery burdens, particularly e-discovery burdens, thus have the potential to divert limited resources and compromise public services. See, e.g., McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001) (Facciola, U.S.M.J.)("... [A] government employee will be diverted from his ordinary duties to search backup tapes. When employees are thus diverted from their

[1] The e-discovery in a large but otherwise routine City of New York construction case was about $3 million in out-of-pocket costs alone. The cost in a government investigation was about $1.3 million.

[2]Preservation at one agency in a particular City of New York case delayed a significant system upgrade for two to three months and cost about $58,000.

[3] To take public education in the City of New York as an example: there are about 1,300 public schools. They are geographically dispersed and generally do not have resident IT staff. Collection from them is very labor-intensive, and can necessitate an on-site trip by IT/e-discovery staff when a collection is needed.

ordinary duties, the function of the agency suffers to the detriment of the taxpayers"). Though hard to quantify, it is evident that these opportunity costs are very large.

While the Cities do have resources allocated to defending litigation, those resources are stretched thin by the sheer volume of our work. Moreover, it is generally hard to shift any costs at all to the parties requesting discovery (including e-discovery). Courts generally see municipalities as "deep pockets" despite the myriad demands on their budgets. Even when weighing the appropriateness of cost-shifting, courts generally do not factor in the *pro rata* salary costs of the municipal employees whose time is diverted to discovery-related taks – which constitutes much of the cost that municipalities incur.

Federal law has long recognized the necessity of protecting the municipal public fisc from litigation excesses that are ultimately borne by the taxpayer.[4] Given the financial and resource limitations that we constantly face, the Cities appreciate the Committee's proposed discovery reforms. Proportionality and presumptive limits provide a framework for ensuring a well-focused discovery process and the accompanying benefits of reduced costs and litigation efficacy for all litigants.

II. **Proposed Rule 26**

The Rule 26 proportionality amendments introduce valuable reforms to the discovery process. The multifactor proportionality test requires that the Court and the parties weigh the benefits of proposed discovery in resolving key issues against the burden and expense of that discovery. The balance here has often tilted in favor of more (expensive) discovery in a chimerical hope that it will be of significant benefit to the merits. In one City of New York case, the number of custodians was broadened from about five (a number that had been sufficient in very similar cases) to a total of about 25, many of whom had only the most glancing involvement, adding documents of negligible relevance. Processing costs alone for the ESI were $74,000, resulting in about 100,000 documents (before search terms were applied); but only 243 emails turned out to be relevant (and non-privileged).

The proposed proportionality framework addresses this kind of discovery excess, striking a realistic balance between the needs of a given case and the parties' resources. Other changes as well evidence a commitment to fair and efficient discovery practices. Take for instance the limitation that a party may only obtain discovery relevant to a party's claims or defenses, rather than discovery "relevant to the subject matter involved in the action," as permitted by the current Rules. The revised language would compel parties to articulate their need for specific discovery in light of practical considerations pertaining to the case and parties.

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[4] As Justice Blackmun observed about the bar on punitive damages: "Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport v. Fact Concerts*, 453 U.S. 247, 267 (1981).

We are similarly in favor of removing the language explicating the nature of discoverable information under Rule 26, as this change serves to enhance the Rule's clarity. Moreover, by allowing common understanding and practice to serve as the interpreter of the nature of discoverable information, proportionality becomes the linchpin of what is deemed discoverable in any given case.

Additionally, the proposed revisions make explicit the authority of the Court to allocate the expenses of discovery by protective order. Although some Courts have already allocated expenses under the current Rules, by making the authority explicit the Committee will encourage more Courts to use this power, thereby "adding teeth" to the proportionality framework.

In sum, the Cities support the proposed amendments to Rule 26. Taken as a whole, they appropriately emphasize proportionality as the critical factor in reducing the scope, burden, and expense of discovery, and in tailoring the discovery process to the needs of a case and the parties involved.

III. **Proposed Rules 30, 31, 33, 34, 36**

The Cities favor some of the changes to numerical limits on discovery devices in the revised rules.[5] We agree with the Committee that this will encourage the responsible and more effective use of these discovery devices. Where a party or parties think a higher number of any or all of these devices are needed, they will be required to present to the Court a reasoned basis for this request. This will help frame the parties' overall needs and the parties can work together and with the Court to develop a suitable plan.

The proposed amendments still provide the court with discretion to expand the scope of discovery when appropriate and proportional to the relative value of the case and the claims in controversy. In those complex cases, the Courts would almost invariably expand the scope of discovery.

However, the vast majority of the cases subject to these Rules will not be the large class action cases referenced by many who have commented in opposition to the new rules. Rather, most of the cases will be the sort of actions that municipalities typically settle for under $50,000. Under the current Rules, plaintiffs are permitted to demand discovery that is highly disproportionate to the value of those cases, effectively using discovery as a tool to drive up settlement value and attorneys fees.[6] The proposed revisions to the presumptive limits on discovery would curtail these types of coercive practices.

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[5] All Cities favor imposing a limit on requests to admit in Rule 36. The City of New York favors the reductions in the number of depositions as a way to curtail overuse of depositions in fee-shifting cases. The City of Chicago opposes the reduction in the number of depositions because of a concern that it would impede the City's ability to conduct depositions in cases involving numerous witnesses.

[6] For example, in a case currently pending in the Eastern District of New York involving only four plaintiffs with relatively minor injuries raising straightforward legal issues, defense

The opposition to the proposed amendments is reminiscent of the opposition to the 1993 amendments that presumptively limited litigants to 10 depositions and 25 interrogatories. Critics predicted that those amendments would have dire consequences, including "forcing courts to become involved in every deposition."[7] The plaintiff's bar feared that the presumptive limits would "stymie their efforts in cases in which there is a great deal of information and all of it is in a defendant's control."[8] These criticisms are echoed today by critics who claim the proposed changes will complicate litigation, not streamline it, and that the courts will be burdened with more discovery disputes than ever. Some critics use stronger language, referring to the proposed changes as "Draconian" or even "a threat to the jugular of the discovery regime."[9]

These fears and criticisms are as overblown and without merit today as they were in 1993. The 1993 limitations on discovery helped streamline discovery while allowing judges to permit more than the presumptive limits in appropriate cases. There is no reason to expect the current proposed amendments to operate any differently.

IV. **Proposed Rule 37(e)**

In the Committee Note to Proposed Rule 37(e), the Rules Committee recognizes the ever-growing preservation burdens imposed by ESI, and the concomitant uncertainties facing litigants and potential litigants seeking to meet their ill-defined obligations under existing Federal Rules and case law:

> The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to[ESI]. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. .... Extremely expensive overpreservation may seem necessary due

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counsel has been forced to respond to discovery regarding nearly every officer on duty at a particular police precinct on the night of the underlying incident, which has resulted in interviews of over 70 police officers, the depositions of 15 officers (to date), when only two members of the police department were actually involved in any altercation with the plaintiffs and many others were not even present in the business when the purported constitutional violation occurred. The plaintiffs have also named ten individual officers in the lawsuit.

[7] Virginia E. Hench, MANDATORY DISCLOSURE AND EQUAL ACCESS TO JUSTICE: THE 1993 FEDERAL DISCOVERY RULES AMENDMENTS AND THE JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF EVERY ACTION, 67 Temp. L. Rev. 180, 238 (1994).

[8] Colleen McMahon, Critics Turn Up Heat on Proposed Discovery Rules, New York Law Journal, July 19, 1993 at S1.

[9] Statement of Arthur R. Miller at 5-6.

> to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

Committee Note to Proposed Rule 37(e).

This is absolutely the Cities' experience. There are many problems with existing spoliation and sanction law. Among these are the lack of bright lines for triggering events. Another is that harsh spoliation sanctions are incentives to "gotcha" satellite disputes which disproportionately distract from the merits of the case. These problems force the Cities to expend scarce resources solely to avoid these irresponsible, and costly, side-disputes (rather than being able to devote the resources to public services). The problems encourage over-preservation, including unnecessary litigation holds, which is often followed by over-collection; over-identification of potential custodians; and over-designations of the types (systems) of ESI to include even the most remotely relevant. Once ESI is collected, it is time-intensive and usually impractical to cut back on the ESI to be processed beyond certain basic measures.[10] Thus, over-collection leads to over-processing, which is also expensive.

Rule 26's preservation requirements and the proposed amendments to Rule 37 are necessarily interrelated, and highlight the importance of proportionality in preservation.

> The application of the proportionality principle to preservation flows from the existence of that principle under the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 26(b)(2)(C)(iii) establishes a "proportionality" test for discovery, and requires courts to limit the "frequency or extent of discovery" where "the burden or expense of the proposed discovery outweighs its likely benefit considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Therefore, proportionality is necessarily a factor in determining a party's preservation obligations.

Pippins v. KPMG, 279 F.R.D. 245, 255 (SDNY 2012)(citations omitted). But even proportionality by itself doesn't solve the problem:

> Because proportionality is a "highly elastic concept... [it] cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order." [Citations omitted.] As [SDNY Magistrate] Judge Cott appropriately cautioned, proportionality "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle" before that party files a motion for a protective order seeking to have a court define its

[10] E.g. restricting processing by ESI date or file type.

> preservation obligations. [Citations omitted.] "Accordingly, '[u]ntil a more precise definition is created by rule,' prudence favors [either] retaining all relevant materials," [citations omitted], or swiftly moving for a protective order.

Id. at 255-56.

There are those who criticize the proposed amendment to Rule 26 by stating that it would empower the parties to do their own proportionality analysis and take that power away from the courts that are better positioned to engage in the analysis. However, it is often the case that by the time the Courts become involved (because litigation has begun), the value of a proportionality analysis is diminished. For example, for a plaintiff in an employment case, the applicable statutes of limitations generally range from as little as 180 days to up to four years. Until the plaintiff files an action (or files with the EEOC or a state equivalent), the would-be defendant is left with the task of predicting its preservation obligations with no opportunity for judicial guidance in that critical pre-litigation phase during which preservation decisions with potentially far-reaching consequences must be made.

As a partial solution, the Cities propose changing the phrase "willful or in bad faith" to "willful and in bad faith." Retaining willfulness as an option without the requirement of wrongful intent will engender excessive motion practice on the meaning of the word within the context of the amended Rule. The Committee Notes are clear that the proposed amendment specifically rejects the holdings in decisions which impose sanctions or adverse inferences upon findings of negligence or gross negligence. The inclusion of the word "willful" as an alternative rather than a requirement will potentially provide the opportunity to redefine gross negligence as willfulness. The result will be disparate holdings on what actions constitute willfulness, rather than the uniform standard the amendment seeks to ensure.

Another definition of willful destruction of records within the context of a reasonable retention policy can be the basis for sanctions or an adverse inference under the proposed scenario because willfulness can be defined as intentional or purposeful conduct, without the element of wrongfulness. Thus, the custodian of records will continue to over-preserve to protect against the potential that in executing a retention plan they expose themselves to sanctions or adverse inferences. This is particularly problematic because the proponent of the Rule 37(e) sanctions will not have to demonstrate that any of the records destroyed pursuant to a retention policy would have been adverse to the custodial party or even relevant to the ultimate issues in the case.

In response to the Committee's inquiry, the Cities agree that a definition of what conduct constitutes willfulness must be included. The following proposed definition should be included in the Committee Notes to provide guidance and ensure a uniform standard: "'Willfulness,' for purposes of spoliation analysis, is defined as the intentional destruction of evidence in order to avoid production."

In summary, highlighting the centrality of proportionality in the Rule 26 analysis and softening the bite of Rule 37 are just small steps to mitigating the considerable expense of

preservation resulting from the uncertainty of what (would-be) litigants, especially institutional litigants like municipalities, are required to preserve. They may not even be enough.

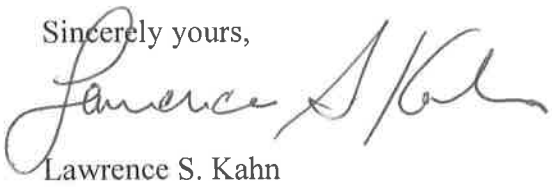
V. **Other amendments.**

Rule 1 amendment: the Cities support this amendment.

Rule 4(m) amendment: the Cities oppose this amendment. Shortening the time to serve the Cities, who are primarily defendants, is unlikely to make a difference to most plaintiffs because we are readily located for purposes of services; but it unfairly shortens the time for the Cities, when we are plaintiffs, to locate defendants who may well be more difficult to locate.

Rule 16 amendment: We are in favor of requiring the scheduling conference to be direct and person to person, for efficiency's sake, so long as it is clear that it may be by telephone (as appears in the Committee Notes).

Sincerely yours,



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cc: Stephen Patton, City of Chicago
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International Municipal Lawyers Association