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February 13, 2014

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rules of Civil Procedure

Dear Members of the Committee:

On behalf of Covington & Burling LLP, I welcome the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure. Our firm appreciates and supports the tremendous effort the Committee has undertaken to amend Rules 26 and 37 (and other rules) in a meaningful and equitable manner and, as explained below, we offer a few additional thoughts for consideration by the Committee and other interested parties.

**Background**

Covington is an international law firm of 850 attorneys with offices in Washington, New York, California, Asia, and Europe. Our litigators represent entities of all sizes, including national and multinational corporations in federal courts nationwide in hundreds of disputes every year. These disputes arise in every sector of the economy and encompass every substantive area of the law — including, *e.g.*, intellectual property, financial services, antitrust, white collar defense, and insurance coverage cases. In addition, we handle such complex disputes as multidistrict and class action litigations, and hundreds of our cases each year entail significant e-discovery components.

As a result, we believe that Covington is uniquely positioned to comment on the proposed amendments. Our clients routinely express concern about the exponential growth of discovery costs over the decades — and we share this concern. In the last year alone, our clients spent a collective $56 million on various discovery phases, with an average cost of $280,000 for our 200 most significant e-discovery matters (including average document review costs of $180,000, data processing and hosting costs of $80,000, and litigation support costs of $20,000). And, such averages are just the tip of the iceberg: they do not account for attorneys' fees or any ancillary expenses. Furthermore, these averages mask the overwhelming costs of the largest litigations. As examples, one client incurred more than $800,000 in contract attorney charges simply for document review, and another incurred document review costs of almost $600,000 in only three months — again, excluding attorneys' fees and other ancillary expenses.

Accordingly, we wholeheartedly support the well-reasoned amendments proposed by the Committee. If given the simple choice — "thumbs up" or "thumbs down" on the amendments as

a whole — Covington would vote in favor. We applaud the Committee's effort to narrow the scope of discovery and establish uniform guidelines across the federal circuits and, likewise, to limit the imposition of sanctions to instances of intentional and bad faith conduct.

In addition, Covington would like to draw the Committee's attention to certain nuances in Rule 26 and Rule 37. Among other things, the Committee may wish to consider amending Rule 26(b)(1) to provide that discovery is limited to matters that are relevant *and material* to any party's claim or defense. Additionally, we urge the Committee to amend Rule 37(e) to provide unambiguously that sanctions issue only where conduct is undertaken in bad faith.

## Amendments to Rule 26(b)(1): Limiting the Scope of Discovery

### I. Covington Applauds the Effort to Redefine and Narrow the Scope of Discovery.

Covington supports the proposed amendment of Rule 26(b)(1) to redefine the scope of discovery — from discovery of anything "relevant to the subject matter involved in the action" to discovery only of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" By tying the discovery sought to actual claims or defenses, the amendment encourages parties to conduct more targeted discovery and therefore reduces the potential for discovery abuse.

In addition, we applaud the Committee's proposal to omit from the Rule the sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Time and again, we have seen this "reasonably calculated" language improperly used to support overly broad discovery. Covington also supports the proposal to incorporate explicitly into Rule 26(b)(1) the proportionality factors that currently appear in Rule 26(b)(2)(C)(iii). Placing these factors more prominently within the Rule would help emphasize these considerations and more overtly focus courts and parties on their importance. The proportionality factors, we think, aid a court and parties in maintaining a reasonable perspective on the practical limits of discovery's scope.

### II. Covington Recommends that the Committee Consider Adding a Materiality Requirement and Omitting "Parties' Resources" as a Proportionality Factor.

We urge the Committee to consider slightly amending Rule 26(b)(1) to provide that discovery is limited to matters that are "relevant *and material* to any party's claim or defense." Requiring that information be material to a party's claim or defense would better align discovery with the needs of individual cases, and would chip away at overly broad interpretations of scope and relevancy.

In addition, Covington recommends omitting any reference to the "parties' resources" as a consideration in the proportionality analysis. As a firm that represents companies of all sizes and financial means, we believe that discovery limits should apply equally to litigants regardless of real or apparent wealth. Litigation between parties with grossly asymmetric means should not

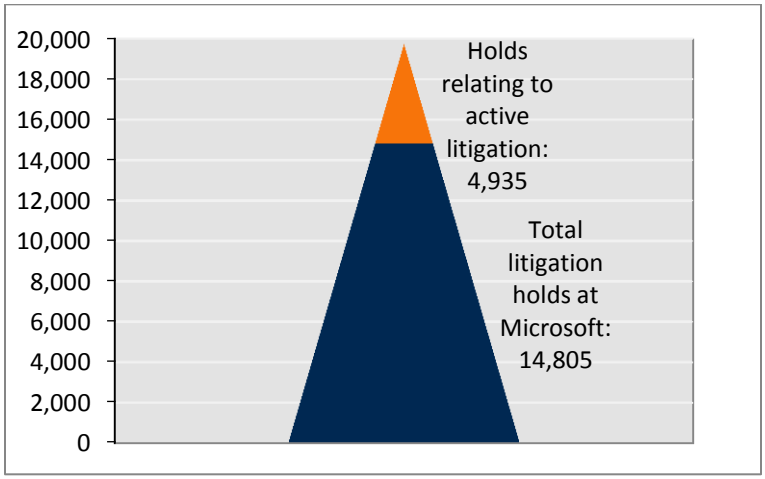
give rise to overly broad and unduly burdensome discovery requests simply because one of the parties has sufficient means to subsidize the other's requests. Such abusive tactics may (and often do) lead parties to settle an action in order to avoid highly expensive discovery — regardless of the merits of the case.[1]

**Amendments to Rule 37(e):**
**Limiting Sanctions to Instances of Bad Faith Conduct**

## I. Sanctions Should Issue Only Where Conduct Is Undertaken in Bad Faith.

Covington supports the Committee's effort to ensure that litigants who seek in good faith to satisfy their preservation obligations will not be subject to sanctions if information is lost despite those efforts. Covington respectfully suggests, however, that the language of proposed Rule 37(e) will require some further modification if the Committee's goals are to be realized, and pervasive over-preservation meaningfully circumscribed.

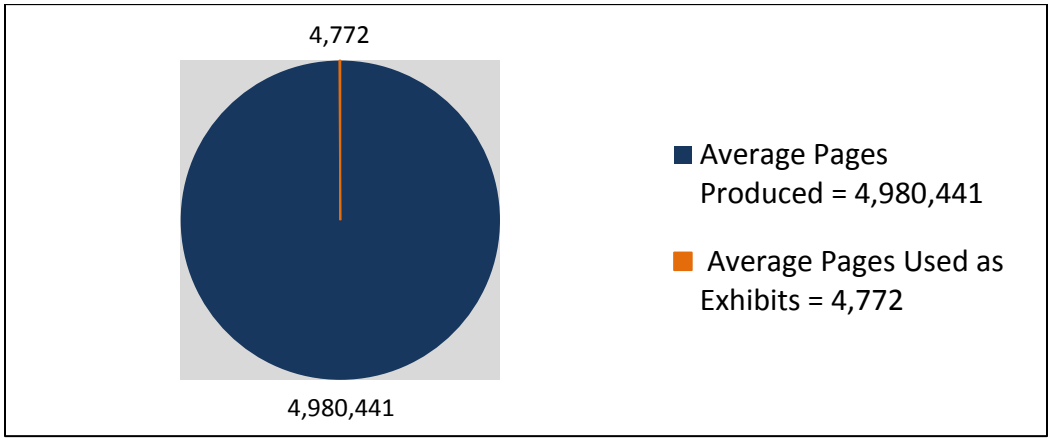
Based on our experience, we believe that the overwhelming majority of companies strive in good faith to fulfill their preservation obligations. But unfortunately, these companies routinely feel compelled to engage in unduly burdensome (and costly) over-preservation practices in an effort to avoid reputation-damaging sanctions. As an example, statistics (already in the record) regarding Microsoft's litigation holds bear out the extreme and pervasive nature of over-preservation practices. In 2011, more than 10 percent of Microsoft's domestic employees were subject to litigation holds — and, as depicted below, only about one-third of the holds related to active litigation.[2] This sort of unfortunate situation, we know, is common.




[1] As the Supreme Court noted in *Bell Atlantic Corp. v. Twombly*, "the threat of discovery expense" may be so great as to "push cost-conscious defendants to settle even anemic cases[.]" 550 U.S. 544, 559 (2007).

[2] Public Comment by Microsoft Corp., *September 9, 2011 Committee Meeting on Preservation and Sanctions* at 3 (Aug. 31, 2011), at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Microsoft.pdf.

Similarly, an Exxon attorney testified at the Committee's public hearing on November 7, 2013 that Exxon is currently required to host a remarkable 600 *terabytes* of information — even though it expects that only 50 gigabytes (or 0.008%) will ever be used.[3] Likewise, as seen below, a 2008 survey of Fortune 200 companies revealed that an average of 1,044 document pages are produced for every *one* page of an exhibit actually used at trial.[4] And, Microsoft's document retention practices are even more conservative: in 2011, it reported preserving an average of 340,000 pages for every *one-page* exhibit used at trial.[5]




We believe that these excessive preservation costs and inefficiencies would be ameliorated by a more narrowly defined sanctions rule. As long as a court can impose sanctions without any showing of bad faith, the threshold for sanctions motions will remain low. This reality — coupled with the extremely damaging impact a sanction or adverse inference instruction may have on a case — incentivizes ancillary litigation unrelated to the merits. Indeed, a recent survey of major e-discovery cases indicated that sanctions issues are litigated, at the appellate level, more than twice as often as any other e-discovery issues.[6] At best, imposing sanctions in the absence of intentional bad-faith conduct does nothing to deter the type of

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[3] Robert L. Levy, Counsel for Civil Justice Reform & Law Tech., Exxon Mobil Corp., Testimony at the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 7, 2013).

[4] Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* 16 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[5] Comment by Microsoft Corp., *supra* note 3, at 5.

[6] *See* Public Comment of Kroll Ontrack, *Kroll Ontrack Commentary Regarding Rulemaking Efforts* 6–7 (Aug. 31, 2011), at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Kroll%20Ontrack.pdf.

spoliation the Rule seeks to address. And at worst, imposing such sanctions subverts the merits of the litigation and allows a jury to draw the erroneous assumption that documents lost in the routine and good-faith operation of an electronic information system would have favored the opposing party.

## II. Rule 37(e)(1)(B)(ii)'s Proposed "Irreparably Deprived" Exception Is Ambiguous and Therefore Should Be Stricken.

Proposed Rule 37(e)(1)(B)(ii) allows for the imposition of sanctions in the absence of bad faith as long as the loss of documents "irreparably deprived" a party of a meaningful opportunity to litigate relevant claims. Although the Committee intends that the "irreparably deprived" exception apply in only "very rare cases," the Rule contains no guidance on the scope or meaning of the term. Parties therefore may view this amorphous exception as yet another avenue for spoliation allegations and sanctions motions — circumventing the intended purpose of the proposed amendments to limit such abusive practices.

The lack of a clear standard also invites ancillary litigation regarding the definition of "irreparably deprived" — with the unfortunate result that sanctions could be based on the nature of the court's interpretation of the term, rather than the culpability of the conduct. Courts would inevitably adopt divergent definitions of "irreparably deprived" and thereby undermine the Committee's effort to establish uniform guidelines. And, companies would be left with no feasible option but to align their document production standards — at great cost — with the most extreme interpretation adopted by a jurisdiction in which they may be subject to litigation.

Accordingly, we recommend that the Committee strike the "irreparably deprived" exception and clarify that sanctions may be imposed only in cases where a party has acted intentionally to avoid a known preservation obligation.[7]

## III. Rule 37(e)'s "Willful or Bad Faith" Standard Should Be Clarified To Support Sanctions Only for Conduct that Is Both Willful *and* Undertaken in Bad Faith.

Proposed Rule 37(e)(1)(B)(i) allows for the imposition of sanctions if a party's actions caused substantial prejudice in the litigation and were "willful or in bad faith." Although Covington supports the Committee's attempt to limit sanctions to instances of willful conduct rising above the level of mere negligence, the proposed Rule leaves ample room for interpretation regarding the definition of "willful" — and courts may interpret the term to encompass intentional conduct that lacks any culpable state of mind.[8]

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[7] Of course, where crucial data are destroyed without any bad faith intent on behalf of the spoliating party, a court may order the curative measures listed in proposed Rule 37(e)(1)(A).

[8] In a decision earlier this year, for instance, District Judge Shira A. Scheindlin associated "willful" conduct with mere intentional or volitional conduct. *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 504 (S.D.N.Y. 2013).

Ambiguity surrounding "willful" would lead to costly and inefficient ancillary litigation regarding the term's meaning — which would inevitably result in courts' adoption of divergent preservation standards that undermine the goal of uniformity. And, even if only a minority of courts define "willfulness" to mean that sanctions may be imposed without scienter, companies conducting business in many jurisdictions would be forced to adopt preservation practices that conform to those standards, fostering the very over-preservation the Committee seeks to curb.

Accordingly, we suggest that the Rule be amended to provide for sanctions only in instances of "willful *and* bad faith" conduct. Alternatively, "willfulness" could be defined in the Committee Notes to require some level of scienter. This approach would help ensure national uniformity among the federal courts — and would encourage reasonable and proportional preservation practices by companies seeking in good faith to fulfill preservation obligations.

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In short, Covington underscores that it wholeheartedly supports the Committee's efforts to address these complex issues in a meaningful way in order to curb discovery abuses and promote uniform standards across the circuits. We urge the Committee to adopt the proposed amendments and to consider the nuances outlined in this comment.

Respectfully submitted,

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