February 11, 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, NE
Washington, DC 20544

Re: Public Comments on Proposed Amendments to the Federal Rules of Civil Procedure

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Dear Members of the Committee:

Google Inc. ("Google") respectfully submits these public comments in support of the proposed amendments to the Federal Rules of Civil Procedure.

Google is a global technology company and is frequently a defendant in federal civil litigation. Google has had experience with discovery in hundreds of lawsuits in federal court. Based on this experience, Google brings a well-informed perspective to the current deficiencies in the Federal Rules of Civil Procedure as they relate to ediscovery for large enterprises.

In an age where email and word processing documents create huge volumes of data, discovery for even a single lawsuit often costs millions of dollars. These costs are driven in large part by ambiguity as to the scope of defensible preservation combined with potentially harsh sanctions even for inadvertent or good faith mistakes. The costs are particularly high in asymmetrical litigation where the requesting party has little incentive to pursue discovery in a reasonable and proportional fashion.

The illustration below approximates Google's discovery in recent years as a stack of paper. Google preserves hundreds of terabytes of data, yet only a tiny fraction is actually produced in litigation or used at trial.

It is Google's belief that it is possible to make electronic information reasonably accessible to the litigation process and to do so in a defensible, cost-effective and timely fashion. The current Federal Rules of Civil Procedure, however, do not effectively prevent abuses of the process. Google supports the proposed rules modifications as a meaningful step in the direction of a just, speedy and efficient legal system, and we are writing to comment on points of particular interest.

COOPERATION - RULE 1

Google welcomes the proposed amendment to Rule 1 and believes that cooperation between parties, supported by the court's continued active role in resolving disputes and protecting parties against excessive discovery demands, is crucial to achieving a balanced and proportional discovery process.

Google cautions, however, that cooperation under Rule 1 should not be read to impose discovery obligations beyond good faith and reasonable diligence on the parties. "Cooperation is an open-ended concept. It is difficult to identify a proper balance of cooperation with legitimate, even essential, adversary behavior."[1] The proper functioning of the adversary process is necessary to prevent the disclosure of non-responsive documents or privileged communications to adverse parties. Unless one party can point to a gap or discrepancy in discovery that the other party is unwilling to address, Google recommends that the courts start with the presumption that lawyers are behaving ethically in discharging their duties, as evidenced by the certification requirement of Rule 26(g).[2] Interjecting

[1] Advisory Committee on Civil Rules, Report to the Standing Committee, May 8, 2013, at p. 10, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf.

[2] *See, e.g., Mancia v. Mayflower Textile Servs. Co.*, 2008 U.S. Dist. LEXIS 83740 (D. Md. Oct. 15, 2008).

additional disclosure requirements into the discovery process would undermine the goals the proposed amendment of the Rule seeks to emphasize.

PROPORTIONALITY, COST SHIFTING, AND RELEVANCE - RULE 26

Because Google is a large, successful organization, the burdens of discovery in a given Google case are often asymmetrical. Google often confronts abusive discovery practices stemming from a litigant's ability and willingness to use discovery as a means to drive up costs in the hope of leveraging settlement, rather than as a tool for obtaining evidence to resolve a case on its merits.

From Google's perspective, such practices stem, in part, from the current formulation of Rule 26. Discovery obligations in a given case frequently rest on an expansive view of the formulation of "discovery relevance," while burden and expense are given short shrift, particularly against large defendants. Often, neither relevance nor burden are viewed with a pragmatic eye towards the contours of a specific dispute. Uncertainty in how a particular court may view the interplay between relevance and burden has encouraged defendants to engage in over-expansive preservation and production efforts, needlessly compounding litigation costs.

The Committee's proposed amendments to Rule 26 regarding proportionality, cost-shifting, and relevance are a welcome attempt to address that situation.

The positive impact of proportionality and cost-shifting are already palpable in those district courts that have employed similar measures to control the scope and expense of discovery. For example, many courts and judges have implemented recommendations from the e-discovery model order created by the Advisory Council to the Court of Appeals for the Federal Circuit.[3] The Advisory Council's model order addressed "disproportionally high discovery expenses" in patent litigation through a number of limitations on e-discovery, including presumptive limits on the production of custodial e-mail data, coupled with cost-shifting for requests exceeding those limits. Google's experience litigating patent disputes in courts adopting those recommendations has confirmed that when appropriately employed, such rules reduce the burdens of discovery, without interfering with a party's ability to have its case litigated on the merits. Google is hopeful that the proposed changes to Rule 26 will have a similar impact.

Google also supports revising Rule 26(b)(1) to remove the overly broad relevance language encompassing discovery that "appears reasonably calculated to lead to the discovery of admissible evidence." Plaintiffs often rely on the "reasonably calculated" language in 26(b)(1) to obtain discovery far beyond the scope of the claims asserted in the case. In Google's experience, uncertainty in the application of that standard compounds the burdens of over-preservation and provides an opportunity for plaintiffs to abuse discovery. Google believes that the Committee's proposed changes to Rule 26(b)(1) will help clarify the proper limits for appropriate discovery under the federal rules.

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[3] *See* ADVISORY COUNCIL TO THE FED. CIR., AN E-DISCOVERY MODEL ORDER (2011), *available at* http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html.

PRESERVATION AND SPOLIATION - RULE 37

Google appreciates and supports the Committee's efforts to provide a unified national culpability standard and to provide preservation guidance in Rule 37(e), but believes the proposed amendment will not serve its intended purpose for a few reasons.

First, proposed Rule 37(e) allows for the imposition of sanctions where a party's actions were either "willful" or "in bad faith." Google proposes that the phrase be changed to require both willfulness *and* bad faith or, alternatively, that willful simply be removed. Willful conduct, on its own, should not be enough to warrant sanctions as contemplated in this section. Willful conduct, without the anchor of bad faith, could be interpreted to capture non-accidental behavior, which seems misaligned with the committee's goal to sanction intentionally culpable conduct.

Second, proposed Rule 37(e)(2), should more clearly articulate an objective threshold for preservation based on when a party can reasonably anticipate litigation is certain. While the five factors proposed in the Committee's amendment to 37(e)(2) are a step in the right direction, courts will inevitably perform that analysis with the benefit of hindsight while potential defendants are still left to predict the future. Unless a more clearly defined, bright-line test can be established with respect to when a party should preserve information, parties will continue to over-preserve to avoid sanctions.

Third, in the absence of a more clearly defined, bright-line test, Google recommends removal of Rule 37(e)(2)(C) that takes into consideration "whether a party received a request to preserve information." This factor does not further the Committee's stated goals as it fails to provide additional guidance regarding preservation and may in fact encourage gamesmanship — precisely what the proposed revisions attempt to curb. The Committee Notes demonstrate the Committee's recognition of the potential consequences of including this factor: "this factor is not meant to compel compliance with all such demands … reasonableness and good faith may not require any special preservation efforts despite the request." The inclusion of proposed Rule 37(e)(2)(C) would give too much credence to unreasonable requests to preserve information.

Google hopes the Committee's changes are successful in providing parties with clearer guidelines on the scope of a party's preservation obligations, more certainty about the risks of failure to preserve information, and greater access to curative and other non-punitive measures where appropriate.

Google appreciates the opportunity to submit these written comments.

Very truly yours,

Pamela Davis
Director, Legal
Google Inc.