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Via Overnight Delivery

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, D.C. 20544

Re: Comment on Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure

Members of the Committee on Rules of Practive and Procedure:

Hewlett-Packard Company ("HP") respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Advisory Committee") concerning the Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure (the "Proposed Amendments").

HP is a leading global provider of products, technologies, software, solutions, and services to individual customers, businesses, and large enterprises, including customers in the government, health, and education sectors. Like other large companies, HP has been involved in a variety of disputes in the federal courts.

HP believes that the Proposed Amendments are a significant step toward reducing the costs and burdens associated with discovery, particularly electronic discovery, and in creating a uniform approach to imposing sanctions for spoliation. HP therefore supports the passage of the Proposed Amendments with the additions and modifications set forth below. HP also endorses the Comment filed by Lawyers for Civil Justice ("LCJ") on September 3, 2013.

Rule 37

Proposed Rule 37(e) would create a much-needed uniform national standard that would work to curtail the costly and wasteful overpreservation of materials that now occurs. Proposed Rule 37(e) would also limit the ancillary litigation over allegations of spoliation that currently consumes judicial and party resources. HP believes that modification of Rule 37(e) is particularly important because the threat of sanctions under the current rule inexorably results in overpreservation.

While HP believes that Proposed Rule 37(e) is a valuable addition to the Federal Rules of Civil Procedure, it urges the Advisory Committee to amend Proposed Rule 37(e) in the following

respects: (i) the exception contained in Proposed Rule 37(e)(1)(B)(ii) allowing courts to impose sanctions if loss of information "irreparably deprives" a party of the ability to present or defend the action, even in the absence of willful destruction of evidence or bad faith, should be removed; (ii) the disjunctive "willful *or* in bad faith" should be amended to the conjunctive "willful *and* in bad faith" to make clear that both willfulness and bad faith are required for sanctions to be imposed (in addition to the "substantial prejudice" requirement); (iii) the "factors to be considered in assessing a party's conduct" in Proposed Rule 37(e)(2) should be moved out of the text of the rule and into the Committee Note; and (iv) Proposed Rule 37(e) requires the addition of a clear, bright-line standard setting forth when an affirmative duty to preserve materials is triggered.

HP, like other companies, is forced to preserve far more material than could ever be used at trial or produced in discovery because of the threat of sanctions imposed by current Rule 37(e). Storing such materials is costly and burdensome, and the materials retained are often duplicative. HP supports the attempt in Proposed Rule 37(e) to curb this costly overpreservation of materials by limiting the imposition of sanctions to situations where a party's behavior is willful, done in bad faith, and causes substantial prejudice to the opposing party. Such a limitation is preferable to the uncertainty created by the current rule, where severe sanctions can be imposed for failure to comply with a nebulous set of requirements that vary from jurisdiction to jurisdiction.

Proposed Rule 37(e)(1)(B)(ii), however, would undermine the positive changes to Rule 37(e) by creating an exception that will defeat the purpose of amending the rule. Allowing the imposition of sanctions if a court finds that the party's actions "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" will allow for sanctions to be imposed in cases where a party might simply have been negligent – a scenario that the Advisory Committee explicitly sought to prevent when it drafted Proposed Amendment 37(e). In addition, determining what constitutes "irreparable deprivation" will cause ancillary litigation that consumes judicial resources and risks the creation of the same inconsistent standards across jurisdictions that Proposed Rule 37(e) seeks to curtail. Maintaining the "irreparable deprivation" exception in Proposed Rule 37(e)(1)(B)(ii) will also necessitate the same overpreservation of materials imposed by current Rule 37(e), as parties will likely preserve unnecessary and duplicative information to avoid the risk of even inadvertently disposing of material that arguably might "irreparably deprive" another party from litigating its claims. Because Proposed Rule 37(e)(1)(B)(ii) will cause more problems than it will prevent, and is unlikely to meaningfully protect litigants, it should be removed.

HP also supports LCJ's proposal that the disjunctive in Proposed Rule 37(e)(1)(B)(i) allowing sanctions only on a finding that the party's actions were "willful *or* in bad faith" should be amended to "willful *and* in bad faith." The Advisory Committee notes in its memorandum requesting public comment that it has chosen not to define what constitutes "willful" actions or actions taken "in bad faith," on the premise that "courts have considerable experience in dealing with these concepts." But variations in how courts define "willfulness" could lead to the imposition of sanctions in cases where a party has acted intentionally (*i.e.*, by setting up an auto-delete function) but not acted in bad faith or with a culpable state of mind. Removing the disjunctive and requiring that a party's conduct be both "willful *and* in bad faith" will limit sanctions to cases where a party acted with scienter. In the alternative, the Advisory Committee

should define "willfulness" to require scienter or actual knowledge that the material was relevant to the litigation. Either of these modifications (changing the language to "willful *and* in bad faith" or defining "willful" to require more than mere "intentional" conduct) would promote a more uniform approach among the courts and reduce uncertainty for litigants about their responsibilities with regard to the preservation of evidence.

The "factors to be considered" by the courts in assessing a party's conduct in Proposed Rule 37(e)(2) should be removed from the text of the rule and added to the "Committee Note," to provide guidance to litigants and courts while decreasing the risk that the listed factors will become the only factors that courts consider in deciding whether to impose sanctions. Proposed Rule 37(e)(2) states that the court should consider "all relevant factors" and that those factors "include" the factors listed, but the practical effect of including such a list is that only the factors listed in the rule will be analyzed by courts when deciding whether to impose sanctions. The enumerated factors, especially "the extent to which the party was on notice that litigation was likely" and "the reasonableness of the party's efforts to preserve the information," are vague and could be used to impose a range of additional actions that parties will feel obligated to take in order to reduce the risk of being sanctioned for failing to preserve discoverable evidence. These additional requirements could be applied quite differently across jurisdictions, leading to uncertainty and increased burdens on litigants. For example, courts across jurisdictions could have very different views about when a "party was on notice that the litigation was likely" or when a party's efforts to preserve evidence are "reasonable." While HP believes the factors should be removed from the text of the rule because of the risk that the listed factors could become a rigid, formulaic test with various standards of conduct mandated across jurisdictions, HP supports the Advisory Committee's effort to provide guidance to litigants and courts about how to determine whether sanctions should be imposed. HP believes that including the listed factors in the Committee Note will provide guidance to litigants and courts while ensuring that other "relevant" factors will be considered by courts in evaluating the facts of specific cases.

Finally, Rule 37(e) should be amended to provide guidance to litigants about when the obligation to preserve discoverable information arises. Currently, Proposed Rule 37(e) uses the nebulous standard "in the anticipation or conduct of litigation." However, it is not clear when a party should "anticipate" litigation. The lack of clarity, coupled with the threat of serious sanctions for failure to preserve evidence, leads HP and other companies to allocate substantial resources to the preservation of materials that may never be involved in litigation. The Advisory Committee should use this opportunity to articulate specifically when the duty to preserve is triggered. HP supports LCJ's proposal that the "trigger" should be "the commencement of litigation." Triggering a duty to preserve evidence (and a corresponding risk of sanctions for failure to preserve evidence) when litigation is commenced provides clarity and will greatly reduce the costs and uncertainty created by the current standard.

Responses to The Advisory Committee's Questions Regarding Proposed Rule 37(e)

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 "electrically 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 to litigation is a recurrent concern in litigation today.

HP's Response: Proposed Rule 37(e) should apply to all types of discovery, as the divide between electronically stored information and other discoverable material continues to shrink. A single rule for all discoverable material is preferable to the creation of two separate standards, particularly where sanctions and adverse inference instructions are potentially involved.

2. Should Rule 37(b)(1)(B)(ii)[1] 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?

HP's Response: As explained above, the exception created by Proposed Rule 37(e)(1)(B)(ii) would defeat the purpose of the other changes to Rule 37(e) and should therefore be removed. Proposed Rule 37(e)(1)(B)(ii) would require parties to continue to overpreserve materials because of the threat of sanctions. This undermines the Advisory Committee's goals of creating a national standard and providing meaningful guidance to parties about when to preserve discoverable evidence. Proposed Rule 37(e)(1)(B)(ii) is also likely to cause ancillary litigation about the meaning of "irreparable deprivation" that could lead to inconsistent approaches by the courts. The number of cases where a party is "substantially deprived" of information in the absence of willfulness or bad faith conduct is likely to be incredibly limited, making the addition of a separate exception in Proposed Rule 37(e) unnecessary.

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

HP's Response: The Advisory Committee's clear intent that Proposed Rule 37(e) will cover all the conduct covered by current Rule 37(e) means that current Rule 37(e) need not be retained in the amended rule.

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.

HP's Response: A definition of substantial prejudice should be added to provide guidance to courts about when sanctions are required. The definition should clarify that the loss or destruction of evidence must have a *material* effect on a party's ability to establish its claims or defenses to be prejudicial, which current tests do not require. For example, the Second Circuit's test for determining whether to give an adverse inference instruction as a sanction for

[1] HP believes the Advisory Committee meant to cite Proposed Rule 37(e)(1)(B)(ii) in this question and has answered accordingly.

destroying evidence is (1) that the party had an obligation to preserve evidence, (2) that the evidence was destroyed with "culpable state of mind," and (3) "that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Sekisui Am. Corp. v. Hart*, No. 12 Civ. 3479, 2013 U.S. Dist. LEXIS 115533, at *16 (S.D.N.Y. Aug. 15, 2013) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002)). In *Sekisui*, the magistrate judge found that sanctions should not be imposed, despite the plaintiff's permanent deletion of the defendants' email files after the complaint was filed, because the defendants had not established that they had been prejudiced by showing that "relevant information potentially helpful to them was missing," and "a court should never impose spoliation sanctions of any sort unless there has been a showing – inferential or otherwise – that the movant has suffered prejudice." *Sekisui Am. Corp v. Hart*, No. 12 Civ. 3479, 2013 U.S. Dist. LEXIS 84544, at *9, 16 (S.D.N.Y. June 10, 2013). The district judge reversed the magistrate judge's ruling and imposed sanctions, finding that "[p]rejudice is presumed for the purposes of an adverse inference instruction where, as here, evidence is willfully destroyed by the spoliating party." *Sekisui*, 2013 U.S. Dist. LEXIS 115533, at *36. Sanctions should not be imposed automatically or because a judge finds that the missing evidence "could" support the claim or defense. Instead, the test should be whether the missing evidence would have had a material effect on a party's ability to establish its 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?

HP's Response: As explained above, amending the disjunctive "willful *or* in bad faith" to "willful *and* in bad faith" would make defining "willful" and "bad faith" unnecessary. However, if the disjunctive "willful or in bad faith" remains, the Advisory Committee should add a definition of "willful" that makes clear that scienter or actual knowledge is required for conduct to be "willful." To prevent overpreservation, the Advisory Committee should make certain that "intentional" conduct, standing alone, is not enough for a court to impose sanctions.

Rule 26

HP strongly supports the Advisory Committee's proposed amendment to Rule 26(b)(1), which would greatly reduce the costs associated with overbroad discovery by ensuring that discovery is limited to the claims and defenses set forth in the pleadings. To make the scope of discovery even more cost-effective, while ensuring parties can obtain the discovery necessary to bring or defend against claims, HP supports LCJ's proposal that the Advisory Committee add an explicit "materiality" standard to Rule 26(b)(1) by defining discoverable material as "any non-privileged matter that is relevant *and material* to any party's claim or defense . . . ." The addition of a "materiality" requirement would further decrease the burdens and costs of discovery and reduce skirmishes over the proper scope of discovery requests.

HP also supports the proposed amendment to Rule 26(c) allowing the entry of a protective order to allocate the expenses of discovery. HP, like other companies, incurs enormous costs in reviewing and producing materials, particularly electronically stored information, in response to broad discovery requests. The ability to allocate the expenses of broad discovery requests to the requesting party would likely reduce the scope of such requests and encourage greater cooperation by the parties in agreeing to search terms or custodians and

taking other measures to reduce the overall burden of discovery while focusing on the information truly necessary to prosecute or defend the case.

Rule 1

HP opposes the proposed amendment to Rule 1, which would provide that attorneys for the parties should "cooperate." Although such an exhortation is well-intentioned in principle, it is likely to lead to abusive motion practice whereby parties accuse each other of failing to cooperate. Such collateral motion practice will increase costs and impose additional burdens on the courts and the parties without bringing about a meaningful change in parties' behavior. HP submits that the other Proposed Amendments, which emphasize proportionality and early judicial involvement, will increase cooperation between the parties without the need for an express "cooperation" mandate in Rule 1.

Remaining Proposed Amendments

HP supports the remaining amendments as part of a broader amendment package. HP believes that the reduction in presumptive numerical limits in Proposed Rules 30, 31, 33, and 36 will reduce the costs and burdens of discovery without hindering litigants' ability to obtain necessary discovery.

HP also supports the active and early judicial involvement contemplated by the Proposed Amendments, as it is likely to increase cooperation between the parties and prevent unnecessary and time-consuming motion practice.

Conclusion

HP thanks the Advisory Committee for its extensive efforts in drafting the Proposed Amendments and for the opportunity to comment on them. HP believes that the Proposed Amendments are a substantial step towards reducing the costs and burdens associated with discovery and in increasing cooperation between the parties, and respectfully suggests that the Proposed Amendments be modified as set forth above to maximize the reforms contemplated by the Advisory Committee.

Respectfully submitted,

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