U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

Public Comment To The Advisory Committee On Civil Rules
Concerning Proposed Amendments To The Federal Rules Of Civil Procedure

November 7, 2013

These comments are offered on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. The Chamber founded ILR in 1998 to address the country's litigation explosion. ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate. ILR strongly applauds the Advisory Committee on Civil Rules ("Committee") for all of its efforts to improve the fairness and efficiency of civil litigation, and particularly its efforts to address ongoing challenges related to the practice of civil discovery in our federal courts.

I. Introduction

The Federal Rules of Civil Procedure ("FRCP") are designed to ensure "the just, speedy, and inexpensive determination of every action and proceeding."[1] However, the costs associated with civil discovery have grown exponentially over the past decade, frustrating these core objectives and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs now comprise between 50 and 90 percent of the total litigation costs in a given case.[2] In addition, the United States has the highest "liability costs" (a definition that includes discovery expenses) of its peer countries, 2.6 times the average level of the Eurozone economies, and 4 times higher than Belgium, the Netherlands and Portugal.[3]

These increased costs are due in large part to the FRCP's failure to contain the rapid growth of electronic discovery, which has forced parties to pay hundreds of thousands (if not millions) of dollars to respond to vexatious requests for documents that are often nothing more than open-ended fishing expeditions in search of a quick settlement.[4] These costs are "weighty

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1 Fed. R. Civ. P. 1.

2 John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 550 (2010).

3 NERA Economic Consulting, "International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States," June 2013, available at: http://www.instituteforlegalreform.com/resource/international-comparisons-of-litigation-costs-europe-the-united-states-and-canada/.

4 Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 892 (2012) (Companies "are especially affected by this switch to an electronic environment. In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits."); *see also* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 Rich. J.L. & Tech. 8, P 1 (2008), http://jolt.richmond.edu/v14k3/article8.pdf ("An explosion in the amount and discovery of electronically stored information (ESI) threatens to clog the federal court system and make judicial determination of the substantive merits of disputes an endangered species.").

for individual parties, but crushing for enterprises with thousands of employees, each of whom may respectively have a terabyte of potentially discoverable information."[5]

Instead of accomplishing its original goals of preventing unfair surprise at trial and ensuring the fair resolution of litigation, discovery is all too often used for strategic purposes.[6] As the Sedona Conference's Cooperation Proclamation notes, "courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether[.]"[7] Simply put: "[o]ur discovery system is broken. It is broken because the standard of 'broad and liberal discovery,' the hallowed principle that has governed discovery in the U.S. for over seventy years, has become an invitation to abuse."[8] Indeed, "[s]cholars, litigators, judges, and, more recently, even politicians have joined in unusual consensus to urge that reform of the discovery process is needed."[9]

We applaud the Committee for recognizing this problem and for its efforts to establish clear standards for the imposition of curative measures and sanctions when discoverable information is lost.[10] The proposed amendments are a significant step toward reining in the costs of civil discovery. Below, we suggest a few changes to the proposal that we think will better achieve the Committee's goals. We also suggest that as the Committee contemplates proposals in the future, it should consider amendments that address the root cause of our broken discovery system: the rule that the producing party bears the cost of production. This system, under which a plaintiff can propound broad and costly discovery requests on a defendant before there is any finding of liability, not only encourages unwieldy and costly discovery requests, but also runs afoul of a defendant's fundamental right to due process. As a result, the Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court.

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5 Philip J. Favro & The Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 936 (2012).

6 Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 Campbell L. Rev. 233, 258-59 (2012) (quoting *Tech. Sales Assocs. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 U.S. Dist. LEXIS 53711, at 4 (E.D. Mich. May 1, 2009)).

7 The Sedona Conference, Cooperation Proclamation, 10 Sedona Conf. J. 331 (2009 Supp.).

8 Gordon W. Nertzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 513 (2010); Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System at 2, http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf; *id.* at 9 (highlighting that suits of "questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them").

9 Griffin D. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, Automatic Disclosure in Discovery – The Rush to Reform, 27 Ga. L. Rev. 1, 2 (1992).

10 *See* Agenda Book for Advisory Committee on Civil Rules, Norman, Oklahoma, at 77, 143, Apr. 11-12, 2013 (the "Agenda Book"), http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf.

II. The Duke Conference Rules Package

From its inception in 1938, the Federal Rules of Civil Procedure have authorized a "broad and liberal" approach to discovery.[11] Concerned that the discovery rules "had formerly invited unlimited discovery if a party so desired," the Committee adopted Rule 26(b)(2)(C)(iii) in 1983.[12] That provision, which appears under the heading, ***Limitations on Frequency and Extent***, purports to address proportionality in civil discovery by providing that "[o]n motion or on its own, the court must limit the frequency or extent of discovery . . . if it determines that . . . (iii) 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."[13] As the notes accompanying that amendment indicate, the provision was designed to "deal with the problems of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects for inquiry."[14]

Unfortunately, as "both judges and commentators have noted," the "proportionality requirement has not proven to be an effective limitation on the scope or costs of discovery."[15] Instead, the principle of proportionality routinely yields to the "default rule of virtually unlimited discovery."[16] This is made even worse by the fact that litigants themselves are frequently unaware of the requirements imposed by the current rule.[17] And for those who are aware of these dictates and seek to urge courts to apply them in discovery, "complaints of judicial disengagement persist and abound."[18] At bottom, neither courts nor litigants have applied the current rule to lessen the burdens imposed by the volume or geographic distribution of

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[11] Nertzorg & Kern, *supra* note 8, at 514.

[12] Richard Marcus, *The Philip D. Reed Lecture Series: Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 Fordham L. Rev. 1, 6 (2004).

[13] Fed. R. Civ. P. 26(b)(2)(C)(iii).

[14] Fed. R. Civ. P. 26 advisory committee's note to 1983 amendments.

[15] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 780-81 (2011) (footnotes omitted); *see also* Beisner, *supra* note 2, at 583 ("In reality, courts have historically ignored proportionality concerns, instead blaming companies for choosing to employ computer systems that make retrieving records more difficult or expensive.").

[16] Nertzorg & Kern, *supra* note 8, at 517; *see also* Inst. for the Advancement of the Am. Legal Sys., 21st Century Civil Justice System: A Roadmap for Reform: Pilot Project Rules 2 (2009) (explaining that the proportionality factors previously adopted by the Committee "are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise.").

[17] *See* The Honorable Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 516 (2013).

[18] Hon. Lee H. Rosenthal, *Judge's View: From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 Denv. U. L. Rev. 227, 238 (2010); *see also* Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 Duke L. & Tech. Rev. 2 (2009) ("Judges have never applied that test to meaningfully limit discovery[.]").

electronically stored information, which is often disproportionate to the value of that information to the litigation.[19]

Statistics bear out the concern that discovery continues to be a "morass, nightmare, quagmire, monstrosity, and fiasco."[20] A 2008 survey of Fortune 200 companies is illustrative, finding that in cases with total litigation costs of more than $250,000, the ratio of the average number of discovery pages to the average number of pages actually used at trial was 1,044 to 1.[21] A survey of attorneys in Chicago yielded similar findings, with practitioners estimating that 60 percent of discovery materials did not justify the cost associated with obtaining them.[22] According to that study, in more than 50 percent of complex cases, the opposing party's discovery efforts had failed to disclose significant evidence.[23] In short, "[w]hatever the theoretical possibilities," the proportionality rule "created only a ripple in the caselaw"; "no radical shift has occurred."[24]

Because Rule 26(b) has not promoted meaningful proportionality in civil discovery, scholars and courts alike have advocated further changes to the rule that would provide stronger and clearer standards for reducing the burden on the party bearing the cost of responding to discovery requests.[25] The Committee has taken heed of these calls for reform by proposing an amendment to Rule 26 that would strengthen the requirement of proportionality by providing that discovery may be obtained ***only*** if it is "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."[26] This change would make clear that discovery

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19 *See* Grimm & Yellin, *supra* note 17.

20 *Id.* at 515 (collecting sources).

21 Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform 16, *Litigation Cost Survey of Major Companies* (2010), http://civilconference.uscourts.gov.

22 Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217, 230 n.24.

23 *Id.* at 234.

24 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2008.1, at 121 (2d ed. Supp. 2008); *see also* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 127 (2005) ("[T]he proportionality principle of Rule 26(b)(2) . . . is not being utilized by judges[.]"); Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 349 (2000) (describing the proportionality requirement of Rule 26(b)(2) as "seldom-used"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 162-63 (1999) (characterizing proportionality rule as "something of a dud").

25 *See* Rosenthal, *supra* note 18, at 238 ("concerns" regarding ineffectiveness of proportionality requirement "have led many to call for more amendments to the discovery and related rules").

26 Proposed Rule 26(b)(1).

is "not an unfettered right," but a reasonable process subject to "ultimate and necessary boundaries."[27]

The proposed amendment closely mirrors the Sedona Conference's Commentary on Proportionality in Electronic Discovery ("Commentary on Proportionality"), which sets forth various principles "to guide courts, attorneys, and parties" when confronting questions regarding the proportionality of discovery.[28] These principles, which include cost, burden and the importance of the information to the litigation, have been relied upon by a handful of courts in attempting to limit discovery based on proportionality. For example, in an action that had been pending for over six years, the Northern District of Illinois cited the Commentary on Proportionality and ordered a phased discovery schedule "to ensure that discovery is proportional to the specific circumstances of th[e] case, and to secure the just, speedy, and inexpensive determination of th[e] action."[29] The court directed the parties to "prioritize their efforts on discovery that is less expensive and burdensome."[30]

Many legal organizations and commentators have also espoused more aggressive proportionality principles in civil discovery. For example, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System released a report in March 2009 recommending discovery reforms, including that electronic discovery "should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens."[31] A number of commentators have endorsed a similar approach, recognizing that proportionality "creat[es] a mindset in the court and litigants that discovery needs to be focused on the real issues in the case and that cost is a consideration."[32]

The proposed amendment to Rule 26 would provide much-needed balance to discovery requests – most notably, those with the potential to unduly burden the other side. "Unless all parties concerned are placed on notice with an unequivocal statement that discovery is to be proportional, many courts and counsel will likely stick to the view that there are few bounds to liberal federal discovery."[33] The Committee's proposal would therefore help transform the default "anything goes" approach to discovery into one that protects against the worst abuses while continuing to ensure access to all needed information. In so doing, the amendment may

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[27] Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 Fed. Cts. L. Rev. 178 (2013) (internal quotation marks and citation omitted).

[28] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010), http://www.thesedonaconference.org/content/miscFiles/Proportionality2010.pdf.

[29] *Tamburo v. Dworkin*, 2010 U.S. Dist. LEXIS 121510, at *8 (N.D. Ill. Nov. 17, 2010) (quoting Commentary on Proportionality, at 294, 297).

[30] *Id.* at *3.

[31] Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *supra* note 8, at 14.

[32] John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell. L. Rev. 455, 460 (2010); *see also* Netzorg & Kern, *supra* note 8, at 527-32 (2010); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since 2006*, 14 Rich. J.L. & Tech. 3 (2008); Favro & Pullan, *supra* note 5, at 956.

[33] Favro & Pullan, *supra* note 5, at 966.

finally cultivate the "judicial 'vigor' hoped for by the Advisory Committee when the proportionality guidelines were first adopted."[34] Moreover, the proposed amendment will afford courts more time to focus on adjudicating the merits of the parties' underlying claims and defenses.

We also commend the Committee's proposal to redefine the scope of discovery in Rule 26(b)(1) to cover "any nonprivileged matter that is relevant to any party's claim or defense[.]"[35] The current rule permits discovery of any information relevant to the "subject matter involved in the action."[36] That rule goes on to specify that discovery is permitted where it "appears ***reasonably calculated*** to lead to the discovery of admissible evidence."[37] As the Supreme Court declared in *Hickman v. Taylor*, the scope of discovery is both "broad and liberal[,]" requiring parties to "disgorge whatever facts" they have that are "relevant" to the subject matter of the litigation.[38] Many courts have pledged their fidelity to this standard, while others have gone even further in describing the scope of discovery envisioned by Rule 26. Indeed, some courts have found that information is presumptively discoverable as long as there is "any possibility" that the information relates to the "general subject matter of the case,"[39] and that resisting discovery is only appropriate where the information sought has "no possible bearing" on the issues pled in the complaint or those that may arise during the litigation.[40] These principles point to one unmistakable conclusion: "the sweeping scope of Rule 26(b)(1) has translated into a strong presumption that 'relevant' discovery is allowed unless and until the responding party obtains a court order to prevent a specific request made."[41]

Under the proposed amendment, facts would only be discoverable to the extent they have ***some*** bearing on the merits of a party's ***claims or defenses***. Moreover, supposedly relevant facts would no longer be discoverable simply where they "appear[] reasonably calculated to lead to the discovery of admissible evidence" – a phrase judges and practitioners have interpreted as "obliterat[ing] all limits on the scope of discovery."[42] This important change is "consistent with

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[34] Nertzorg & Kern, *supra* note 8, at 522 (quoting Fed. R. Civ. P. 26 advisory committee's note to 2000 amendment).

[35] Proposed Rule 26(b)(1).

[36] Fed. R. Civ. P. 26(b)(1).

[37] *Id.* (emphasis added).

[38] *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

[39] *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C. 1989).

[40] *Hammond v. Lowe's Home Ctrs., Inc.*, 216 F.R.D. 666, 670 (D. Kan. 2003) (internal quotation marks omitted) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 690 (D. Kan. 2001)); *see also Foster v. Berwind Corp.*, 1990 WL 209288, at *6 (E.D. Pa. Dec. 12, 1990).

[41] Nertzorg & Kern, *supra* note 8, at 519.

[42] Agenda Book, *supra* note 10, at Tab 1A, 35; *see also* Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26 Utah Bar J. 38, 40 (2013) ("many judges and lawyers unwittingly extrapolate[] the 'reasonably calculated' wording to broaden discovery beyond the benchmark of relevance").

the general tenor of Rule 26," which already makes repeated references to a party's claims or defenses,[43] and is critical to narrow overbroad discovery.[44]

While ILR enthusiastically endorses this change, the Committee should refine the proposed amendment by adding a requirement that the information not only be relevant, but also ***material*** to a party's claim or defense. A materiality standard would strengthen Rule 26(b)(1) by ensuring an even greater relationship between relevant facts and a party's claims or defenses, without compromising a party's ability to obtain legitimately needed information.

The Committee's other proposed proportionality changes to the discovery rules should be adopted as well. These changes, which would limit the number of depositions, interrogatories and requests for admissions, and reduce the presumptive duration of depositions, 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.[45]

III. Proposed Rule 37(e) – Preservation And Spoliation

The Committee's proposed re-write of Rule 37(e) is needed because the effectiveness of the current rule's "rarely applied" "safe harbor"[46] has been called into question, as "electronic discovery has become a prime tool used offensively by litigants, with sanctions motions turning into their own mini[-]litigations."[47] As one commenter noted, "[i]n the Fourth Circuit there are only a handful of reported court opinions applying Rule 37(e), and there is no opinion in which the Rule barred the imposition of a sanction."[48]

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[43] Shaffer & Shaffer, *supra* note 27. For example, the disclosure provision of Rule 26 requires parties to identify individuals, documents and electronically stored information that they "'may use to support their claims and defenses.'" *Id.* (quoting Fed. R. 26(a)(1)). Similarly, Rule 26(f)(2) mandates a meet-and-confer session during which the parties must develop a discovery plan based on their "'claims and defenses.'" *Id.* (quoting Fed. R. Civ. P. 26(f)(2)).

[44] Paul V. Niemeyer, *Symposium Honoring Professor Edward Cooper: Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. Mich. J.L. Reform 673, 679 (2013) (noting that American College of Trial Lawyers has consistently supported this change, which "would help stem" the rising costs associated with modern discovery).

[45] *Compare* Proposed Rule 26(b)(2) *with* Fed. R. Civ. P. 26(b)(2).

[46] Mark S. Sidoti, Gibbons P.C., *Staying Ahead Of The E-Discovery Learning Curve*, Metropolitan Corporate Counsel (June 2013).

[47] Danielle M. Kays, *Reasons to "Friend" Electronic Discovery Law*, 32 Franchise L.J. 35, 36 (2012); *see also* Shaffer & Shaffer, *supra* note 27 ("[d]ata shows that spoliation motions are being filed more frequently"); Laura A. Adams, *Reconsidering Spoliation Doctrine Through the Lens of Tort Law*, 85 Temp. L. Rev. 137, 154 (2013) ("the frequency of motions for sanctions for spoliation of evidence has increased, generating additional costs and concerns for litigants, lawyers, and the judiciary"); Margaret Rowell Good, *Loyalty to the Process: Advocacy and Ethics in the Age of E-Discovery*, 86 Fla. Bar J. 96, 96 (2012) ("courts are increasingly imposing [discovery] sanctions on parties and, occasionally, on counsel").

[48] Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. Rev. 537, 564 (2013).

Because companies fear they will be sanctioned for missing information, preservation costs have continued to mount under the current rule. The corporate general counsel of an American company recently estimated that ten percent of the company's 200,000 employees were under a litigation hold, which required the company to save approximately twenty terabytes of data – the equivalent of approximately five hundred million pages of plain text.[49] That same general counsel also highlighted preservation efforts undertaken in connection with a matter the company reasonably anticipated would result in litigation. For that matter, the company was spending $100,000 per month, with total costs exceeding $5 million.[50]

Former United States Magistrate Judge (and now District Court Judge) Paul Grimm described the problem as follows:

> How then do such corporations develop preservation policies? The only 'safe' way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[51]

And Judge Lee Rosenthal, former Chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, similarly observed, "[t]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information."[52] Sure enough, fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information,[53] even though only an infinitesimal fraction of information that is actually preserved ends up being used by the parties in support of their claims or defenses.[54]

The Committee is correct to recognize the staggering costs of over-preservation and to acknowledge that Rule 37(e) has "not been sufficiently effective" in reducing "preservation

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[49] *See* Adams, *supra* note 47, at 155 (citing Meeting Notes, Mini-Conference on Preservation and Sanctions for the Discovery Subcommittee of the Advisory Committee on Civil Rules 2 (Sept. 9, 2011)), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

[50] *See id.*

[51] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010).

[52] *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

[53] Carol Stainbrook et al., Cohasett Assocs. Inc., *Electronically Stored Information (ESI) – Legal Holds & Disposition* 6 (2012).

[54] *See* Withers, *supra* note 48, at 546 ("For all their expense, preservation activities seldom return value to the parties. . . . [L]ittle of what is preserved is ever called for in litigation, implying that either little analysis is going into preservation decisionmaking, or it is driven more by fear than by need[.]") (citing Lawyers for Civil Justice, *Preservation – Moving the Paradigm to Rule Text 14* (2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Lawyers%20for%20Civil%20Justice.pdf.).

sanction risks."[55] The proposed new Rule 37(e) is an improvement over the current rule in which the only option for a court is to sanction a party for losing discoverable information. Because the goal of Rule 37(e) should be to lessen the impact of a party's loss of information on the other side – rather than to punish that party – a rule that gives courts the option of ordering curative measures is sensible. Further, the Rule's "focus[]" on curative measures may reduce "expensive and time-consuming [sanctions] motion practice and facilitate[] [the] efficient disposition of [an] action."[56] The new rule should also help mitigate the "balkanized approach to the spoliation issue that now characterizes the litigation landscape."[57]

There are two important changes that need to be made to the proposal, however. Under the proposed amendment, courts could sanction parties for the loss of information where "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."[58] ILR believes that the first category should be limited to conduct that is both willful ***and*** in bad faith. After all, some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind.[59] Thus, under the proposed amendment, businesses could be sanctioned for destroying information pursuant to an existing document retention policy, even if that policy were being implemented in good faith. Because sanctions should only be allowed where a party has engaged in intentionally culpable conduct – i.e., knowingly destroying evidence that the party knows should have been preserved – the Committee should change the word "or" in proposed Rule 37(e)(1)(B)(i) to the word "and."

ILR also urges that the second category, which would allow sanctions without a finding of either willfulness or bad faith, be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation "mini-litigations," described above, and impose significant costs on American companies by encouraging them to store every last byte of information. It would also be highly unfair. As one federal appeals court explained, an adverse inference instruction, one type of sanction imposed where a party has lost discoverable information, "creates a substantial danger of unfair prejudice" by "encourag[ing] the jury to speculate that the missing [information] contained admissions and other information damaging to" the party accused of spoliation.[60] This prejudice is "all but a declaration of

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55 Advisory Committee on Civil Rules, at 122, Nov. 1-2, 2012, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf.

56 Shaffer & Shaffer, *supra* note 27.

57 *Id.*

58 Proposed Rule 37(e)(1)(B)(i)-(ii) (emphases added).

59 *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.").

60 *Morris v. Union Pac. R.R.*, 373 F.3d 896, 903 (8th Cir. 2004); *see also id.* at 900-01 ("When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of [a lost piece of evidence].").

victory" for the opposing side.[61] Allowing this sort of severe sanction absent willful and bad-faith conduct is simply "too strict."[62]

Proposed Rule 37(e)(2) also lays out five factors a court should consider when assessing a party's conduct before ordering curative measures and/or sanctions.[63] While these factors are well-intentioned, they should be deleted from the proposed amendment. This is so because none of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Such a standard "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle."[64]

IV. Answers To The Committee's Questions

The Committee has invited public comment on five specific questions concerning proposed Rule 37(e). Here are ILR's responses:

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: The rule should not be limited to electronically stored information. Having two separate rules for electronically stored information and physical evidence will only create confusion for litigants. This is especially so given that the Committee's question itself recognizes the increasing difficulty of distinguishing between the categories of discovery. Because Rule 37(e) sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

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

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61 Adams, *supra* note 47, at 151.

62 Erickson, *supra* note 4, at 892.

63 These factors are: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information. *See* Proposed Rule 37(e)(2).

64 *Orbit One Communications v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (In light of "highly elastic" reasonableness standard, "party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.'") (citation omitted).

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: As set forth above, this provision should not be included in the rule. Opening the door to sanctions absent culpability by the party that lost the information is inherently unfair. It would also encourage over-preservation and increased discovery costs, as parties fear that even good-faith, routine destruction of information may result in sanctions in the future. This new provision also threatens to create a cottage industry of spoliation-sanction litigation that focuses on whether a party's loss of information has "irreparably deprived" the other side of a "meaningful opportunity to present or defend against the claims in the" case. An invitation for additional discovery motion practice simply cannot be squared with the Committee's desire to reduce costs and burdens.

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.

Response: If the Committee makes the changes proposed in our comments, then there is no need to retain current Rule 37(e).

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: Yes, the Committee should add a definition of "substantial prejudice" to ensure a national, uniform standard when determining whether sanctions for spoliation should be imposed on a party. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. According to the Southern District of New York, for example, this standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense."[65] But "substantial prejudice" should be defined as a more stringent standard – i.e., that the loss of information is somehow material to the party's claims or defenses.

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: Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith – for example, as part of a routine document preservation system. In other words, sanctions should only be available where

[65] *Sekisui Am. Corp.*, 2013 WL 4116322, at *4.

a party acted, knowing that it had a duty to retain the information.[66] Such a definition would ensure that only those parties who are culpable for losing information are punished by sanctions.

V. The Committee Should Ultimately Address The Due-Process And Fairness Implications Of The Current Producer-Pays System.

We commend the Committee's efforts to reform the current civil discovery rules. As discussed above, the proposed amendments mark an important step forward in reducing the costs and burdens that characterize modern discovery. We fear, however, that "[m]ajor and systemic reform is required to attain the goals stated in Rule 1" and cannot be accomplished simply by "tinkering at the edges of the Rules of Civil Procedure."[67] Therefore, once these rules are adopted, we urge the Committee to address the root cause of our broken discovery system: the rule that the producer of discovery generally bears all of the costs associated with production. This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself.[68]

Discovery requests have become more and more expensive with the continued expansion of electronic discovery. Law Technology News has reported that the total cost of electronic discovery rose from $2 billion in 2006 to $2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually over the next few years.[69] In a more recent case study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled $1.8 million per case.[70]

A significant consequence of the current producer-pays rule is the routine settlement of even meritless claims.[71] As one report found, lawsuits of "questionable merit . . . are settled rather than tried because it costs too much to litigate them."[72] Even the Supreme Court has

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66 *See Rimkus*, 688 F. Supp. 2d at 642-43 (finding that bad faith, not just intentional conduct, was required to support an adverse-inference instruction).

67 Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century*, FDCC (May 2, 2010), http://www.thefederation.org/documents/V60N3_WhitePaper.pdf.

68 Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001) ("the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request.").

69 George Socha & Tom Gelbmann, *Climbing Back: Revenue Climbing Back for EDD Industry*, Law Tech. News (Aug. 1, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463900292.

70 *See* Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012).

71 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also* Beisner, *supra* note 2, at 549("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

72 Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *supra* note 8, at 2.

recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial.[73]

Beyond encouraging costly and burdensome discovery, the rule that a defendant bears all of the costs of responding to the other side's discovery requests also raises significant constitutional issues. Specifically, we believe that the rule violates a defendant's right to due process because it requires that party to pay exorbitant sums of money without any preliminary finding of wrongdoing. This is particularly so given that one's failure to comply with discovery obligations can result in a finding of contempt of court under Rule 37.[74] The due process clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[75] And the Supreme Court has made clear that a defendant's bank accounts qualify as the sort of property protected by this provision.[76] Such property cannot be deprived "except pursuant to constitutionally adequate procedures"[77] – most notably "notice and opportunity for hearing."[78]

This view is also the position of some legal scholars, who have explained that "impos[ing] the nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process" because it requires payment "without even a preliminary judicial finding of wrongdoing."[79] It is also a logical extension of longstanding Supreme Court precedent holding that deprivation of a property interest, based merely on a plaintiff's ability to make out a facially valid complaint, carries too great a risk of erroneous deprivation to satisfy due process.

In *Fuentes v. Shevin*, the Supreme Court invalidated laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin.[80] Under these laws, any person could file an *ex parte* application for a pre-judgment writ of replevin as long as she posted a security bond. The laws did not require any notice to be given to the other side; nor did they afford the possessor any pre-seizure opportunity to be heard.[81] The Supreme Court struck down the laws as a violation of due process. As the Court explained, while "the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ . . . those requirements are hardly a substitute

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73 *Twombly*, 550 U.S. at 558-59.

74 Redish & McNamara, *supra* note 15, at 806 (citing Fed. R. Civ. P. 37).

75 U.S. Const. amend. V.

76 *See N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (a bank account is "surely a form of property").

77 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

78 *Bell v. Burson*, 402 U.S. 535, 542 (1971).

79 Redish & McNamara, *supra* note 15, at 807-08.

80 *Fuentes v. Shevin*, 407 U.S. 67 (1972).

81 *Id.* at 69.

for a prior hearing."[82] This is so, the Court explained, because "they test no more than the strength of the applicant's own belief in his rights."[83] Instead, the court must "examine[] the support for the plaintiff's position" and "hear both sides" before depriving the defendant of a property interest.[84]

Similarly, in *Connecticut v. Doehr*, the Supreme Court held that a state law providing for a prompt post-attachment hearing did not comport with the requirements of due process.[85] There, the claimant sought an attachment of defendant's home to secure payment of a judgment he hoped to obtain on a civil assault complaint against the defendant.[86] According to the Supreme Court, the state law provision authorizing a prompt post-attachment hearing was inadequate under the due process clause because the law did not otherwise provide adequate safeguards against an erroneous deprivation. The Court explained that "[p]ermitting a court to [take away a property interest] merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would [impermissibly] permit the deprivation of the defendant's property when the claim would fail to convince a jury [or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute."[87]

The principles set forth in *Fuentes* and *Doehr* apply with equal force to the civil discovery context because a plaintiff's conclusory allegation of wrongdoing automatically triggers a defendant's obligation to pay significant amounts of money responding to a plaintiff's discovery requests. In fact, the due process concerns are even more serious in the discovery context because, unlike applications for writs of replevin, there is no requirement that a plaintiff place a security bond before proceeding to discovery. While the Supreme Court's recent decisions in *Twombly* and *Iqbal* have raised the bar for stating a claim and, thus, unlocking the keys to discovery,[88] a skilled lawyer can usually fashion a complaint that satisfies the requirements of these key decisions, irrespective of the underlying merit of the case.[89] And the fact that a defendant may be afforded a judicial hearing before a court rules on a motion to dismiss or for judgment on the pleadings is of little import to the due process question.[90] After

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82 *Id.* at 83.

83 *Id.*

84 *Id.*

85 *Connecticut v. Doehr*, 501 U.S. 1, 5 (1991).

86 *Id.*

87 *Id.* at 13-14.

88 *See Twombly*, 550 U.S. at 563 n.8 (courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct"), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

89 *See* Judicial Conference Advisory Committee on Civil Rules & Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 5-7 http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf (noting that the full impact of the Supreme Court's heightened pleading standards on discovery is unclear).

90 *See* Redish & McNamara, *supra* note 15, at 809-10.

all, "the sine qua non of a due process hearing is the ability of the judge to make a 'realistic assessment concerning the likelihood of an action's success'"; however, "[t]he evaluation of a complaint . . . occurs before the parties have had the opportunity to gather or present information in support of their claims."[91] As a result, "the adjudication of a motion to dismiss is not a constitutionally adequate hearing" to safeguard a defendant's right to due process before being deprived of its property.[92]

"[P]lacing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."[93] In determining whether an adjustment by the court is appropriate, the court should consider whether the party from whom the discovery is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies. This approach would reduce the likelihood that discovery is employed as a strategic weapon, ensuring that it is instead used to obtain information that is legitimately needed. The result would be a circumscribed, less expensive discovery system. In addition to diminishing the costs and burdens of civil discovery, such an approach would also protect defendants' due process rights because they would no longer be forced to give up large sums of money producing discovery before a court has found that they did anything wrong. This system would also facilitate greater and more direct court involvement in discovery, which is a principal purpose behind the Duke Conference Rules Package amendments, by giving courts a very direct role in balancing the burdens of discovery between the parties.

An alternative – albeit more modest – solution would be presumptive cost-shifting only for electronic discovery, which remains the most expensive form of civil discovery. While some courts have embraced cost shifting for electronic discovery,[94] the Rules currently do not ***require*** that courts consider cost shifting when overseeing discovery.[95] Creating a presumption in favor of cost-shifting whenever a party seeks electronic discovery would encourage parties to think twice before making needless discovery requests. As a result, parties would likely narrow their requests for information, lowering the costs associated with production and reducing the prospect that a defendant's due process rights will be infringed.[96] Moreover, because cost shifting is

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91 *Id.* at 810 (quoting *Doehr*, 501 U.S. at 14).

92 *Id.*

93 Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 Fla. L. Rev. 885, 894 (2012).

94 For example, in *In re Fosamax Products Liability Litigation*, 2008 WL 2345877, at *8 (S.D.N.Y. June 5, 2008), Judge John F. Keenan of the Southern District of New York not only restricted the plaintiffs' discovery, but also ordered the plaintiffs to shoulder up to $ 150,000 of the production costs.

95 James Pooley & Vicki Huang, *Multi-National Patent Litigation: Management of Discovery and Settlement Issues and the Role of the Judiciary*, 22 Fordham Intell. Prop. Media & Ent. L.J. 45, 55 (2011) (courts have "discretion to shift a portion of the costs onto the requesting party to protect the responder from 'undue burden or expense'") (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

96 *See* Grimm & Yellin, *supra* note 17, at 524 ("The bottom line is that cost containment in discovery cannot be discussed seriously without entertaining the concept of cost allocation.").

currently subject to rules that vary from court to court, the Committee should consider establishing clearer guidelines for the practice. The Committee might codify the factors articulated by the American Bar Association.[97] Enshrining these factors into the civil discovery rules would represent an important advancement over prior efforts to curtail abusive and costly discovery.

At the very least, parties requesting electronically stored information that is not reasonably accessible should be required to bear the costs of producing that information. For example, parties seeking data from backup tapes and other forms of disaster-recovery media[98] should bear the costs of retrieving, reviewing, and producing this information. Notably, such a rule has been adopted by Texas, which has succeeded in limiting discovery costs.[99]

VI. Conclusion

The Committee's proposals are encouraging news for both litigants and the courts, all of whom are harmed by the rising costs associated with modern civil discovery. Strengthening the proportionality requirement of Rule 26(b)(1), limiting discovery to information relevant to a party's claims or defenses and reducing the presumptive limit on depositions and other vehicles of discovery will help keep unbridled discovery in check, thereby lowering the costs of discovery for litigants and the judiciary. The proposal to incorporate curative measures into Rule 37(e) – giving courts an alternative to imposing sanctions – is also laudable, as it will likely reduce the volume of discovery-sanctions motions, saving parties critical resources and time. While the curative measures provision is a sensible improvement over the current sanctions-only approach, sanctions should only be authorized where a party has acted willfully and in bad faith.

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97 *See* ABA Section of Litig., Civil Discovery Standards (2004), http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf. These factors include: "A. The burden and expense of the discovery, considering among other factors the total cost of production . . . compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product . . . ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; . . . J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; . . . O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]" *Id.* at Standards 29b.iv.A-P.

98 Disaster-recovery systems are those designed to deal with and prevent IT downtime.

99 *See* Tex. R. Civ. P. 196.4 (requiring the party who makes unreasonable discovery requests to pay for the discovery).

Expanding the category of sanctions beyond truly culpable conduct will hurt American businesses, which will find themselves expending vast sums of money preserving information for the sake of avoiding sanctions.

In sum, the Committee's proposals offer very positive, cost-effective reforms to the nation's civil discovery system. Over the longer term, however, the Committee should consider changing the default rule under which the party who produces discovery bears the cost of that production. It is this rule (more than any other factor) that has driven up the costs of discovery, because there is no downside to serving overbroad and burdensome discovery requests. Moreover, such a rule cannot be reconciled with a defendant's due process rights because a plaintiff's mere allegations trigger a defendant's obligation to produce information and bear the costs of doing so, without any judicial finding of wrongdoing. Accordingly, the Committee should ultimately consider an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court. Alternatively, the Committee should expand cost-shifting for electronic discovery, which remains the primary factor behind excessive discovery costs.