LAWYERS FOR CIVIL JUSTICE

PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

REDUCING THE COSTS AND BURDENS OF MODERN DISCOVERY: WHY THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE ARE URGENTLY NEEDED (WITH A FEW IMPORTANT IMPROVEMENTS)

August 30, 2013

I. Introduction and Summary

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") concerning the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments").[2] In doing so, LCJ commends the Advisory Committee for its extensive work to fashion just and workable reforms and suggests measured changes to support that effort.

The proposed amendments are a significant step towards a national, uniform spoliation sanction approach and a fair and practical revised scope of discovery. Fundamental discovery reform is necessary[3] because the costs and burdens associated with discovery, especially electronic

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] This Comment addresses a number of issues related to the proposed amendments in addition to the five questions on which the Committee specifically invited comment. Please see section II. B. 5. below for a concise summary of LCJ's views on the Committee's five questions.

[3] Another critical and interrelated piece of needed reform is the creation of incentive-based cost default rules. We look forward to working with the Advisory Committee as the Discovery Subcommittee undertakes a meaningful review of the economic incentives in discovery.

discovery, have put our civil justice system in "serious need of repair."[4] In a significant fraction of cases, discovery rather than the underlying merits drives the outcome of legal disputes.

There is widespread agreement that discovery costs are affecting the outcome of cases. A survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System[5] found that 80 percent of chief legal officers or general counsels disagree with the statement that "outcomes are driven more by the merits of the case than by litigation costs." That survey also found that over 70 percent of chief legal officers or general counsels believed that parties "overuse permitted discovery procedures" by going beyond what is necessary or appropriate for the particular case, and 97 percent believe that litigation is too expensive.

Corporate defense counsel are not alone in perceiving a serious problem. The American College of Trial Lawyers data[6] and that of the American Bar Association,[7] both representative of views from plaintiffs' and defense bar, show a widespread opinion that discovery is too expensive; that costs, rather than the merits, forces settlements; and that e-discovery is abused. Put simply, there is solid agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery are skewing the civil justice system.

It is no wonder that more and more litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, settling cases early and without regard to the merits in an effort to avoid the expense and unpredictability of litigation—meanwhile, serious discussion about the vanishing jury trial and what it means for civil justice continues.

Because of the Advisory Committee's decision to move forward with the proposed amendments discussed herein, there is now an opportunity to have a real impact on the costs and burdens of discovery—a goal that many before have attempted but failed to achieve. LCJ supports this effort while strongly urging the Committee to make important additions and modifications to the proposed rules that will enable the Committee to achieve its goal of improving our civil justice system.

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[4] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT 2 (2009), *available at* http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i.

[5] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf .

[6] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (Sept. -Oct. 2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf .

[7] AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

II. Preservation and Sanctions: Proposed Rule 37(e)

A. A New Preservation Rule is Urgently Needed.

Preservation of electronically stored information (ESI) has developed into one of the major cost drivers in litigation. The electronic information explosion is not the problem. The unfettered scope of discovery and the lack of a uniform, national preservation standard have created an environment in which ancillary litigation about preservation thrives.

Preservation issues are currently decided on a case-by-case basis by courts that have created their own *ad hoc* "litigation hold" procedures. Without clearly defined preservation rules, parties struggle to draw the line on the scope of preservation—especially in the period prior to commencement of litigation—and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. Organizations must divert resources to "defensive preservation" and individual litigants are faced with costly spoliation/sanctions battles that they simply do not have the economic resources to fight.[8] There has been a dramatic escalation in reported decisions on the topic, indicating the tip of an iceberg of motion practice and unfairness.[9]

The only alternative to costly over-preservation is to risk severe and embarrassing sanctions for failing to preserve what might be pertinent ESI. Many courts impose severe sanctions, such as an adverse-inference jury instruction, on the basis of a party's unintentional failure to meet *ad hoc* requirements that do not exist in any rule and may vary from jurisdiction to jurisdiction.

In other words, the lack of a clear preservation rule forces a Hobson's Choice: Preserve too much, incurring high storage costs, significant burdens on custodians, and the resulting challenges of analysis and production of huge volumes of information, or preserve too little, and face the risk of second-guessing with spoliation allegations that can result in a case-altering jury instruction that a party was a "bad actor" (even without a finding of bad faith), which inevitably causes an adverse judgment.

Often lost in this discussion is that fact that most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue. For example, Microsoft Corporation reported in 2011 that that "[f]or every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1." [10] In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are preserved, but only 142 are actually used.[11] Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.

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[8] *Bozic v. City of Washington*, 912 F. Supp. 2d 257, 260, n. 2 (W.D. Pa. 2012) ("Neither state of affairs is a good one.").

[9] There has been a dramatic escalation in spoliation motions and rulings since the already elevated levels reported to the 2010 Duke Litigation Conference. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 791 (2010) ("an all-time high").

[10] Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (August 31, 2011).

[11] *Id.*

The fear of sanctions and the inability to navigate the conflicting standards has bred an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information.

Proposed Rule 37(e)(1)(B) is a significant improvement over the current rule,[12] but as explained in the next section, the proposal must be confined to a clear and simple standard without the current unpredictable and unmanageable exceptions.

B. Proposed Rule 37(e) Must Be Improved to Be Effective.

1. The (B)(ii) Exception Should Be Stricken.

The exception set forth in proposed Rule 37(e)(1)(B)(ii) ("the (B)(ii) exception") would permit sanctions or an adverse inference instruction without a showing of willfulness or bad faith when a party is "irreparably deprived" of a meaningful opportunity to present or defend a law suit.[13] This exception is based on the Fourth Circuit decision in *Silvestri* v. *General Motors,*[14] where the prejudice from loss of evidence in a products liability case was clear and it was unfair to require the defendant to defend the action.

However, there is no need, based on policy or case law, for the (B)(ii) exception, since ample measures exist to handle that type of rare case. Absent willfulness and bad faith, there should be no authority for harsh sanctions based solely on assertions of irreparable prejudice, an allegation which can be (and often is) routinely made. Crafting a separate rule for the one-in-a-million case,[15] when balanced against the potential to undermine the entire proposed Rule 37(e), creates risks that vastly outweigh the possibility of its usefulness. [16]

a. Removing the (B)(ii) Exception Will Not Lead to Results Adverse to Existing Spoliation Law.

Proposed Rule 37(e) is sufficiently comprehensive without the (B)(ii) exception to address situations where a key item of evidence is lost or destroyed. The facts of S*ilvestri*[17] are illustrative. The plaintiff in *Silvestri* was allegedly injured when the airbag in the car he was driving failed to deploy during an accident. Plaintiff's experts were provided an opportunity to inspect the car soon after the accident. However, despite their admonitions to Plaintiff's counsel that General Motors would need to inspect as well and that the car should, therefore, be preserved, the car was eventually sold and repaired before such an opportunity was provided.

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[12] The Advisory Committee has specifically invited comment on whether the provisions of the current Rule 37(e) should be retained in the proposed rule. Because proposed Rule 37(e) covers all of the conduct that the current rule does, as explained in the proposed Note, LCJ believes that it is unnecessary to retain the current 37(e) language in the proposed rule.

[13] Proposed Rule 37(e)(1)(B)(ii).

[14] *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

[15] Even the circuit court in *Silvestri* acknowledged the "peculiar circumstances" of the case. 271 F.3d 583, 595 (4th Cir. 2001).

[16] This exception risks harming parties of all sizes, but may pose the most risk to an innocent single plaintiff who may not understand the importance of key evidence.

[17] 271 F.3d 583 (4th Cir. 2001).

Because plaintiff claimed the airbag was faulty, GM's lack of opportunity to inspect presented a major issue in the case. The lack of opportunity was exacerbated by the deficiencies in plaintiff's own experts' reports, which failed to include any measurements, for example. Ultimately, because of the substantial prejudice caused by the loss of the key piece of evidence, plaintiff's case was dismissed.

If this case had been analyzed under the proposed Rule 37(e) without the (B)(ii) exception, the outcome could have been the same. The *Silvestri* court noted that the failure to preserve the car "may have been deliberate."[18] In so finding, the court cited counsel's knowledge that the vehicle was the "central piece of evidence in his case against General Motors and that he had been reminded that this piece of evidence should be preserved or that General Motors should be notified."[19] Instead, "the vehicle was not preserved, and neither Silvestri nor his attorneys notified General Motors of Silvestri's claim until almost three years after the accident,"[20] which by then was too late—the vehicle had already been repaired. Thus, under proposed Rule 37(e)(1)(B)(i), sanctions would likely have been available to GM because the court could have deemed the conduct at issue to be willful ("deliberate"), in bad faith and prejudicial.

Moreover, under the proposed Rule, the availability of remedial or curative measures would have permitted equivalent relief. The *Silvestri* court could have reached an essentially similar result without the (B)(ii) exception by precluding plaintiff's experts' reports and testimony and allowing comment by counsel at trial.

Situations with significant missing evidence with limited culpability often can be addressed by selecting remedies short of the harsh sanction of dismissal, given the alternatives available to a court. A clear example is *Allstate Texas Lloyd's v. McKinney*.[21] In *Allstate*, the court could have resorted to *Silvestri* to dismiss the case since the "prejudice to McKinney is that he cannot physically or visually test the sample Allstate relied on to deny the claim.[22] The court instead allowed the case to continue but prevented Allstate and its experts from relying upon the missing evidence.

A similarly instructive result was reached in *Byrd v. Alpha Alliance*.[23] In *Byrd*, the majority reversed the district court's dismissal of plaintiff's case based on destruction of a glass stove top central to a fire investigation. The Sixth Circuit held that dismissal was "excessively harsh in light of other available options, such as an adverse instruction." The dissent, on the other hand, would have let the dismissal stand in the absence of bad faith because "*Silvestri* does not require a complete inability to defend, but [only] a substantial impairment …. where the spoliator's conduct falls short of bad faith." The reasoning of the dissent highlights the danger of the (B)(ii) exception. Although well intentioned, the exception permits harsh sanctions absent a finding of bad faith.

[18] *Id*. at 594.
[19] *Id*. at 593.
[20] *Id*. at 594.
[21] No. 4:12-CV-02005, 2013 WL 3873256 (S.D. Tex. July 24, 2013).
[22] *Id*. at *5.
[23] No. 12–5400, 2013 WL 1223886 (6th Cir. Mar. 26, 2013) (unpublished opinion).

These examples clearly illustrate that the removal of the B(ii) exception will not "overturn" the *Silvestri* line of cases. In all the examples, sanctions would likely have been available to the prejudiced party under the proposed rule absent the (B)(ii) exception. Thus, fears that spoliation will go unaddressed are unfounded.[24]

b. The Proposed "Irreparable Deprivation Standard" Will Create Ancillary Litigation, Not Reduce It.

As demonstrated by the *Byrd* trial court and dissent, it is entirely foreseeable that including the (B)(ii) exception would result in an increase in motions seeking harsh sanctions in cases that lack any showing of bad faith—thus dangerously undermining a uniform national standard requiring bad faith as a prerequisite to harsh sanctions and unnecessarily preventing a court from dealing with cases on the merits. The (B)(ii) exception would permit "case-dispositive" sanctions listed in Rule 37(b)(2)(A) (such as a default judgment or a non rebuttable adverse-inference jury instruction) *merely* because a party has been "irreparably" deprived of a "meaningful opportunity" to present or defend against claims without any wrongful conduct by the opposing party. This is unwise in the extreme.

Where a party seeks such a remedy using the exception, this would be tantamount to seeking a tort-based spoliation recovery with all the confusion and interpretive problems that have led most state jurisdictions to reject its use. This would also be inconsistent with the limitations in 28 U.S.C. § 2072(b) given that "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, 'from a court's inherent power to control the judicial process.'"[25]

Additional problems with this approach also are apparent. The (B)(ii) exception conceivably could permit a jury to assess damages in an underlying claim where a court has directed a judgment without anyone knowing the impact, if any, of the missing evidence, thus encouraging rank speculation. All that would be needed to justify such a holding is the fact that key evidence was lost—through no fault of the party opposing the motion—along with a showing of the lack of a meaningful opportunity to present or defend against claims.

The circumstances under which a party is "irreparably deprived" of the means to prove or defend a case are amorphous and will be difficult to identify. Does it require proof that the spoliation proximately caused the plaintiff to be unable to prove the underlying cause of action, or would it be sufficient that the loss merely impaired their ability to prove the claim?

A determination of what is sufficient to trigger the (B)(ii) exception would differ from judge to judge, and from court to court, leading to inconsistency amongst the federal courts—and in any state courts that also adopt the amended rule. This potential exposure could cause individuals and

[24] The Advisory Committee has specifically invited comment on whether proposed Rule 37(e) should be limited to ESI or include tangible things as well. LCJ believes the rule should apply to all discoverable matter, both because of our conclusion that the proposed rule, absent the (B)(ii) exception, will not overturn existing spoliation case law, and because the distinction between ESI and other discoverable matter is vanishing in many instances due to technological innovation.

[25] *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. Feb. 4, 2009).

entities to take extraordinary measures to retain documents at substantial cost and perpetuate the exact problems that motivated the Committee to re-write the rule.

c. The (B)(ii) Exception Will Encourage Expansion of the "Gotcha Game."

It is already clear that the "gotcha game" associated with routine spoliation allegations is a wide-spread problem.[26] The (B)(ii) exception would only exacerbate the problem, not tame it. Including the (B)(ii) exception in the new rule will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the "irreparably deprived" language.

Eliminating the (B)(ii) exception, on the other hand, will ensure that proposed Rule 37(e) delivers a consistent and uniform national standard and a change of the paradigm. Courts will be able to focus on the merits of litigation and whether enough evidence exists to prosecute or defend a claim, rather than on what was lost or whether any mistakes were made while trying to ensure every piece of relevant evidence was preserved. Accordingly, we urge the Committee to remove the (B)(ii) exception from proposed Rule 37(e).

2. Sanctions Should Require a Showing of Willfulness and Bad Faith

Proposed Rule 37(e)(1)(B)(i) would establish "willful or in bad faith" conduct as the threshold culpability standard for imposition of sanctions and, coupled with the "substantial prejudice" requirement, provide an elevated threshold to distinguish conduct that should be sanctioned from that which is appropriate for labeling as spoliation.

However, "willful" can be defined as intentional or deliberate conduct without any culpable state of mind.[27] This was recently and remarkably illustrated in *Sekisui American Corp. v. Hart*,[28] in which Judge Shira Scheindlin applied the following standard:

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[26] *See* LAWYERS FOR CIVIL JUSTICE ET AL., COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, PRESERVATION – MOVING THE PARADIGM 11-12 (Nov. 10, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=17. ("Currently there is no disincentive for a requester to lodge other than an overly broad request, and there is an incentive for the responder to seek to comply with such an overly broad request in an effort to avoid potential sanctions even at significant cost. A concern over lost data (feigned or real) is unlikely to result in a movant being sanctioned for waste of judicial resources. There is no downside to playing the game."); LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE 41 (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40 ("Although information appears to be more available in the digital age, ancillary litigation has increased over the loss of small portions of digital information with little or no connection to the controversy. . . . The result is a legal "gotcha" game focused on the steps used to preserve data, instead of the data actually available . . . .").

[27] *See* BLACK'S LAW DICTIONARY 1737 (9th ed. 2009) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious"; defining "willfulness" as "[t]he fact or quality of acting purposely or by design; deliberateness; intention"); *Powell v. Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008) (defining "willful" as "deliberate or intentional").

[28] *Sekisui American Corp. v. Hart*, ---F. Supp. 2d---, 2013 WL 4116322 (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."[29]

Under this standard, the act of establishing a standard auto-delete function, for example, could be characterized as "willful" because it is intentional, even if not done in bad faith. If that act would be defined to meet the "willful or in bad faith" prong of proposed Rule 37(e)'s test, allowing sanctions in that context would run counter to the goal of sanctioning only intentionally culpable conduct—*i.e.*, destruction of evidence known to be relevant to pending or potential litigation in order to deprive the requesting party of its use.[30]

Accordingly, we urge the Committee to substitute the conjunctive "and" for the disjunctive "or" in the proposed rule to make clear that an intentional act carried out in good faith is not a sufficient basis for sanctions.[31] It must also involve intentional failures to preserve[32] that are "purposefully"[33]or deliberately undertaken.[34] That type of misconduct stems from a desire to suppress the truth[35] because the missing information might damage the spoliating party's case.[36]

In the alternative, the Committee could—consistent with recent treatment of the issue—define "willful" to require a scienter or knowledge.[37] Either approach would further the aims: (1) to

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[29] *Id.* at *4 (footnote omitted).

[30] Not only is the "willful" as "intentional" standard an inappropriate basis for the imposition of sanctions, but it is also an incorrect premise for the extrapolation that "intentional" destruction allows a presumption of relevance. Judge Scheindlin explained:

> When evidence is destroyed willfully, the destruction alone "is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." "[T]he intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful." "Similarly, a showing of gross negligence in the destruction ... of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party."

Id. at *5 (footnotes omitted).

[31] We have not been able to identify any evidence that the Advisory Committee or Discovery Subcommittee has considered and rejected the use of "and" in place of "or."

[32] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (contrasting sanctions where a litigant has engaged in "bad-faith conduct or willful disobedience of a court's orders" with those for conduct that merely fails to meet a reasonableness standard); *see also Victor v. R.M. Lawler*, No. 12-2591, 2013 WL 1681425, at *2 (3d Cir. April 18, 2013) (refusing to find "willful spoliation" in absence of intentional conduct).

[33] *Adeptech Sys., Inc. v. Fed. Home Loan Mortg. Corp.*, 502 Fed. Appx. 295, 296, 2012 WL 6720927 (4th Cir. Dec. 28, 2012) (overwriting of email pursuant to normal retention policies is not "purposeful" destruction in anticipation of litigation).

[34] *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. Aug. 20, 2008) ("document destruction, although not conducted in bad faith, [can] yet be 'intentional,' 'willful,' or 'deliberate'").

[35] *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. Jan. 15, 2013).

[36] For an excellent chart showing the role of "willfulness" in connection with adverse inference instructions, *see* Hon. David C. Norton et al., *Fifty Shades of Sanctions: What Hath the Goldsmith's Apprentice Wrought?*, 64 S.C. L. REV. 459, 485-486 (2013).

[37] *See, e.g., Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his willful conduct resulted in its loss or destruction"); *McCargo v. Texas Roadhouse, Inc.*, No. 09-cv-

sanction only that conduct in which the actor has a culpable state of mind; and (2) to ensure uniformity among federal courts in sanctioning such conduct.

3. The Factors Listed in Rule 37(e)(2) Do Not Belong in the Rule.

a. The Committee's Purpose in Including the Factors No Longer Applies to the Current Proposed Rule.

The E-Discovery Panel at the 2010 Duke Litigation Conference suggested inclusion of "bright-line" rules that would provide a sufficient articulation of preservation conduct to provide a "safe harbor" from sanctions, and to bring certainty to the pre-litigation efforts to preserve. Testimony at the Dallas Mini-Conference supported this approach, especially in regard to the onset or "trigger" of the duty to preserve and its scope of its implementation, including the numbers of custodians and the types of electronic information that should presumptively be retained.

However, that approach was abandoned by the Committee for a variety of reasons, not the least of which was a concern about the rule-making authority. Instead, proposed Rule 37(e) leaves it to the courts to determine whether discoverable information that should have been preserved in anticipation of litigation or its conduct has not been preserved. The proposed rule does "not attempt to prescribe new or different rules on what must be preserved."[38] The reviewing court retains the responsibility for determining whether a failure to preserve has occurred, as modified (in ways that will vary) by the culpability and prejudice thresholds supplied by the proposed rule. However, in determining compliance with common law obligations, courts are encouraged to consider all relevant factors, including those listed in proposed Rule 37(e)(2).[39]

The listed factors emphasize consideration of the role of "notice" that litigation is likely, that the information is "discoverable"[40] and the role of preservation demands,[41] while encouraging early

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02889-WYD-KMT, 2011 WL 1638992, at *8–9 (D. Colo. May 2, 2011) (describing willful as intentional destruction of records known to be relevant); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction); Connecticut Practice Book § 13-14(d) (2013) (no sanctions "in the absence of intentional actions designed to avoid known preservation obligations").

[38] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 274 (2013) [hereinafter *Preliminary Draft of Proposed Amendments] available at* http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

[39] The listed 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.

[40] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316(Proposed Rule 37(e)(2)(A)).

[41] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316-317 (Proposed Rule 37(e)(2)(C)).

court involvement in resolving any unresolved disputes.[42] They also speak of the "reasonableness" of preservation efforts and their "proportionality" to anticipated or ongoing litigation.[43] Over time, an original list of eight factors was reduced to five by combing redundant factors and deleting one factor related to "a party's resources and sophistication in litigation."

b. The Factors Do Not Address the Analysis Required by the Proposed Rule.

Unfortunately, the list of factors is incomplete and potentially misleading in its implications. None of the factors informs the assessment of culpability and prejudice, the considerations most crucial to the spoliation analysis. Indeed, neither "willful" nor "bad faith" is defined.[44] The role of "intent" is not even mentioned, and there is no relative ranking of the factors' importance in the proposed rule or in the draft Committee Note that is offered to explain the factors. In contrast, a district judge in the Southern District of New York has modified the list of factors (published as guidance applicable to cases before her) to emphasize the need to focus on whether a failure to preserve was the result of culpable conduct and resulted in prejudice.[45]

Moreover, despite the emphasis on reasonable conduct, there is limited discussion of the impact of its absence. While the promotion of good preservation practices is to be encouraged, their absence in a particular case is not decisive under Rule 37(e) when the culpability threshold is not met or substantial prejudice does not ensue. That is the heart of the proposed Rule. Curative measures short of sanctions are provided for those instances where the thresholds for sanctions are lacking. Accordingly, the factors fail to address the key determinations that courts would be required to make under the proposed rule and should be removed.

Moreover, some of the factors can be read to imply certain preferences,[46] despite the fact that, as pointed out in *Orbit One Communications, Inc. v. Numerex Corp.*, "sanctions [are not] warranted by a mere showing that a party's preservation efforts were inadequate,"[47] including any contemporary preservation standard such as those listed in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC.*[48] A mere failure to preserve that

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[42] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 317 (Proposed Rule 37(e)(2)(E)).
[43] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316-317 (Proposed Rule 37(e)(2)(B)&(D)).
[44] The Advisory Committee has specifically invited comment as to whether there should be an additional definition of willfulness and bad faith under proposed Rule 37(e)(1)(B)(i) and, if so, what should be included in that definition. LCJ believes these terms should be defined, and urges the Committee to include in the definition of willfulness an element of malice. Doing so would make clear that sanctions are limited to acts executed in bad faith and that cause substantial prejudice.
[45] *See* Honorable Lorna G. Shofield, United States District Judge for the Southern District of New York, *Individual Rules and Procedures for Civil Cases*, at 5-6 (July 2013), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=820.
[46] Some of the factors compete with each other. The rule seems to advocate, for example, adherence to open-ended "demands" while simultaneously encouraging proportional measures. There are ample grounds for concerns about pre-litigation demands of that nature. *See, e.g., Aaron v. Kroger Ltd. P'ship I*, No. 2:10CV606, 2012 WL 78392 (E.D. Va. Jan. 6, 2012) (sanctioning non-compliance with demand without assessing relevance, prejudice or culpability).
[47] 271 F.R.D. 429, 441(S.D. N.Y. Oct. 26, 2010).
[48] 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (listing "contemporary standards" which mandate sanctions as a grossly negligent *per se*, dispensing with the need to show that any resulting loss is even relevant or materially prejudicial to

is found to have occurred without the culpability or preservation thresholds being met could require, at the most, additional discovery or other curative actions under Rule 37(e)(1)(A).

c. The Factors, If Incorporated Into the Rule, Will Create a Significant Risk of New Mandates and Will Spur Ancillary Discovery.

Incorporating the factors into the rule text creates several risks. First, courts may cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule. For example, the current draft Committee Note states that "as under the current rule," the prospect of litigation may call for "altering [any] routine operation"[49] and "[t]he party's issuance of a litigation hold is often important [on this point]."[50] It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate.[51]

In *Arista Records LLC v. Usenet.com, Inc.*,[52] for example, a District Judge cited the Rule 37(e) Committee Note as indicative of "what steps parties should take" and made it clear that intervention in the operation of an information system through use of a litigation hold was "required." It is not hard to imagine, absent clarification, that a court would take the same approach to proposed Rule 37(e)(2) and misread discussion of its factors as expressing mandates for action.

Other risks that are likely to emerge as courts construe the language of the factors include the following:

1. Proposed subsection 37(e)(2)(A) requires an examination of "the extent to which the party was on notice that litigation was likely and that the information would be discoverable." The circumstances constituting such notice are not defined with any precision in the Rule or the draft Committee Note, which merely states that a "variety of events" may alert a party to the prospect of litigation.[53]

2. Proposed subsection 37(e)(2)(B) requires an evaluation of the reasonableness of preservation efforts. Reasonableness is an inherently vague standard and the mere fact that some discoverable information is lost does not preclude its presence. The discussion in the draft Committee Note risks perpetuating the unfortunate myth that unless a party has preserved all relevant evidence ("perfection"), a party has "crossed the line" without

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innocent party) *abrogated in part by Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012) ("rejecting" notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*).

[49] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 319 (Proposed Rule 37(e) Committee Note).

[50] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 325 (Proposed Rule 37(e)(2) Committee Note).

[51] *See* FED. R. CIV. P. 37 advisory committee's note (2006) (stating that good faith may "involve a party's intervention to modify or suspend certain features" as "one aspect of what is often called a 'litigation hold.'"); *see, e.g., Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.,* 242 F.R.D. 139, 146 (D.D.C. 2007) (holding that "this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation").

[52] 608 F. Supp. 2d 409 (S.D.N.Y. 2009).

[53] As discussed in the next section, this factor would be entirely unnecessary if Rule 37(e) defined a clear preservation trigger, such as the commencement of litigation.

the necessity of proof of intent to impair the ability of a requesting party to prosecute or defend a claim or actual resulting prejudice.

3. Proposed subsection 37(e)(2)(C) requires a court to assess whether a party receiving a preservation demand has engaged in good-faith consultation regarding it. This could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.[54] The draft Committee Note states that "reasonableness and good faith may not require any special preservation efforts despite the request," improperly implying that the reverse may be true in some instances even if the requisite culpability or prejudice does not result.[55]

4. Proposed subsection 37(e)(2)(D) requires an examination of "the proportionality of the preservation efforts to any anticipated or ongoing litigation." Although proportionality is an extremely important principle, neither the proposed Rule nor the draft Committee Note spells out presumptive categories of data which need not be preserved absent prior notice.[56] Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands and can also help to stimulate early discussions.[57] Further, the risk of this factor is that proportionality will be applied to decide bad faith which should have no bearing on culpable conduct.

5. Proposed subsection 37(e)(2)(E) requires courts to evaluate whether the party "timely sought the court's guidance on any unresolved" preservation disputes. While such an effort may be useful in some cases, requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to provide guidance.

Thus, proposed subsection 37(e)(2) risks transforming proposed Rule 37(e) into one that encourages costly ancillary discovery unrelated to the merits, often involving pre-litigation work product and attorney client communications. It could encourage over-broad preservation and gamesmanship. These outcomes do not comport with the Committee's goals in re-writing Rule 37(e).

d. The Factors Do Not Belong in the Rule.

The factors included in proposed subsection 37(e)(2) work against the Advisory Committee's intended purpose of proposed Rule 37(e). At their best, factors in rules can be "a way for a

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[54] A requesting party which would not have to live up to the same standard of preservation it seeks would benefit from making the broadest demands it can fashion, thereby increasing the costs on the other side, or by creating conditions where some data loss can be used as leverage in motion practice. This "gaming" the system should not be encouraged.

[55] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 326.

[56] Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 374 (2008) (a requesting party should take steps to put the responding party on notice of the relevance and unique nature of the ephemeral data it plans to request).

[57] [Proposed] Standing Order Relating to the Discovery of Electronically Stored Information, Seventh Circuit Electronic Discovery Pilot Program (listing six categories of ESI whose possible preservation or production must be raised "at the meet and confer or as soon thereafter as practicable"), *available at* http://www.discoverypilot.com/.

district judge to think about what to do, not a series of conditions precedent before the judge can do anything, and not a script for making what the district judge does appeal-proof."[58]

Ultimately, the interpretation of the proposed rule is committed to the discretion of the trial court.[59] In *Altercare v. Clark*,[60] for example, a state appellate court ignored a similar list of factors associated with the Ohio version of Rule 37(e)[61] while affirming dismissal of a complaint by a lower court based on its independent review of the facts.[62] Similarly, the factors provide only a vague "checklist" approach and does not provide criteria whose satisfaction constitutes bright-line guidance. An incomplete list of this sort is unlikely to be useful to courts and will be confusing to parties seeking to ensure compliance with their preservation obligations.

In short, the factors do not belong in the discovery rules. They should only be mentioned, if at all, in the Committee Note, given the limited role they are intended to play. Doing so would not only reflect the Committee's historical practice with factors, but also would be more consistent with the goal of providing a uniform national standard and clear guidance to parties. In particular, a clear statement needs to be made in the Committee Note that a failure to preserve—or to meet any contemporary preservation standard such as those identified by *Pension Committee*[63]—does not, in and of itself, justify sanctions without a separate showing of culpability and substantial resulting prejudice.

4. A Bright-Line Preservation Trigger Is Needed.

It is time for a clear, bright-line standard to clarify that the *affirmative* duty to preserve information is triggered only upon commencement of litigation.[64] Proposed Rule 37(e) enshrines the vague "foreseeability" standard in its opening sentence:

> "If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation . . . ."

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[58] *Woodward v. Ford Motor Co.*, No. 1:11-cv-3092-CL, 2013 WL 3024828, at *3 (D. Or. June 13, 2013).
[59] Robert G. Bone, *Who Decides: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2016 (2007) ("[w]hile a comprehensive list of factors might restrain judges from relying on illegitimate considerations, it does nothing to constrain judges who act in good faith, at least not without some normative direction to guide the balancing process").
[60] *Altercare v. Clark*, No. 12CA010211, 2013 WL 3356577 (Ohio Ct. App. June 28, 2013) (affirming dismissal because the party was "greatly hampered" by a failure to produce a computer for forensic examination).
[61] Ohio R. Civ. P. 37(F) (2008) ("The court may consider the following factors in determining whether to impose sanctions under this division . . ."). The five factors were (1) whether and when the duty was triggered, (2) whether "ordinary use" of the system was involved, (3) whether a party "intervened" in a timely fashion, (4) whether a party complied with agreements and (5) "other facts relevant to its determination."
[62] *Altercare*, 2013 WL 3356577 at *6 (producing party had no satisfactory explanation for the failure to preserve and produce).
[63] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) *abrogated by Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).
[64] *See* Letter from Robert Owen to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (Oct. 24, 2011) (distinguishing between intentional destruction of information and the affirmative duty to preserve), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

Instead, we urge the Committee to adopt a bold, clear and reasonably balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps, combined with continuing authority to sanction the willful and bad faith destruction of material that causes substantial prejudice to a potential adversary, i.e., traditional spoliation.

Currently, parties and their lawyers are driven to wasteful over-preservation by their shared fear of a sanction order, even for conduct undertaken in good faith prior to commencement of litigation, which can tarnish a company's brand and devastate a lawyer's career. Companies must guard against even the potential of risk associated with spoliation because the impact of an adverse finding (including the assertion of recidivism as found in *Voom Holdings LLC v. Echostar Satellite L.L.C.*[65]) are incalculable. The Committee received eloquent written and oral evidence of this at and after the 2011 Dallas Mini-conference.[66]

Judicial decisions in bad-facts cases have transformed the traditional spoliation rule that was a brake on *plaintiffs'* conduct prior to suit ("don't destroy a crucial piece of evidence if you want to sue about it") into a new rule that placed great affirmative burdens on *defendants* to preserve *all* potentially relevant material regardless of the strength of its connection to the claims and defenses at issue in the case. The burdens of this transformed rule of law are exaggerated by the current "reasonable anticipation of litigation" trigger standard which, essentially, mandates a form of guessing.

A bright-line trigger rule would yield vast benefits without materially damaging any party's ability to prove or defend any claim. Rarely if ever has there been a perfect documentary trial record, and our centuries-old "preponderance of the evidence" standard takes that into account, for the benefit of the plaintiffs, of whom perfection is not required. For the benefit of defendants, the Committee should likewise reject the goal of perfection that is embedded in the "reasonable anticipation" test, and adopt a more sensible proposal.

Under the "reasonable anticipation" trigger standard, preservation decisions must be made prior to the receipt of a scope-defining complaint, the appearance of an opposing lawyer with whom to negotiate, or the assignment of a judge available to resolve preservation issues. Over-preservation is inevitable. Once an action is commenced by the filing of a complaint, all three of these factors are resolved.

What about auto-delete?

A hypothetical involving auto-delete[67] is often posed in opposition to a commencement-as-trigger rule. (In reality, this is often the *only* objection to the proposal.) The hypothetical assumes the following: An event that is certain to lead to litigation against a party occurs (e.g.,

[65] 93 A.D. 3d 33, 939 N.Y.S.2d 321 (N.Y. App. Div. 2012).

[66] *See* Materials submitted to the Dallas Mini-Conference, as collected at http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/dallas-mini-confrence-sept-2011.aspx.

[67] Auto-delete functions exist on many email systems, and purge emails that have attained a pre-set age. Folders containing Deleted Items typically have the shortest auto-delete life spans, and folders that contain useful material like the Inbox and user-created subfolders thereof have the longest. Many companies, for business reasons or to meet regulatory requirements, have very long auto-delete periods or none at all.

an airliner crashes, or a patient dies on the operating table), but since the party (the airline, the hospital) has set a very short auto-delete period, and the party does nothing to suspend auto-delete, some potentially discoverable materials are destroyed.

Critics of the commencement of litigation trigger employ this scenario to justify continuing the massive uncertainty, cost and risk that vex litigants today as they grapple with the "reasonable anticipation of litigation" trigger. But the hypothetical does not reflect reality, ignores the availability of other sources of information and ignores that there are many other determinants of parties' document retention decisions besides the Committee's procedural litigation rules.

First, there is no evidence before the Committee that the use of short auto-delete periods on important email folders is a widespread practice without alternative sources of the same information remaining. In fact, in our experience, such a practice is rare. Most entities and individuals make arrangements to retain important materials in alternate, longer-term term storage. Entities that generate ESI have many other reasons to save data for longer than minimal periods, and many use auto-delete in ancillary or secondary roles only.

Second, those entities that do use auto-delete without alternatives or a backup have valid business reasons for it, and are not doing so to thwart future litigants. Even if they were, however, the Supreme Court has given its unanimous blessing to document retention policies even where those policies are adopted to "keep certain information from getting into the hands of others, including the Government."[68] The good faith establishment of an auto-delete policy deserves respect by courts.

Third, the hypothetical assumes that the auto-delete function erases all copies of relevant material, but that is highly unlikely. Auto-deletion of one email in one folder will not cause all of the other copies of it to disappear. Moreover, technology has made the forensic retrieval of deleted items much more available when absolutely necessary.

Fourth, a retroactive finding that an auto-delete practice is per se unlawful affects primary business conduct, as to which there are already many regulatory rule-making or legislative bodies other than the Committee which are better equipped to make that assessment (and have not done so). Other actors in our country's complex economy have influence over how businesses manage their information. Insurers, for example, may raise or lower insurance rates based on a particular insured's information management practices. Moreover, reckless governance of information can often lead to liability, not exoneration, such as when a record is needed to rebut a plaintiff's allegations.

Finally, since plaintiffs control the timing of initiation of litigation, they could file quickly to trigger affirmative preservation duties and seek prompt redress if the ample (and soon to be upgraded under the proposed rules) provisions for early discussions and discovery plans were not satisfactory. Or they could, in extreme cases, seek to give the type of pre-litigation notice contemplated in Rule 27 (which could be amended to allow pre-filing applications for preservation orders in urgent situations).

[68] *Arthur Andersen v. United States*, 544 U.S. 696, 704 (2005).

The commencement of litigation trigger is a fair line that creates a framework for both plaintiffs and defendants to control preservation decisions and reduce gamesmanship. We urge the Committee to incorporate this standard into proposed Rule 37(e).

5. Answers to the Committee's Questions.

The Advisory Committee has invited public comment on five specific questions concerning proposed Rule 37(e). Here are LCJ'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: Proposed rule 37(e) should apply to all types of discoverable information. As a matter of rulemaking, a single standard is vastly superior to the creation of two separate standards. This is particularly true where, as the Committee's question indicates, the ability to distinguish between ESI and physical evidence is highly likely to become more complicated with future technological innovation. Also, as explained in section II. B. 2. a. of our Comment, proposed rule 37(e), absent the (B)(ii) exception, is sufficiently comprehensive to address physical evidence issues so there is no reason to limit the proposed rule's application to ESI.

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 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: The exception contained in 37(b)(1)(B)(ii) must be removed from the proposed rule in order to achieve the Committee's goal of providing a uniform, national standard for culpability and prejudice sufficient to deter over-preservation and provide meaningful and predictable standards for planning. The (B)(ii) exception, although well-intended for the one-in-a-million case, risks overwhelming the primary rule by providing an avenue for harsh sanctions where no culpability exists. As set forth in section II of our Comment, the factors that incentivize ancillary litigation, over-preservation and the "gotcha" game will continue if the Committee provides an exception to the principle that no sanctions are warranted absent culpable conduct and substantial prejudice.

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: There is no need to retain the current Rule 37(e) language based on the clear intention of the Committee that the proposed Rule 37(e) covers all of the conduct that the current rule covers. The Committee's proposed Note explains this clearly. If, however, the provisions of

proposed Rule 37(e) are materially changed, it could be necessary to retain the current safe harbor provisions.

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, it is important that the Committee add a definition of "substantial prejudice" to the rule in order to clarify that materiality to claims and defenses is the key to this standard. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in *Sekisui American Corp. v. Hart*, 2013 WL 4116322 (S.D.N.Y.) at *4, FN 48.

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: If the Committee were to adopt the "willful *and* in bad faith" standard urged in section II. B. 3. of our Comment, there may be no need to define the terms "willful" and "bad faith" in the rule. However, as currently drafted, the proposed rule may be, in the view of some courts, open to an interpretation that "willful" conduct—meaning intentional actions—that occurred in good faith will still provide grounds for harsh sanctions. In order to prevent this loophole, the Committee should define "willful" in the rule to include the element of scienter or bad faith.

III. Scope and Proportionality: Rules 26(b)(1) and 26(c)

A. The Proposed Amendments' Focus on Claims, Defenses and Proportionality Is a Much-Needed Reform.

The broad scope of discovery as interpreted under current Rule 26(b)(1) is a fundamental cause of the discovery problems addressed above and in LCJ's prior comments.[69] The ill-defined boundaries of modern discovery result in the preservation and production of staggering volumes of data which ultimately contribute little to the resolution of the case. A survey of "major" companies revealed that, although the average number of pages produced in discovery in major cases that went to trial was 4,980,441, the average number of exhibit pages totaled just 4,772—a mere 0.10% of the total production.[70] Such statistics, together with the costs and burdens of

[69] LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.

[70] LAWYERS FOR CIVIL JUSTICE ET AL., STATEMENT ON LITIGATION COST SURVEY OF MAJOR COMPANIES, App. 1 at 16 (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

producing documents make it unsurprising that e-discovery has been described as a "morass"[71] that "is crushing"[72] or "could ruin"[73] the civil justice system.

LCJ strongly supports the Committee's proposal to amend Rule 26(b)(1). These modest edits would produce an important reduction in abusive discovery practices without depriving anyone of necessary information. No longer would parties be left to divine the amorphous boundaries of discovery based on the ill-defined and troublesome standard of what is "relevant to the subject matter involved in the action." Instead, the claims and defenses pled by any party would provide a clear anchor to which any discovery must be attached.

Thus, a single question becomes the measurement by which to proceed in discovery: "How is this information relevant to a claim or defense asserted by any party?" While the "relevance" of particular evidence may remain open to some interpretation, to be sure, the ability to articulate the clear tie between any potentially discoverable information and a claim or defense plead by any party would provide a meaningful and useful standard upon which to base discovery decisions.

By reducing the amount of information subject to discovery in any case—as the proposed amendment is intended to do—the costs of discovery will necessarily also go down. Moreover, to the extent parties will nonetheless be obligated to expend time and resources on their discovery efforts, the information at issue will have greater potential actually to affect their case.

Rule 26(b)(1) would also benefit *greatly* from the emphasis on inclusion of the considerations that bear on proportionality, currently in Rule 26(b)(2)(C)(iii). The concept of proportionality has been present in the rules for many years, but is routinely ignored in favor of notions of broad and liberal discovery. Despite this, recent jurisprudence has made clear that considerations of proportionality have an important place in discovery and should be seriously considered by all parties.[74] Explicitly referencing proportionality in Rule 26(b)(1) will encourage its early application and thus reduce the likelihood that ultimately unhelpful information is nonetheless caught up in a party's discovery efforts.

B. Adding a Materiality Standard Would Further the Goal of Encouraging Proportional Discovery.

Despite our strong support for the proposed amendments to Rule 26(b)(1), LCJ remains concerned that historically broad notions of discovery and relevance could prevent the

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[71] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT B-1 (Aug. 1, 2008) *available at* http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3650.

[72] *Id.* at B-4.

[73] *Id.* at B-3.

[74] *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to the case and consistent with clearly established applicable standards.").

amendment from fulfilling its potential unless the Advisory Committee adds a materiality requirement to Rule 26(b)(1). Such a materiality standard would be added as follows:

> "Parties may obtain discovery regarding any non-privileged matter that is relevant **[and material]** to any party's claim or defense . . ."

This small but impactful addition to the rule would promote the proper purpose of discovery, namely "the gathering of material information,"[75] and ensure proportionality in both preservation and production by clearly signaling the end to expansive interpretations of scope and relevance. Prior efforts to reign in the scope of discovery, when matched against such notions, have unfortunately fallen short. Indeed, the effects of the 2000 amendment to Rule 26(b)(1) (which bifurcated discovery into two tiers: attorney-managed and court-managed), is an instructive example. That amendment was unsuccessful in its goal to focus discovery on the claims and defenses involved in the action.[76] Instead, it has been widely reported that the amendment was generally ignored.[77]

A materiality standard has proven successful in other jurisdictions. In England, for example, Rule 31.6, which defines what must be disclosed in a party's "standard disclosure," has been interpreted to require production of only those documents upon which a party relies in support of their contentions in the proceedings and those documents which "*to a material extent* adversely affect a party's own case or support another party's case."[78] After 15 years, this model of disclosure remains in effect and has reportedly resulted in significant curtailment of excess discovery. Adoption of such a proposal would serve to align discovery more closely with the needs of individual cases—a positive result that would comport well with the Committee's articulated goal to "adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938."[79] We urge the Committee to make this improvement.

C. Incorporating Cost Allocation into Rule 26(c) is a Positive Step.

We also support adoption of the proposed amendment to Rule 26(c) adding an express recognition that protective orders may allocate expenses for discovery. As the Committee is well aware, LCJ has long supported changes to the current cost allocation models in the American civil justice system and in particular to the default "rule" that a producing party must pay for the costs of responding to an opposing party's discovery requests.[80] Although a small step toward

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[75] An E-Discovery Model Order, Introduction 2 (Fed. Cir. 2011) *available here*: http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html.

[76] FED. R. CIV. P. 26 advisory committee's note (2000) ("The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.").

[77] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY, 7-9 (Sept. 2010) *available at* http://www.lfcj.com/articles.cfm?articleid=1 .

[78] 1 WHITE BOOK SERVICE, at 909 (The Right Honourable Lord Justice Jackson ed., 2012) (emphasis added).

[79] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, at 227, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

[80] A requester-pays rule would encourage parties to focus discovery requests on evidence that is important to proving or defending against the claims, and would significantly reduce if not eliminate any tactical reason to engage in overbroad discovery. *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY

our larger vision of reform, express recognition of the court's authority to allocate discovery expenses is an important first step.[81] Such express recognition of this authority, in addition to emboldening the courts to address more effectively the rampant problems of disproportional discovery, will place requesting parties on notice that they may be required to bear the costs of responding to their requests, and thus encourage more careful deliberation regarding the true needs of the case.

IV. Cooperation: Adding "Parties" to Rule 1's Reach, and an Exhortation to Cooperate in the Note, Is Unneeded and Risks Ancillary Litigation about an Undefined Duty.

The proposed amendments to Rule 1 and the Committee Note aim to bolster Rule 1's goal of a "just, speedy and inexpensive" resolution by (1) explicitly stating that the rules are to be "employed by . . . the parties" (i.e., attorneys) to reach that result, and (2) incorporating into the Note an exhortation that attorneys should "cooperate." These changes are intended to "encourage cooperation by lawyers and parties directly," and to "provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short."[82] While we believe cooperation is a valid aspirational goal, we do not believe the rules should be used as a tool to enforce it.

Since 1938, Rule 1 has been understood as embodying the goals of the Federal Rules of Civil Procedure and has not been used to impose any affirmative duty on parties or their lawyers. The 1993 Committee Note makes clear that attorneys, as officers of the court, share responsibility while at the same time making it clear that the Federal Rules of Civil Procedure are intended to be a tool for the c*ourt* to utilize. The Advisory Committee's proposed amendment risks transforming the rule's uncontroversial statement of general goals into a duty, the breach of which could lead to sanctions and more.

The incorporation of "parties" risks providing an inappropriate opportunity to game the system. Attorneys could file motions under Rule 1 claiming that the actions of opposing counsel have failed to secure the goals of the rules by inadequate cooperation. As the courts' experience with the first version of Rule 11 shows, arming adversaries with additional pathways to complain about choices made by counsel spur wasteful motions and burden the courts in unanticipated ways. It is not difficult to imagine a scenario where an opponent could deem even ordinary discovery decisions as reflecting a lack of cooperation.

The Advisory Committee originally considered adding a duty of cooperation in the text of the rule, but properly abandoned that idea when many commentators expressed concerns about the incorporation of an amorphous cooperation duty into the rules. As the Committee itself

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COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVIZES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (April 1, 2013) *available at* http://www.lfcj.com/articles.cfm?articleid=169; LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40 .

[81] We believe that overly burdensome discovery can be explained in material part by the default rule that parties do not pay the tab for what they request. We look forward to working with the Committee as the Discovery Subcommittee undertakes a meaningful review of the economic incentives in discovery.

[82] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.

explained, "[i]t is "difficult to identify a proper balance of cooperation with legitimate, even essential adversary behavior."[83] The drafters also determined that a "general duty of cooperation could conflict with professional responsibilities of effective representation."[84]

Those concerns remain under this proposal. How can a legal duty to cooperate be smoothly incorporated into a system that for centuries has functioned as unapologetically adversarial? However, without doing anything more than noting those concerns, the Committee has proposed adding references to cooperation into the Committee Note. If amended as proposed, the Note could reasonably be read as enshrining a duty to cooperate in the rules, and parties will likely find themselves in the same uncertain position as if the drafters had written the duty to cooperate directly into the rule itself.

The term "cooperate" does not define specific actions. Advocates of "cooperation" have attempted to define cooperation, but have only created new ambiguities and more uncertainty, not less. For example, in the wake of its *Cooperation Proclamation*, The Sedona Conference® has published two resources to guide courts and counsel in understanding the meaning of cooperation – *The Case for Cooperation*[85] and *Guidance for Litigators & In-house Counsel*.[86] Although well-intended, these publications merely state that cooperation does not mean "capitulation."[87] The meaningless contrast between cooperation, on the one hand, and capitulation on the other becomes a no man's land in which attorneys are left not knowing the boundaries of either. *Guidance for Litigators* merely contains "cooperation points" that are intended to serve as examples of cooperative behavior.[88] Although instructive and helpful in certain circumstances, the points do not provide a definitive description of what it means to "cooperate" for purposes of evaluating an attorney's compliance with a legal requirement.[89] For example, Cooperation Point #3 directs an attorney to "appreciate and address opposing counsel's legitimate concerns" and to propose "creative and sincere" solutions.[90] This seems to suggest that attorneys show a level of empathy to the adversary that can and will affect the decision making processes. At what point does identifying with the opponent's concerns go too far and negatively affect an attorney's professional responsibilities and effective representation?

There are many serious questions involved. For example, must one disclose information that is not sought in discovery but which may be helpful to opposing counsel and would that level of cooperation not run afoul of the ethics rules concerning loyalty and diligence to the client? Should opposing counsel be permitted to bring a "Rule 1" motion against the party/attorney in

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[83] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.
[84] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.
[85] The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009 Supp.) [hereinafter *The Case for Cooperation*].
[86] THE SEDONA CONFERENCE, COOPERATION PROCLAMATION: GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL (March 2011) [hereinafter GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL] *available for download at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Cooperation%20Guidance%20for%20Litigators%20%2526%20In-House%20Counsel .
[87] *The Case for Cooperation*, *supra* note 85, at 340 ("Cooperation is not capitulation.").
[88] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 2.
[89] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 2. The purpose of the guidance is to "identify opportunities for constructive, mutually beneficial cooperation with opposing counsel." Its purpose is not to define the outside limits on cooperative behavior.
[90] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 4-5.

that circumstance? If the answer is "no" to these questions, where would a lawyer or judge seeking the meaning of the new Rule 1 and the Committee Note find that?

Until the concept of "cooperation" can be defined to provide objective ways to evaluate a party's compliance—including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation—the Committee Note should not be amended to include an unlimited exhortation to cooperation. It is settled that a court may find a rule unconstitutional that penalizes or sanctions a person when the rule is so vague that it fails to provide notice to the persons to whom the rule is directed.[91] Rules that incorporate terms with "no settled usage or tradition of interpretation in law" and where an attorney finds himself or herself forced to understand the rule by "guess[ing] at its contours" are especially at risk. "Cooperation" is such a term.

The Advisory Committee should reject and reconsider the proposed amendment to Rule 1 because the imposition on parties of a new substantive duty should be more carefully considered and expressly defined, especially when it would go to the heart of our centuries-old adversary system. As for the Committee Note, if the Committee decides to adopt the proposed amendment to the Note, it should add an express statement that the Note is exhortative only and should not be construed to expand substantive duties.

V. Case-Management Proposals: Rules 4(m), 16(b) and 26(d) & (f)

We encourage the adoption of these proposed amendments *as part of a larger package*. Although the individual proposals are generally sound, they are unlikely to result in a significant improvement in the orderly administration of justice and would do little to address the major problems of modern litigation and discovery. Thus, we encourage the Committee to continue to focus on the more substantial proposed amendments and to adopt the case management proposals only as part of a larger amendments package.

VI. Presumptive Numerical Limits: Rules 30, 31, 33 and 36

LCJ supports adoption of the presumptive numerical limits to discovery *as part of a larger amendments package*. We believe that lower limits will be useful in encouraging parties to reflect on the true needs of each case[92] (proportionality) and will result in an adjustment of expectations concerning the proper amount of discovery in civil litigation.[93] This adjustment in expectations is particularly vital in light of the recent explosion of electronic information and its problematic effects on modern discovery.

We are aware that the lowering of the numerical limitations has engendered opposition from plaintiffs' counsel, and in particular those involved in employment litigation. Comments seem

[91] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991).

[92] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (discussing proposed numerical limitations on depositions and explaining that the "*lower limit can be useful in inducing reflection on the need for depositions*, in prompting discussions among the parties and - when those avenues fail - in securing court supervision.") (emphasis added)).

[93] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (discussing proposed numerical limitations on depositions and explaining: "Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.").

particularly focused on the potential difficulty of obtaining relevant information if the proposed amendments are adopted. Such fears are unfounded, however, in light of the presumptive nature of the proposed limitations, which is made clear in the text of the affected rules. If amended, for example, Rule 30 would specifically state that "the court must grant leave" to take additional depositions "to the extent consistent with Rule 26(b)(1) and (2)." Similar language is also present in the other affected rules. Thus, the proposed amendments merely seek to encourage more careful contemplation of the true needs of each case and the best way to accommodate them. This is specifically confirmed in the language of the proposed Committee Note to Rule 33, which explains that "[a]s with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices."

To ensure parties' understanding of the purpose of the amendments and the need for proportionality in discovery, we present one minor proposal. We propose the inclusion of specific language outlining the "purpose" of the presumptive limitations in each affected rule's Committee Note, similar to that currently proposed for Rule 33. Specifically, each Committee Note should expressly state that the purpose of the presumptive limitations is to "encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices." To the extent parties and courts are unlikely to read the Committee Notes for rules not directly at issue in a particular case or motion, it is important to include a statement of purpose in each Note.

In response to arguments that lower presumptive limitations will result in increased motions practice, we echo the words of the Advisory Committee which, when addressing the proposed presumptive limitations to the number of allowed depositions, acknowledged that some cases will require more and noted that "*parties can be expected to agree, and should manage to agree, in most of these cases*."[94] Moreover, motions practice regarding current limitations is relatively uncommon, and there is little reason to think parties will be less able to cooperate on these issues as a result of the proposed amendments.

In short, the proposed presumptive numerical limitations would serve to address the problems of modern discovery by both limiting the volume of information subject to discovery in most cases and by encouraging proportionality, even in cases where the presumptive limitations may need adjustment.

VII. Conclusion

The American civil justice system is in crisis. Litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, are settling cases early and without regard to the merits. This is due to what an overwhelming percentage of legal practitioners observe in their daily experience: the costs and burdens of discovery are too high and discovery, particularly e-discovery, is being abused. The proposed amendments are a commendable, and in some cases, essential antidote for many of the ills affecting the American system of civil justice. LCJ applauds the Committee's work in developing the proposed rules, which hold the promise of rescuing the system. But we strongly urge the Committee to make the necessary changes

[94] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (emphasis added).

discussed in this Comment in order to ensure that the Committee's efforts—unlike so many that have failed before—result, this time, in meaningful reform.

Respectfully submitted,

Lawyers for Civil Justice