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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 7-240
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Dear Members of the Advisory Committee on Civil Rules:

I. Introduction

Merck & Co., Inc. ("Merck") respectfully submits this Comment to the Advisory Committee on Civil Rules ("the Committee") concerning the proposed amendments to the Federal Rules of Civil Procedure ("the Rules"). Merck is among the world's foremost global healthcare companies and is a leader in the innovation and development of prescription drugs, therapies, vaccines, and consumer and animal health products. Merck has substantial experience with civil litigation and particularly discovery in the U.S. federal courts. With approximately 76,000 employees, Merck is also the custodian of an extraordinary volume of electronic data and has witnessed firsthand the escalating costs associated with storing and producing this data in response to civil discovery orders. We applaud the Committee for taking up the important issue of discovery reform and appreciate the opportunity to contribute to the discourse.

II. Background

The Committee has proposed several amendments to the Federal Rules of Civil Procedure designed to "reduc[e] cost and delay in civil litigation."[1] Critically, this is not the first time the Committee has pursued such ends. While prior efforts at reform have brought incremental improvement, they have, in some areas, fallen short of their stated goals. This should come as no surprise. Civil discovery is as dynamic as it is complex, but the rapid rise of electronically stored information ("ESI") in recent years has drastically and permanently altered the discovery landscape. The Committee's current proposal targets the shortcomings of prior amendments,

[1] Letter of transmittal to Judge Jeffrey S. Sutton, Chair, Committee of Rules on Practice and Procedure, from Judge David G. Campbell, Chair, Advisory Committee on Civil Rules (May 8, 2013, as supplemented June 2013), in Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Aug. 2013), at 259, 265 [hereinafter "Proposed Rules"].

making slight but critical adjustments that will adapt the Rules' historic aims to new circumstances.

The Federal Rules of Civil Procedure are "designed to further the due process of law that the Constitution guarantees,"[2] by facilitating the "just, speedy, and inexpensive determination of every action."[3] To this end, the Rules establish the parameters of a civil litigant's right to demand germane evidence from an opposing party, and the scope of the corresponding obligation to respond. The goal in creating this system was clear: "to encourage open exchange of information by litigants in federal courts,"[4] and in turn, "to enable the parties to discover the true facts."[5] But far from innovating in this area, the drafters of the Rules merely clarified and codified the existing common law scheme, confident that the "ethical standards of the profession would prevent discovery abuse."[6] The drafters' optimism soon gave way to "a gradual but sweeping transformation in American jurisprudence."[7] that has left us with a system that has proven unwieldy and susceptible to exploitation.

Chief among the ills of modern civil discovery is its crippling cost. These skyrocketing expenses deemphasize the merits of a case, placing much of the focus in litigation on managing costs rather than on adjudicating rights. The more costly discovery becomes, the more the truth-seeking function of litigation is distorted. As Justice Breyer has noted, "discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes."[8] This is more than a mere byproduct. Indeed, parties depend on it, deploying discovery as "an end in itself—a costly weapon used to 'bludgeon' parties into settlements."[9] As one federal judge and a co-author put it, these developments "have altered the nature of the field of play, and the system will remain unbalanced so long as these changes are not understood and addressed."[10]

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[2] *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000).

[3] Fed. R. Civ. P. 1.

[4] *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982).

[5] *Hickman v. Taylor*, 329 U.S. 495, 506 (1947)

[6] Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1683 (1998) (citing Hon. William D. Mitchell, Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc., 23 A.B.A. J. 966, 969 (1937)).

[7] *Id.* at 1684.

[8] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting).

[9] Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 515 (2010) (reporting the results of a 2008 survey of members of the American College of Trial Lawyers); *see also* Robert Hardaway et. al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 Rutgers L. Rev. 521, 522 (2011) (noting that the present system can "encourage expensive litigation ancillary to the merits of civil litigants' cases").

[10] 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, 508 (2013).

This imbalance has only been compounded by the exponential rise in ESI generated. Vast swaths of electronic data are sought and produced by litigants every day, though most of it never sees the inside of a courtroom. In one multi-district litigation, for example, Merck has produced more than 4.2 million documents, totaling over 37.5 million pages, and additional native data from its various databases and systems. The storage, preparation, and production of this amount of data has been an incredibly burdensome exercise for Merck—both in terms of money spent and time lost. But the problems stem from more than just volume. Merck generates, collects, and retains information for specific *business*—rather than legal—reasons, and the way in which such information is stored and managed reflects this fact. Documents and data responsive to discovery orders are frequently scattered across a number of systems, many of which are designed and maintained in different ways, and extracting these documents requires time, expertise, and money. For this reason, production is more than just a rote slog through the gigabytes; it often requires costly adjustments to complex infrastructure and internal protocols.

Not surprisingly, discovery has become by far the costliest aspect of litigation. "By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case."[11] An empirical survey of Fortune 200 companies revealed that "the average company paid average discovery costs per case of $621,880 to $2,993,567" between 2006 and 2008, with costs on the high end reaching nearly $10 million *per case*.[12] This comports with Merck's experience. In fact, Merck has even faced the prospect of litigation for which the projected cost of discovery exceeded the amount sought by the plaintiff.

These costs are not limited to large corporations. Even "[l]itigants of moderate means are often deterred through discovery from vindicating claims or defenses," unable to last in a "war of attrition."[13] Moreover, the cost of civil discovery diverts resources from productive endeavors—in Merck's case, the pursuit of our foremost mission: the innovation of new drugs that save and improve lives.

III. Prior Reform Efforts

In the seventy-five years since the adoption of the Federal Rules of Civil Procedure, the central aims motivating them—"speed, cost, accuracy, and finality"[14]—have proven increasingly elusive when it comes to discovery. It is no surprise then that the Advisory Committee on Civil

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[11] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 549 (2010); *see also*. John G. Koelti, *Progress in the Spirit of Rule 1*, 60 Duke L.J. 537, 540 (2010) (noting that "the costs in high-stakes litigation can be enormous").

[12] Lawyers for Civil Justice, et al., Litigation Cost Survey of Major Companies, at 3 (2010) [hereinafter "Litigation Cost Report"], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf

[13] John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell L. Rev. 455 (2010).

[14] F. Scott Kieff, *The Case for Preferring Patent-Validity Litigation over Second-Window Review and Gold-Plated Patents: When One Size Doesn't Fit All, How Could Two Do the Trick?*, 157 U. Pa. L. Rev. 1937, 1946 (2009).

Rules has sought in the past to correct course by amending the Rules to limit costs and curb abuse.

In 1983, Rule 26 was amended to provide that:

> [O]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules 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.[15]

This change was intended to introduce a requirement that discovery be proportional in addition to relevant, and was coupled with a certification requirement whereby a lawyer's signature on a discovery order certified that the information requested was indeed proportional to the underlying case.[16] But some have charged that the 1983 proportionality requirement has been "more or less ignored since its introduction," owing to a failure of the rule as written to keep up with "exponentially expanding ESI."[17] An influential report from the Sedona Conference's Working Group on Electronic Document Retention and Production concluded that notwithstanding such amendments, "courts have not always applied proportionality in circumstances when its application was warranted."[18] It is time to return to the drawing board on proportionality. As a state judge in Utah, where state discovery rules boast a much stricter proportionality requirement, has noted: achieving proportionality in the federal system "will require a rule change."[19] At a minimum, as this Committee has itself recognized, the 1983 proportionality effort "cannot be said to have realized the hope of its authors."[20]

The Rules on discovery have been further amended twice in the past fifteen years. First, in 2000, Rule 26(b)(1) was altered to narrow the scope of information deemed presumptively discoverable. This change introduced the present two-tiered approach to discovery whereby a litigant is entitled to any information "relevant to the claim or defense of any party," and, upon a showing of good cause, may be granted further discovery on "any matter relevant to the subject matter involved in the action."[21] Though a commendable effort, "the 2000 Amendments failed to

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[15] Fed. R. Civ. Pro. 26(b).

[16] Fed. R. Civ. Pro. 26(g).

[17] John Jablonski, *Raising the Bar on Proportionality? in* Preservation and Proportionality 19, 19 (Brad Harris & Ron Hedges, eds.), *available at* http://www3.legalholdpro.com/rs/zapproved/images/WP-PreservationandProportionality-Nov11.pdf.

[18] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 293 (2010).

[19] Philip J. Favro & The Honorable Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 935 (2012).

[20] Proposed Rules at 265.

[21] Fed. R. Civ. Pro. 26(b)(1).

rein in abusive discovery practices,"[22] as the volume of discoverable information produced and the amount of money spent doing it are both still trending upward.[23] In 2006, the Rules were once again amended, this time with e-discovery specifically in mind. The 2006 Amendments targeted the increasing costs associated with the rapid expansion of ESI by addressing storage, retention, and preservation obligations, and by encouraging early cooperation between litigants.[24] But many agree that the Rules need to provide litigants greater guidance on their ESI obligations, primarily by more clearly defining key terms and concepts.[25] Clarity will equip litigants with the tools to resist abuse from opponents attempting to cherry-pick discoverable documents from sources known to be costly to access.

IV. The Present Reform Effort

We applaud the Committee for recognizing that, despite the important progress made by previous amendments, much important work remains. The precise nature of that work, and the best way to approach it, were the topics of a 2010 conference held by this Committee at Duke Law School. The impetus for this conference was a familiar one: the ongoing need to reduce the delay and costs associated with civil litigation. Likewise, the themes that emerged were not new: "Proportionality in discovery, cooperation among lawyers, and early and active judicial case management."[26] The Duke Conference and its attendant discussions and scholarship represent a thoughtful and comprehensive analysis of the issues of modern discovery by a cross-section of highly qualified stakeholders. The proposed changes that emerged are not a drastic alteration of course, but a careful and considered correction toward goals universally deemed worthy. To be sure, they will not prove a panacea, but with a few minor but critical adjustments, they can be an important step forward. Though the "Duke Rules" package proposed several important amendments, we focus our Comments on only two of them: the proposed changes to Rule 26(b)(1), and the proposed changes to Rule 37(e).

a. The Proposed Rule 26(b)(1)

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[22] Beisner, *supra* note 7, at 578.

[23] *See* Litigation Cost Report, *supra* note 7, at 17 (concluding that "litigation costs on average and as a percent of revenue have trended up over the past nine years[;] . . . multi-national companies spend a greatly disproportionate percentage of their revenues in litigations expenses in the U.S. relative to foreign jurisdictions[; and that] . . . a substantial portion of that differential may be attributable to the discovery process, which makes up at least one-fourth of outside legal fees.").

[24] *See* Beisner, *supra* note 7, at 581-83.

[25] *See, e.g., id.*; Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 Lewis & Clark L. Rev. 875, 890 (2008) ("Since the amendments do not define good cause, leaving tremendous discretion to judges, litigants do not have a clear concept of what they must demonstrate (or rebut) to establish (or rebut) good cause."); Bradley T. Tennis, Comment, *Cost-Shifting in Electronic Discovery*, 119 Yale L.J. 1113, 1117 (2010) (noting that "post-amendment case law has not diverged significantly from pre-amendment doctrine, leading some scholars to conclude that the 2006 amendments did not meaningfully alter the rules governing electronic discovery").

[26] Proposed Rules, *supra* note 7, at 260. These themes were distilled and reported by The Honorable John G. Koetl, who served as chair of the Duke Conference Subcommittee.

Under the current proposal, Rule 26(b)(1) would be amended to require that all discovery be "proportional to the needs of the case." The current Rules define the scope of discovery broadly, as information "regarding any nonprivileged matter that is relevant to any party's claim or defense,"[27] but then obligate the court, "[o]n motion or on its own," to narrow that scope when "the burden or expense of the proposed discovery outweighs its likely benefit."[28] The Committee's proposal, by contrast, incorporates proportionality into the *definition* of what is discoverable in the first instance. Moreover, the Committee's proposal strikes from Rule 26(b)(1) language enabling a court, upon a showing of good cause, to "order discovery of any matter relevant to the subject matter involved in the action,"[29] narrowing the scope of discoverable information to only that which is "relevant to any party's *claim or defense*."

We support not only the redoubling of efforts to achieve proportional discovery, but also the current effort's focus on the definition of what is discoverable. As many have noted, the only foolproof way to change the scope of information *produced* in discovery is to change the scope of information *subject* to discovery.[30] Rather than asking courts to retrofit proportionality atop a much broader swath of discoverable information (a regime that has proven ineffective over the past thirty years), the Committee's proposal places the responsibility of the proportionality analysis with the parties themselves, ensuring the producing party has the ability to resist "fishing expeditions." Some argue that party-controlled proportionality will "merely serve to exacerbate [existing] problems" by "increasing the adversarial nature of parties' communications."[31] While the Committee's proposal may lead to "an increase in motions to compel, which, in turn, will lead to greater levels of judicial involvement in resolving discovery disputes,"[32] any such uptick will be only temporary. It may well take some initial judicial supervision to define the bounds of proportionality, but litigants and lawyers will soon internalize these limits and adapt accordingly. Moreover, the potential for judicial involvement is essential to ensure parties do not abuse the concept of proportionality to deny rightful access to information. Motions practice will remain an important coercive tool for dealing with recalcitrant litigants, but most cases do not involve recalcitrant litigants.

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[27] Fed. R. Civ. Pro. 26(b)(1).

[28] Fed. R. Civ. Pro. 26(b)(2)(C)(iii).

[29] Fed. R. Civ. Pro. 26(b)(1).

[30] *See, e.g.*, Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring A Realistic Prospect of Trial*, 46 Harv. C.R.-C.L. L. Rev. 399, 409 (2011) (arguing that "proportionality should be a foundational principle underlying procedural rules"); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 513 (2010) ("Until the default is reversed from 'all you can eat' discovery to proportional discovery geared to the needs of the case, as the rules already contemplate, the courthouse doors will remain closed to legitimate cases that the average citizen cannot afford to bring or defend.").

[31] Testimony of Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., Before the United States Senate Judiciary Committee Subcommittee on Bankruptcy and the Courts, Hearing on "Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?", Nov. 5, 2013, at 9.

[32] *Id.*

Moreover, these limitations are familiar to courts and litigators. Indeed, the list of proportionality factors a court must now consider under Rule 26(b)(2)(C)(iii) is transferred verbatim under the proposed rule to Rule 26(b)(1). Thus, the intended scope of discovery remains unchanged from 1983, though the proposed rule will emphasize this limit. What is more, those factors—"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"[33]—preserve the bedrock principle of a "broad and liberal" discovery.[34] Nothing in the foregoing list of factors suggests a contraction of discovery beyond the point where litigants will be able to vindicate important rights. Discovery will continue "to help define and clarify the issues" truly relevant to the case, while finally achieving its "ultimate and necessary boundaries."[35]

We further support the proposal to limit discovery to information relevant to a party's *claims or defenses*—information within the presumptive "first tier" of discovery under the current Rules. The ability, under the current Rules, to compel production of a "second tier" of information, relevant merely to the *subject matter* of the action, has been a driving force behind the explosion in the scope of discovery. Though the Rules require a showing of "good cause" to compel this broader, subject-matter discovery, "[t]he case law so far suggests that the second tier's good-cause element is an obstacle in name only."[36] Thus, the current Rules have supplied the elements for a perfect storm of discovery abuse: a broad grant of discovery rights, coupled with an ineffective gate-keeping standard. The results are predictable.[37] The shift away from this two-tiered approach sends an unmistakable message that the Committee intends to curtail over-inclusive and unnecessary discovery.

The increasing popularity of methods of alternative dispute resolution ("ADR") suggests that narrower discovery and fair process are not mutually exclusive ideals. Every day, parties look to arbitrators to resolve complex disputes under discovery procedures significantly narrower than those that govern in the federal system, which nevertheless preserve equal access to the information central to the dispute at hand.[38] Far from preventing the satisfactory and just

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[33] Fed. R. Civ. Pro. 26(b)(2)(C)(iii).

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

[35] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978) (internal quotations omitted).

[36] Beisner, *supra* note 7, at 580 (citing *Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045, at *3 (N.D. Ill. May 10, 2001); *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001)); *see also* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 Harv. J.L. & Tech. 49, 63 (2007) (noting that "[t]he good cause standard is so vague that it is almost always ignored by the parties").

[37] *See id.* at 61-62 (detailing the widespread compliance issues with the two-tiered system under the 2000 Amendments).

[38] *NBC, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999) (Few, if any, non-American tribunals of any kind, including most arbitration panels created by private [parties, provide for the kind of discovery that is commonplace in our federal courts . . . .").

resolution of claims, parties have pursued ADR with increasing frequency.[39] Of course, not all claims can be resolved via arbitration. The process requires parties to agree beforehand to settle disputes in this manner, but its dramatic rise should dispel fears that justice and accuracy are inevitable casualties of a contracted discovery process.

The Committee's proposed changes to Rule 26(b)(1) should be adopted. Meaningful proportionality is an important goal that has eluded our system of discovery for too long. The Committee's proposal makes clear that information is not discoverable unless it is both relevant and proportional to the needs of the case, a definitional shift that will finally effectuate the goals of the 1983 Amendments. Furthermore, by limiting discovery to information that is relevant to a party's claims or defenses, the Committee's proposal will refocus discovery on its initial goal of pinpointing the truth about a given case, while curbing widespread abusive tactics.

b. The Proposed Ruled 37(e)

The Committee is also considering a proposal to amend Rule 37(e) to address concerns over rising preservation costs and the uncertain landscape of sanctions for spoliation. The amendments would effect three changes. First, the new rule would make clear that courts may resort to curative measures, such as ordering additional discovery, rather than to sanctions to address spoliation concerns. Second, courts would be permitted to impose sanctions only under the Rules themselves, rather than under their inherent power. And finally, sanctions would be available only against parties whose failure to preserve either "caused substantial prejudice in the litigation and [was] willful or in bad faith; or irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."

Once more, we support the Committee's attention to an area of e-discovery in dire need of reform. Preservation costs represent a substantial—and growing—portion of defendants' litigation expenses, and will only continue to rise if steps are not taken to mitigate them.[40] We support the general thrust of the Committee's efforts to reform Rule 37(e), and we offer below two minor adjustments to the proposed language that will help the proposal better effectuate the Committee's intent, and better address the root of the present problem.

Presently, the Rules offer courts little guidance on when litigants should be sanctioned for failing to preserve discoverable information in anticipation of litigation. As a result, in order to avoid the harsh sanctions often issued by courts, corporate defendants are forced to proceed as if the strictest standards will apply. Thus they spend enormous sums retaining electronic

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[39] *See id.* at 190-91 ("The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure."); *see also General Counsel—Arbitration Versus Other Forms of Dispute Resolution*, Corporate Disputes, Apr.-June 2013 (reporting the widespread opinion that "the popularity of arbitration as a dispute resolution forum is growing," in part because it affords "the ability to enforce an award via a relatively straightforward process on an almost global scale").

[40] *See* Beisner, *supra* note 7, at 588 ("With the increasing prevalence of electronically stored information, data preservation has become one of the costliest aspects of litigation, in terms of both the expense of maintaining the physical media on which the data are stored and the expense of fighting spoliation motions."); Hardaway et. al., *supra* note 13, at 578 (noting "the costs associated with the preservation duty[, which] include not only the costs of compliance, but the costs of ancillary litigation to assess and remedy noncompliance").

information via "litigation holds." Presently, courts "may not impose sanctions *under these rules* . . . for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[41] The root of the confusion in this area is two-fold. First, a consistent definition of "routine, good faith operation" has eluded courts, resulting in different standards across different jurisdictions. Potential defendants whose litigation risk spans multiple jurisdictions are forced then to comply with the strictest—and most expensive—possible retention standard in an effort to avoid spoliation sanctions.[42] Second, even when sanctions "under these rules" are foreclosed, courts can and do impose sanctions pursuant to their inherent power,[43] further compounding the unpredictability. As one commentator has noted, "[t]he task of preserving electronic information is fraught with pitfalls, even for the wary."[44]

Merck, like many companies, has sought to avoid these pitfalls by implementing a litigation hold system. Both its design and management have required significant resources from Merck, as does the increased data retention it begets. Consistent with current case law, and to ensure Merck is not later subject to spoliation claims, these litigation holds are often remarkably broad. By way of example, Merck's broadest current hold covers the electronic data of over 4,000 individuals, all for a single litigation. And the costs do not stop at retention; holds exist in a dynamic environment, and often require costly adjustments in response to everything from a court's order to shifts in the prevailing case law.

The Committee's proposal takes aim at this problem, providing much-needed clarity as to when sanctions are appropriate, replacing the current vague standard with one that should both afford courts greater guidance and promote greater cross-jurisdictional uniformity. In practice, the Committee's proposal will reserve sanctions, in the majority of cases, for those parties who acted with intent or in bad faith and substantially prejudiced their opponents in the process. This is an important step toward ensuring that spoliation sanctions are appropriately calibrated to the violation. Sanctions, such as an adverse inference against the party responsible for the missing information, often put the recipient at a substantial disadvantage, and it is critical that they be reserved for those who acted with a sufficiently culpable state of mind. The proposal's focus on

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[41] Fed. R. Civ. Pro. 37(e).

[42] *See The Proposed Rules: Light at the End of the E-Discovery Tunnel*, The Metropolitan Corporate Counsel (Sept. 26, 2013, 08:24), http://www.metrocorpcounsel.com/articles/25558/proposed-rules-light-end-e-discovery-tunnel (reporting a panel discussion in which one in-house counsel explained: "Companies that periodically experience litigation therefore must create preservation protocols designed to address what might be called the 'lowest common denominator' or the most restrictive and extreme approach as to what needs to be preserved.").

[43] *See Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004) ("Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent power or Rule 37 of the Federal Rules of Civil Procedure, even absent an explicit bad faith finding, and we conclude that the giving of an adverse inference instruction in these circumstances is not an abuse of discretion."); *Clark Const. Grp., Inc. v. City of Memphis*, 229 F.R.D. 131, 137 (W.D. Tenn. 2005) ("The Court has both express power, under Federal Rule of Civil Procedure 37, and inherent power to impose sanctions for bad faith conduct during discovery.").

[44] Beisner, *supra* note 7, at 590.

curative measures further reflects this value, making clear that, absent intentional wrongdoing, a court's focus should be on furthering the goals of discovery rather than on punishing litigants.

The Committee's worthy aim in this regard, however, would be better served by altering slightly the proposed Rule 37(e)(1)(B)(i) to make sanctions available against those whose actions "caused substantial prejudice in the litigation and were willful *and* in bad faith," rather than "willful *or* in bad faith" as it currently reads. This is largely a matter of providing clear guidance to courts and litigants, as the term willful may be interpreted by some to mean little more than simply volitional. Almost all of the actions that lead to a loss of discoverable information will be done intentionally; the distinguishing factor should be whether they were done maliciously. The simple change from "or" to "and" will underscore this distinction, better advancing the Committee's goal of making sanctions available against parties actively seeking to disadvantage their opposition. Moreover, the Committee should seek to clarify the definition of both "willful" and "bad faith," either in the Committee Notes or elsewhere. We are concerned that the list of factors provided in Rule 37(e)(2) under the Committee's proposal will prove insufficient to produce the certainty and predictability the Committee is seeking. Experience has demonstrated that, in failure-to-preserve cases, different jurisdictions perceive culpability differently. To avoid repetition of the same problem, the Committee should clarify that the requirement of willfulness and bad faith is intended to reserve sanctions for those who intentionally seek to disadvantage litigants or potential litigants in bringing their claims.

The Committee's proposal also provides an overbroad caveat on spoliation sanctions in the proposed Rule 37(e)(1)(B)(ii), rendering them available against parties whose actions have "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation," even in the absence of bad faith. We believe that this language threatens to create an exception that will swallow the newly crafted rule. Faced with the possibility of sanctions under these circumstances, corporations will simply continue their current and costly retention policies. The Committee should adjust the proposed language to make clear that this caveat is a limited and narrow exception to the general proposition that spoliation sanctions will not be available absent bad faith. One way for the Committee to accomplish this would be to limit sanctions available under B(ii) to the loss of tangible evidence only.

While clarity on sanctions will represent an improvement in of itself, it will also serve to reduce the drastic costs associated with preservation. When defendants are better able to anticipate and understand their preservation obligations, they will no longer be forced to retain everything, just in case. The proposed Rule 37(e) will bring retention in line with the more focused conception of discovery afforded by the Committee's proposed Rule 26(b).

V. Conclusion

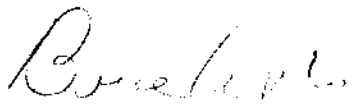
That the Committee has undertaken to address the cost of civil discovery is welcome news, and the proposed changes to the Federal Rules of Civil Procedure represent a critical first step. As scholars and experts have long maintained, the rise in discovery costs is about far more than just increased expenses to defendants—it threatens to undermine the very foundation of our civil justice system. The Committee's proposals, coupled with the modest changes we outline above, will begin the process of restoring discovery to its intended scope and role, and will force

litigants to focus more on the merits of claims and defenses than on costly gamesmanship and coercion.

The proposed changes to Rule 26(b) will accomplish what the 1983 Amendments to the Rules attempted and render civil discovery proportional to the needs of the case. With the advent of electronically stored information, the sheer volume of data litigants may possess has reached a scope never imagined by the drafters of either the Federal Rules or the 1983 Amendments. This has left defendants particularly susceptible to discovery abuse and strike suits. Refocusing discovery on the merits is thus a vital correction which we commend the Committee for making. Likewise, the proliferation of sanctions for the spoliation of discoverable information has caused potential defendants to retain vast amounts of irrelevant information at great expense. The Committee's proposed Rule 37(e) makes clear that, absent extraordinary circumstances, sanctions will issue against only those acting in bad faith, freeing companies to proceed with good faith preservation policies actually calibrated to real litigation risk.

These proposed changes are worthy of praise, though we have identified above two important areas in which a slight change will better serve the twin aims of reducing cost and delay. Critically, however, the likely impact of the Committee's proposal and the "Duke Rules" package must be kept in perspective. If prior reform efforts have taught us anything, it is that civil discovery frequently outpaces the rules that govern it. The Committee's proposals will neither stamp out abuse nor eradicate unnecessary expenditures. Though the proposals will effect progress on both fronts, it is vital that the Committee continue to monitor the cost of civil discovery and its adherence to its historical aims.

Very truly yours,



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