November 26, 2013

Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle NE
Washington, DC 20544

Re: Response by The Sedona Conference® Working Group 1 Steering Committee to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013)

Dear Committee:

On behalf of the Steering Committee of Working Group One ("WG1") of The Sedona Conference®, we respectfully submit our response to the request from the Hon. Jeffrey S. Sutton, dated August 15, 2013, for comments regarding certain proposed amendments to the Federal Rules of Civil Procedure. We welcome the opportunity to comment and commend the Committee for its diligent efforts over the nearly three-year period it has been working on the topic.

Our comments are primarily focused on certain of the Case Management amendments to Rules 16 and 26 and on proposed Rule 37(e), as well as the change in Rule 1. We have previously submitted proposals regarding these topics by letters dated October 3, 2012 and December 17, 2012. However, since the proposals are apparently not part of the public record, we have included copies as Attachments A and B. Our drafting teams did not consider the proposed changes to the other Rules, and therefore we do not comment here on the proposed amendments to those Rules.

Generally speaking, we believe that the Committee's proposals have the potential to advance the stated goals of improving early and effective judicial case management, enhancing the means of keeping discovery proportional to the action and advancing cooperation. Accordingly, we offer suggestions for additional revisions to help advance the Committee's stated goals. Our suggestions are reflected in Attachment C to this submission and discussed below. It is unclear, however, that the

Committee's proposed changes to Rule 37(e) as currently drafted will have a substantial impact on the goal of reducing the burden and costs associated with overbroad preservation or setting forth a uniform national spoliation standard. We ask that the Committee, therefore, carefully consider our alternative proposal to Rule 37(e), delineated in Attachment A and elaborated upon in Attachment B. Alternatively, we would ask that the existing draft be revised consistent with points raised in our comments, as suggested in Attachment C.

We conclude by recommending an important related revision to Rule 45 that is not included in the pending amendment to that Rule.

Sedona's Background and its Interest in Rule Amendments

WG1 of The Sedona Conference® brings together people with differing perspectives – plaintiffs, defendants, in-house and outside counsel, government lawyers, judges, academics, and service providers – to reach a consensus viewpoint on pertinent legal topics and to move the law forward in a reasoned and just way. WG1 focuses on e-discovery, information governance, data security, and privacy. We have published numerous peer-reviewed commentaries and analyses on these topics, which have been favorably cited in judicial decisions.

In 2011, the Steering Committee of WG1 formed drafting teams to identify possible amendments to the Civil Rules related to preservation and remedies or sanctions. The groups considered and drafted various proposals, which were vetted with the members of WG1 and discussed at three national meetings of the membership. The drafting teams and the WG1 Steering Committee carefully considered all the input and realized that, due to the complexity of the issues, the membership of WG1 could not reach consensus on all issues. As noted above, after inviting comments from the WG1 membership, the Steering Committee submitted a proposal on October 3, 2012 to this Committee addressing Rules 1, 16, 26, 37(e) and 45 (Attachment A). We followed this submission with more detailed comments regarding Rule 37(e) on December 17, 2012 (Attachment B), and Steering Committee representatives commented on them at the Meeting of November 2, 2012.[1]

[1] *See* Minutes, Rules Advisory Committee Meeting, November 2, 2012, lns. 449 – 499.

Since making these submissions, we have continued to follow the proceedings with respect to the Rules amendments, and following the Standing Committee's meeting in June, we reassembled our drafting teams to study the latest proposals so we could comment on them, if appropriate. This current submission is the combined product of those drafting team members and the WG1 Steering Committee. It reflects the consensus view of the Steering Committee but, as with the case of our initial proposals, not necessarily the entire WG1 membership.

Agreement with Proposed Revisions to Rule 1

We endorse the Committee's proposal to amend Rule 1 to specify that the Rules are to be "employed by the court and the parties" to meet the goals of achieving the "just, speedy, and inexpensive determination of every action and proceeding;" and the Committee Note reference to the fact that effective advocacy is consistent with cooperative and proportional use of procedure. This approach is consistent with The Sedona Conference® Cooperation Proclamation[2] effort to help change the culture of discovery and our earlier recommendation to the Committee that the Rule and Notes be revised to emphasize that cooperative behavior does not conflict with an attorney's professional duties.

Proposed Revisions to Rule 16 and Recommendation that Additional Consideration be Given to Preservation and Privacy Issues

The Committee's proposal to include "preservation" in the list of permissible topics in Rule 16(b)(3) for scheduling orders is similar to the proposal advanced in our October 3, 2012 submission (Attachment A), and we accordingly endorse this change. That said, however, we continue to urge that the Committee further revise Rule 16 to include preservation as one of the topics covered by Rule 16(a) and that privacy issues be included among the issues that might be addressed under Rule 16(b)(3). Attachment C hereto is a redline version showing how this and other proposed changes would be reflected in the Committee's proposals. Preservation and privacy are important issues in many cases, and we submit that their early treatment in the Rule

[2] *The Sedona Conference® Cooperation Proclamation*, 10 Sedona Conf. J. 331 (2009).

16 conference is consistent with the Committee's goal of improving early case management, keeping discovery proportional to the action, and advancing cooperation.

In this regard, we recommend that the Committee renumber the subparagraphs of Rule 16(a) and insert a new Rule 16(a)(3). The new provision would specify that one purpose of the pretrial conference would be to address "any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C)."

Similarly, we suggest the following phrase be added at the end of Rule 16(b)(3)(B)(iv): "and any agreements addressing legally protected privacy interests." The additional phrase would facilitate the resolution of an issue that is of increasing concern in civil litigation.

In addition to these two changes, we recommend that the Committee insert the words "managing discovery" at the beginning of current Rule 16(a)(3) [Rule 16(a)(4) if our proposal for a new Rule 16(a)(3) is accepted]. We think the addition of those words will serve to further emphasize the important role that courts play in effective early case management.

Returning to Rule 16(b), we submit that the Committee's proposed language for 16(b)(2), which directs a judge to issue a scheduling order "unless the judge finds good cause for delay" to be awkward because it implies that the parties have not been diligent, even though the court is to make its finding even before it meets the parties. We suggest that the Rule instead provide: "The judge must issue the scheduling order within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared, unless the court anticipates that the complexity of the case, the needs of the parties, or the ends of justice warrant additional time."

The Committee's proposal for Rule 16(b)(3)(B)(iii) adds "preservation" to a list of topics so that the scheduling order may "provide for disclosure, discovery, or preservation of electronically stored information." We suggest that this language be broadened to include preservation of all types of information. Experience has shown repeatedly that electronically stored information is not the only potential evidence that is subject to spoliation, and there seems to be no sound reason to limit the court's ability to enter orders respecting all potentially discoverable matter and information.

We also endorse the Committee's proposal for Rule 16(b)(3)(B)(v), which encourages courts to include in scheduling orders a requirement that parties meet and confer with the court before filing discovery motions. When used, this approach encourages meaningful dialogue among the parties, and may advance the efficient, timely, and early resolution of discovery disputes, thus obviating expensive and wasteful motion practice. In this regard, we refer the Committee to a complementary proposal, set out in our October 3, 2012 submission (Attachment A) and discussed *infra*, that would require the parties to provide a report on their discovery and preservation discussions following their Rule 26(f) conference. We think that such reports would complement and, indeed enhance, the Committee's proposed Rule 16(b)(3)(B)(v).

Finally, we recommend that the Committee insert cautionary language into the Committee Notes for Rules 16(b) to the effect that "judicial intervention is appropriate only after the parties meet and confer in good faith about these issues." Such language would stress the importance of meaningful dialogue among the parties to address these issues, which, in turn, can serve to preserve judicial resources.

Agreement with Proposed Revisions to Rule 26 and Recommendation that Further Consideration Be Given To Preservation and Other Issues

The Committee's proposed amendments to Rule 26 make two significant changes in Rule 26(b)(1) that we endorse. First, the proposal limits the scope of discovery to "any nonprivileged matter that is relevant to a party's claim or defense" and moves the proportionality provision currently in Rule 26(b)(2)(C)(iii) into Rule 26(b)(1). In doing so, it also removes from the Rule the provision allowing parties to seek discovery "relevant to the subject matter involved in the litigation."

Both of these provisions have the potential to help cabin excessive discovery. Also, these amendments might have some marginal indirect effect on the burden caused by over-preservation. By limiting discovery to claims and defenses of the parties as stated in the pleadings, the Rule may effectively relieve a party, once litigation has commenced, from a perceived need to preserve everything that may relate to the subject matter of the claim.

We believe, however, that the amendments to Rule 26 should go further and explicitly address preservation in pending cases. We recognize that the Committee has been reluctant to propose any Rule amendment that describes the common law preservation obligation and that proposed Rule 37(e)(2) already mentions reasonability and proportionality as factors in assessing conduct relating to spoliation sanctions. However, we believe that Rule 26 would be materially improved by the adoption of more general provisions that govern preservation in filed cases. Just as a court might in appropriate cases limit the scope of discovery, there seems to be no reason why it might not relieve a party of the need to over-preserve, and its accompanying burden.

Accordingly, we urge the Committee to add a reference to "preservation" in the Preamble to Rule 26 (B)(2)(C) and in Rule 26(b)(2)(C)(i) so that it authorizes courts to limit preservation which would be unreasonably cumulative, duplicative, or that can be obtained from a more convenient, less burdensome, or less expensive source. Similarly, the Committee should make clear the courts' ability to limit preservation under Rule 26(b)(2)(C)(iii) when it is outside the scope of Rule 26(b)(1) – i.e., disproportionate to the needs of the case, or beyond the range of what might be discoverable under Rule 26(b)(1).

Our October 3, 2012 submission (Attachment A) also recommended several revisions to Rule 26(c) involving protective orders; we encourage the Committee to take a closer look at those recommendations. In particular, we urge the Committee to make further changes to Rule 26(c) to enable parties to obtain relief from the burden of over-preservation. To accomplish this, the preamble of Rule 26(c) should be enlarged to enable not only parties who are subject to discovery to seek protective orders, but also that such motions might be filed by a party "who, is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things." To discourage excessive motion practice, we also suggest that the Committee add to the current requirement in Rule 26(c) that the moving party certify that it has conferred or attempted to confer with the adversary, a condition that the "the court cannot consider the motion unless it" receives such a certification.

We also believe that the administration and effective management of cases would be enhanced if Rule 26(c) were to include a requirement that, in cases where a meet and confer has taken place, the parties file a report with the court describing the issues that were not resolved by the meet and confer. Rule 26(f) would also be amended to provide for such a report, as described below. Such a provision is

consistent with, and furthers, the underlying intent of the Committee's proposed revision of Rule 16(b)(3)(B)(v), which would authorize courts to require parties to request a meeting with the court before filing any discovery motion.

In addition, we recommend three interrelated clarifying changes to Rule 26(c)(1)(B). First, we suggest insertion of the words "specifying terms for preservation" at the beginning of the (c)(1)(B) to make it clear that the court may set boundaries on the duty to preserve. Second, for the same reasons, we suggest that the words "limiting the scope of preservation" be inserted into current Rule 26(c)(1)(D). Third, we suggest that, after the initiation of a lawsuit, the Committee add a new subsection to Rule 26(c)(1) clarifying that the court may issue an order "relieving a party from preserving certain documents, electronically stored information, or tangible things."

Finally, with respect to Rule 26(f), we draw the Committee's attention to our recommendation, noted above, that the parties prepare both a discovery plan and, if appropriate, a report following their Rule 26(f) conference in which they would set out any unresolved issues arising from the conference. Modifying our October proposal to fit the Committee's own proposal, we suggest a new Rule 26(f)(3)(F) be inserted into the Rule and the current Rule 26(f)(3)(F) be re-designated as 26(f)(3)(G). The new Rule would provide:

> (F) Conference Reports. If the parties are unable to resolve issues discussed during a conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:
>
> (i) A section stating the issues discussed during the conference and summarizing the areas where agreement was reached on each issue;
>
> (ii) A section, containing no argument and providing a brief statement identifying each issue for which agreement was not reached, including:
>
> - A short and plain statement of the position of each person or party on each issue in contention; and;
> - The proposal of each party for reaching a resolution of the issue.

This proposal thus provides a robust reporting mechanism for the submission of disputes. We submit that such a provision would facilitate the informal resolution of discovery disputes and thus advance the Committee's goal of facilitating early case management, particularly under Rule 16(b)(3)(B)(v), reducing expensive motion practice in discovery, and facilitating cooperation.

Comments and Recommendations Regarding Proposed Revisions to Rule 37(e)

We approve of and support the Committee's goal of replacing current Rule 37(e) with a Rule that would establish a uniform national culpability and prejudice standard for the imposition of spoliation sanctions, and that would serve the goal of reducing over-preservation while still ensuring the right of parties to obtain discovery.

We have a number of concerns, however, about the manner in which Proposed Rule 37(e) is currently drafted, and the potential unintended consequences that may flow from it. Our recommendations and responses to the Committee's invitation to comment on several specific issues are set forth below.

Recommendation That "Curative Measures" Should Not Be Treated Separately From "Sanctions"

Proposed Rule 37(e)(1) as currently drafted takes a bifurcated approach to the actions that a court may take if a party failed to preserve discoverable information that should have been preserved. This approach separately addresses "curative measures" in Rule 37(e)(1)(A) and "sanctions" in Rule 37(e)(1)(B). The curative measures prong does not require either a showing of culpability or prejudice, while the sanctions prong requires either (i) "substantial prejudice" and willful or bad faith conduct or (ii) that the party seeking sanctions must have been irreparably deprived of any "meaningful opportunity" to present or defend against the claims in the litigation (an "exceptional circumstances" type test).

We have several observations about this approach. First, we presume that by listing such curative or remedial measures, the Committee does not seek to imply that courts would be limited in their authority to utilize similar measures to manage their cases, for example, by assuring compliance with court orders, including scheduling orders, or in responding to violations of the Federal Rules. Still, we believe this point should be clarified in the Committee Note to avoid any misunderstanding or misconstruction by judges or practitioners.

We also believe, however, that "curative measures" should not be treated separately from "sanctions" under Rule 37(e). Rather, the rule should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies ("sanctions") for failures to preserve relevant information, and that it should emphasize that where a party has acted in good faith in its preservation efforts, such sanctions should only be imposed in exceptional circumstances. In our view, the proposed rule departs from its principal intended goals, and would significantly undermine them, by providing for "curative measures" without a showing either of exceptional circumstances or of prejudice and culpability, as currently called for in Rule 37(e)(1)(B).

In practice, there is often no difference between the ultimate effect of many "sanctions" and "curative measures." Any sanctions imposed should remedy a harm done, but some curative measures are in effect the same as sanctions.

The problem is highlighted by the fact that even serious sanctions, such as a permissive adverse inference jury instruction, have been characterized by courts as remedial rather than as a "sanction." For example, in *Mali v. Fed'l Ins. Co.*, 720 F.3d. 387, 393 (2nd Cir. Jun. 13, 2013), the Second Circuit recently held that a permissive adverse inference instruction "is not a sanction" but rather "an explanation of the jury's fact-finding powers." Other courts have treated such an instruction as a sanction. *See Arch Ins. Co. v. Broan-NuTone, LLC*, 509 Fed. Appx. 453, 459 (6th Cir. 2012) (treating permissive adverse inference instruction as a sanction and recognizing that it is "dressed in the authority of the court, giving it more weight than if merely argued by counsel."). This inconsistent treatment of a permissive adverse inference instruction as a non-sanction and as a sanction demonstrates how proposed Rule 37(e)(1)(A) as currently drafted would undermine the goal of uniformity.

The Advisory Committee has stated that "[t]he fundamental thrust of the proposal is . . . to amend the rule to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions."[3] It has also stated that the purpose of the proposed rule is to provide "a uniform national standard for culpability findings."[4] We agree with those goals. But Proposed Rule 37(e)(1)(A) would permit in some cases imposition of what are essentially sanctions without a requirement of either prejudice to the requesting party or culpability on the part of the responding party. In doing so, the "curative measures" exception would in many cases effectively render ineffective the requirements for imposing "sanctions" that exist in proposed Rule 37(e)(1)(B).

Accordingly, we do not believe that it is necessary for the proposed rule to address authority to issue "curative measures" separately from "sanctions." The Sedona submission of October 3, 2012 (Attachment A) embodies a different and, we believe, ultimately more effective approach to these issues. It starts with the general proposition that "[a]bsent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith."

The rule also provides that a court may invoke sanctions only if the party "did not act in good faith" which, in turn requires that a court consider whether, among other elements, the party "intentionally destroyed information relevant to the claims or defenses." Where sanctions are appropriate, a court may impose one of several listed "sanctions," which range in severity from merely amending the case management order to imposing harsh remedies. The rule specifically states that courts are not prohibited from issuing such remedial or case management orders as are necessary to effectuate discovery or trial preparation. In our view, when a court chooses to impose a curative measure under another rule (thereby avoiding the ancillary effect on parties receiving a "sanction")[5], neither prejudice to the requesting party nor culpability on the part of

[3] Advisory Committee on Civil Rules Report to the Standing Committee (May 8, 2013) at 35 ll. 1256-60; *see also id.* at ll. 1267-73 ("The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation.").

[4] *See id.*

[5] Unlike curative measures imposed under other rules, measures issued under Rule 37 (i.e., "sanctions") potentially affect parties and counsel long after the case in which those sanctions are issued. For

the responding party would be required. But when courts use Rule 37 to impose remedies (however mild), absent exceptional circumstances, the court must first determine that the party to be sanctioned failed to act in good faith and that the requesting party was prejudiced.

Recommendation That "Willful" Should Be Removed From The Culpability Standard, And "Bad Faith" Should Be Replaced With "Did Not Act In Good Faith" For the Goal of Uniformity

The Advisory Committee has invited comment on whether there should be an additional definition of "willful" or "bad faith" under proposed Rule 37(e)(1)(B)(i). We are concerned that inclusion of the term "willful" likely will undermine that goal and the goal of having a uniform national standard.[6] For this reason, we believe *a party's failure to have acted in good faith* is the appropriate culpability standard and that "willful" should simply be removed from the proposed rule rather than further defined.[7]

The Supreme Court has long recognized that, for example, willful "is a word of many meanings, its construction often being influenced by its context."[8] Judge

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example, *pro hac vice* applications sometimes require counsel to report whether they have ever been sanctioned.

[6] *See, e.g., Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96-97 (3d Cir. 1983) (affirming the district court's refusal to issue an adverse inference instruction for the intentional disposal and/or loss of key evidence by the plaintiff's agent in a product liability case, because there was no evidence that the plaintiff "wilfully" permitted its agent to destroy the evidence); *cf. Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (affirming the district court's issuance of an adverse inference instruction, even in the absence of a finding of bad faith, for the intentional use of destructive testing methods on the evidence in a product liability case); *Sekisui Am. Corp. v. Hart,* 12 Civ. 3478, 2013 WL 4116322 at *6 (S.D.N.Y. Aug. 15, 2013) (noting that "[t]he law does not require a showing of malice to establish intentionality. . . . [E]ven a good faith explanation for the willful destruction of ESI . . . does not alter the finding of willfulness.").

[7] We are also concerned that the term "bad faith" presents similar issues and is likewise susceptible to multiple interpretations. In this regard, the term "bad faith" could be construed as either requiring or not requiring a level of culpability.

[8] *Spies v. United States*, 317 U.S 492, 497 (1943). *See generally* Note, *An Analysis of the Term "Willful" in Federal Criminal Statutes*, 51 Notre Dame L. Rev. 786, 786-87 (1976).

Learned Hand, in an exchange with Professor Herbert Wechsler (the reporter for the Model Penal Code), stated that "[Willfully] is an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet."[9] Ultimately, the drafters of the Model Penal Code did not include the term "willful."[10]

In fact, the term "wil[l]ful" was expressly removed from Rule 37(d) in the 1970 revisions to the Federal Rules, with the Advisory Committee noting that the "concept of 'wil[l]ful failure' is at best subtle and difficult, and the cases do not supply a bright line." *See* Advisory Comm. Notes to 1970 Amendments. The term "willful," however, has been regularly invoked by the courts, operating under different standards, in issuing sanctions for spoliation pursuant to both Rule 37[11] as well as the courts' inherent authority.[12] As such, importing the term "willful" into Rule 37 now would invite a similarly disparate application of the term by the various courts, and would be contrary to the goal of national uniformity.

The proposed rule would best be served by similarly removing the term "bad faith." To avoid overbroad preservation and improve uniformity, the proposed rule should be focused on imposing sanctions for parties or nonparties that fail to act in good faith in seeking to meet their preservation obligations.

As noted earlier, the Sedona proposal for Rule 37(e) has as one of its threshold requirements for sanctions that "the party against whom sanctions are sought did not act in good faith in the preservation of relevant information."[13] We chose the phrase "did not act in good faith" instead of acted in "bad faith" to avoid the confusion created

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[9] *See United States v. Aversa*, 984 F.2d 493, 497 n.5 (1st Cir. 1993), *vacated sub nom Donovan v. United States*, 510 U.S. 1069 (1994) (quoting American Law Institute, Model Penal Code § 2.20, at 249 n.47 (1985)).

[10] *See Dixon v. United States*, 548 U.S. 1, 16 (2006) (noting Section 2.02(2) of the Model Penal Code does not include the term "willfully" but instead defines "purposely," "knowingly," "recklessly," and "negligently").

[11] *See The Proctor & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005).

[12] *See Vodusek, v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

[13] *See* Sedona Conference Proposed Rule 37(e)(2)(A) (Attachment A).

by cases that identify bad faith under a negligence standard.[14] The Advisory Committee has stated that it intends to "reject decisions that have authorized the imposition of sanctions . . . for negligence or gross negligence." Using the phrase "did not act in good faith" should ensure that the rule fulfills the Advisory Committee's intent, while "willful or in bad faith" risks courts imposing sanctions for negligent or grossly negligent conduct. Additionally, we believe that adopting a good faith standard will allow for a development of a set of factors that incentivizes good behavior. We therefore recommend that the Advisory Committee adopt the phrase "did not act in good faith" as the threshold requirement for proposed Rule 37(e).

To the extent the Committee is unwilling to entertain our proposal to adopt a "good faith" standard, we encourage the Committee to clarify that the standard adopted, "willful", "bad faith", or "willful and bad faith" require a finding by the court that the alleged spoliating party acted with "specific intent" to deprive the opposing party of material evidence relevant to the claims and/or defenses to the matter prior to the imposition of sanctions and/or any curative measure that would be tantamount to a sanction.[15] As noted herein, we have rejected the false distinction between curative measures and sanctions adopted by the Committee in the draft rule and, instead, urge the Committee to set forth a rule that has a range of sanctions that a court could impose, all of which would require a finding of absence of "good faith" and, for more serious sanctions (e.g., spoliation instructions and terminating sanctions) to

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[14] As stated in our October 3rd and December 17th submissions (Attachments A and B, respectively), we think that, absent the exceptional circumstances provided for in Rule 37(e), mere negligent conduct should not be sufficient for imposing sanctions. *See e.g., Arambura v. Bowing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (Court explained that "[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); *Streit v. Elec. Mobility Controls,* LLC, 2010 WL 4687797 at *2 (S.D. Ind. Nov. 9, 2010) ("[A] showing of bad faith by the non-moving party is a prerequisite to imposing sanctions for the destruction of electronically stored information. '[B]ad faith' means destruction for the purpose of hiding adverse information." [internal citations omitted]; *Russell v. Univ of Texas,* 234 Fed. App'x 195 (5th Cir. 2007) (*per curiam*), (there was no error in declining to instruct a jury as to spoliation where there was no evidence that the destruction of evidence resulted from actions in bad faith. The court noted that "mere negligence" was insufficient, and that destruction of business records under a routine policy did not draw an inference of bad faith, even where the destruction may have occurred after the initiation of litigation). Our proposal recognizes, however, that Rule 37 does not prohibit courts from issuing remedial or case management orders as are necessary to effectuate discovery or trial preparation.

[15] However, intent can be demonstrated by direct evidence or circumstantial evidence. For example, a court might infer intent where a party elects not to preserve information that it has a clear and known obligation to preserve.

demonstrate "specific intent." In the absence of this clarification and, as the proposed rule is currently drafted, the "willful" and/or "good faith" standard without clarification could be interpreted as little more than a tort-based standard for the imposition of sanctions – which should be uniformly rejected by the Committee for the various reasons stated herein.

Recommendation That "Substantial Prejudice" Should Be Further Defined

The Advisory Committee also invited comment on whether there should be additional definition of "substantial prejudice" under proposed Rule 37(e)(1)(B)(i).

We support the Committee's approach of requiring a party to show that it has been seriously prejudiced in its ability to prove its case before imposing sanctions, other than in exceptional circumstances. However, we believe it is important that the Rule make clear that "substantial prejudice" means that a party must have been materially hindered in presenting or defending against the claims in the case.

Although a party may claim that any loss of relevant information is "prejudicial," the party may not have been materially hindered in pursuing its claims or defenses.

For that reason, Rule 37(e) should specify that a party is not "substantially prejudiced" where the lost relevant information has not materially prevented a party from presenting or defending against the claims, where it is cumulative of other relevant information, is available from other sources or can otherwise be provided through other means (*e.g.*, depositions, interrogatory responses, or requests for admission).

Related to the substantial prejudice requirement, we believe it also is important that the proposed rule expressly state that a sanctions motion must be timely—a requirement that is currently absent from the proposed rule. Indeed, a party's undue delay in bringing a sanctions motion in appropriate circumstances can be indicative of a lack of substantial prejudice flowing from the loss of relevant information.

Thus, the Sedona Proposal for Rule 37(e) provides that a court may only impose a sanction if the party seeking sanctions has established (a) the party against whom

sanctions are sought did not act in good faith in the preservation of relevant information; (b) relevant information was lost; (c) no alternative sources exist for the lost information; (d) the party seeking the sanctions was materially prejudiced in its ability to prove or respond to the claims and defenses; and (e) considering all the circumstances, the sanctions motion was timely.

Recommendation That Proposed Rule 37(e)(1)(B)(ii) Would Not Be Necessary With The Sedona Conference's "Absent Exceptional Circumstances" Approach

The Advisory Committee invited comment on whether Rule 37(e)(1)(B)(ii) should be retained and whether it adds "important flexibility."

We are concerned that the language "deprived a party of any meaningful opportunity" would be susceptible to inconsistent interpretations because the term "meaningful" is inherently subjective. The approach that Sedona has recommended—specifying that "absent exceptional circumstances" a party should not be subject to sanctions where it has acted in good faith—provides a court with appropriate flexibility to address situations where the loss of evidence has deprived a party of the ability to pursue or defend against claims.

If the Advisory Committee is inclined to keep subsection 37(e)(1)(B)(ii) in the proposed Rule, we recommend that it be revised to apply only where a party has been "irreparably deprived of the ability to present or defend against the claims in the litigation." We believe that this language would be much less susceptible to inconsistent interpretations than the Committee proposal which qualifies the rule by reference to "any meaningful opportunity."

Recommendations That The Rule Identify The Range Of Potentially Applicable Sanctions, Provide That The Court Must Select The Least Severe Sanction To Remedy the Failure To Preserve, And That The Court Should Consider The Proportionality Of The Sanction

The Committee proposal for Rule 37(e) incorporates a list of potential sanctions by cross-reference to Rule 37(b)(2)(A), adds a new reference to an "adverse-inference jury

instruction" (which is not currently in the Civil Rules) and also lists "curative measures" in Rule 37(e)(1)(A).

We believe that any new Rule 37(e) should identify more broadly the range of potential sanctions (whether "curative" or otherwise), and that it should require a court to select the least severe sanction necessary to remedy the preservation failure, require the court to consider whether the sanction is proportional to: (i) the non-movant's failure to preserve the specific information at issue; and (ii) the degree of prejudice suffered by the movant as a result of the loss or unavailability of that information and only impose the most severe sanctions where the failure was intentional.

As currently drafted, the proposed rule, in its "sanctions" subsection, only references the most severe sanctions. Proposed Rule 37(e)(1)(B) provides that the court may "impose any sanction listed in Rule 37(b)(2)(A) or give an adverse inference jury instruction[.]" Rule 37(b)(2)(A) lists the following sanctions: (i) evidence preclusion; (ii) claim preclusion; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing the action; (vi) default judgment; and (vii) treating the failure as a contempt of court. The proposed rule includes other remedial sanctions in its "curative measures" subsection at proposed Rule 37(e)(1)(A) which do not require a showing of culpability or prejudice. Those remedial sanctions consist of permitting additional discovery, imposing monetary sanctions and other unspecified curative measures.[16]

As noted earlier, the line is often blurry (or non-existent) between "remedies" and "sanctions." Consequently, we do not believe it would be beneficial to separate "curative measures" from "sanctions," particularly where there is no prejudice or culpability requirement for "curative measures" (which may be punitive and severe in their effect).

Rather, we believe that the proposed rule should more comprehensively list the range of sanctions (including those that are purely remedial in nature) and apply prejudice and culpability requirements (subject to the flexibility provided by the

[16] In contrast, the Sedona Proposal for Rule 37(e) lists, in addition to the severe sanctions included in Rule 37(b)(2)(A), the following remedial sanctions: (i) amending the case management order as appropriate, including the scope of discovery or the discovery schedule; (ii) requiring the responding party to respond to additional discovery; and (iii) requiring the responding party to pay the reasonable expenses of the requesting party, including attorney's fees.

"absent exceptional circumstances" language that we have proposed). We recognize, of course, that courts can utilize their case management functions under other civil rules to adjust litigation schedules, allow additional discovery and provide other appropriate relief where there are issues of spoliation, but no proof of conduct that would give rise to sanctions. But the imposition of a sanction, even in its least severe form, has consequences that extend beyond the case in which that sanction is issued. Accordingly, we believe that any relief accorded under Rule 37 should require a finding that the party subject to the sanction did not act in good faith.

We also recommend that the Committee consider adding references to three more factors:

First, the proposed rule should provide that, in determining which sanction to impose, the court should select the least severe sanction necessary to remedy the failure to preserve. The rule as currently proposed contains no such provision, raising the specter that without such a limitation, different courts faced with the same loss of evidence, with the same impact on a case, could impose highly inconsistent sanctions.

Second, the Rule should include a reference to the importance of proportionality and the degree of prejudice in the list of factors that the court should consider in assessing which sanction to impose. *Cf.* Proposed Rule 37(e)(2)(D) (focusing on the proportionality of the preservation efforts). Courts should consider whether the sanction is proportional to (i) the responding party's failure to preserve the specific information at issue and (ii) the degree of prejudice suffered by the requesting party as a result of the loss or unavailability of the information.

Finally, we believe that it is important that Rule 37(e) expressly provide that the most severe sanctions—*i.e.*, those listed in Rule 37(b)(2)(A) and adverse inference jury instructions—should only be imposed for the most egregious misconduct. The proposed rule submitted by Sedona, for example, provides that absent exceptional circumstances, harsh sanctions [which are identified in Sedona Proposed Rule 37(e)(5)(C) as a subset of possible sanctions listed in Sedona Proposed Rule 37(e)(4)] may not be imposed unless the party's failure to preserve was intentional.

Recommendations That The Rule Should Not Include Receipt Of A "Preservation Letter" As A Factor In Assessing A Party's Conduct And Should Include The Overall Reasonableness Of The Party's Preservation Efforts And Whether the Party Intentionally Destroyed Relevant Information

We generally agree with all but one of the factors that the Advisory Committee has included in Proposed Rule 37(e)(2) as factors that the court should consider in assessing a party's conduct. (Note that in the Committee's Proposed Rule 37(e), these are factors to be considered in determining whether a "failure [to preserve] was "willful or in bad faith." For the reasons discussed above, we believe the issue should be stated differently, *i.e.*, whether the party "did not act in good faith in the preservation of relevant information.")

We are concerned about the inclusion of a factor based on the receipt of a demand for preservation, because the duty to preserve often arises independent of any preservation request, and conversely, there may be no duty to preserve even when a request is received. Such demands are frequently overbroad and sent for improper purposes. By including the issuance of such a request in the factors the court should consider in determining whether to impose sanctions, it may result in such letters being sent in virtually every case (with at least a significant percentage of them being for purposes of "setting up" a later sanctions motion).

When coupled with the factor of "whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information" (which we think is a good factor to include), this factor may result in gamesmanship and impose the burdens of significant side litigation on the parties and the court.

We do agree that the reasonableness of a party's preservation efforts should be included as a factor, but we are concerned that the specific language of proposed Rule 37(e)(2)(B) could be interpreted too narrowly. It is possible that the language could be seen as referring narrowly to the circumstances about specific information that was not preserved rather than the overall preservation efforts. If interpreted in that fashion, it would be reverting to a negligence standard with respect to the information that was not preserved—a standard that the Advisory Committee has correctly rejected. Sedona has suggested broadening the factor to refer to whether the party "made

reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve".

Finally, we believe that the list of factors should include whether the party intentionally destroyed information that it knew was likely relevant to the claims or defenses, which is currently missing from the Committee's list. This factor is particularly relevant to whether the party did not act in good faith such that sanctions should be imposed and is one of the factors that the Sedona Proposed Rule 37(e)(3) listed for consideration in determining whether a party acted in "good faith." *See* Attachment A.

Recommendations That Rule 37(e) Not Be Limited To Electronically Stored Information

The Advisory Committee has invited comment on whether amended Rule 37(e) should be limited to sanctions for loss of electronically stored information ("ESI"). We do not believe the rule should be so limited. Although the focus of concern about the expenses and burdens of over-preservation has been on the rapidly increasing volumes of ESI with which litigants must deal, the problems apply equally to preservation of hard copy documents and other tangible things.

Many litigated matters still involve significant quantities of hard copy documents in addition to ESI, and their preservation should be treated consistently. It would be incongruous for sanctions to be imposed for a failure to preserve hard copy documents, for example, where a failure to preserve the same information in electronic form would not result in sanctions under the proposed rule. Furthermore, we should not rule out the possibility of future technologies and means of communicating and storing data that are not "electronic."

Recommendation That The Provisions Of Existing Rule 37(e) Need Not Be Included If The Amended Rule Adopts A Good Faith Standard

The Advisory Committee has invited comment on whether the provisions of current Rule 37(e) should be retained in the rule. Generally speaking, Proposed Rule 37(e) would subsume the circumstances covered by the current ESI-only Rule. However, if the Advisory Committee retains its proposed Rule 37(e)(1)(A), permitting the imposition of remedial sanctions regardless of culpability or prejudice, we believe that the provisions of current Rule 37(e) should be included lest the protection it currently provides be lost.

Recommendation That Committee Notes Include A Comment To Clarify The Term "Discoverable Information"

We recommend that the Advisory Committee include in its Note to Proposed Rule 37(e) some guidance regarding the interplay between the term "discoverable information" in proposed Rule 37(e) and the impact of the Committee proposal to move the "proportionality" language from current Rule 26(b)(2)(C) to the definition of the "scope of discovery" provision in Rule 26(b)(1)(B). Specifically, the Advisory Committee's Note should deal with whether a party could be sanctioned for failing to preserve information that is outside the scope of discovery, as determined after a reasonable and good faith assessment of the relevance of the information considering the proportionality of the preservation effort.

Recommendation That Rule 45 Be Further Revised to Conform To The Proposed Amendments And To Address the Burden of Over-Preservation

The Chief Justice has submitted proposed amendments to Rule 45 to Congress. Although the Advisory Committee's current proposals do not advance any further revisions to Rule 45, the Committee's proposals for Rules 26 affect the cross-references to 26(b)(2)(C) in both the pending and proposed Rule 45.

We note that third parties to litigation face all of the concerns that parties face with respect to both privacy and related issues and the burdens caused by the over-preservation of information, yet they frequently lack the ability to secure current information about the status of a case and whether or when their duty to preserve may have ended. Our October submission accordingly recommended revisions to current Rule 45(c)(3) which would add protection from disclosing legally protected information and permit the commanded person to request confirmation of compliance and provide a mechanism for court review if needed. The language for these specific changes is set out in our October 3, 2012 submission (Attachment A).

Respectfully submitted,

The Steering Committee of WG1*

Kevin F. Brady
William P. Butterfield
Conor R. Crowley
Maura R. Grossman
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: Attachments A, B and C

* The statements in this Letter and Attachments A, B, and C do not necessarily represent the individual views of the Steering Committee Members or their firms, employers, clients, or any organizations with which they may be affiliated. In addition, the listed individuals – and all members of Sedona WG1 – reserve the right to express individual opinions or to advocate different positions from those represented by the letter and the attachments.

Attachment A

Letter from The Sedona Conference® Working Group 1 Steering Committee to Hon. David G. Campbell, John G. Koeltl, and Hon. Paul W. Grimm dated October 3, 2012

October 3, 2012

Hon. David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2118

Hon. Paul W. Grimm
United States District Court
Garmatz Federal Courthouse
101 West Lombard St.
Baltimore, MD 21201

Hon. John G. Koeltl
United States District Court
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judges Campbell, Grimm and Koeltl:

We write to respectfully request that the attached proposal be included in the agenda materials to be posted for the upcoming meeting of the Civil Rules Advisory Committee scheduled for November 1-2, 2012. This submission is in response to your request for input from The Sedona Conference® Working Group 1 on preservation, sanctions, and related issues.

The attached proposal reflects nine months of collaborative effort by the Working Group. In 2011, drafting teams drawn from the members of WG1 were formed for the purpose of identifying possible amendments to the Federal Rules of Civil Procedure related to preservation and remedies or sanctions for the failure to preserve, as well as the initial conference, the meet-and-confer obligation, and third-party subpoenas. A series of drafts were posted on The Sedona Conference® web site for WG1 member comment and presented to WG1 members present at the 2011 Annual Meeting, the 2012 Mid-Year Meeting, and the 2012 Annual Meeting. After each meeting, the drafting teams and the Steering Committee carefully considered the input received from WG1 members, both those in attendance and those who submitted comments via email. The attached proposal was posted on September 25, 2012 on The Sedona Conference® website for any additional WG1 member comment.

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Our goal at The Sedona Conference® is to bring together representatives of differing views and differing perspectives in order to attempt to reach a consensus viewpoint that reflects best practices and attempts to move the law forward in a reasoned and just way. However, given the complexity of many of the issues raised, the membership of WG1 was unable to reach consensus on every aspect of the accompanying proposal. Accordingly, the proposal does not represent the consensus of WG1, but is submitted as a compromise proposal on behalf of the drafting teams and the Steering Committee. This version represents our thinking on the following Rules: 1, 16, 26, 37(e) and 45.

Due to the issues raised by the proposed revisions to Rule 37(e), we wish to specifically address our goals in that regard. In our dialogue we found the existing Rule 37(e) to be not workable as a practical matter. Our goals in drafting a new Rule 37(e) were to:

- Adopt a uniform standard in the federal courts for the imposition of sanctions for the failure to preserve relevant evidence. In this regard, we felt it important that any standard reject the adoption of a tort-based standard for the imposition of sanctions now being utilized by some courts.

- Create a new, "good faith" standard for the imposition of sanctions that rewards producing parties for engaging in positive behavior such as undertaking reasonable steps to preserve information relevant to the claims and defenses. We intentionally avoided the term "bad faith" as opposed to a "good faith" standard because of the existing body of common law decisions attempting to define "bad faith," which under some decisions requires a showing of intent. Under our definition, intent is one factor, among many, that may be considered but its presence or absence is not required for establishing that a party acted or failed to act in "good faith."

- Recognize the reality that evidentiary related sanctions (e.g., spoliation instructions) are tantamount to a terminating sanction and, therefore, should not be imposed absent the showing of intent. We have, therefore, recommended a culpability standard for any sanction that ranges from evidence-related instructions to judgment or other terminating type of sanction.

- Avoid what we believe to be a false distinction between what are deemed "remedies" versus "sanctions." Our framework requires the court to first determine whether or not a sanction is warranted. Only once a court has determined that a sanction is warranted does the court then consider the range of sanctions. Our belief is that the court should have the latitude to determine a wide range of sanctions without having to label some actions as "remedies" and other "sanctions."

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We have made it clear that the proposed Rule 37(e) is not designed to take away a court's power to employ remedial or case management orders to manage a case, provided that such orders are not actual or *de facto* sanctions.

Consistent with our mission, we will consider comments from our members as they are received. To the extent that we believe that additional comments lend themselves to revising or supplementing our proposal, we may seek to submit a revised proposal, but we do not anticipate making further substantial revisions at this time and we are hopeful that the proposal can assist in the dialogue anticipated at the upcoming meeting.

Respectfully submitted,

The Steering Committee of WG1*

Jason R. Baron
William P. Butterfield
Conor R. Crowley
Maura R. Grossman
Sherry B. Harris
Timothy L. Moorehead
John J. Rosenthal
Ariana J. Tadler
Edward C. Wolfe
Thomas Y. Allman (Chair emeritus)
Jonathan M. Redgrave (Chair emeritus)

Attachment

* The statements made in this cover letter and the attached proposal do not necessarily represent the views of individual Steering Committee members or their firms, employers, clients, or organizations with which they are affiliated. In addition, members of WG1, including members of the Steering Committee, reserve the right to express their individual opinions and advocate proposals that may differ from that proffered by WG1.

RULE 1

SCOPE AND PURPOSE

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed***, complied with,*** and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 1

The words "complied with" are added to the Rule to emphasize the role and responsibility of attorneys in implementing this Rule. A necessary component of an attorney's responsibility to "comply with" the rules is "cooperation," which facilitates the "just, speedy, and inexpensive" determinations of actions and proceedings before the courts. Cooperation by attorneys and parties in the form of proactive communication and the reasonable exchange of non-privileged information with opposing counsel can speed up litigation by eliminating unnecessary motion practice, and can help focus discovery on individuals, documents, and other materials that are relevant to a party's claims or defenses. Cooperation by attorneys to meet the scope and purpose of these Rules is part of the attorney's duties as an officer of the court, and does not conflict with the attorney's professional duties to his or her client, but rather it focuses an attorney's advocacy on the presentation of legal argument to the court and facts to the trier of facts.

Methods for cooperative conduct that would further this Rule, particularly in regard to discovery, are addressed in the amendments and Committee Notes to Rule 26(f).

RULE 16

PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) Purposes of a Pretrial Conference. Except in categories of matters exempted by local rule [, or where the court orders otherwise], in any action, the court must order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(2)(A);

(4) managing discovery and discouraging wasteful pretrial activities;

(5) improving the quality of the trial through more thorough preparation; and

(6) facilitating settlement.

(b) Scheduling.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under ***Rule 26(f)(3)***; or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) address the scope of relevance and the scope of preservation or discovery, taking into account the scope and limitations described in Rule 26(b);

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced ***or addressing legally protected privacy interests;***

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

******

(c) Attendance and Matters for Consideration at a Pretrial Conference.

******

(2) *Matters for Consideration.* At any pretrial conference, the court must consider and take appropriate action on the following matters:

*****

(F) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(2)(A), taking into account the scope and limitations described in Rule 26(b);

(G controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37, taking into account the scope and limitations described in Rule 26(b);

[letters preceding remaining subjections of (c)(2) change but content does not]

[remainder of Rule is unchanged]

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 16

Note. Subdivision (a):

The lack of early and active judicial management of civil actions and proceedings often leads to excessive preservation and discovery, and increased disputes between the parties over these matters. Rule 16(a) is amended to make the pretrial conference mandatory, except in categories of matters exempted by local rule [, or where the court orders otherwise]. Moreover, the absence of clear judicial guidance on the scope of preservation of potentially relevant electronically stored information, in general and in particular cases, has led to complaints that the attendant costs and complications are the avoidable result of over-preservation. The scope of preservation must be based on informed judgment of the relevant facts and circumstances of the case, including the risk of non-compliance with preservation obligations. *See, e.g.*, The Sedona Conference® Commentary on Legal Holds: The Trigger and The Process, 11 Sedona Conf. J. 265 (2010). Judicial intervention in preservation is appropriate only after counsel meet and confer in good faith, as contemplated by Rule 26(f), but are unable to reach agreement on the extent of preservation or discovery. The amendments make explicit the court's authority to address these concerns during a pretrial conference.

Note. Subdivision (b):

Rule 16(b)(3)(ii) makes explicit that the court may, in crafting the scheduling order, address the scope of preservation or discovery and incorporate the proportionality framework set forth in Rule 26(b). *See, e.g.*, The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289, 291, 296 (2010).

Rule 16 (b)(3)(B)(iv) is amended to include among the topics that may be addressed in the scheduling order an agreement between parties about the treatment of information protected under domestic and foreign privacy laws, such as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and international data protection and privacy laws.

Note. Subdivision (c):

Paragraph (F) is amended to make explicit a court's authority, where appropriate, to resolve any disputed issues regarding preservation identified through the meet and confer process described in Rule 26(f)(2)(A).

When the court addresses the scope and methods of preservation, it may consider issues relating to: retention of electronically stored information and implementation of a data preservation plan under Rule 26(f)(2)(A), if any; identification of potentially relevant information and sources of such information; relevant time frames; appropriate form or forms of preservation or production; and appropriate limitations on the number of custodians, among others. Consideration should also be given to the framework set forth in Rule 26(b)(2). *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 598, 613 (2010); The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289 (2010); Lee Rosenthal, From Rules of Procedure to How Lawyers Litigate, 87 Denv. U. L. Rev. 227, 241 (2010); The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible (2008).

RULE 26

DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Required Disclosures.

[NO CHANGES]

(b) Preservation and Discovery Scope and Limits.

(1) *Scope.*

(A) Scope of Preservation in General. Unless otherwise limited by court order, the scope of preservation is as follows: Parties must take reasonable steps in good faith to preserve documents, electronically stored information, and tangible things relevant to any party's claims or defenses. For good cause, the court may order preservation of any documents, electronically stored information, and tangible things relevant to the subject matter involved in the action pursuant to Rule 26(c)(2) or Rule 37(a)(3). Preservation is subject to the limitations imposed by Rule 26(b)(2)(C).

(B) *Scope of Discovery in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or

defenses—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted. [NO CHANGES]*

(B) *Specific Limitations on Electronically Stored Information. [NO CHANGES]*

(C) *When Required.* On motion, or on its own, the court must limit ***the scope of preservation, or*** the frequency or extent of discovery otherwise allowed by these rules or by local rule, if it determines that:

(i) ***the preservation of certain documents, electronically stored information, or tangible things, or*** the discovery sought, is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense ***of preserving certain documents, electronically stored information, or tangible things, or*** 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.

(3) *Trial Preparation: Materials.*

[NO CHANGES]

(4) *Trial Preparation: Experts.*

[NO CHANGES]

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

[NO CHANGES]

(c) Protective Orders.

(1) *In General.* A party or any person ***who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things, or*** from whom discovery is sought, may move for a protective order in the court where the action is pending—or as an alternative, on matters relating to a deposition, in the court for the district where the deposition will be taken. ***The court cannot consider the motion unless it*** include***s*** a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action***. If the persons or parties have conferred, the motion must be accompanied by a report that conforms to the requirements of Rule 26(f)(5).*** The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) ***specifying terms for preservation, or*** specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or ***limiting the scope of preservation***, disclosure, or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs; ***and***

(I) relieving a party from preserving certain documents, electronically stored information, or tangible things.

(2) *Ordering* ***Preservation or*** *Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person ***preserve documents, electronically stored information, or tangible things, or*** provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

[NO CHANGES]

(e) Supplementing Disclosure and Responses.

[NO CHANGES]

(f) Conferences of the Parties; *Addressing Preservation;* Planning for Discovery.

(1) *Conferences Timing.*

(A) *Conferences Addressing Preservation and Discovery*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conferences' Content; Parties' Responsibilities.*

(A) ***Conferences Addressing Preservation and Discovery.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; the appropriateness of holding iterative conferences; and develop a proposed discovery plan. Issues about preserving discoverable information may include:

(i) ***the scope of preservation, considering the limitations imposed by Rule 26(b)(2)(C);***

(ii) ***the applicable time frames for preservation;***

(iii) ***sources of documents, electronically stored information, or tangible things over which the parties have possession, custody, or control;***

(iv) ***third parties who may have possession, custody, or control of relevant documents, electronically stored information, or tangible things;***

(v) ***sources of electronically stored information identified as not reasonably accessible because of undue burden or costs under Rule 26(b)(2)(B);and***

(vi) ***conditions for terminating of the duty to preserve in whole or in part prior to final resolution of the matter.***

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed preservation and discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

*****

(5) Preservation and Discovery Conference Reports. If the parties are unable to resolve issues discussed during a conference under Rule 26(f)(2)(A), all persons or parties who participated in the conference are responsible for submitting a joint, written report to the court within 14 days containing the following:

(A) A section stating the issues discussed during the conference and summarizing the areas where agreement was reached on each issue;

(B) A section containing no argument and providing a brief statement identifying each issue for which agreement was not reached, including:

(i) a short and plain statement of the position of each person or party on each issue in contention; and;

(ii) the proposal of each party for reaching a resolution of the issue.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3), ***every conference report under Rule 26(f)(5),*** and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

[NO CHANGES]

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 26

Note. Subdivision (b):

Rule 26(b)(1) is amended to address the Scope of Preservation in General within the Rules under Rule 26(b)(1)(A), and moving the existing Scope of Discovery in General to Rule 26(b)(1)(B).

Rule 26(b)(1)(A) now clarifies the scope of the parties' duty to preserve documents, electronically stored information, and tangible things, and does not abridge, enlarge, or modify

the applicable common law duties of parties with respect to preservation, including those that may arise prior to the initiation of litigation.

"Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort." Guideline 7, *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265, 270 (2010). *See also, id.*, Guidelines 6, 8.

Rule 26(b)(2)(C) has been amended to conform to the addition of the Scope of Preservation in General in Rule 26(b)(1)(A), by specifying that limitations applicable to the scope of discovery may also apply, where appropriate, to the scope of preservation.

Note. Subdivision (c)(1):

Rule 26(c)(1) is amended to further encourage cooperation between the parties prior to their moving for a protective order. Whereas the former rule required the movant to include a certification that it had conferred or attempted in good faith to confer, the amendment clarifies that a Court must not consider a motion for a protective order absent such a certification and a report in compliance with 26(f)(5). The amendment is designed to encourage the parties to take more reasonable positions during the preservation or discovery conferences, and to provide the Court with additional information about the extent of the parties' cooperation and the context of their dispute.

Rule 26(c)(1) is also amended to provide a procedure for a party to seek protective orders in connection with preservation of documents, electronically stored information, and tangible things, and to conform this subdivision with amendments made regarding preservation in subdivision (b). In particular, amendments have been made to subdivisions (c)(1)(B) and (c)(1)(D), which respectively permit a court to specify the terms of preservation, or to limit the scope of preservation under the appropriate conditions specified in the Rule.

In determining whether to specify the terms of preservation, or limit the scope of preservation, the Court should first consider whether the expected costs and burden of preservation of certain documents, electronically stored information, or tangible things potentially subject to discovery under this Rule would be outweighed by the expected benefit, including the likely importance of the information in proving or refuting the unresolved claims and defenses of the parties. If the Court determines that the interests of justice require limiting the scope of preservation, it may nonetheless order preservation while specifying the terms of such preservation. The good-cause inquiry and considerations of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions, limits, and terms for preservation under this subsection. A requesting party's willingness to share or bear the preservations costs may be weighed by the Court in determining whether there is good cause.

In considering the burden imposed upon a party for ongoing preservation of information, or in setting the terms of preservation, the Court may also consider the future impact on the preserving party's document retention program, information security, and data privacy obligations,

including the cost of repeated processing and review of the information in response to subsequent legal or regulatory obligations.

Subsection (c)(1)(I) has been added to reflect the need for review of the burdens and benefits of ongoing preservation from time to time during the pendency of the action.

Note. Subdivision (f)(2):

Rule 26(f)(2) identifies six potential topics related to preservation for discussion during the conferences. This Rule is intended to ensure that the parties consider all of the key issues before seeking input from the Court, and to encourage cooperation among the parties in accordance with Rule 1. The parties may, of course, discuss topics in addition to those enumerated in the Rule. It is important to recognize that parties are often required to make preservation decisions before they have an opportunity to meet and confer with opposing parties. Indeed, preservation decisions are sometimes required before service of a complaint. Among other things, the preservation and discovery conferences contemplated in Rule 26(f)(1)(A) afford the parties an opportunity to discuss, and if reasonable or necessary, modify those early preservation decisions.

Note. Subdivision (f)(5):

Rule 26(f)(5) has been added to require parties who have participated in a preservation or discovery conference under Rule 26(f)(2)(A) to submit a joint written report to the Court in the event of a dispute. To the extent possible, the report should be neutral in tone and devoid of argument, which is reserved for any motion or opposition that may be separately filed. A Court may, by order or direction, specify the contents of the report or modify the timing for submission of the report. Pursuant to Rule 37(f), a party that fails to participate in good faith in developing and submitting a proposed preservation or discovery plan, or conference report, may be required to pay another party's reasonable expenses, including attorney's fees, caused by the failure.

Note. Subdivision (g):

Subdivision (g) is amended to provide that each conference report issued pursuant to Rule 26(f)(5) must include a party or attorney certification.

RULE 37

37(e) FAILING TO PRESERVE ELECTRONICALLY STORED INFORMATION

[the following is intended to replace the current Rule 37(e) in its entirety]

(1) *General Rule*. Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

(2) *Violation Showing.* A court may impose a sanction only if it finds that the party seeking sanctions has established:

(A) the party against whom sanctions is sought did not act in good faith in the preservation of relevant information;

(B) information relevant to a party's claims or defenses was lost;

(C) no alternative sources exist for the lost information;

(D) the party seeking a sanction was materially prejudiced in its ability to prove or respond to the claims and defenses of the action; and

(E) the sanction motion was timely.

(3) *Good Faith.* In determining whether a party acted in good faith in its preservation efforts under Rule 37(e)(2)(B), a court must consider whether the party:

(A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;

(B) intentionally destroyed information relevant to the claims or defenses;

(C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;

(D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and

(E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

(4) *Types of Sanctions.* If the court determines that the conditions of Rule 37(e)(2) are satisfied, the court may impose an appropriate sanction. Such sanctions may include any of the following:

(A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;

(B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;

(C) staying further proceedings until the order is obeyed;

(D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;

(E) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action as the prevailing party claims;

(F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(G) striking pleadings in whole or in part;

(H) dismissing the action or proceeding in whole or in part;

(I) rendering a default judgment against the non-movant; or

(J) treating the failure as a contempt of court, if there has been a violation of a previous order.

(5) *Selection of Sanction.* In determining which sanction to impose the court must:

(A) select the least severe sanction necessary to redress the failure to preserve;

(B) consider whether the sanction is proportional to: (i) the non-movant's failure to preserve the specific information at issue; and (ii) the degree of prejudice suffered by the movant as a result of the loss or unavailability of that information; and

(C) absent exceptional circumstances, not sanction a party under Rule 37(e)(4)(E)-(J) unless the party's failure to preserve was intentional.

(6) *Remedial Orders*. Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation.

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 37(e)

Note. Subdivision (e):

The amendment to Rule 37(e) is intended to establish a uniform standard for evaluating potential sanctions or remedial orders for the failure to preserve documents, electronically stored information and tangible things and to eliminate divergent approaches between federal jurisdictions. While Rule 37(e) does not abrogate a court's inherent authority to impose sanctions or remedial orders for bad faith conduct in appropriate circumstances, *see Chambers v.*

NASCO, Inc., 501 U.S. 32 (1991), courts should look to Rule 37(e) as the guiding analytical framework for sanctions based on the loss of documents, tangible things or electronically stored information. This is consistent with the principle that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Chambers*, 501 U.S. at 48. Moreover, insomuch as the imposition of sanctions or remedial orders pursuant to inherent authority depends on a finding of bad faith, courts should look to the factors set forth in Rule 37(e)(3)(A)-(E) to determine whether a party failed to act in good faith in connection with a failure to preserve evidence. Although this rule is specifically addressed to parties, it is not intended to limit a court's authority to impose sanctions on counsel in appropriate circumstances.

The words "absent exceptional circumstances" were added to Rule 37(e) to address those extremely rare factual circumstances where the producing party acted in good faith but nonetheless material evidence in the case was lost that cannot produced or recreated from any other source and the unavailability of that evidence substantially prejudices the non-producing party to the point that it cannot maintain its claims. In that rare and exceptional instance, the court is permitted the latitude to impose sanctions or remedial orders under this Rule to remedy the prejudice. It should be noted that it is both unusual and unlikely that such information cannot be produced or recreated from other sources.

Note. Subdivision (e)(1):

In recent years, courts have injected tort-based standards into sanction decisions. *See e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). Tort based standard are not the proper framework to determine the applicability of sanctions under the Federal Rules. The 201X amendments to Rule 37(e) are designed to move away from those tort-based standards for sanctions for failing to preserve evidence and adopt instead a "good faith" standard for sanctions, similar to the "good faith" standard that is found in other parts of the Federal Rules of Civil Procedure.

To be more specific, except for exceptional circumstances provided for in Rule 37(e), mere negligent conduct will not be sufficient for imposing sanctions. *See e.g., Aramburu v. Boeing Co*., 112 F.3d 1398, 1407 (10th Cir. 1997) (Court explained that "[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); *Streit v. Elec. Mobility Controls*, LLC, 2010 U.S. Dist. LEXIS 119999 (S.D. Ind. Nov. 9, 2010) ("[A] showing of bad faith by the non-moving party is a prerequisite to imposing sanctions for the destruction of electronically stored information. '[B]ad faith' means destruction for the purpose of hiding adverse information . . '"; *Russell v. Univ. of Texas*, 234 Fed. App'x 195 (5th Cir. 2007) (*per curiam*) (there was no error in declining to instruct a jury as to spoliation where there was no evidence that the destruction of evidence resulted from actions in bad faith. The court noted that "mere negligence" was insufficient, and that destruction of business records under a routine policy did not draw an inference of bad faith, even where the destruction may have occurred after the initiation of litigation). *See also Rimkus Consulting Group, Inc. v. Cammarata*, 2010 U.S. Dist. LEXIS 14573 (S.D.Tx. Feb. 19, 2010) ("And to the extent sanctions are based on inherent power, the Supreme Court's decision in *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32, 43 – 46 (1991)] may also require a degree of culpability greater than

negligence."); *Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975) (Instructing that when defining "bad faith": "Mere negligence is not enough for it does not sustain an inference of consciousness of a weak case. *McCormick, Evidence* § 273 at 660 – 61 (1972), 31A C.J.S. Evidence §156(2) (1964)").

Before sanctions may issue in this context, the party alleged to have improperly destroyed evidence must act or with an intent to suppress the truth. *See e.g., Faas v. Sears, Roebuck & Co.*, 552 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to [the defendant], we must find that [the defendant] intentionally destroyed the documents in bad faith."); *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 2006 U.S. Dist. LEXIS 66642, at *25 (M.D. La. July 19, 2006) (The court found that given the scope of information allegedly known by the party at the time, the party's original litigation hold was "not so unreasonable as to demonstrate bad faith" and the party was not required to "preserve every shred of paper but only those documents of which it had "actual knowledge" that they would be material to future claims," and held the moving party did not make a sufficient showing of "'bad faith' or intentional misconduct.")

Note. Subdivision (e)(2)(D):

A party seeking sanctions must demonstrate that it has been prejudiced by the unavailability (through loss or destruction) of potentially relevant information. While prejudice is not an element that is required to prove a discovery failure, it is important in determining a sanction and while there are varying degrees of prejudice, simply showing the relevance of the evidence destroyed, lost or not produced is generally insufficient to demonstrate prejudice. In addition, simply showing that the requesting party is prejudiced by not having access to the information requested is not sufficient to prove that a sanction is warranted. Moreover, a requesting party does not satisfy its burden under this section by simply showing that the evidence destroyed, lost or missing is cumulative or merely tangentially relevant. The requesting party must demonstrate and the court must find that the requesting party was "materially" prejudiced, i.e., that the effect of the producing party's conduct was so prejudicial that it substantially denies the requesting party the ability to defend or prosecute its claim.

Note. Subdivision (e)(2):

Upon a showing of good cause, a court may allow a party the discovery necessary to establish the elements of Rule 37(e)(2).

Note. Subdivision (e)(3)(B):

Rule 37(e)(3)(B) requires the court to consider as one factor in determining the existence of good faith whether the destruction was intentional. To the extent that the destruction was intentional and done for the purpose of depriving the non-producing party of relevant information, the factor alone should be given considerable weight over and above the other factors in the determination of good faith. This factor is distinguished from Rule 37(e)(3)(C) that focuses on the reasonableness of the preservation actions of the producing party – not whether the loss of the evidence was intentional.

Note. Subdivision (e)(3)(C):

In determining whether the producing party's preservation actions were reasonable under Rule 37(e)(3)(C), consideration should be given to whether the producing party had the opportunity and, if so, met and conferred with the opposing party in an attempt to reach an agreement on reasonable preservation steps. Whether or not such a meet and confer occurred is not dispositive in determining whether the preservation actions were reasonable. Producing parties are usually required to make initial preservation decisions unilaterally at or about the time that the obligation to preserve evidence arises. Once litigation has been commenced and the responding party is aware of opposing counsel, the court should consider whether evidence was lost after the responding party had the opportunity to meet and confer, failed to meet and confer in good faith, or failed to undertake reasonable compromises offered by the requesting party in determining whether the party acted in good faith. In determining whether this element was satisfied, the court should also consider whether the requesting party timely asked the responding party for a meet and confer on preservation or failed to meet and confer in good faith in an attempt to agree on reasonable preservation steps.

Note. Subdivision (e)(3)(D):

Rule 37(e)(3)(D) is intended to harmonize the concept of proportionality as it applies to both discovery and preservation. With the rising volume of electronically stored information and the associated burdens, preservation must be proportional, in the same way that discovery must ultimately be proportional to the amount in controversy and the nature of the case. With respect to discovery, proportionality has long been a gating concept that applies to the question of whether a judge must limit discovery under Rule 26(b)(2)(C). Rule 37(e)(3)(D) clarifies that the concept applies equally to the question of whether a party may in good faith place reasonable limits on preservation that are proportional to the case. *See Rimkus v. Cammarata*, 2010 WL 645253 (S.D. Tex.) ("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 that case and consistent with clearly established applicable standards.) (Emphasis in original.) Just as Rule 26(b)(2)(C) was designed to "minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information," (*see* Notes on Advisory Committee on 1988 amendments to Rules, Subdivision (b); Discovery Scope and Limits), Rule 37(e)(3)(D) seeks to focus attorneys on the information needs of the litigation—or anticipated litigation—at hand, and not on an attempt to preserve *all* information on any given subject. The analysis of whether preservation is proportional depends heavily on the facts of each case and should be evaluated from the perspective of the preserving party at the time the decision was made.

Note. Subdivision (e)(4):

The rule provides the court with a great deal of flexibility to fit the sanction to the facts and circumstances of the particular case and to impose a sanction that both deters and remediates and is the least severe sanction available. Rule 37(a)(4) then sets out some potential sanctions a court may impose, but is a non-exhaustive list; the use of the word 'may" appropriately reflects the

discretion the court has to fashion the right sanction. Rule 37(a)(5) then reemphasizes that a court must impose the least severe sanction.

Rule 37(e)(4)(A)-(D) set forth certain actions that are arguably remedies as opposed to sanctions. Sanctions law focuses, however, not only on punishment and deterrence but on remediation. *Kronisch v. United States,*150 F.3d 112, 127 (D.C.Cir.1998) (an important tenet of sanction law is to "place the innocent party in the same position he would have had" had the sanctionable conduct not taken place"). A court must have wide range of sanctions at its disposal so that it can satisfy the multiple aims of sanction law. The rule expressly rejects the position that action by a court must either be a sanction or a remedy and that an action denominated as a remedy in one context can ever be a sanction in another context. Thus, the rule does not prohibit a court from imposing remedial actions under other rules (e.g., extending the discovery deadline under Rule 16) for conduct that could, alternatively, give rise to a sanction under Rule 37(e)(4)(A)-(D).

Note. Subdivision (e)(5):

This rule is not intended to prohibit a court from the issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation provided such remedial or case management orders are not imposed upon a party as an actual or *de facto* sanction.

RULE 45

SUBPOENA

(a) In General.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must: (i) state the court from which it issued; (ii) state the title of the action, the court in which it is pending, and its civil-action number; (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and (iv) set out the text of Rule 45(c) and (d).

(B) Command to Attend a Deposition—Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things

relevant to claims or defenses in the action or proceeding, or to permit the inspection of premises, may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) *Issued from Which Court.* A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena***, consistent with the obligations of Rule 26(g),*** as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored in- formation, or tangible things or the inspection of premises be- fore trial, then before it is served, a notice must be served on each party.

(2) *Service in the United States.* Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena is- sued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) *Service in a Foreign Country.* 28 U.S.C. §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction— which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may***, consistent with the obligations of Rule 26(g),*** serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be

served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to ***and after attempting in good faith to meet and confer with*** the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party;

(iii) disclosing legally protected information or

(iv***)*** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(4) Confirming Compliance with a Subpoena.

A person commanded to produce documents, electronically stored information, or tangible things may request that the party or attorney responsible for issuing the subpoena confirm that the commanded person has complied with the duties described in Rule 45(d). Within 30 days after receiving the request for confirmation (or such other time as may be agreed), the party or attorney responsible for issuing the subpoena must either confirm that the duties have been fulfilled, or, following a good faith effort to meet and confer, move the court to compel further production or inspection. Any order issued in response to such motion must protect the commanded person from significant burden or expense. Absent such motion, a commanded person may presume compliance with its Rule 45 duties, unless it has actual knowledge to the contrary.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents, Electronically Stored Information, or Tangible Things.*

A person commanded to produce documents, electronically stored information, or tangible things must take reasonable steps in good faith to identify and produce them as follows:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Not Reasonably Accessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged, subject to protection as trial-preparation material ***or legally protected information*** must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

[REMAINDER OF RULE IS UNCHANGED]

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 45

Note. Subdivision (a)(1)(C):

The amendment to subdivision (a)(1)(C) is consistent with the general scope of discovery absent court order for good cause shown, and is inserted to emphasize that attorneys issuing subpoenas, and courts enforcing them, should protect third parties from unnecessary burden and expense. In circumstances where a third party may be the only source of information relevant to the subject matter of the action or proceeding, the serving party may apply to the court in accordance with the procedures contemplated under subdivision (c)(2)(B)(i).

Note. Subdivision (a)(3):

The amendments to subdivision (a)(3) and to subdivision (c)(2)(B) are intended to eliminate any doubt that the obligations and consequences set forth in Rule 26(g) with respect to discovery requests under these rules apply with equal force to the request for information pursuant to subpoena.

Note. Subdivision (c)(2)(b)(i):

The amendment to subdivision (c)(2)(b)(i) confirms that principles of cooperation applicable to party discovery are equally applicable to efforts to enforce subpoenas for documents, electronically stored information, and tangible things.

Note. Subdivision (c)(3)(B)(iii):

A new subdivision (c)(3)(B)(iii) is added and an amendment to subdivision (d)(2) is made in recognition of the fact that third parties may be entitled to protection from production of information subject to legally protected privacy rights such as those pursuant to HIPAA and international data protection and privacy laws.

Note. Subdivision (c)(4):

Subdivision (c)(4) is added to address concerns that current procedures do not provide a mechanism for subpoenaed third parties to release legal holds with confidence after producing information in response to subpoenas. As a result, entities that are subject to frequent subpoenas have been preserving large volumes of information that would otherwise be returned to routine retention procedures. This situation poses burdens and costs that are unnecessary and disproportionate to the legitimate needs of the parties to litigation. The last sentence is added to ensure that the burdens and costs of any continued preservation are allocated to mitigate the burden and costs on the third party.

Note. Subdivision (d):

An introductory clause is added to subsection (d) to affirm that the person responding to a subpoena must take reasonable steps in good faith.

Attachment B

Letter from The Sedona Conference® Working Group 1 Steering Committee to Hon. David G. Campbell and Hon. Paul W. Grimm dated December 17, 2012

December 17, 2012

Hon. David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2118

Hon. Paul W. Grimm
United States District Court
Garmatz Federal Courthouse
101 West Lombard St.
Baltimore, MD 21201

Dear Judges Campbell and Grimm:

On behalf of the Steering Committee and Drafting Teams of The Sedona Conference® Working Group 1, we submit the following comments to the draft Rule 37(e) reported out of the Discovery Subcommittee and adopted by the Civil Rules Advisory Committee on November 2, 2012. At the Advisory Committee's request, The Sedona Conference® submitted a draft Rule 37(e) (attached hereto) for consideration as part of the rules amendment process. The Advisory Committee's draft Rule 37(e) was similar in many respects to the draft Rule 37(e) submitted for consideration by Working Group 1, but we think it might be helpful in the Advisory Committee's continued consideration of Rule 37(e) to point out where the two proposals differ, and in those instances, explain the reasoning behind our proposal, memorializing and supplementing the comments made by William Butterfield and John Rosenthal at the November 2 meeting. At that meeting, Judge Campbell indicated that the Committee has the authority to further refine its proposal, consistent with the comments offered at the meeting, prior to submitting it to the Standing Committee. We are hopeful that the Committee will entertain our comments in considering any revisions to the draft rule.

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Rule 37(e)(1) Remedial measures vs. sanctions. While there is much similarity in approaches, there are some critical differences. After extensive discussion by our Rule 37 drafting team, we concluded that remedial measures (in contrast to sanctions) are better served and addressed by other rules. Our reasoning is as follows:

> *First*, under our approach, a showing of loss of evidence is not a prerequisite for the imposition of a *remedial* measure. This important distinction recognizes that there may be occasions when remedial measures are necessary to determine whether there has been evidence of spoliation in the first place. For example, there may be questions about whether evidence was lost or whether additional copies or alternative forms of "lost evidence" exist elsewhere. Where it is not known yet whether the evidence was lost, one of the curative measures that can be taken is to order additional discovery. Under the Advisory Committee's proposal, it appears necessary that loss of evidence be shown even before imposing remedial measures under Rule 37(e)(1).
>
> *Second*, there is potential ambiguity in Rule 37(e)(1) of the Committee's proposal. It is not clear whether the rule restricts a court's remedial powers under other rules, by permitting a court to order remedial measures pursuant only to Rule 37(e)(1).
>
> *Third*, we are concerned that under the Committee's proposal, a court might impose remedies that are *de facto* sanctions, in that their intent and effect are punitive in nature, but the court would not be required to adhere to the strictures of the rule, provided that the magical words "sanction" or "Rule 37(e)" are not invoked.

Rule 37(e)(2)(A). The Committee equates willfulness and bad faith. We took a different approach. We abandoned a tort standard in favor of a reasonableness standard by using the term "good faith." We adopted a "good faith" standard for several reasons: (i) we wanted to allow for the development of a set of factors that incentivized good behavior, in the Note or in case law; (ii) we wanted to avoid the confusion created by cases that identify bad faith under a negligence standard in contrast with those that that utilize an intent standard; and (iii) we wanted to avoid adopting an intent standard because we thought that intent should go to the severity of the sanction – not whether a sanction should be imposed in the first instance.[1]

Thus, in our draft proposal at 37(e)(2), we look at:

1. Whether the party against whom sanctions are sought acted in "good faith" – an expressly defined term;
2. Whether the lost information was relevant to the claims or defenses of the party seeking sanctions;
3. Whether alternative sources of that information exist;
4. Whether there was material prejudice to the party seeking sanctions; and
5. Whether the motion for sanctions was timely.

Rule 37(e)(2)(B). We used the phrase "absent exceptional circumstances" to address cases like *Silvestri*. The Committee uses the term "irreparably deprived a party of any meaningful opportunity to present a claim or defense." While, it is likely that the Committee's proposal and our proposal are intended to capture the same thing, we are concerned that the Committee's phrase will give rise to litigation over its meaning. On the other hand, we believe that there is sufficient case law describing the term "absent exceptional circumstances." Moreover, the Committee's use of different terms might cause confusion. In its proposed Rule 37(e)(2)(a), the Advisory Committee uses the term "substantial prejudice." In its proposed Rule 37(e)(2)(b), the Advisory Committee uses the term "irreparably deprived a party of any meaningful opportunity." We are not sure

[1] In this regard, most circuits currently have adopted an intent standard for the imposition of the more draconian sanctions.

whether the Committee intended to capture different concepts in those subdivisions of Rule 37 and wonder whether there is a danger of having a new body of case law defining that difference.

Rule 37(e)(3)(C). We discussed mentioning a preservation request and decided not to include it in our proposal. We were concerned that it would promote gamesmanship and create side litigation. We were also concerned that such a requirement might be interpreted to preclude a duty of preservation in the absence of a preservation demand from the opposing party.

Rule 37(e)(3)(F) (and throughout). We do not think it is helpful to use the term "discoverable information." It opens a potential loophole. Consider the following examples: 1) A first year associate, being ultra-cautious, improperly classifies a document as "privileged." If so, it could be argued that the document is not discoverable and is thereby subject to immediate destruction. 2) Counsel makes a unilateral determination that information is inaccessible. If the information is inaccessible, counsel could claim that it is not discoverable under Rule 26(b)(2)(B) and is thereby subject to immediate destruction, Instead of using the term "discoverable information," we use the term "relevant to the claims and defenses of the parties."

Compare our 37(e)(5) (A) and (B). We also believe that the following principles are important to the sanctions issue. *First*, to avoid inconsistent results, courts should be required to impose the least severe sanction to address the problem. *Second*, sanctions should be proportional to (i) the non-movant's failure to preserve evidence; and (ii) the degree of prejudice suffered by the movant.

We recognize and appreciate the work of the Civil Rules Advisory Committee and its Discovery Subcommittee in creating a solid proposal to address a very difficult subject.

Respectfully submitted,

The Steering Committee of WG1*

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Attachment

* The statements made in this letter and the attached proposal do not necessarily represent the views of individual Steering Committee members or their firms, employers, clients, or organizations with which they are affiliated. In addition, members of WG1, including members of the Steering Committee, reserve the right to express their individual opinions and advocate proposals that may differ from that proffered by WG1.

RULE 37

37(e) FAILING TO PRESERVE ELECTRONICALLY STORED INFORMATION

[the following is intended to replace the current Rule 37(e) in its entirety]

*(*1) *General Rule*. Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

(2) *Violation Showing.* A court may impose a sanction only if it finds that the party seeking sanctions has established:

(A) the party against whom sanctions is sought did not act in good faith in the preservation of relevant information;

(B) information relevant to a party's claims or defenses was lost;

(C) no alternative sources exist for the lost information;

(D) the party seeking a sanction was materially prejudiced in its ability to prove or respond to the claims and defenses of the action; and

(E) the sanction motion was timely.

(3) *Good Faith.* In determining whether a party acted in good faith in its preservation efforts under Rule 37(e)(2)(B), a court must consider whether the party:

(A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;

(B) intentionally destroyed information relevant to the claims or defenses;

(C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;

(D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and

(E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

(4) *Types of Sanctions.* If the court determines that the conditions of Rule 37(e)(2) are satisfied, the court may impose an appropriate sanction. Such sanctions may include any of the following:

(A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;

(B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;

(C) staying further proceedings until the order is obeyed;

(D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;

(E) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action as the prevailing party claims;

(F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(G) striking pleadings in whole or in part;

(H) dismissing the action or proceeding in whole or in part;

(I) rendering a default judgment against the non-movant; or

(J) treating the failure as a contempt of court, if there has been a violation of a previous order.

(5) *Selection of Sanction.* In determining which sanction to impose the court must:

(A) select the least severe sanction necessary to redress the failure to preserve;

(B) consider whether the sanction is proportional to: (i) the non-movant's failure to preserve the specific information at issue; and (ii) the degree of prejudice suffered by the movant as a result of the loss or unavailability of that information; and

(C) absent exceptional circumstances, not sanction a party under Rule 37(e)(4)(E)-(J) unless the party's failure to preserve was intentional.

(6) *Remedial Orders*. Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation.

PROPOSED ADVISORY COMMITTEE NOTES TO RULE 37(e)

Note. Subdivision (e):

The amendment to Rule 37(e) is intended to establish a uniform standard for evaluating potential sanctions or remedial orders for the failure to preserve documents, electronically stored information and tangible things and to eliminate divergent approaches between federal jurisdictions. While Rule 37(e) does not abrogate a court's inherent authority to impose sanctions or remedial orders for bad faith conduct in appropriate circumstances, *see Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), courts should look to Rule 37(e) as the guiding analytical framework for sanctions based on the loss of documents, tangible things or electronically stored information. This is consistent with the principle that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Chambers*, 501 U.S. at 48. Moreover, insomuch as the imposition of sanctions or remedial orders pursuant to inherent authority depends on a finding of bad faith, courts should look to the factors set forth in Rule 37(e)(3)(A)-(E) to determine whether a party failed to act in good faith in connection with a failure to preserve evidence. Although this rule is specifically addressed to parties, it is not intended to limit a court's authority to impose sanctions on counsel in appropriate circumstances.

The words "absent exceptional circumstances" were added to Rule 37(e) to address those extremely rare factual circumstances where the producing party acted in good faith but nonetheless material evidence in the case was lost that cannot produced or recreated from any other source and the unavailability of that evidence substantially prejudices the non-producing party to the point that it cannot maintain its claims. In that rare and exceptional instance, the court is permitted the latitude to impose sanctions or remedial orders under this Rule to remedy the prejudice. It should be noted that it is both unusual and unlikely that such information cannot be produced or recreated from other sources.

Note. Subdivision (e)(1):

In recent years, courts have injected tort-based standards into sanction decisions. *See e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). Tort based standard are not the proper framework to determine the applicability of sanctions under the Federal Rules. The 201X amendments to Rule 37(e) are designed to move away from those tort-based standards for sanctions for failing to preserve evidence and adopt instead a "good faith" standard for sanctions, similar to the "good faith" standard that is found in other parts of the Federal Rules of Civil Procedure.

To be more specific, except for exceptional circumstances provided for in Rule 37(e), mere negligent conduct will not be sufficient for imposing sanctions. *See e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (Court explained that "[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); *Streit v. Elec. Mobility Controls*, LLC, 2010 U.S. Dist. LEXIS 119999 (S.D. Ind. Nov. 9, 2010) ("[A] showing of bad faith by the non-moving party is a prerequisite to imposing sanctions for the destruction of electronically stored information. '[B]ad faith' means destruction for the purpose of hiding adverse information . . '"; *Russell v. Univ. of Texas*, 234 Fed. App'x 195 (5th Cir. 2007) (*per curiam*) (there was no error in declining to instruct a jury as to spoliation where there was no evidence that the destruction of evidence resulted from actions in bad faith. The court noted that "mere negligence" was insufficient, and that destruction of business records under a routine policy did not draw an inference of bad faith, even where the destruction may have occurred after the initiation of litigation). *See also Rimkus Consulting Group, Inc. v. Cammarata*, 2010 U.S. Dist. LEXIS 14573 (S.D.Tx. Feb. 19, 2010) ("And to the extent sanctions are based on inherent power, the Supreme Court's decision in *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32, 43 – 46 (1991)] may also require a degree of culpability greater than negligence."); *Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975) (Instructing that when defining "bad faith": "Mere negligence is not enough for it does not sustain an inference of consciousness of a weak case. *McCormick, Evidence* § 273 at 660 – 61 (1972), 31A C.J.S. Evidence §156(2) (1964)").

Before sanctions may issue in this context, the party alleged to have improperly destroyed evidence must act or with an intent to suppress the truth. *See e.g., Faas v. Sears, Roebuck & Co.*, 552 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to [the defendant], we must find that [the defendant] intentionally destroyed the documents in bad faith."); *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 2006 U.S. Dist. LEXIS 66642, at *25 (M.D. La. July 19, 2006) (The court found that given the scope of information allegedly known by the party at the time, the party's original litigation hold was "not so unreasonable as to demonstrate bad faith" and the party was not required to "preserve every shred of paper but only those documents of which it had "actual knowledge" that they would be material to future claims," and held the moving party did not make a sufficient showing of "'bad faith' or intentional misconduct.")

Note. Subdivision (e)(2)(D):

A party seeking sanctions must demonstrate that it has been prejudiced by the unavailability (through loss or destruction) of potentially relevant information. While prejudice is not an element that is required to prove a discovery failure, it is important in determining a sanction and while there are varying degrees of prejudice, simply showing the relevance of the evidence destroyed, lost or not produced is generally insufficient to demonstrate prejudice. In addition, simply showing that the requesting party is prejudiced by not having access to the information requested is not sufficient to prove that a sanction is warranted. Moreover, a requesting party does not satisfy its burden under this section by simply showing that the evidence destroyed, lost or missing is cumulative or merely tangentially relevant. The requesting party must demonstrate and the court must find that the requesting party was "materially" prejudiced, i.e., that the effect

of the producing party's conduct was so prejudicial that it substantially denies the requesting party the ability to defend or prosecute its claim.

Note. Subdivision (e)(2):

Upon a showing of good cause, a court may allow a party the discovery necessary to establish the elements of Rule 37(e)(2).

Note. Subdivision (e)(3)(B):

Rule 37(e)(3)(B) requires the court to consider as one factor in determining the existence of good faith whether the destruction was intentional. To the extent that the destruction was intentional and done for the purpose of depriving the non-producing party of relevant information, the factor alone should be given considerable weight over and above the other factors in the determination of good faith. This factor is distinguished from Rule 37(e)(3)(C) that focuses on the reasonableness of the preservation actions of the producing party – not whether the loss of the evidence was intentional.

Note. Subdivision (e)(3)(C):

In determining whether the producing party's preservation actions were reasonable under Rule 37(e)(3)(C), consideration should be given to whether the producing party had the opportunity and, if so, met and conferred with the opposing party in an attempt to reach an agreement on reasonable preservation steps. Whether or not such a meet and confer occurred is not dispositive in determining whether the preservation actions were reasonable. Producing parties are usually required to make initial preservation decisions unilaterally at or about the time that the obligation to preserve evidence arises. Once litigation has been commenced and the responding party is aware of opposing counsel, the court should consider whether evidence was lost after the responding party had the opportunity to meet and confer, failed to meet and confer in good faith, or failed to undertake reasonable compromises offered by the requesting party in determining whether the party acted in good faith. In determining whether this element was satisfied, the court should also consider whether the requesting party timely asked the responding party for a meet and confer on preservation or failed to meet and confer in good faith in an attempt to agree on reasonable preservation steps.

Note. Subdivision (e)(3)(D):

Rule 37(e)(3)(D) is intended to harmonize the concept of proportionality as it applies to both discovery and preservation. With the rising volume of electronically stored information and the associated burdens, preservation must be proportional, in the same way that discovery must ultimately be proportional to the amount in controversy and the nature of the case. With respect to discovery, proportionality has long been a gating concept that applies to the question of whether a judge must limit discovery under Rule 26(b)(2)(C). Rule 37(e)(3)(D) clarifies that the concept applies equally to the question of whether a party may in good faith place reasonable limits on preservation that are proportional to the case. *See Rimkus v. Cammarata*, 2010 WL 645253 (S.D. Tex.) ("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 that case and consistent with clearly established applicable standards.) (Emphasis in original.) Just as Rule 26(b)(2)(C) was designed to "minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information," (*see* Notes on Advisory Committee on 1988 amendments to Rules, Subdivision (b); Discovery Scope and Limits), Rule 37(e)(3)(D) seeks to focus attorneys on the information needs of the litigation—or anticipated litigation—at hand, and not on an attempt to preserve *all* information on any given subject. The analysis of whether preservation is proportional depends heavily on the facts of each case and should be evaluated from the perspective of the preserving party at the time the decision was made.

Note. Subdivision (e)(4):

The rule provides the court with a great deal of flexibility to fit the sanction to the facts and circumstances of the particular case and to impose a sanction that both deters and remediates and is the least severe sanction available. Rule 37(a)(4) then sets out some potential sanctions a court may impose, but is a non-exhaustive list; the use of the word 'may" appropriately reflects the discretion the court has to fashion the right sanction. Rule 37(a)(5) then reemphasizes that a court must impose the least severe sanction.

Rule 37(e)(4)(A)-(D) set forth certain actions that are arguably remedies as opposed to sanctions. Sanctions law focuses, however, not only on punishment and deterrence but on remediation. *Kronisch v. United States,*150 F.3d 112, 127 (D.C.Cir.1998) (an important tenet of sanction law is to "place the innocent party in the same position he would have had" had the sanctionable conduct not taken place"). A court must have wide range of sanctions at its disposal so that it can satisfy the multiple aims of sanction law. The rule expressly rejects the position that action by a court must either be a sanction or a remedy and that an action denominated as a remedy in one context can ever be a sanction in another context. Thus, the rule does not prohibit a court from imposing remedial actions under other rules (e.g., extending the discovery deadline under Rule 16) for conduct that could, alternatively, give rise to a sanction under Rule 37(e)(4)(A)-(D).

Note. Subdivision (e)(5):

This rule is not intended to prohibit a court from the issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation provided such remedial or case management orders are not imposed upon a party as an actual or *de facto* sanction.

Attachment C

Civil Rules Advisory Committee amendment proposals of August 15, 2013 with The Sedona Conference® Working Group 1 Steering Committee proposals interlined in red

ATTACHMENT C

Civil Rules Advisory Committee amendment proposals in black; deletions appear as ~~strikeouts~~ and additions appear as underscores. Sedona Working Group 1 Steering Committee further amendment proposals in red; deletions appear as ~~strikeouts~~ and additions appear as underscores.

Rule 16 Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C);

~~(3)~~ (4) managing discovery and discouraging wasteful pretrial activities;

~~(4)~~ (5) improving the quality of the trail through more thorough preparation; and

~~(5)~~ (6) facilitating settlement.

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) ***Time to Issue.*** The judge must issue the scheduling order ~~as soon as practicable, but in any event unless the judge finds good cause for delay the judge must issue it~~ within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared, unless the court anticipates that the complexity of the case, the needs

of the parties, or the ends of justice warrant additional time.

(3) *Contents of the Order*.

* * *

(B) *Permitted Contents.* The scheduling order may:

* * *

(iii) ~~provide for disclosure, or discovery, or preservation of electronically stored information.~~ address the scope and limitations of discovery or preservation;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502 and any agreements addressing legally protected privacy interests;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

* * *

Committee Note

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared.

This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time

for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses to them. Judicial intervention is appropriate only after the parties meet and confer in good faith about those issues.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

* * *

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery

need not be admissible in evidence to be discoverable ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)~~.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

* * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery or preservation ~~otherwise allowed by these rules or by local rule~~ if it determines that:

(i) the discovery or preservation sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

* * *

(iii) the ~~burden or expense of the~~ proposed discovery or preservation is outside the scope permitted by Rule 26(b)(1). ~~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.~~

* * *

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought or who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The court cannot consider the motion ~~must include~~ unless it receives a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and accompanied by a report that conforms to the requirements of Rule 26(f)(5). The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

(B) specifying terms of preservation; specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

* * *

(D) forbidding inquiry into certain matters, or limiting the scope of preservation, disclosure, or discovery to certain matters;

* * *

(I) relieving a party from preserving certain documents, electronically stored information, or tangible things.

(d) Timing and Sequence of Discovery.

(1) *Timing*. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B); or

(B) when authorized by these rules, including Rule 26(d)(2), by stipulation, or by court order.

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered as served at the first Rule 26(f) conference.

~~**(2)**~~**(3)** ***Sequence.*** Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f) Conference of the Parties; Planning for Discovery.

* * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * *

(C) any issues about disclosure, or discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(F) If the parties are unable to resolve issues discussed during a Conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:

(i) A section stating the issues during the conference and summarizing areas where agreement was reached on each issue;

(ii) A section, containing no argument, providing a brief statement identifying each issue for which agreement was not reached, including:

a short and plain statement of the position of each person or party on each issue in contention and;

the proposal of each party for reaching a resolution of the issue.

~~(F)~~(G) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * *

Committee Note

The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. Proportional discovery relevant to any party's claim or defense suffices. Such discovery may support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears reasonably calculated to lead to the discovery of admissible evidence is also amended. Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. Hearsay is a common illustration. The qualifying phrase — "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" — is omitted. Discovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend

beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence. Deleting the "reasonably calculated" phrase will further the purpose of the 2000 amendment that revised this sentence out of concern that, as expressed in the 2000 Committee Note, it "might swallow any other limitation on the scope of discovery."

Rule 26(b)(2)(A) is revised to reflect the addition of presumptive limits on the number of requests for admission under Rule 36. The court may alter these limits just as it may alter the presumptive limits set by Rules 30, 31, and 33.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1).

The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by deleting the reference to discovery "otherwise allowed by these rules or local rule." Neither these rules nor local rules can "otherwise allow" discovery that exceeds the scope defined by Rule 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that specify terms allocating expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.

Rule 26(d)(1)(B) is amended to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required

Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Former Rule 26(d)(2) is renumbered as (d)(3) and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders on agreements

to protect against waiver of privilege or work-product protection under Evidence Rule 502. Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses to them.