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

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

Dear Advisory Committee on Civil Rules:

I respectfully submit a 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 ("Rules").¹ I thank you for the opportunity to comment, and I commend the Committee's tireless efforts and dedication in order to improve our judicial system through the refinement of the Rules. This comment is a supplement to my testimony at the January 9, 2014, Phoenix hearing.

I believe that the Committee's proposals have the potential to advance the stated goals of improving early and effective judicial case management and enhancing the means of keeping discovery proportional to the action. I respectfully offer suggestions to the Committee on how the current draft Rules might be edited in order to improve the overall package, address some of the concerns raised by various parties, and clarify certain language.

I. Background

I am the Chair of Winston & Strawn's e-Discovery & Information Management Practice Group. I am a member of the Steering Committee of Working Group 1 – Electronic Document Retention and Production. I am also on the Advisory Board of the Georgetown Law Center's E-Discovery Institute. I act as national e-discovery counsel for several Fortune 500 companies, where I handle the e-discovery in matters regardless of whether Winston & Strawn is retained to

¹ I am a litigation partner in Winston & Strawn LLP's Washington, D.C. office who represents clients across the globe in an array of complex antitrust and litigation matters. This comment represents my views alone, and does not necessarily represent the views of Winston & Strawn.

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handle the substantive litigation. I am also on the faculty of several e-discovery educational programs throughout the United States, including those offered to the judiciary.

Founded in 1853, Winston & Strawn is an international law firm with more than 900 attorneys among 17 offices in Beijing, Brussels, Charlotte, Chicago, Geneva, Hong Kong, Houston, London, Los Angeles, Moscow, New York, Newark, Paris, San Francisco, Shanghai, Silicon Valley, and Washington, D.C. The firm serves the needs of enterprises of all types and sizes, in both the private and the public sector. The firm's practice encompasses virtually every major legal discipline, including trial practice and litigation, white-collar criminal defense and enforcement, corporate internal investigations, antitrust and trade regulation, employee benefits and executive compensation, corporate and financial, labor and employment relations, real estate, tax, environmental law, intellectual property, federal and state legislative and regulatory, health care, and trusts and estates.

After the 2006 amendments to the Federal Rules, Winston & Strawn immediately witnessed the Rule's impact upon civil litigation, and the dramatic cost that it imposed upon clients in terms of the cost to preserve, collect, review and produce electronically stored information ("ESI"). To better serve its clients, the firm undertook to build an e-discovery consulting shop behind its own firewall in an attempt to control the ever increasing costs and burdens of e-discovery. Today, Winston & Strawn's eDiscovery & Information Management Group is one of the largest and most experienced in the United States. The Group is comprised of 24 partners and associates located throughout the firm. The eDiscovery Group also includes 26 technical experts that bring an in-depth knowledge of current and emerging technical tools and products. Winston & Strawn also operates two review centers in Washington, D.C. and New York. It has internalized all phases of the electronic discovery reference model to include collection, processing, hosting and reviewing. Last year, the eDiscovery Group handled over 1,000 active litigation matters, accounting for over 100,000 hours of time.

II. General Comments Regarding the Proposed Rules Changes

A. Changes Are Necessary To Address The Rising Cost of Discovery That Is Inconsistent With the Goals of Rule 1

The 2006 amendments to the Rules recognized the reality that evidence in most civil cases is in the form of ESI – not paper. Those rules transformed the way that federal litigation is conducted. The 2006 amendments, however, could not anticipate the tremendous growth of the sheer amount of ESI generated by many organizations, or the explosion in the means to communicate, store and reproduce that ESI. In 2006, for example, e-mail was still the primary means of electronic communication. The use of instant messages, text messages, and social media were in their mere infancy. Similarly, nobody could have imagined the explosion in the use of smartphones and tablets upon business communications. The result is that, not only is there a tremendous amount of information within corporate firewalls, but also the number of locations upon which that ESI is located and can be stored has increased dramatically. All of

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these unanticipated technological advances have resulted in dramatically increased burdens and costs for corporations to identify, preserve, collect, process, and produce ESI. The costs and burdens are further complicated by a number of significant factors.

First, parties have lost their way in terms of the scope of discovery. In even the smallest of cases, corporations have had to spend significant amounts of money to preserve and produce thousands, if not millions, of pages of ESI, when in fact, the overwhelming majority of that ESI has little, if any materiality, to the claims and issues at hand. The necessary consequence is that discovery costs have outstripped all other considerations in most cases, to the point that many corporations would rather settle baseless cases than incur the cost of discovery.

Second, the system is being gamed by many participants. Many of the weapons that plaintiffs have employed against corporations in the past, in the pursuit of asymmetrical litigation (such as the notice pleading standard and the burdens of proof associated with class certification) have been either taken away or restricted. But e-discovery remains a powerful weapon that plaintiffs can use against large data-producing organizations. In fact, the Federal Circuit has recognized that “[i]n recent years, the exponential growth of and reliance on electronic documents and communications has exacerbated such discovery abuses.”² Plaintiffs know that they can substantially raise the nuisance value of a case by pursuing broad and often baseless e-discovery, and as currently drafted and enforced, the Rules provide little remedy to corporations.

Third, with the rise of e-discovery, there has been a dramatic increase in the number of sanctions motions filed, and the awarding of serious sanctions (*i.e.*, spoliation motions, default judgments). While the plaintiffs’ bar points to certain studies suggesting that the actual sanctions awarded by courts remains relatively small, those studies fail to address the use of sanctions as a tactical weapon. Indeed, it is not just the filing of sanctions motions that is the problem – it is the threat of filing such motions. Make no mistake; the threat of such sanctions is commonplace in civil litigation today by requesting parties. By way of example, the Committee need look no further than an article published by one serial litigant entitled: “Sanctions: Don’t Leave Home Without ‘Em.”³ In the article, the author advises other plaintiffs’ counsel that “[s]anctions are an important tool in a trial attorney’s arsenal and no case should be litigated without at least investigating the possibility that evidence has been destroyed, hidden or tampered with by the opposing party”.⁴ In the face of such “gotcha” tactics, corporations cannot take the risk of facing even the threat of sanctions, baseless as they may be, because of the reputation injury associated with such claims. The response by most corporations is a natural one – over-preserve ESI in an effort to thwart these baseless claims. The preservation now undertaken by most corporations is substantial in terms of costs and resources (both technological and human). For example,

² U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, AN E-DISCOVERY MODEL ORDER 2 (2011), available at http://www.ca9c.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

³ See Robert L. Pottroff, Sanctions: Don’t Leave Home Without ‘Em, 1 Ann. 2003 ATLA-CLE 1017 (2003).

⁴ *Id.*

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Winston & Strawn's clients have invested substantial resources in archiving solutions, legal hold software, search and retrieval software, and storage as a means to defeat tactical claims of spoliation. In some cases, I have been hired at the front end of a case to defend a spoliation claim, despite the fact that there is no reason to believe that any relevant ESI has been lost. Why? Clients have enough experience to know that when the plaintiff is unable to establish the merits of its claims, it will turn to spoliation in an attempt to change the very nature of the litigation.

B. These Rules Changes Will Have No Negative Impact on Access to the Courts

I have reviewed almost every comment submitted by the various interested parties. I attended the Phoenix hearing and I have read summaries of the remaining testimony. I am struck by the comments of the plaintiffs' bar that has almost uniformly opposed these amendments, arguing that they are likely to limit the access of litigants to the federal court and/or limit their ability to present their claims and defenses. I offer several observations about these claims.

First, many of the individuals and/or organizations now submitting comments to the Committee opposing this Rules package staked out a "just say no" position almost *two years* ago before the first draft rule was promulgated by the Committee. This "just say no" position should be evaluated in that context (*i.e.*, it is difficult to provide serious comments to draft rules when you have staked out an ideological position having nothing to do with the actual proposals).

Second, the proposed Rules put forth by the Committee are modest in nature. There is nothing in this package that limits any party's access to the federal courts, regardless of size, resources, or the side of the "v" they reside. To the contrary, these proposed amendments are more than likely going to provide greater access to litigants to the federal court system by reigning in the cost of discovery, which limited the ability of both individuals and entities to bring, defend and, most importantly, take cases through to trial on their merits.

Third, in the face of empirical evidence showing the large, unnecessary costs, faced by corporate Defendants, these objectors offer no empirical evidence whatsoever to support their "cry wolf" position that litigants are being kept from federal court.

C. The Aspirational Goals of Cooperation Alone Will Not Stem the Rising Costs of E-Discovery

Many of the comments by the plaintiffs' bar have also urged that these rules are unnecessary because the issues of rising costs and burdens can be resolved with greater cooperation through the meet and confer process. As a Steering Committee Member of The Sedona Conference Working Group 1, I wholeheartedly endorse the notion of cooperation. Through "meaningful cooperation" the parties should be able to work together to reach agreements that will lower the scope of e-discovery, and thus, the burdens and costs associated with such discovery.

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“Meaningful cooperation” however, is often extremely difficult, if not impossible, to achieve in practice. This is particularly true in asymmetrical litigation, where a putative named class plaintiff may have one computer and a smartphone, as compared to a defendant that has thousands of computers and servers. Despite the best efforts by groups such as The Sedona Conference, the reality is that cooperation is not working in the overwhelming majority of the cases, because the plaintiff has no “stake in the game” and only engages in the “appearance of cooperation” without any real intention to reach reasonable compromises on the scope of preservation and/or production. Unless and until there is more active judicial case management of e-discovery in most cases, and/or there are real financial consequences (*i.e.*, cost shifting) to the requesting party for its failure to engage in “meaningful cooperation,” cooperation is unlikely to result in reducing the burdens and costs of e-discovery.

III. Comments to Specific Rule Changes

A. Rule 26

I strongly endorse the Committee’s two proposed amendments to the scope of discovery under Rule 26, in an attempt to restrain the current view by many courts and practitioners that discovery within the federal judicial system is boundless. I believe that the additional recommendations below will help further that goal.

1. Revisions to Rule 26(b)(1) In Terms of Scope and Proportionality Are Likely to Reduce the Tremendous Burden and Cost of Discovery Without Impacting a Party’s Ability to Prosecute or Defend Its Claims

The change in language for Rule 26(b)(1) from “relevant to the subject matter involved in the action” to “is relevant to a party’s claim or defense,” and removal of the language that states “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” are long overdue. The 2000 amendments to the Federal Rules actually changed the scope of discovery under Rule 26 to “claims and defenses.” Courts and practitioners failed to recognize or understand this change, and continue to falsely operate under the pre-2000 standard. The removal of the “reasonably calculated to lead to the discovery of admissible evidence” language, in particular, will go a long way toward requiring courts and parties to focus on the evidence relevant to the action. This will eliminate the all too common fishing expedition, based on a claim that non-relevant information may somehow assist in the discovery of relevant evidence. Most importantly, this change will eliminate the burden of endless preservation, as it is impossible for a party to know what non-relevant information could lead to relevant information.

But more needs to be done. I respectfully suggest that the inclusion of proportionality and materiality also be included in Rule 26(b)(1). Even with limiting discovery to information relevant to the “claims and defenses,” there is simply too much information maintained by

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organizations, and that information seems to grow each day. A decade ago, the average personal computer stored less than 30 gigabytes of information. Network storage was largely not available to most employees. Collaboration work sites were in their infancy. Social media did not largely exist as a corporate tool. At that time, substantially less than one gigabyte (1 gb = approximately 60,000 to 65,000 pages of information) of information per custodian might be subject to discovery. Today, the average personal computer is sold with 500 gigabytes of storage. Network storage, collaboration work spaces and social media abound. The average amount of information stored by an individual is well over a hundred gigabytes. Collections are amounting to approximately 10 gigabytes of potentially relevant information per custodian (*i.e.*, 650,000 pages per custodian). Even in a small case with less than 5 custodians, more than a million pages of documents may be the subject of discovery.

But relevancy alone can no longer be the standard, as there is simply too much information available, and the costs of discovering such information is negatively impacting parties (of all sizes) ability to prosecute and defend actions.⁵ Proportionality must become more central in defining the scope of information subject to preservation and discovery. Contrary to assertions by many commentators, the movement of proportionality up to 26(b)(1) is not a radical change that negatively impacts the ability of a party to secure relevant evidence to its case, or limit access to the courts. Proportionality is already embodied in Rule 26(b)(2)(C)(iii). Every single day, courts and the parties are required to make proportionality decisions in deciding a motion to compel or stating objections in responses to requests for the discovery of information.

I also do not see how the movement of proportionality up in the Rules changes the burden from the producing party to the requesting party to demonstrate that the discovery sought is proportional. The requesting party *currently* has the obligation to certify that its written discovery is proportional. There is no language in either the current draft of the Rule or the notes that directly or indirectly changes the burden. The burden should continue to fall on the requesting party to demonstrate proportionality in its request, just as the responding party should be required to demonstrate that its response is proportional.

I also agree with other commentators such as Lawyers for Civil Justice that a materiality standard should be added to Rule 26(b)(1) to ensure proportionality in both preservation and production. Adding a materiality component would appropriately require an extra layer of significance before information needs to be produced. There is no reason for information to be preserved and produced if there is only marginal relevance and the requesting party cannot show how the information is material to its claim or defense.

⁵ The amount of information will only continue to grow. In 2009, the digital universe “grew by 62% to nearly 800,000 petabytes. . . . [B]y 2020, our Digital Universe will be 44 TIMES AS BIG as it was in 2009.” JOHN GANTZ & DAVID REINSEL, IDC, THE DIGITAL UNIVERSE DECADE—ARE YOU READY? 1 (2010), available at <http://www.emc.com/collateral/analyst-reports/idc-digital-universe-are-you-ready.pdf>.

Electronic Letterhead**2. Courts Should be Allowed to Limit Unnecessary
Preservation Under Rules 26(b)(2)(C) and 26(c)**

I agree with The Sedona Conference's suggestion that "preservation" should be added to the Preamble to Rule 26(b)(2)(C) and Rule 26(b)(2)(C)(i). Such a reference would authorize courts to limit preservation that is unreasonably cumulative, duplicative, or that can be obtained from a more convenient, less burdensome, or less expensive source. Similarly, the Committee should make clear of a 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 discovered under Rule 26(b)(1).

I also endorse The Sedona Conference's recommendation that Rule 26(c) be enlarged to include not only parties who are subject to discovery, but also a party "who, is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things." The addition of this language would allow preservation disputes to be resolved early on by a court if the parties cannot first agree. Preservation issues should be tackled by a court as soon as possible to alleviate the burden of over-preservation.

B. Rule 37(e)

The goal in the original Rule 37(e) was to craft a "safe harbor" for the loss of ESI where a party acted in good faith. The Rule was intended to recognize that the preservation of ESI in the modern world is a complex undertaking, where perfection cannot be the standard. In an attempt to revise the draft Rule in a manner that would be acceptable to all interests, however, the purpose and meaning of the original intent of the draft Rule was lost. The current Rule 37(e) is rarely, if ever, invoked because courts and practitioners have no idea what it means or how it is to be applied.

The Committee has stated that the goals of the proposed Rule 37(e) are: (i) "[t]o 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."⁶ It has also stated that the purpose of the proposed rule is to provide "a uniform national standard for culpability findings."⁷ I agree with those goals, but do have a number of concerns with respect to the current draft that are likely to weaken the proposed Rule in practice, and I encourage the Committee to consider the comments below.

⁶ 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.").

⁷ *See id.*

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1. The Bifurcation Between “Sanctions” and “Curative Measures” Should Be Abandoned

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. It separately addresses “curative measures” in Rule 37(e)(1)(A), which does not require either a showing of culpability or prejudice, from “sanctions” in Rule 37(e)(1)(B), which does require such a showing. The failure to require culpability or prejudice will likely substantially weaken the goals in adopting the Rule. Rule 37(e) should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies, *i.e.* sanctions for failures to preserve relevant information. “Curative measures” should be eliminated from the Rule. There are several rationales behind this position.

First, the difference between a “curative measure” and a “sanction” is a false distinction unsupported by decades of case law. There is often no practical difference between the effect of many “sanctions” and “curative measures.” Moreover, in the overwhelming majority of cases, courts granting sanctions have awarded what the Committee is now attempting to classify as “curative measures.”

Second, it is often impractical or impossible to distinguish between an action that is “curative” in nature and one that is “punitive.” Permissive adverse jury instructions are a prime example, where certain courts have described them as remedial, and others as punitive. For instance, 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.” *Id*; but 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.”). The 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.

Third, Rule 37(e)(1)(A) would permit, in some cases, the 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). More importantly, the rule may be abused as a vehicle to impose a *de facto* sanction so long as the magical word “sanction” is not invoked.

Fourth, the “curative measures” provision provides no standard or guidance as to when and under what circumstances a court may grant such measures. This is likely to result in years of litigation over the meaning and use of Rule 37(e)(1)(A). Importantly, the “curative measures” provision is likely to be used as a tactical weapon in litigation to disadvantage the other side, for instance, to gain more depositions or to shift costs. This would tremendously expand motion

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practice and the cost of litigation, even when parties are not prejudiced by the missing information.

For all of these reasons, I suggest that the curative measures provision be abandoned in its entirety. This would not mean that Courts would lose the power to issue curative measures. For example, a court under Rule 16, has the ability to amend a scheduling order or order additional discovery. I suggest that, in addition to deleting the curative measures provision, a note be added to Rule 37(e) that indicates that nothing in this Rule is intended to limit the ability of courts to enter remedial or curative measures afforded to courts under other rules.⁸

2. The Culpability Standard Set Forth in Rule 37(e)(B)(1) Should Be Precisely Defined to Avoid Ambiguity and “Wiggle Room”

The absence of a uniform national standard has tremendously complicated the preservation decisions for corporations operating in multiple states. For those corporations, it therefore must be recommended that they apply the standard with the lowest threshold (*i.e.*, mere negligence) with respect to its approach to preservation in the context of litigation. This lower standard, combined with the tactical use of the threat of sanctions, results in over-preservation. The proposed rule will allow outside counsel to recommend, and corporations to implement, reasonable and proportional preservation decisions without the fear of death penalty sanctions. There is little doubt that the proposed changes will dramatically change preservation decisions by corporations, resulting in reduced burdens and costs.

I endorse the Committee’s approach of requiring a heightened culpability standard for the imposition of sanctions, and I agree with the Committee that a negligence-based standard should not apply. The draft Rule takes an important step of eliminating the adoption of sanctions standards that are predicated on a tort-based negligence standard of care and fail to consider actual prejudice to the other side. Of particular concern is the practice by some courts to allow the imposition of spoliation instructions based upon a finding of mere negligence. The application of tort-based standards to the issue of sanctions has no place in the Rule, and certainly has no place with respect to the imposition of spoliation instructions that are the equivalent to “terminating sanctions” (*i.e.*, dismissal or default judgment). In addition, and as I pointed out to the Committee during the Oklahoma City Committee meeting, the impact of

⁸ I also suggest the Committee consider The Sedona Conference’s Submission of October 3, 2012, that offers that it is not necessary for the proposed Rule to address a Court’s authority to issue “curative measures” separately from “sanctions.” Instead, the Rule should start 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.” Where sanctions are appropriate, The Sedona Conference suggests that there be several listed sanctions, which range in severity from merely amending the case management order to imposing harsh remedies. I am not advocating that the Committee abandon or delay its current process. But I urge the Committee to look closely at The Sedona Conference’s suggestions in its consideration of how the existing draft might be revised.

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labeling attorneys (either in-house or outside counsel) with labels as “negligent” or “grossly negligent” will have dramatic and unfair impacts on individual reputations and careers for years to come.

With that said, I am concerned that inclusion of the terms “willful” and “bad faith” under proposed Rule 37(e)(1)(B)(i), will likely undermine the goal of having a uniform national standard. The term “willful” 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.”⁹ But Courts have regularly used the term “willful” in issuing sanctions for spoliation, and have defined it anywhere from including a culpable mind to not requiring any sort of malice.¹⁰ Similarly, there have been courts throughout the country that identify “bad faith” under a negligence standard.¹¹ As such, importing the terms “willful” and/or “bad faith into Rule 37 would invite a similarly disparate application of the term by various courts, and would be contrary to the goal of national uniformity.

I encourage the Committee to consider The Sedona Conference’s suggestion of a “good faith” standard, and that “willful” and “bad faith” should simply be removed from the proposed Rule rather than further defined. 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, adopting a good faith standard will allow for a development of a set of factors that incentivizes good behavior.¹²

⁹ See Advisory Comm. Notes to 1970 Amendments.

¹⁰ 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 “willfully” permitted its agent to destroy the evidence); *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 U.S. Dist. Lexis 115533 (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.”).

¹¹ See e.g., *United Medical Supply Co., Inc. v. U.S.*, 77 Fed. Cl. 257, 267 (Fed. Cl. 2007) (noting that the “difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as ‘bad faith’ what others would call ‘recklessness’ or even ‘gross negligence.’”); *Karnazes v. County of San Mateo*, 2010 WL 2672003 at *2 (N.D.Cal. July 2, 2010) (“An adverse inference instruction may be appropriate where a party’s bad faith or gross negligence has resulted in either the spoliation of evidence or failure to turn over relevant evidence)

¹² At the recent Dallas hearing, Judge Grimm asked whether a party who had reckless disregard to preserve information should be sanctioned under Rule 37(e). I respectfully submit that it should not. By introducing the term “reckless disregard” the Rule would be introducing a tort standard, which would undermine the goal of uniformity, and instead replace it with each state’s tort rules. It appears that the Committee’s consideration of whether “recklessness” should be included arises out of a concern that many times there would not be direct evidence of a

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With this said, if the Committee intends to leave “willful” and/or “bad faith” within the draft, then I encourage the Committee to adopt a clear definition to prevent the “wobble room” that Robert Owen so artfully described in his testimony at the Phoenix hearing. In terms of a definition, I direct the Committee to the definition offered by The Sedona Conference in its submission: “the alleged spoliating party acted with specific intent to deprive the opposing party of material evidence relevant to the claims and/or defenses.”

3. “Substantial Prejudice” Should Be Further Defined

The Committee has invited comment on whether there should be additional definition of “substantial prejudice” under Rule 37(e)(1)(B)(i). A party should have to show that it has been seriously prejudiced in its ability to prove its case before imposing sanctions. But the Rule should make clear that “substantial prejudice” means that a party must have been materially hindered in presenting or defending against the claims in the case.¹³ 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).

4. The Committee Should Not Attempt to Craft a Rule To Address The Rare Exception or What Many Refer to as the “Mythical Unicorn”

Rule 37(e)(1)(B)(ii) would permit sanctions without a showing of willfulness or bad faith if a party is “irreparably deprived” of a meaningful opportunity to present or defend a lawsuit. The Committee invited comment on whether the Rule should be retained and whether it adds “important flexibility.” In practice, even though the Committee intends for this Rule to only be

lack of good faith. I respectfully remind the Committee, as I did in the Oklahoma City Rules Committee meeting, that the Committee has properly attempted to craft a Rule that avoids the use of tort based language for obvious reasons of attempting to achieve uniformity, which is largely defeated by vague tort concepts that vary from jurisdiction to jurisdiction. Inserting the word “recklessness” is a variation of the same problem as “negligence” and “gross negligence.” These concepts have no place in a sanctions rule. In addition, it would be unfortunate to create a rule that has courts labeling attorneys as “reckless,” a word likely to have significant impacts on their ability to continue the practice of law. It is also important to recognize “intent” is not established by direct evidence alone. Intent, more often than not, is established by circumstantial and indirect evidence. Thus, for example a party’s failure to take reasonable steps to implement a legal hold resulting in the loss of data may not be “direct” evidence of “willfulness” or “bad faith”, but it is circumstantial evidence that, combined with other facts, might rise to that level.

¹³ See *Larsen v. Coldwell Banker Real Estate Corp.*, 2012 WL 359466, at *7-8 (C.D. Cal. Feb. 2, 2012) (“The few isolated examples cited by Plaintiffs (out of a document production of approximately 9,000 pages) fail to demonstrate that Defendants have not reasonably and in good faith produced the documents required by this Court’s October 25, 2011 Order....To require Defendants to repeat this labor merely because Plaintiffs have identified a few alleged discrepancies in the ESI production is simply unreasonable.”)

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used in extremely narrow circumstances, I would caution the Committee in crafting a rule for the rare exception.

In this instance, the language “deprived a party of any meaningful opportunity” would be susceptible to countless motions from creative lawyers, and inconsistent interpretations by courts, because the term “meaningful” is inherently subjective. Thus, I fear that this exception would swallow up the Rule, and would lead to the same over-preservation and ancillary motion practice that currently exists. The Rule should not be retained.

If the Committee feels that the proposed rule should address this narrow circumstance, I suggest two courses of action. First, I urge the Committee to consider the approach that The Sedona Conference has recommended by eliminating Rule 37(e)(1)(B)(ii), and simply start Rule 37(e)(1)(B)(ii) with the words “absent exceptional circumstances.” These words are well understood by federal courts, and there exists a body of case law around them. Second, regardless of the course of action taken in the body of the Rule itself, I strongly suggest the note to the Rule be revised to clarify further the extremely narrow circumstances in which this exception would apply.

5. The Least Severe Sanctions Should be Issued

The new Rule 37(e) should identify the range of potential sanctions that are available to a Court, and should require a court to select the least severe sanction necessary. 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. Indeed, courts currently differ on the parameters of sanctions. For instance, the Fifth Circuit “has consistently held that a district court, when considering the imposition of sanctions for discovery violations ... should impose the least severe sanction that will accomplish the desired result.” *United States v. Garrett*, 238 F.3d 293, 298 (5th Cir. 2000). On the other hand, the Seventh Circuit has stated that “we do not require the lower court to select the least severe sanction.” *In re Golant*, 239 F.3d 931, 937 (7th Cir. 2001). Again, uniformity throughout the country should be the goal. Finally, 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.

6. Certain Factors Should Not be Included in Assessing a Party’s Conduct

I share The Sedona Conference’s concern that the receipt of a demand for preservation is a factor in assessing a party’s conduct. 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 will likely result in overly-broad preservation letters being sent in virtually every case, causing the same over-preservation

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problems that the Rules are trying to fix. This factor would likely result in gamesmanship, and impose the burdens of significant side-litigation on the parties and the court.

In addition, this factor also could lead to adverse consequences for not “consulting” with the other side in response to a request to preserve documents. Not every preservation request deserves or requires meeting or conferring. But factor (C), as presented, seems to assume that it is always to be expected. And this “duty” appears to be triggered not only prior to the Rule 26(f) conference, but even prior to commencement of any litigation. There should not be any express or implied duty to consult or negotiate about litigations that have not been, and may never be, filed.

In addition, I agree with the American Bar Association that factor (E), which focuses on “whether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information” should not be included, or at a minimum, clarified. The language presumes that it is the duty of the request recipient, and not the demanding party, to go into court, and seek to have its decision not to preserve information authorized by the court. The burden of seeking court intervention should be on the party who wants the information preserved.

7. Rule 37(e) Should Not be Limited to ESI

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. Moreover, many smaller plaintiffs have hard copy documents rather than ESI. It would be asymmetrical and unfair for sanctions to be imposed for a failure to preserve ESI, but would not result in sanctions for hard copy documents. Furthermore, future technologies and means of communicating and storing data may include non-electronic sources.

C. Rule 1

I 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.”

D. Rule 16

I endorse the Committee’s proposal to include “preservation” in the list of permissible topics in Rule 16(b)(3). That said, I agree with The Sedona Conference position that Rule 16 should be further revised 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). 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.” This language should be broadened to include preservation of all types of information, and not simply ESI. **Electronic Letterhead**

E. Rules 33 and 36

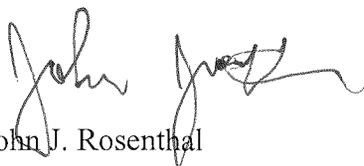
I agree with the adoption of the numerical limits that are suggested to be added to Rules 33 and 36 for interrogatories and requests for admissions. The limits are appropriate given the overwhelming majority of civil cases within the federal court system. I strongly disagree with the assertion by some commentators that presumptive limits will deprive parties of their ability to conduct reasonable and proportional discovery in cases. These are merely presumptions, and judges may exercise their discretion to expand or contract these limitations depending upon the needs of the particular case. Those against these changes would, in fact, be hard pressed to find written decisions suggesting that presumptive limits have ever been enforced in a manner that has limited a party from prosecuted or defending its claims.

Importantly, for those that express cooperation as the solution to the current burdens of e-discovery, these presumptive limits are likely to facilitate the meet and confer process. Having conducted dozens and dozens of Rule 26(f) meet and confers since 2006, one of the significant problems in reaching compromises is that much of the conferences are wasted in attempting to reach numbers on the scope of discovery. Presumptive limits would act as a fulcrum upon which parties can base their discussions in an attempt to craft reasonable discovery plans, and reach agreements on the scope of discovery.

IV. Conclusion

I thank the Committee for its dedication, and for allowing such thoughtful and robust comments. I am pleased to have the opportunity to comment on the proposed Rules. It is important that civil litigation be fair to all parties, and allow for cases to be decided on their merits. The proposed Rules are a substantial first step toward that goal, and the additional changes that I set forth above, I believe will help to further that goal.

Respectfully submitted,



John J. Rosenthal