

COMMENT
LAWYERS FOR CIVIL JUSTICE
To
THE CIVIL RULES ADVISORY COMMITTEE

October 30, 2012

***THE NEED FOR A MEANINGFUL PACKAGE OF AMENDMENTS TO GOVERN
DISCOVERY AND PRESERVATION AND TO REVERSE CURRENT COST DEFAULT
ASSUMPTIONS***

I. Introduction and Summary

We write once again to express our views regarding the need for meaningful change in the Federal Rules of Civil Procedure. While many of our positions are undoubtedly familiar to members of this Committee, the urgency of the need for an integrated, meaningful package of amendments compels continued comment, especially in view of the new sanctions and scope of discovery proposals.

Before we launch into the merits of these encouraging developments, we pause to very respectfully suggest that the next, now truncated, committee meeting be devoted to discussion and perhaps tentative approval of these proposals, but that no formal action be taken to recommend publication until they can be considered in the context of a complete package of fully integrated proposals governing the three pillars of discovery: (1) scope of discovery; (2) preservation sanctions and triggers; and (3) an incentive based cost default rule. We look forward to working with the Committee, as it receives input from all quarters, on developing such a package that could be considered for formal publication at the spring meeting.

As has been widely reported, the civil justice system is in “serious need of repair.” A major contributor to the state of the system is the current discovery paradigm, which encourages broad, expensive, and often unnecessary discovery. The current paradigm frequently erodes the availability of a just, speedy and inexpensive determination of the issues, rather than encouraging it. Moreover, these problems have long been recognized as impediments to justice, a fact that is evidenced by the repeated efforts made to address them. These efforts, however, have had limited success and now, after decades of tinkering change, the rules suffer greatly under the weight of ambiguous standards and burdensome requirements. This weight is all the more crushing when coupled with the drastic increase in the costs, burdens, and volume of discovery of electronically stored information, a trend that is all but guaranteed to continue in light of growing reliance on technology and its expanding prominence in all aspects of modern life.

Careful study of historical discovery amendments leads to an undeniable conclusion: tinkering change is no antidote for the problems of abuse and misuse, nor can it effectively rein in the “tradition” of overly broad discovery that has long plagued our system. Accordingly, a different approach must be taken to finally address the ever-worsening problems in the current discovery model. To that end, Lawyers for Civil Justice has proposed a comprehensive package of

amendments that *together* accomplish many of this Committee’s historical (and ongoing) goals to address the problems of discovery. Summarizing broadly, our numerous proposals address three major topics: 1) the scope of discovery (and therefore, preservation); 2) preservation, including what triggers the obligation and sanctions for failure to uphold the obligation; and 3) an economic incentive based cost default rule – “user pays” – that would reverse current economically perverse cost default assumptions. While the adoption of any one proposed amendment in any of these areas would undoubtedly address *some* of the many problems of modern discovery, *it is as an interrelated package that these proposals would find their greatest strength.*

There is, thus far, cause for cautious optimism that this round of amendments could finally result in the meaningful changes that are necessary to right this listing discovery ship—but not without further work. Among the encouraging evidence of progress is this Committee’s recently proposed replacement Rule 37(e), which addresses the availability and imposition of sanctions for failing to preserve information — a major issue in modern discovery and one for which clear guidance has been seriously lacking. Without belaboring the details — and recognizing that there are aspects of the proposal that raise some concerns — the proposed amendment is a good start toward bringing about the necessary shift away from traditional (but misguided) notions of discovery “perfection” and toward a more realistic standard of reasonableness, with a focus on the preservation and discovery of information “most important to resolving the case” (an apt description recently incorporated into Magistrate Judge Grimm’s Discovery Order, for use in his courtroom).

We do have concerns about some aspects of the sanctions proposal, which are explained below, but it does head in the right direction. Without additional efforts, however, and despite best intentions, the proposed sanctions rule cannot accomplish the level of change necessary to meaningfully address the problems of discovery, which have proven themselves immune to tinkering half-measures.

Judge Campbell’s more recently drafted sketch of a new Rule 26(b)(1) that proposes to narrow the scope of discovery to include only information that is relevant to a party’s claim or defense and proportional to the needs of the case is, therefore, also encouraging. As this Committee well knows, LCJ has long supported similar, but somewhat different, amendments and we are encouraged that serious consideration is now being given to this very important proposal. We will, of course, also comment on further improvements that we contend should be made in this proposal as well.

As discussed above, because the interconnection of LCJ’s amendments is the foundation of their strength, serious consideration of these two very important proposals, which work together to address the long standing problems of discovery, is evidence of this Committee’s clear commitment to meaningful change.¹

¹ The interrelated sanctions and scope amendments should work together to reduce the compulsion to over-preserve, but even greater progress would be made toward reducing the costs and burdens of excessive discovery and over-preservation if a bright line preservation trigger were developed and the scope provision included “materiality”, reinforced by a change in the current cost default paradigm.

Notably, the effectiveness of the above proposed revision of the scope of discovery (and thus preservation) would undoubtedly be increased significantly by reconsideration of the current cost allocation model. Stated plainly, parties will be more inclined to carefully consider what is “most important to resolving the case” (i.e. what is relevant to the claims and defenses at issue) if they are likely to be held responsible for paying for what they request. While the policy considerations for this proposal will be discussed in greater detail later in this comment, it is clear that a new cost allocation paradigm would complement and enhance the effectiveness of the other proposals and thus, for once, effectively address the problems in the current discovery system.

We must remain steady on the course toward real change. Failure to adopt meaningful and comprehensive reform could be disastrous. Electronic discovery has changed everything. The volume of discovery has exploded in recent years to a level likely not contemplated during prior efforts to amend. Particularly in recent years, the expansion of technology and commensurate increase in the volume of electronic information has been staggering. Take, for example, the number of users on Facebook, considering that the discovery of social media content has become a “hot topic” in electronic discovery of late. In October 2007, the number of users on Facebook was approximately 50 million.² In September 2012, the number of “monthly active users” reached 1 Billion (*with a “B”*).³

The corresponding amount of data created in those years, while far beyond our ability to accurately calculate, is mind boggling ... and all potentially subject to discovery if relevant to the subject matter of any litigation (recognizing, of course, that the discovery of such information is affected by numerous factors, including international law). Now, in keeping with this social media theme, consider the amount of data also created on MySpace, Google+, LinkedIn, Twitter, or any other of the many social networking sites that have gained in popularity in recent years. It is, quite frankly, almost beyond comprehension. This explosion in the creation of data in only one small corner of the technological world clearly illustrates the nature of the problem this Committee faces. Something must be done to more carefully focus discovery efforts on the truly important information amidst this sea of data. But not just any something will do. Meaningful and comprehensive change is the only workable solution.

II. Scope of Discovery & Reasonable Limitations

A. 26(b)(1)

Judge Campbell’s recently drafted sketch of a significantly changed Rule 26(b)(1) is a very encouraging sign that real change is within reach. As has been discussed many times in comments to this Committee, reducing the scope of discovery is a foundational component of meaningful reform and should not be overlooked or left for “next time” as has historically been the case. The scope of discovery affects all aspects of discovery (including preservation issues) and has a direct bearing on many long-recognized problems. Loyalty to traditional notions of the broadest possible discovery is both fundamentally mistaken in its underlying premise (that more

² Facebook, One Billion Fact Sheet, *available here*:
<http://newsroom.fb.com/ImageLibrary/detail.aspx?MediaDetailsID=4227>

³ *Id.*

information is better, particularly when it's free) *and impossible to justify in an age of electronic information*. Accordingly, decisive action must be taken so that the Federal Rules of Civil Procedure better reflect the realities of modern litigation throughout the nation.

1. Materiality

We respectfully suggest that the Committee consider adding the very significant word “material” to the operative phrase of the proposed revised scope of discovery, as follows:

“* * * Parties may obtain discovery regarding any non-privileged matter that is relevant [**and material**] to any parties claim or defense* * *”

While the explosion of electronic discovery has dramatically changed litigants’ experience of the discovery process, the proper purpose of discovery – namely, “the gathering of material information” – remains unchanged. Thus, one obvious response is to limit the scope of discovery to evidence that is relevant *and material* to the claims and defenses in each case. This solution solves a myriad of long-identified problems with discovery abuse and misuse while simultaneously addressing the relatively new “problem” of electronic discovery and its attendant high volumes and costs. At the same time, a focus on information relevant *and material* to the claims and defenses of the parties serves to better align the rules of discovery with the realities of litigation.⁴ We, therefore, respectfully suggest that the Committee consider inserting the word “material” into the scope of discovery proposal.⁵

2. Proportionality

“Proportionality” is a crucial requirement that discovery not be unreasonably cumulative or duplicative, not be otherwise available, and that its burdens are outweighed by its likely benefits. These fundamental principles appear to be nicely imported into the proposed revised scope rule. However, one phrase appears to be left out that we suggest be included:

“* * * Parties may obtain discovery regarding any non-privileged matter that is relevant [**and material**] to any parties claim or defense, **is not unreasonably cumulative or duplicative, is not otherwise available and is proportional** to the needs of the case considering* * *” See Rule 26(b)(2)(C)(i) and (ii).

The current proposal appears to contemplate that only the elements of Rule 26(b)(2)(C)(iii) be incorporated into the scope of discovery. However, the Committee might consider incorporating some elements of romanette (i) and (ii) as well, so that the Rule is fully self implementing.

⁴ Honorable Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit, Remarks at the E.D. Texas Judicial Conference: The State of Patent Litigation (2011).

⁵ See, e.g., English Civil Procedure Rules, The White Book Note CPR 31.6.3 (2), adopted pursuant to the recommendations of the Lord Woolf Committee Report in 1998; URCP Rule 26(b) (Utah 2011).

3. Vigilance

Vigilance must be maintained to successfully bring about meaningful change, particularly with regard to a revised scope of discovery. Recalling that “those who cannot remember the past are condemned to repeat it,” Committee members may recall similar significant attempts to amend the scope of discovery that did not succeed.⁶ In each instance, half measures were adopted that did little to address the *very real* problems of discovery abuse and misuse and, as is evidenced by the continued need to revisit the same issues of abuse, misuse and cost, these half measures did not achieve the Committee’s goals.

Having recalled the failures of the past, it would be folly to repeat them. Now, as the Committee seriously re-considers a significantly revised scope of discovery, the alarmist chorus once again warns that instances of abuse are overstated—existing in only the most complex of cases — or that they can be solved through judicial intervention or reliance on existing rules — comments quite similar to those that have been raised during past efforts to amend the scope of discovery. These same defenders of the unacceptable *status quo* fail, however, to point out that those cases are the source of most of the system’s problems, costs, and burdens.

One might be tempted to think that little has changed, but that is not the case. Indeed, much has changed since the very first missed opportunity: the problems have grown much worse, and costs and burdens have increased much more substantially. Moreover, we are fortunate in this instance to have the benefit of hindsight, which reveals both the mistaken logic of those that originally opposed a sensible scope and the failure of judicial intervention to address the problems of discovery. It is, therefore, with this in mind that we strongly encourage this Committee to remain steadfast in its commitment to finally address the problems of discovery and to resist the temptation to once again demur in favor of less controversial but ineffective tinkering.

B. Presumptive Limitations

Another key component of the LCJ package is to set presumptive limitations on discovery by, for example, identifying categories of information presumptively exempted from discovery and by placing specific limitations on the number of requests for production or the number of custodians allowed.⁷ Such bright line limitations would serve the dual purpose of both objectively limiting the amount of data subject to discovery—a necessary component of any successful package—and reducing the need for judicial intervention. Moreover, and perhaps more importantly, such presumptive limitations on discovery would further support the overarching efforts to affect the

⁶ LCJ, et al., *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century*, 1-2, 20-24 (May 2, 2010)

⁷ At the recent Dallas mini-conference, Judge David Campbell posed the question whether the “custodian” limitation would apply as technology moved to the cloud. This custodian concept is even more applicable when data is in the cloud, as ease of storage only increases the volume of ESI available. One of the advantages of storing your data in the cloud is that you can store more data at a more economical price. However, in order to effectively and efficiently use the data, a company must associate the data with particular employees (or custodians). So while the physical location of the ESI may change, the need to organize it for retrieval by a particular employee (custodian) will not.

necessary shift away from needlessly broad discovery and better focus the efforts of parties and counsel on what is truly at issue in the case.

III. Rule Based Economic Incentives

There is no meaningful way to curtail discovery abuse without acknowledging the economic incentives that drive the overuse of document requests. We, therefore, urge the Committee to recognize that limiting the amount of free discovery, and requiring the requester to bear the cost of additional discovery (subject to reasonable exceptions), are simple yet profound answers to this problem.

A rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party – the party in the best position to control the scope of those demands and, therefore, their cost. The rule would also discourage parties from using discovery as a weapon to force settlements without regard for the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests.

Conventional economic theory on price as a mechanism for efficient allocation of resources is adequate justification for a “requester pays” rule:

Judges should not confuse costs with penalties. There is nothing punitive about requiring an economic actor to pay for resources that are consumed in an activity that they undertake to make a profit. On the contrary, the philosophy behind a market economy is that resources will be used most efficiently if those who decide to consume them pay the marginal costs of production. For the same reasons that electricity will be wasted and over-consumed if government requires it to be supplied at a price below the marginal cost to make it, litigation will be over-supplied, wasting societal resources, if those who initiate litigation pay only a small fraction of its cost. [Sources omitted.]⁸

In addition, Professor Bone has described the law-and-economics version of utilitarianism as: “The optimal rule from a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs.” Robert G. Bone, *Twombly*, *Pleading Rules*, and *the Regulation of Court Access*, 94 Iowa L. Rev. 873, 910 (2009).⁹

⁸ E. Donald Elliott, *Twombly in Context: Or Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, 64 U. FLA. L. REV. 895 (2012); See also, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487 (1989) (Because regulating by incentives is more efficient than by judicial command and control, incentive-based procedure is the first-best solution.)

⁹ See also Redish, *Allocation of Discovery Costs and the Foundations of Modern Procedure*, 2 (forthcoming chapter in THE AMERICAN ILLNESS, The Yale Univ. Press [2012]), available at: <http://buckleysmix.com/wp-content/uploads/2010/10/Redish.pdf>; Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, Northwestern University School of Law, Law and Economics Series, No. 10–16 (2010); Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 U. FLA. L. REV. 845 (2012); Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 FLA. L. REV. 885, 893-4 (2012); Richard Esenberg, *A Modest Proposal for Human Limitations on*

Importantly, at the mini-conference, **both** leading legal-economics scholars Professors Bone and Elliott agreed that the Duke proposals under discussion did not go far enough, stressed the importance of adopting meaningful rule based, economic incentives, and deemed “**crucial**”, consideration of reversing the existing cost allocation default rule from producer pays to requester pays. It appeared that both shared Chairman Franks view that “[P]erhaps the most important issue to which your Committee should give very serious consideration is to reversing the “wrong-way” economic incentives of the current system by amending the Rules to require that each party pay the costs of the discovery it seeks. This will shift the cost-benefit decision onto the requesting party and thus encourage each party to manage its own discovery expenses responsibly.” [Trent Franks, Letter to Rules Committee, 032112](#).

The cost default rule proposed by LCJ will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to focus discovery on the merits and to settle meritorious cases before the completion of discovery. More cases will be tried and those cases will be fairer to both sides and more likely to be resolved on the merits without the perverse incentives created by the current system.

V. Preservation

A. Trigger

Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated – upon “reasonable anticipation of litigation” – it is an almost impossible task to determine confidently the commencement of the preservation obligation under the current varying interpretations of that standard. What is necessary to give useful guidance is a clear, bright line standard that will meaningfully clarify the time at which a duty to preserve information for purposes of litigation is triggered. As a result, we continue to urge this Committee to adopt a “commencement of litigation” standard. A “commencement of litigation” trigger rule would eliminate the current “gotcha” game of demanding unreasonably expansive pre-litigation preservation and the costs of over-preservation to respond to those demands.

While the proposed sanctions rule is a step in the right direction, adopting a “bright line” commencement trigger in addition to a narrower scope of discovery will better shift the paradigm. Courts will be empowered to focus on the merits of claims, rather than focusing on ancillary litigation about the date a duty to preserve was triggered or examining the scope of preservation efforts undertaken years before litigation commenced. Furthermore, a commencement trigger will have the immediate benefit of eliminating vast amounts of costly over-preservation, which now takes place in tens of thousands of potential claims that are never filed.

It is unlikely that key evidence will be lost between the accrual of a claim and the date of commencement, in light of the extremely large volume of data that pervades every corner of the

[Cyberdiscovery](#), 64 U. FLA. LAW REV. 965 (2012) (referencing, Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 643 (1989)).

digital age. Since plaintiffs control the timing of litigation, an action can be commenced in the rare case where a real concern exists that key evidence will be destroyed, triggering the duty to preserve. The same type of procedure is contemplated in Rule 27. A commencement trigger has the added benefit of ending the “gotcha game.” All parties will have clear understanding of when the duty to preserve is triggered. It is far easier for parties to pattern their conduct around a clear rule, than to pattern their conduct around the uncertainty caused by the myriad of interpretations of the reasonable anticipation of litigation trigger. The commencement trigger is a fair line that creates a framework for both plaintiffs and defendants to control preservation decisions and reduce gamesmanship.

A standard based on “commencement of litigation” will permit each district court to be engaged in the preservation process as necessary, (rather than second guessing the propriety of pre-litigation activity). It will subject the requesting party to Rule 11 (rather than the current absence of sanctions for overly broad preservation demands) and the preserving party to Rule 37 (rather than the court’s inherent power). This “commencement of litigation” rule should be supplemented with a rule or a comment that clarifies what is in reality already the law, i.e., that it is prohibited to destroy material with the intention of denying it to others in litigation. Such a bright line prohibition is easy to articulate and understand, and easy for line employees and others to comply with.

B. Scope of Preservation

Of course, a successful solution to the problems of costly and burdensome preservation must include a rule governing the scope of **all discovery** as we suggest above – not a separate scope of preservation rule. Therefore, we are encouraged that the Committee will be considering the new scope of discovery proposal. Discovery limited to information that is relevant, material and proportional to the claims and defenses in the case would provide a simple, straightforward, and easily understood solution to the problems of preservation—a simplicity that is sorely needed within the Federal Rules. Moreover, such a scope of discovery would have the immediate and direct effect of reducing the costs and burdens of discovery and preservation of information — precisely the problems the Committee has been attempting to address for many, many years.

C. Preservation and Sanctions: Proposed 37(e)

The draft Rule 37(e) is an important start towards promoting sound preservation practices that would, in turn, lead to reduced discovery burdens. The most meaningful improvement over the existing Rule 37(e) is the language in draft 37(e)(2)(A) concerning willful or bad faith conduct, and the language in (2)(B) concerning irreparable harm, which together would provide appropriate incentives for parties to make good decisions on preservation issues while keeping their focus on the underlying merits of the case.

Those provisions would also conserve judicial resources by reducing the incentives for parties to unduly press preservation disputes by creating satellite litigation about spoliation for the purpose of, at least in part, driving up the settlement value of their cases. Limiting the threat of preservation sanctions to instances of willful or bad faith conduct that cause irreparable harm would produce a highly positive result in our litigation system.

Perhaps just as importantly, draft 37(e)(2)(A) and (B) would have the effect of reducing the perceived need for over-preservation. Over-preservation is well known as one of the most inefficient and burdensome by-products of our civil justice system. Those provisions would promote responsible preservation by incentivizing producing parties to meet specifically described standards. This would be an efficient, self-executing mechanism that would promote sound preservation practices without requiring judicial intervention, litigation and extra cost.

Unfortunately, however, the list of factors for determining reasonableness and good faith in draft 37(e)(3) contains several provisions that will prevent the draft rule from achieving its potential—and in fact could cause more harm than good.

1. Notice and Reasonableness of Preservation

The first factor for determining reasonableness, draft rule 37(e)(3)(A), is an examination of “the extent to which the party was on notice that litigation was likely and that the information would be discoverable.” This vague standard will open up the potential of ancillary discovery on anticipation of litigation and state of mind regarding the potential claim and the scope of materials subject to preservation. A rule intended to reform discovery should not facilitate new topics for discovery, particularly discovery designed to probe work product and attorney client communications. It would also lead to over-broad preservation notices drafted before the parties know what the litigation is about. A better approach would be to define a preservation trigger that provides clarity to parties and judges. Draft rule 37(e)(3)(B) creates a similar concern by requiring an evaluation of the reasonableness of preservation efforts—a concept that could create a whole new area of discovery into parties’ efforts to preserve information. These issues would no doubt balloon in some cases to become their own satellite proceedings.

2. Reasonableness of the Request and Consultation

Draft Rule 37(e)(3)(C) requires, as part of determining the *producing* party’s reasonableness, willfulness and bad faith, an assessment of “***whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation.***” As a threshold matter, it would be an odd judicial standard to assess the *producing* party’s reasonableness and good faith on the basis of the *requesting* party’s request and consultations. But more profoundly, the result of draft 37(e)(3)(C) would be to create a new meet-and-confer (consultation) process that will in many cases defeat the entire benefit of replacing Rule 37(e). That is because, as a practical matter, the series of back-and-forth letters outlining and responding to preservation demands, followed by consultation, will inevitably focus on the topic of preservation rather than on the merits of the case. Furthermore, the nature of such communications is entirely predictable because the burden of preservation falls exclusively on the producer, whose interest in containing costs is inapposite to the interests of the requestor, who benefits tactically from driving costs up.

The discussions contemplated by this amendment are occurring in cases today. It would be unrealistic to expect that a higher volume of words exchanged on the subject, without changing the fundamental incentives, would have any effect other than thwarting the very goals of the

amendment. Rather than incentivizing parties to be more cooperative, transparent and focused, it will likely make them more adversarial, mistrustful and cagey. Requesting parties will have little incentive to compromise and producing parties will, therefore, have little incentive to spend the time to be transparent, cooperative and forthcoming.

The harmful effects of draft rule 37(e)(3)(C) would be particularly acute in cases of asymmetrical litigation, where one party happens to possess the predominant share of information. This has everything to do with the practical realities and very little to do with the demeanor of counsel or the level of judicial management. The requesting party in such cases has almost no incentive to formulate objectively reasonable demands because it does not have to live up to the same standard of preservation it seeks. The requestor bears none of the costs of preservation. It suffers none of the intrusion and disruption of its business. Rather, the requesting party actually benefits from making the broadest demands it can fashion, either by simply increasing the costs on the other side or by finding some data loss it can use as leverage in motion practice.

Our system frequently rewards such behavior in the form of quicker and larger settlements, and it does not present a downside. Producing parties who resist have to seek court protection, and courts are not well situated to sort out preservation issues, which are frequently even more technical and nuanced than discovery disputes. Even when courts are inclined to manage preservation disputes, they may well require the requestor to submit extensive evidence as to their IT systems, business practices and costs—some of which information could require expert testimony. And all of this is for the purpose of testing the negative—*i.e.*, that a particular source of ESI is *not* worth preserving based on the proportional analysis and is *not* likely to contain material that leads to the discovery of admissible evidence.

The predictable, real-world response to draft rule 37(e)(2)(C) as drafted will be to do one or more of the following: (1) over-preserve by a large margin in an effort to blunt the requestor's tactics, despite the great cost and uselessness of the exercise; (2) settle cases based on preservation cost analysis rather than evaluating the merits of the claims; or (3) take preservation disputes to the judge. None of these outcomes comports with the goals of re-writing Rule 37(e).

3. Resources, Sophistication and Fairness

The language of draft rule 37(e)(3)(D), requiring an examination of “the party’s resources and sophistication in litigation,” is well-intended, but virtually certain to produce unfair results. The question of (e)(3) is whether a party acted willfully or in bad faith. The draft language suggests that the facts of one party’s intent should be judged on a different standard than the facts of another party’s. This test is fundamentally lacking in objectivity and justice. Large companies that act in good faith should be treated the same as small companies that act in good faith, and vice versa. There is simply no basis for codifying a different standard for one or the other.

CONCLUSION

The Rules Committee has long recognized the danger the information explosion poses to our civil justice system. In that time, the problems of discovery and preservation have worsened

dramatically and, left unchecked, they will only continue to grow. Our system is crying out for national, policy-based solutions designed to provide uniform, real world relief for real world problems. We applaud the Committee's progress so far on the path toward developing an interrelated package of incentive based rule amendments governing discovery, preservation, and costs and will continue to work with the Committee toward their adoption.

Respectfully submitted,

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