COMMENT

To

THE CIVIL RULES ADVISORY COMMITTEE

SUPPORTING PUBLICATION OF PROPOSED RULE 37(E) AND THE DUKE SUBCOMMITTEE PROPOSALS FOR PUBLIC COMMENT: A MEANINGFUL STEP TOWARDS ADDRESSING PRESERVATION, DISCOVERY AND COSTS

On Behalf of

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FEDERATION OF DEFENSE & CORPORATE COUNSEL
DRI – THE VOICE OF THE DEFENSE BAR
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I. Introduction and Summary

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), DRI – The Voice of the Defense Bar (DRI) and the International Association of Defense Counsel (IADC) respectfully write to support publication of proposed Rule 37(e) and the Duke Subcommittee proposals for public comment, to urge the Committee not to publish a version of proposed Rule 37(e) that would inject a tort standard into the Federal Rules, and to share some concerns that we plan to address during the public comment period.

The proposals before the Committee represent material progress toward the three pillars of discovery reform: (1) a national and uniform spoliation sanction approach; (2) a fair and practical revised scope of discovery; and (3) incentive-based cost default rules.[1] We believe it is critical to address all three in order to rescue the civil justice system, which is in "serious need of repair."[2] Our current system of discovery encourages broad, expensive, and often unnecessary discovery which thwarts the availability of a just, speedy and inexpensive determination of the issues.

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

[2] Am. College of Trial Lawyers & Inst. for the Advancement of the Am. Legal Syst., *Final Report* 2 (2009), http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i .

Proposed Rule 37(e) addresses a profound cost-driver in modern discovery: the lack of clarity and uniformity in the standards for imposition of spoliation sanctions among the Federal Circuits and within them. We applaud the Committee and its Discovery Subcommittee for devoting extensive time and effort to this proposal, which by spelling out a single, uniform standard for culpability holds the promise of providing predictability which will reassure and address the endemic problem of over-preservation.

We are greatly concerned, however, about the proposal to add a culpability standard of "negligent or grossly negligent" to Rule 37(e). It would enshrine *Residential Funding Corp. v. DeGeorge Financial Corp.*[3] and cases like it in the Federal Rules instead of rejecting them, as the Committee has stated it intends to accomplish. The idea of expressly authorizing sanctions for this level of culpability is such a tectonic shift that it will "draw fire," absorbing all of the public commentary. It is totally inconsistent with the essential thrust of the base recommendation that the uniform standard for harsh sanctions should be "willful" or "bad faith" conduct. We strongly urge the Committee not to move forward with this proposal.

Ultimately, risking the whole enterprise to reform Rule 37(e) due to a desire to handle a theoretically minor issue – the fear that courts may be unable to handle "Act of God" or no-fault losses – is flawed. There are other sound ways to handle the issue. Accordingly, we recommend that the Committee eliminate (e)(1)(B)(ii) altogether from its primary draft and simply publish two versions of proposed Rule 37(e): one that would apply to preservation of all types of evidence, and the other limited to ESI. This will help focus public comments on the fundamental approach outlined by the Committee. On the contrary, including (e)(1)(B)(ii) would result only in unnecessary public commentary to reinforce facts that the Committee has explored extensively since the Duke Conference – that costly over-preservation, the spoliation "gotcha game," and fear of harsh sanctions for negligent conduct is eroding our justice system.

We also support publication of the Duke Subcommittee proposals.

Publication of both proposals in August is key because the status quo is not static. Courts and parties – each and every day – wrestle with complicated discovery burdens at the cost of horrendous over-preservation and unjust results. As the volume of data increases, and the propensity to commence collateral sanction proceedings continues to increase, so will our judicial system suffer by distracting judges, lawyers and parties from the merits of claims and defenses. It is time to move forward.

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

Although we strongly oppose the exception based on the lesser tort standard, we support publication of proposed Rule 37(e) in two versions – one restricted to ESI – for public comment because both versions would establish the uniform rule that spoliation sanctions should be limited to cases where the failure to preserve information caused "substantial prejudice" ***and*** was "willful or in bad faith."[4] Only a single, uniform standard can "reassure" those who would

[3] 306 F.3d 99 (2d Cir. 2002).

[4] Microsoft's submission to the Committee in 2011 gave concrete examples, reporting that for every "one-page trial exhibit, Microsoft . . . preserves almost 340,000 pages." The new Rule, combined with a

otherwise be tempted to practice costly "over-preservation" for fear of being branded a spoliator. Moreover, only sufficiently comprehensive rule-based remedies will convince courts to refrain from using the "looser notions of inherent powers" to "circumvent the protections established by the new Rule 37(e)."[5]

Unfortunately, however, proposed Rule 37(e) contains four elements that would prevent the proposed rule from achieving its full potential: the current (e)(1)(B)(ii) exception; an ambiguous "willful or bad faith" culpability standard, the lack of a bright-line preservation trigger, and a list of vague factors that belongs in the Committee Note rather than the Rule.

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

We support the Committee's removal of the no-fault exception from proposed Rule 37(e). There is no reason or need, based on policy or case law, to authorize use of a severe penalty due to an Act of God or the loss of information by third parties to the litigation. The same logic, moreover, applies to losses caused by party negligence and gross negligence. Absent willfulness and bad faith, there should be no sanction.

Moreover, there is a very serious possibility that courts would misread their authority and simply order sanctions for such lesser culpability at any point that an unknown loss is argued to be important, which, we can be assured, will be virtually every case where a sanction is sought. This exception is not needed to preserve current spoliation case law and is harmful because it would perpetuate the "gotcha game." We respectfully urge the Committee to strike subsection (e)(1)(B)(ii) from any final draft(s) to be submitted to the Standing Committee.

1. Interjection of Negligence and Gross Negligence Into the FRCP Risks Creation of a Spoliation Tort.

The interjection of negligence and gross negligence into Rule 37(e) would risk creation of a tort-based substantive right that would significantly hinder the effort to introduce clarity and uniformity.[6] As drafted, the Committee's proposal would require parties to set forth the elements necessary to establish an independent cause of action for negligence: a duty of care, a breach of duty, causation and damages. This showing creates the need for ancillary and unnecessary mini-

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revised Rule 26(b)(1), would materially reduce such wasteful over-preservation. *See,* Robert D. Owen, *Skating Along the eDiscovery Cliff: Will Newly Proposed Civil Rules Amendments Help to Refocus Litigation on the Merits? (Part I)* 13 DDEE 51 (BNA) (Jan. 31, 2013).

[5] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013,* 100-101, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf#pagemode=bookmarks.

[6] The proposed rule could even be viewed as an endorsement of the tort of negligent spoliation. Currently, there is no independent cause of action for spoliation under federal law. *See Lombard v. MCI Telecomms. Corp.*, 13 F. Supp. 2d 621, 627 (N.D. Ohio 1998) (granting summary judgment on plaintiff's asserted claim for spoliation of evidence under federal law, "because no such independent cause of action exists"). Many courts have refused to recognize an independent tort of negligent spoliation of evidence by a party litigant when applying state law. *See* Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R. 5th 61 § 3[b] (2002) (collecting cases).

trials regarding proof of negligence during the discovery process, further increasing the cost of discovery (and coming very close to improper substantive rulemaking in violation of the Enabling Act).

Moreover, it could have unintended consequences on protected private activity. Parties that acted in good faith and simply misplaced or discarded documents without fault, such as under a document retention policy, could find themselves subject to harsh sanctions, the very problem that the base rule was intended to address. A determination of what is sufficient to trigger the exception would differ from judge to judge, and from court to court, leading to inconsistency amongst the federal courts. This potential exposure could cause individuals and entities to take extraordinary measures to retain documents, at substantial cost, and perpetuate the problems now at issue.

In sum, we urge the Committee not to publish a version of proposed Rule 37(e) with a negligence or gross negligence standard.

2. Removing the (e)(1)(B)(ii) Exception Will Not Overturn Existing Spoliation Case Law.

Proposed Rule 37(e) does not need the (e)(1)(B)(ii) exception to cover situations where loss of discoverable information is prejudicial to the requesting party. In the oft-cited case of *Silvestri v. GM*,[7] for example, where a dismissal was based on the fact that an automobile was unavailable for analysis through no fault of the defending party, there was ample evidence that, in fact, the loss of the evidence "may have been" deliberate.[8] A finding of "willful" activity could have been made. Moreover, there were other remedial steps available, such as preventing testimony or allowing comment at the trial on the fact that GM was disabled from the inspection.

In *King v. American Power Conversion Corp.*,[9] the alleged source of a fire was destroyed, after suit was filed, by a third party, which is a typical type of case raising these issues. The court held that: "[a]s in *Silvestri*, [plaintiffs'] conduct, although perhaps insufficient by itself to justify dismissal, does not preclude dismissal because it is of sufficient culpability in light of the severity of the prejudice to American Power's ability to defend. Accordingly, we reject the argument that the Kings' conduct prevents dismissal."[10]

A similar result was reached in *State Farm Fire & Casualty Co. v. Potomac Electric Power Co.*,[11] where the court specifically noted that disposing of the key items of evidence was sufficiently egregious to warrant dismissal.[12]

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[7] 271 F.3d 583 (4th Cir. 2001).
[8] *Id.* at 592. (noting that "[Silvestri] **knew** the significance of preserving the automobile . . . yet Silvestri took no steps to assure General Motors equal access to the evidence or to give General Motors notice of his claim." (emphasis added)).
[9] 181 Fed. Appx. 373 (4th Cir. 2006).
[10] *Id*. at 378.
[11] 2010 U.S. Dist. LEXIS 110086 (D. Md. Oct. 15, 2010).
[12] *Id*. at *8-10.

In other words, the results in each of the above cases would not have changed if sanctions were sought pursuant to the proposed Rule 37(e) without the (e)(1)(B)(ii) exception.

3. The (e)(1)(B)(ii) Exception Will Encourage Expansion of the "Gotcha Game."

It is well known that the "gotcha game" associated with modern spoliation motions is a wide-spread problem.[13] The (e)(1)(B)(ii) exception in proposed Rule 37(e) would only cause the problem to expand – not tame it – because it will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the "irreparably deprived" language. This will swallow the Rule.

Eliminating the (e)(1)(B)(ii) exception, on the other hand, will help ensure that proposed Rule 37(e) delivers what it is designed to provide: relief from inconsistent national standards and a change of the paradigm. By concentrating the imposition of sanctions on "bad actors" rather than on mistakes, courts will be able to focus on the merits of litigation, and the paradigm will shift to whether enough evidence exists to prosecute or defend a claim, rather than whether any mistakes were made while trying to ensure every piece of relevant evidence was preserved. Only by removing the (e)(1)(B)(ii) exception will the Committee uphold the original intent and purpose of proposed Rule 37(e).

4. The (e)(1)(B)(ii) Exception Is Unneeded.

One important characteristic of discoverable information in electronic form is that it is often found in—and thus available from—many different sources. It is an extremely rare circumstance when key evidence is lost or destroyed to such a degree that a party is irreparably deprived of any meaningful opportunity to present a claim or defense.

It is even rarer that the loss of a key piece of evidence occurs through no one's fault. Even if a potential litigant lacks possession, custody or control over a key piece of evidence, action can be taken to protect the evidence (such as initiating litigation, serving a subpoena, otherwise inspecting the key evidence or advising a potential adversary of the whereabouts of the evidence[14]) and to recover evidence that is "lost." Crafting a separate rule[15] for the one-in-a-

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

[14] *See, Silvestri v. GM*, 271 F.3d 583, 591 (4th Cir. 2001) ("If a party cannot fulfill [the] duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party

million case where key evidence is genuinely lost or destroyed through little or no fault of a party is not worth the risk of undermining the entire Rule 37(e).

B. Sanctions Should Require a Showing of "Willfulness and Bad Faith" in the Absence of Definitions of Each.

We have reservations about the failure to define "willfulness" and "bad faith" in proposed Rule 37(e), and therefore suggest that proposed Rule 37(e)(1)(B)(i) use the conjunctive "and" rather than "or" to avoid confusion. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, but was not done in bad faith. That act might meet the "willful or in bad faith" prong of the test, a result the Committee certainly does not intend. There is no need to risk the potential of such confusion concerning willful acts in good faith when it would be so simple to remedy the language while adhering to the Committee's intent to capture only acts that are both willful and in bad faith. We therefore urge the Committee to change the language of this standard to the conjunctive, "willful *and* in bad faith," prior to publication.

C. A Bright-Line Preservation Trigger Is Needed.

Proposed Rule 37(e) needs a clear, bright-line standard to clarify the time at which a duty to preserve information is triggered. Currently, preserving parties are left to guess, which inevitably leads to wasteful over-preservation, as the Committee discussed at the 2011 Dallas Mini-conference. Unfortunately, proposed Rule 37(e) – even with the removal of "reasonably" – leaves the current "reasonable anticipation of litigation" standard in the rule's opening sentence:

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

We urge the Committee to revisit the trigger question and to adopt a simple, predictable "commencement of litigation" trigger for affirmative preservation, combined with a general prohibition against destroying material with the intention of keeping it away from a potential adversary. We support this standard because the clarity of a bright-line trigger rule would yield vast benefits without materially damaging any party's ability to prove or defend any claim. Furthermore, a commencement trigger would have the immediate benefit of eliminating vast amounts of costly over-preservation that now takes place in tens of thousands of potential claims that are never filed.

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notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.").

[15] LCJ has dubbed proposed subsection 37(e)(1)(B)(ii) as the "No Fault Exception" to proposed Rule 37(e)'s required showing of substantial prejudice and willfulness or bad faith, that would allow imposition of case-altering sanctions where, even though there may not have been willfulness or bad faith, a party was "irreparably deprived … of any meaningful opportunity to present a claim or defense" by a failure to preserve. *See* LAWYERS FOR CIVIL JUSTICE, THE "NO FAULT EXCEPTION" OF PROPOSED RULE 37(e)(1)(B)(ii) SHOULD BE STRICKEN SINCE IT IS INCONSISTENT WITH THE RULE'S SUBSTANCE, PURPOSE AND INTENT (Feb. 10, 2013).

The most common objection to a commencement trigger is the existence of auto-delete functions on most companies' email systems, which purge emails that have reached a pre-set age. Since plaintiffs control the timing of initiation of litigation, they can undertake steps to notify potential defendants in advance of litigation if a concern exists that key evidence will be destroyed. The same type of pre-litigation notice is contemplated in Rule 27. It is far easier for parties to pattern their conduct around a clear rule than to navigate the uncertainty caused by the myriad of interpretations of the "reasonable anticipation of litigation" test. The commencement trigger is a fair line that creates a framework for both plaintiffs and defendants to control preservation decisions and reduce gamesmanship.

It is also important to keep in mind that auto-delete programs exist for perfectly valid business reasons and are entirely legal, permissible and appropriate. They are not instituted for the purpose of destroying evidence. In fact, the Supreme Court has given its unanimous and express blessing to document retention policies.[16] Additionally, the programs are highly unlikely to delete every copy of a particular email because auto-deletion of one email will not cause all of the other copies to disappear. Technology has also made the forensic retrieval of deleted items much more available.

Companies and other entities that generate ESI have many reasons not to delete data simply for the purpose of thwarting future law suits. Many, including the United States Government, *themselves* have valid operational reasons to maintain relevant information for longer than minimal periods of time, and so do not implement auto-delete programs. If auto-delete settings became a problem, , there are many regulatory rule-making or legislative bodies equipped and ready to act. Additionally, other actors in our country's complex economy have influence over how businesses manage their information. Insurers, for example, could raise or lower quoted insurance rates based on a particular insured's information management practices, thereby constraining a company from adopting unwise information governance policies, such as very abbreviated auto-delete periods.

For these reasons, we urge the Committee to incorporate a "commencement of litigation" trigger standard into proposed Rule 37(e).

D. The Listed Factors in Rule 37(e)(2) Belong in the Committee Note.

The five factors set forth in proposed Rule 37(e)(2) are intended to help a court determine whether a party "failed to preserve discoverable electronically stored information that should have been preserved" and whether that failure "was willful or in bad faith."[17]

[16] *Arthur Anderson, LLP v. United States*, 544 U.S. 696, 704 (2005) ("It is, of course, not wrongful for a manager to instruct his employees to comply with a valid retention policy under ordinary circumstances.").

[17] Advisory Committee on Civil Rules, *Agenda Materials, Norman, OK, April 11-12, 2013*, 161, http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-civil-procedure.aspx.

The purpose for listing factors is plainly different from the articulation of rule, which is intended to proscribe or authorize conduct. The factors serve as a "checklist" of some – not all – the issues involved, but without any normative value.

Consequently, the factors should be treated differently from the rule text – they should be incorporated into the Committee Note. Doing so would not only reflect the Committee's historical practice with factors, but would also be more consistent with the goals of providing a uniform standard and clear guidance to parties. It would also mitigate the seriousness of some of the issues that are sure to emerge as courts drill down into the language of the factors, including the following:

1. Proposed subsection 37(e)(2)(A) requires an examination of "the extent to which the party was on notice that litigation was likely and that the information would be discoverable." The reference to notice will perpetuate ancillary discovery and consume judicial resources on the issue of anticipation of litigation as well as state of mind regarding the potential claim and the scope of materials subject to preservation.

2. Proposed subsection 37(e)(2)(B) requires an evaluation of the reasonableness of preservation efforts—a fundamental concept also likely to result in a whole new area of discovery into parties' efforts to preserve information. Moreover, it risks perpetuating the unfortunate experience under current Rule 37(e) whereby some courts equated the *Zubulake* dictum regarding litigation holds as a per se requirement of written litigation holds as the sine qua non of compliance. Codifying the *Zubulake* approach would perpetuate the current over-preservation problem by focusing on a party's efforts to preserve all relevant evidence instead of shifting the focus to whether sufficient evidence exists to prosecute or defend a claim.

3. Proposed subsection 37(e)(2)(C) requires the court to assess "whether the party received a request to preserve information," as well as "whether the request was clear and reasonable," and whether the person who made the request and the party engaged in "good-faith consultation regarding the scope of preservation." This will only encourage a new practice of back-and-forth letters that could defeat the benefit of replacing Rule 37(e) by focusing such time and attention to the topic of preservation rather than the merits of the case. Analyzing this factor, particularly if it is incorporated into the rule, is therefore unlikely to help courts find clarity as to the reasonableness and good faith of the producing party.

4. Proposed subsection 37(e)(2)(D) requires an examination of "the proportionality of the preservation efforts to any anticipated or ongoing litigation." Although proportionality is an extremely important matter, properly analyzed in the context of preservation conduct, placing this factor in the rule text without allusion to illustrative limits on types of discoverable information is of limited immediate value.

5. Proposed subsection 37(e)(2)(E) requires courts to evaluate whether the party "timely sought the court's guidance on any unresolved disputes about preserving discoverable information." While such a consideration may be useful in some cases, requiring it as a

rule will largely be confounding since most preservation questions arise pre-litigation when no court is available to provide guidance.

Placing these factors in the rule text risks transforming them into required steps, not merely illustrative factors. None of these outcomes comports with the Committee's goals in re-writing Rule 37(e). All of them would be mitigated by placing the factors in the Committee Note rather than in the text of 37(e).

Conclusion on Proposed Rule 37(e)

In sum, the Committee's initial draft of proposed Rule 37(e) – without the "Act of God" exception – represents a meaningful advance in addressing the problem of over preservation and has the potential to reduce substantially the needless burdens and costs that are affecting all participants in the civil litigation system. We urge the Committee not to inject a "negligent or gross negligent" standard into the Federal Rules in an attempt to deal with a highly theoretical issue. The best way for the Committee to elicit the most meaningful public comment on the salient issues is to publish two versions of the proposed rule, both excluding the exception, one applicable to all evidence and the other limited to ESI. We also urge the adoption of a "willful *and* in bad faith" culpability standard, in the absence of a clearer articulation, much as Connecticut has done.[18] Finally, because proposed Rule 37(e) would better fulfill the Committee's objective with a few modifications, we look forward to the opportunity during the public comment period to explain the importance of adding a bright-line trigger and placing the five factors in the Note.

III. THE DUKE SUBCOMMITTEE PROPOSALS

We support Committee approval of the updated Duke Subcommittee proposals for publication in August together with proposed Rule 37(e). At the same time, however, we urge the Committee to ensure the effectiveness of the Duke Subcommittee proposals by: (i) incorporating a materiality requirement into Rule 26(b)(1); (ii) refraining from inserting "parties" into Rule 1 or a duty of "cooperation" into the Note; and (iii) removing the provisions creating "sanctions torts" from Rules 34 and 37.

A. Rule 26(b)(1): Adding a Materiality Standard Would Further the Committee's Goal of Encouraging Proportional Discovery.

The proposed revision of Rule 26(b)(1), which would incorporate the existing Rule 26(b)(2)(C)(iii) proportionality factors into Rule 26(b)(1), would be an important but modest change. Studies have shown that the perceived value of wide-open discovery as a tool for justice is mistaken, and that the percentage of information ultimately relied upon by parties to litigation is a mere fraction of what is exchanged.[19] Thus, a rule change that encourages proportionality

[18] Connecticut Practice Book § 13-14(l) (2013) (no sanctions "in the absence of a showing of intentional actions designed to avoid known preservation obligations").
[19] Lawyers for Civil Justice et al., *Statement on Litigation Cost Survey of Major Companies* 3 (2010), http://www.uscourts.gov/rulesandpolicies/federalrulemaking/overview/dukewebsitemsg.aspx (select "Empirical Research").

will help to mitigate the unjustifiable expense and burden of unnecessary preservation and discovery.

The Committee has correctly observed that defining "relevant information" to include that which is "reasonably calculated to lead to the discovery of admissible evidence" has "failed in practice."[20] Why? Because "[t]oo many lawyers, and perhaps judges, understand the rule to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit of relevant information may be uncovered."[21] Although the proposed amendment to Rule 26(b)(1) would be helpful, expansive perceptions of relevance are unlikely to be altered by this rule change alone and will persist in fostering disproportional discovery unless a materiality standard is added to proposed Rule 26(b)(1), as follows:

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

Materiality as a standard for discovery is supported by the same logic as relevance. The Committee has noted, in describing why the "reasonably calculated" language has failed to establish a meaningful standard, that "[i]t is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed."[22] The same holds true for materiality: it is difficult to see why discovery should be allowed into matters that are immaterial to any party's claims or defenses. After all, as noted by the Federal Circuit, the purpose of discovery is "the gathering of *material* information"[23] related to properly plead claims in preparation for litigation. Discovery is not "an open range for plaintiffs to ride roughshod in the hope that their claims may find support."[24] Discovery is not a fishing expedition. Unfortunately, however, judicial definitions of "relevance" continue to be quite broad, and the entrenched notion of virtually limitless discovery remains common.[25] In short, defining modern discovery as information that

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[20] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 227.
[21] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 227.
[22] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 227.
[23] An E-Discovery Model Order, Introduction 2 (2011) *available here*: http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html (emphasis added).
[24] *Rojas v. Brinderson Constructors Inc.*, 567 F. Supp. 2d 1205, 1212 (C.D. Cal. 2008).
[25] *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2013 WL 474380 (N.D. Ill. Feb. 7, 2013) ("Underlying many of the disputes between the parties is what is relevant. And so we begin with the meaning of relevance under the Federal Rules of Civil Procedure. Consistent with the overall design of the Federal Rules of Evidence and the plain language of Rule 401, the federal courts are unanimous in holding that the definition of relevant is expansive and inclusive, *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 387–388, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008); *Daubert*, 509 U.S. at 587, and that the standard for admissibility is very low. *United States v. Needham*, 377 Fed.Appx. 84, 85–86 (2nd Cir.2010); *United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir.2007); *United States v. Murzyn*, 631 F.2d 525, 529 (7th Cir.1980) ("minimal"); *United States v. Curtis*, 568 F.2d 643, 645 (9th Cir.1978). The question is not whether the evidence has great probative weight, but whether it has any, and whether it in some degree advances the inquiry. *Thompson v. City of Chicago*, 472 F.3d 444, 453 (7th Cir.2006).

is both relevant *and material* to the claims and defenses of any party is the best way to ensure proportionality.

Materiality in the U.K. A materiality requirement has been successfully incorporated in the English justice system for nearly 15 years, and has demonstrated success. In 1998, the English rules of procedure were significantly amended to include, for the first time, the principle of proportionality. The changes resulted in a substantial improvement in discovery. Pursuant to Civil Procedure Rule 31.6, "standard disclosure" requires a party's production of: "the documents on which he relies," the documents that adversely affect his own case or the case of another party, the documents that support another party's case, and the documents that he is specifically required to disclose by a relevant practice direction. Further, according to the White Book[26]—an established and authoritative source on the Civil Procedure Rules in England[27]—Rule 31.6 requires disclosure *only of those documents which materially affect the case of a party to the action*. Indeed, the White Book specifically limits standard disclosures to:

> (1) The *parties'* own *documents*; these are the documents which a party relies upon in support of their contentions in the proceedings;
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> (2) *Adverse documents*: these are documents which to a material extent adversely affect a party's own case or support another party's case.[28]

The White Book specifically *excludes* from standard disclosure both (i) "relevant documents" (defined as "documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case" and further described as "part of the 'story' or background" or documents which although relevant "may not be necessary for the fair disposal of the case"[29]) and (ii) "train of inquiry documents" (described as "documents which may lead to a train of inquiry enabling a party to advance his own case or damage that of their opponent"[30]). In short, as noted by Chris Dale, a consultant at the e-Disclosure Information Project, evidence that is merely "[r]elevant is irrelevant to standard

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As Dean McCormick has aptly phrased it, to be relevant, evidence need only be a brick, not a wall. *See also Huddleston v. United States,* 485 U.S. 681, 691, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) (" '[I] ndividual pieces of evidence insufficient in themselves to prove a point may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.' ").
As expansive and inclusive as the definition of relevancy is under Rule 401 of the Federal Rules of Evidence, the standard for relevancy under the discovery provisions of the Federal Rules of Civil Procedure is even broader, *Hofer v. Mack Trucks,* 981 F.2d 377 (8th Cir.1992), for the information sought need not itself be admissible. It is enough if it appears reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1).")

[26] 1 THE WHITE BOOK SERVICE (The Right Honourable Lord Justice Jackson ed., 2012) [hereinafter WHITE BOOK].

[27] Although considered an authority, like the Advisory Committee's notes, the White Book is not binding on the courts.

[28] WHITE BOOK, *supra* note 26, at 909.

[29] WHITE BOOK, *supra* note 26, at 909.

[30] WHITE BOOK, *supra* note 26, at 909.

disclosure."[31] After 15 years, this model of disclosure remains in effect and has resulted in significant curtailment of excess discovery.

Materiality in the I.B.A. Rules. A materiality standard is also present in the rules governing the exchange of evidence in international arbitration. Specifically, Article 3.3 of the International Bar Association's Rules on the Taking of Evidence in International Arbitration allows requests for documents "relevant to the case and material to its outcome." Article 3.3 "is designed to prevent a broad 'fishing expedition', while at the same time permitting parties to request documents that can be identified with reasonable specificity and which can be shown to be relevant to the case and material to its outcome."[32]

Materiality in the United States. Both Connecticut[33] and New York[34] impose a materiality standard for discovery. Although the standards are interpreted quite liberally, any notion that a materiality standard is incompatible with American discovery is directly contradicted by these states' efforts to impose one.

Fundamentally, "proportionality" and "materiality" are merely different expressions of the same idea—the idea that discovery should be "worth it." Thus, incorporating a materiality standard in Rule 26(b)(1) should be seen as a means of strengthening the imported Rule 26(b)(2)(C)(iii) proportionality factors. Adoption of such a proposal would serve to align discovery more closely with the needs of individual cases—a positive result that would comport well with the Committee's articulated goal "to adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938."[35] We urge the Committee to make this improvement.

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[31] Chris Dale, *Relevant is irrelevant to standard Disclosure*, THE E-DISCLOSURE INFORMATION PROJECT (Apr. 9, 2008, 12:23 AM), http://chrisdale.wordpress.com/2008/04/09/relevant-is-irrelevant-to-standard-disclosure/.

[32] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 ABA Rules on the Taking of Evidence in International Arbitration 8 (2010), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[33] Connecticut Practice Book § 13-2,(2013) ("**Sec. 13-2 Scope of Discovery; In General** In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, a party may obtain in accordance with the provisions of this chapter discovery of information or disclosure, production and inspection of papers, books, documents and electronically stored information ***material to the subject matter involved in the pending action***, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, and which are within the knowledge, possession, or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility that it could otherwise be obtained by the party seeking disclosure.") (emphasis added).

[34] N.Y. C.P.L.R. § 3101 Scope of Disclosure (McKinney 2009) ("(a) Generally. There shall be full disclosure of all matter ***material and necessary*** in the prosecution or defense of an action, regardless of the burden of proof, by: . . .") (emphasis added).

[35] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 227.

B. Adding "Parties" to Rule 1 and Describing a Duty of "Cooperation" in the Note Will Lead to Ancillary Litigation.

The idea of mandating cooperation in the text of Rule 1 has been appropriately abandoned,[36] but the Duke Subcommittee proposals now include an amendment to Rule 1 and the Committee Note that would achieve unfortunate results. The amended rule would state that the rules should be "employed by the court and the parties."[37] The purpose of this change is so that "[t]he concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court."[38] We oppose these changes because they are unnecessary, will not improve cooperation, and will create ancillary litigation over obligations of counsel.

The Committee has already made clear that lawyers share the court's duty to exercise the authority provided by the rules. The Committee Notes for Rule 1 explained the 1993 amendment as follows:

> The purpose of the revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. *As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.* (Emphasis added.)

This clear statement would not be improved by requiring parties to "employ" the Rules. On the contrary, such a change would confuse what all participants in our legal system understand: courts construe and administer the Rules, and the lawyers and parties comply with them. To make such a change only as a vehicle to facilitate the encouragement of cooperation in the Note is both unnecessary and unwise.

Adding a requirement (even in the Note) of "cooperative and proportional use of procedure" is unlikely to bring about a meaningful increase in civil behavior and is highly likely to bring about negative, unintended consequences. As the Committee pointed out in its most recent report to the Standing Committee, "there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments."[39] Moreover, a new and undefined obligation that many may regard as at odds with counsel's duties to clients is likely to cause confusion, accusation and diverting motion practice. Ample resources are already devoted to promoting ethical and practical cooperation without adding the complications of making it a rule-based obligation.

We respectfully suggest the Committee could achieve a much more profound improvement in discovery behavior by focusing on promulgating unambiguous, bright-line, self-executing rules

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[36] Advisory Committee on Civil Rules, *Agenda Materials, Norman, OK, April 11-12, 2013*, *supra* note 17, at 88.
[37] Advisory Committee on Civil Rules, *Agenda Materials, Norman, OK, April 11-12, 2013*, *supra* note 17, at 89.
[38] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 237.
[39] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, *supra* note 5, at 237.

that would provide participants in our legal system the kind of clarity that avoids uncooperative acts and the need for extraordinary judicial resources.

C. The Proposed Changes to Rules 34 and 37 Should Be Abandoned Due to the Risk of Creating "Sanction Torts. "

We oppose the Duke Subcommittee proposals that would amend Rules 34 and 37 because they would give rise to "sanction torts" and spur new ancillary litigation. Specifically, the proposed amendment to Rule 34(b)(2)(B) would require parties choosing to produce ESI (rather than allowing inspection) to complete production "no later than the date for inspection stated in the request or a later reasonable time." The amendment to Rule 37(a)(3)(B)(iv) would create a motion to compel production for failure to meet that schedule. On its face, this language may seem innocuous. Inspection of ESI, however, is simply not a practical or realistic alternative to its production because of the difficulties of creating an inspection protocol for ESI that does not first require its collection and review or require the acceptance of the incredible risk and considerable expense of allowing direct access to a responding party's information systems. Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it.

Similarly, the proposed amendment to Rule 34(b)(2)(C) requiring specification of whether any responsive material is being withheld would create yet another discovery obligation that would only serve to add to the burden of discovery and would result in additional delays and inevitable disagreements regarding compliance. We urge the Committee to drop these amendments from the Duke Subcommittee proposals.

D. Numerical Limitations Are Helpful.

The use of numerical limits on depositions and interrogatories has worked in the past, and we support its extension to requests to admit. We support reducing to 15 the presumptive number of Rule 33 interrogatories; reducing depositions to 5 per side and the presumptive duration of a deposition to six hours; and adopting a presumptive limit of 25 for Rule 36 requests to admit. 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.

E. Changes in the Initial Stages of the Litigation Process Are Minor.

The Duke Subcommittee proposals concerning the early stages of discovery and case management are thoughtful and generally sound, but unlikely to result in a significant improvement in the orderly administration of justice. They would shorten the time for service under Rule 4(m) and for issuance of a scheduling order under Rule 16(b). They would change the Rule 26(d) moratorium and would encourage actual conferences prior to the issuance of scheduling orders and informal conferences prior to discovery motions.

The current structure of discovery timing seldom causes significant delays in the progress of lawsuits. And while there can be no doubt that diligent lawyers, constructive parties, and an active and interested judge can manage litigation effectively, it is equally true that courts already

have the authority to tailor discovery for each and every case. Therefore, these proposals will not make any difference to the underlying problems, which include overbroad and burdensome discovery requests, unknowable preservation requirements and the protracted discovery controversies thus engendered.

IV. CONCLUSION

LCJ, DRI, FDCC, and IADC applaud the Committee's work in developing proposed Rule 37(e) and the Duke Subcommittee proposals, and we support publication of those proposals together in August for public comment. But we strongly urge the Committee not to move forward with the Rule 37(e) proposal that would – for the first time – inject authority to issue harsh sanctions for mere negligence or gross negligence. Rather, the Committee should seek publication of two versions of proposed Rule 37(e), both without the (e)(1)(B)(ii) exception: one that applies to all evidence and the other limited to ESI. We also urge the Committee to adopt a "willful *and* in bad faith" culpability standard prior to publication. Although the Committee could make other meaningful improvements in proposed Rule 37(e) and the Duke Subcommittee package as described in this Comment, we will use the opportunity to make the case for such improvements during the public comment period in the event the Committee chooses not to do so before then.

Respectfully submitted,

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