UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KYLE PIPPINS, JAMIE SCHINDLER, and EDWARD LAMBERT, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

KPMG LLP,

Defendant.

11 Civ. 0377 (CM) (JLC)

ECF CASE

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S OCTOBER 11, 2011 ORDER

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November 4, 2011

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber is greatly concerned with the rising cost of litigation, particularly the cost of class action litigation, and its effect on the productivity of American businesses. It has submitted *amicus* briefs in numerous cases involving class action issues, including recently in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). Although the vast majority of the Chamber's *amicus* briefs are filed in the Supreme Court of the United States, the federal Courts of Appeals, and state supreme courts, the Chamber will file an *amicus* brief in a federal District Court when the court faces a case presenting issues of exceptional importance.

This is such a case. The Magistrate Judge's order in this case raises issues of profound significance to businesses in America. In recent years, there has been a veritable explosion of electronically stored information in American commerce. Virtually every enterprise is heavily reliant on information technology today. Virtually every employee uses a company-owned desktop, or laptop, or tablet, or smart phone, or all of the above, all creating documents and generating data, often in multiple copies, frequently replicated and backed up, over and over again. Many employees send and receive hundreds of emails a day, many with attachments, with the result that companies accumulate many millions of such messages a year. Even cell phones today have storage measuring in the gigabytes; the desktops, hundreds of gigabytes; the servers, terabytes. One gigabyte equals roughly 500,000 typewritten pages; one terabyte, 500,000,000—

half a *billion*. If 2,500 pages fit in a banker's box, a terabyte would fill *200,000* such boxes.

The Magistrate Judge's opinion reached an unprecedented conclusion here: that, faced with an uncertified class or collective action alleging that employees were not properly compensated for overtime, KPMG, at considerable expense, has to rip out and retain every single hard drive from every computer that any member of the putative class or collective may have used before leaving the company. This KPMG must do, said the Judge, even though there is a database that directly recorded the employees' hours, and even though virtually all of the data on the hard drives would be irrelevant to the case.

The Magistrate Judge made two errors of law that led to this novel conclusion. First, he held that the duty to preserve electronically stored information was not limited by any test of proportionality. Second, he held that every member of the proposed plaintiff class or collective action was a "key player" for purposes of discovery and the retention of electronic information. Both holdings are wrong, unprecedented, and—if affirmed here and followed by other courts—would be highly detrimental to the conduct of civil litigation under the Federal Rules.

ARGUMENT

THE MAGISTRATE JUDGE ERRED IN ORDERING KPMG TO PRESERVE THE HARD DRIVES OF THOUSANDS OF ITS FORMER AND DEPARTING EMPLOYEES.

A. The Magistrate Judge erred in refusing to apply a proportionality standard.

The Magistrate Judge held that the generally applicable "proportionality" test for discovery—which requires courts to "limit the frequency or extent of discovery" if "the burden or expense of the proposed discovery outweighs its likely benefit," FED. R. CIV. P. 26(b)(2)(C), does not apply to the preservation of electronically stored information. *See* Oct. 11 Order at 10, 14-15. Rejecting "the application of a proportionality test as it relates to preservation," *id.* at 14, the Judge emphasized "that this is a dispute about preservation, not production," *id.* at 15.

That distinction is wrong—and dangerous. In rejecting the proportionality test for preservation, the Judge ignored the well-recognized burden of preserving electronic records today. The *Manual for Complex Litigation (Fourth)*, for example, commends precisely the opposite of what the Judge ordered here. The *Manual* recognizes that the scope of data preservation must be carefully limited to what is proportional, as "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operation." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.442, at 73 (2004). "Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens," courts must carefully consider "the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burden." *Id.* Efforts should be made to "minimiz[e] cost and intrusiveness and the downtime of the computers involved." *Id.* And preservation orders should "*exclude* specified categories of documents or data whose cost of preservation *outweighs* substantially their relevance in the litigation, *particularly ... if there are alternative sources for the information*." *Id.* § 11.442, at 74 (emphasis added).

As the *Manual* recognizes, there may be relevant needles buried in many electronic haystacks, but it may not be worth keeping all the haystacks to hunt for all the needles. That is because the amount of electronic information that accumulates in modern enterprises is immense:

> Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering. … A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes … .
>
> Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or from third parties.

Id. § 11.446, at 77-78.

In explaining the scope of the problem a few years ago to the Civil Rules Advisory Committee, one corporate in-house counsel testified that his global company, half of whose employees were in the United States, "generate[d] 5.2 million emails a day," had "65,000 desktop computers … and 30,000 laptop computers," each with a typical storage capacity of "40 gigabytes, … the equivalent of 20 million typewritten pages"; the company also had "between 15,000 and 20,000 blackberries and PDAs around the world," "7,000 servers worldwide, 4,000 of them in the U.S.," "one thousand to 2,000 networks worldwide, about half of those in the U.S.," "3,000 databases, 2,000 of those in the U.S." He summarized: "Our total storage of information that we now have is 800 terabytes, 500 terabytes in the U.S. … 500 terabytes equals 250 billion pages." Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing Before the Committee on Rules of Practice & Procedure, 36-38 (2005) (statement of Chuck Beach, Exxon Mobil Corp.), *available at* http://1.usa.gov/ubzdUT.

And a very recent letter to the Committee from in-house lawyers at Microsoft Corporation detailed how "[t]he burden of over-preservation grows heavier by the day," and is becoming "a significant drag on innovation and productivity":

> Unfortunately, with almost every new and useful technological advance, conflicting and ambiguous case law on the duty to preserve creates additional burdens. This is a significant drag on innovation and productivity. …
>
> Today, for preservation purposes alone, Microsoft *collects*, on average, 17.5 GB from each custodian in litigation (which is equivalent to over 430 banker boxes of documents per custodian). … Based on a current snap-shot, the company currently monitors 14,805 separate custodian legal holds in 329 separate matters. In other words, Microsoft currently places an average of 45 custodians on hold for each matter (or a total of 787.5 GB). This corresponds to nearly 20,000 banker boxes of documents per matter. Thus, the company is effectively preserving several warehouses of documents at any one point in time.

Letter from David M. Howard et al., to Hon. David G. Campbell, at 1-3 (Aug. 31, 2011), *available at* http://1.usa.gov/vFoIeH.

As one commentator has explained, the costs of electronic discovery "threaten to drive all

but the largest cases out of the system" by "'dominat[ing] the underlying stakes in dispute'":

> [T]he volume of information, including electronically stored information, is growing at a rate of 30 percent annually. The growing cache of electronic information drives up costs, as companies are forced to cull through ever-larger stockpiles of data to identify responsive documents. … [E]xpenditures for the collection and processing of electronic documents in the United States will reach $4.7 billion in 2010, an increase of 15 percent over the prior year. Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege ….
>
> The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system. A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery "could dominate the underlying stakes in dispute." But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking under the strain.

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 567 (2010) (footnotes and citations omitted).

Given this explosion of electronic information, if the Federal Rules of Civil Procedure are to have any chance at being "administered to secure the just, speedy, and inexpensive determination of every action and proceeding," FED. R. CIV. P. 1, then preservation of that information must be restricted to what is proportional. Indeed, the application of the proportionality principle to preservation follows from the existence of that principle under the discovery rules. For the duty to preserve turns upon what is discoverable under Rule 26: "Generally, the duty to preserve extends to documents or tangible things … by or to individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'" *Rimkus Consulting Grp.* v. *Cammarata*, 688 F. Supp. 2d 598, 612-13 (S.D. Tex. 2010). "Descriptions of the scope of the common-law duty to preserve are virtually coextensive with the scope of discovery." Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 BALT. L. REV. 381, 395 & n.61 (2008) (citing authorities).

The scope of discovery, in turn, is expressly limited by the proportionality principle: Rule 26(b)(2)(C) provides that discovery "*must*" be limited to what is proportional from a cost-

benefit standpoint, viewed in light of the size of the case, the importance of the discovery, and the availability of alternative sources of information:

> On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules … if …
>
> > the discovery … can be obtained from some other source that is more convenient, less burdensome, or less expensive; … or …
> >
> > the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C) (emphasis added).

As a result, "[a] corporation, upon recognizing the threat of litigation, need not preserve every shred of paper, every e-mail or electronic document, and every backup tape." *In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.*, No. 2:03-md-1565, 2009 WL 2169174, at *11 (S.D. Ohio July 16, 2009) (quoting *Consol. Aluminum Corp.* v. *Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006) (citation and internal quotation marks omitted)). Instead, "[w]hether preservation … is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus*, 688 F. Supp. 2d at 613 (emphasis in original). "Electronic discovery burdens should be proportional to the amount in controversy or the nature of the case," because "[o]therwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation." THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007), *quoted in Rimkus*, 688 F. Supp. 2d at 613 n.8.[1]

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[1] *Accord*, *e.g.*, *Victor Stanley*, *Inc.* v. *Creative Pipe*, *Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010) (The duty to preserve "is neither absolute, nor intended to cripple organizations. … [T]he scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation." (internal citations and quotation marks omitted)); *Kay Beer Distrib.*,
(footnote continued)

B. The Magistrate Judge erred in holding that every potential class or collective action member is a "key player."

The Magistrate Judge's mistaken repudiation of the proportionality principle was compounded by a second, equally significant, error. The Judge held that KPMG had to retain hard drives of "*each and every Audit Associate*"—meaning thousands of former employees, with the number ever increasing as more personnel depart—because each such former employee "is a potential plaintiff and thus could be found to be a '*key player*'" as that phrase was used in Judge Scheindlin's widely cited opinion in "*Zubulake IV*," *Zubulake* v. *UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Oct. 11 Order at 9 (emphasis added).

This holding lacks foundation in precedent and logic. To begin with, it twists the "key players" concept beyond recognition. As the Magistrate Judge acknowledged, *Zubulake IV* used the phrase as shorthand for the people whom parties must identify in their mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1)(A)(i): "each individual *likely* to have discoverable information … that the *disclosing party may use to support its claims or defenses*, unless the use would be solely for impeachment." FED. R. CIV. P. 26(a)(1)(A)(i) (emphasis added; quoted in part in Oct. 11 Order at 9); *see Zubulake IV*, 220 F.R.D. 218 & n.25 (citing and quoting FED. R. CIV. P. 26(a)(1)(A)(i)). The rule requires production of a *witness* list. It "requires all parties … early in the case to exchange information regarding potential *witnesses*"—"persons who … might reasonably be expected to be deposed or called as a witness." FED. R. CIV. P. 26 Advisory

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Inc. v. *Energy Brands*, *Inc.*, No. 07-1068, 2009 WL 1649592, at *4 (E.D. Wis. June 10, 2009) ("mere possibility of locating some needle in the haystack of ESI … does not warrant the expense [defendant] would incur in reviewing it"); *S. Capitol Enters.*, *Inc.* v. *Conseco Servs.*, *L.L.C.*, No. 04-705-JJB-SCR, 2008 WL 472427, at *2 (M.D. La. Oct. 24, 2008) ("the likely benefit … is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data."); *Mancia* v. *Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (noting "concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each").

Committee Note to 1993 Amendments (emphasis added).[2] This provision serves to "*focus* the discovery" and to "achieve[]" "savings in time and expense" by "accelerat[ing] the exchange of *basic* information about the case and … eliminat[ing] … paper work." *Id.* (emphasis added).

"Key players" thus could not, and does not, embrace every member of a putative class of thousands. If a party—even a party to a class action—produced a Rule 26(a)(1)(A)(i) witness list bearing thousands, or even hundreds, of names, that party would almost certainly be sanctioned. For no one could in good faith say that she may call such a large group to testify at a trial, even a huge trial; and certainly a list so long would not serve Rule 26(a)(1)(A)'s purpose of focusing discovery and reducing expense. Not surprisingly, when Judge Scheindlin in *Zubulake IV* first used the words "key players," she was actually referring to a group of *five* people. *See* 220 F.R.D. at 218 ("Chapin, Hardisty, Tong, Datta and Clarke"). In fact, in a later opinion she described as "*Zubulake* Revisited: Six Years Later," Judge Scheindlin herself distinguished between "*all* those employees who had any involvement with the issues raised in the litigation" and "*just* the key players." *Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of Am. Sec.*, *LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (emphasis added). And other cases invoking her "key players" concept have likewise used it to describe similarly select groups.[3] The

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[2] *Accord*, *e.g.*, *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004) (Rule 26(a)(1)(A) requires identification of "each potential *witness*"; emphasis added); *McDermott* v. *Liberty Mar. Corp.*, No. 08 Civ. 1503 (KAM), 2011 WL 2650200, at *3 (E.D.N.Y. July 6, 2011) (noting party's obligation to "disclos[e] *witnesses*" under rule; emphasis added); *Ventra* v. *United States*, 121 F. Supp. 2d 326, 330 (S.D.N.Y. 2000) (rule "requires parties to disclose *witnesses*"; emphasis added); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.22[4][a][i] (3d ed. 2011) (rule "requir[es] the parties to disclose the identities of their prospective witnesses early in the litigation … to assist the other parties in deciding whom they wish to depose").

[3] *See, e.g.*, *E.I DuPont de Nemours and Co.* v. *Kolon Indus.*, *Inc.*, No. 3:09-cv-58, 2011 WL 2966862, at *4-18 (E.D. Va. July 21, 2011) (six employees); *E.I. DuPont de Nemours and Co.* v. *Kolon Indus.*, *Inc.*, No.3:09cv58, 2011 WL 1597528, at *13 (E.D. Va. Apr. 27, 2011) (four former employees); *Siani* v. *SUNY Farmingdale*, No. CV09-407 (JFB) (WDW), 2010 WL 3170664, at *7 (E.D.N.Y. Aug. 10, 2010) (five employees); *Crown Castle USA Inc.* v. *Fred A. Nudd Corp.*, No. 05-cv-6163T, 2010 WL 1286366, at *10 (Mar. 31, 2010), *report and recommendation adopted*, 2010 WL 4027780 (W.D.N.Y. Oct. 14, 2010) (five employees).

cases even say that "key players" ordinarily are witnesses who are so significant that counsel has a duty to personally *"interview*" each of them, *Williams* v. *New York City Transit Auth.*, No. 10 Civ. 0882 (ENV), 2011 WL 5024280, at *4 (E.D.N.Y. Oct. 19, 2011) (citation omitted), an obligation that would be entirely infeasible if those witnesses could number in the thousands.

In addition to misapprehending the case law upon which it relied, the Magistrate Judge's "key players" holding irreconcilably conflicts with the proper status of an absent class member under Rule 23, and of a member of an FSLA collective, if such a class or collective is properly certified. Put bluntly: no absent member of a properly certified class or non-party to a properly certified collective action should be a "key player." Under the FLSA, employees who sue may represent "other employees" only if they are "similarly situated." 29 U.S.C. § 216(b). Under Rule 23(a)(3), "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Indeed, the very "premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff[s], so go the claims of the class." *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). And for a Rule 23(b)(3) class like the New York class proposed here, the "the questions of law or fact common to class members [must] predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

In short, no one should be key, because all should be alike. If there are absent class or collective action members who are key players, then there shouldn't be a class or collective action, or they shouldn't be in it. At the very least, in contrast to what the Magistrate Judge held, certainly *not every* class or collective action member can be deemed "key."

* * *

In disregarding the proportionality principle and in treating every potential class or collective action member as a "key player," the Magistrate Judge set a dangerous precedent. Although it contradicts other authority, his decision, if not overturned, would exert an inordinate influence on how practitioners perceive the law. Every decision on the subject of discovery is important, because courts so sparsely write about it, as discovery disputes tend to be fact-bound and often settled. More significantly, however, because of the threat of sanctions, a decision—like the Magistrate Judge's—that *overstates* the duty of *preservation* will effectively *become* the law. For in the absence of controlling authority, parties and their counsel have no way to know in advance what standard a court will ultimately apply, and in an overabundance of caution, they may feel obligated to follow the broadest standard of preservation adopted by any court. It is imperative that this Court overturn the Magistrate Judge's decision and correct its errors of law.

CONCLUSION

It is respectfully submitted that the Court should set aside the Magistrate Judge's October 11, 2011 Order.

Dated: New York, New York
November 4, 2011

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U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

Public Comment To The Advisory Committee On Civil Rules
Concerning Proposed Amendments To The Federal Rules Of Civil Procedure

November 7, 2013

These comments are offered on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. The Chamber founded ILR in 1998 to address the country's litigation explosion. ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate. ILR strongly applauds the Advisory Committee on Civil Rules ("Committee") for all of its efforts to improve the fairness and efficiency of civil litigation, and particularly its efforts to address ongoing challenges related to the practice of civil discovery in our federal courts.

I. Introduction

The Federal Rules of Civil Procedure ("FRCP") are designed to ensure "the just, speedy, and inexpensive determination of every action and proceeding."[1] However, the costs associated with civil discovery have grown exponentially over the past decade, frustrating these core objectives and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs now comprise between 50 and 90 percent of the total litigation costs in a given case.[2] In addition, the United States has the highest "liability costs" (a definition that includes discovery expenses) of its peer countries, 2.6 times the average level of the Eurozone economies, and 4 times higher than Belgium, the Netherlands and Portugal.[3]

These increased costs are due in large part to the FRCP's failure to contain the rapid growth of electronic discovery, which has forced parties to pay hundreds of thousands (if not millions) of dollars to respond to vexatious requests for documents that are often nothing more than open-ended fishing expeditions in search of a quick settlement.[4] These costs are "weighty

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

[2] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 550 (2010).

[3] NERA Economic Consulting, "International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States," June 2013, available at: http://www.instituteforlegalreform.com/resource/international-comparisons-of-litigation-costs-europe-the-united-states-and-canada/.

[4] Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 892 (2012) (Companies "are especially affected by this switch to an electronic environment. In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits."); *see also* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 Rich. J.L. & Tech. 8, P 1 (2008), http://jolt.richmond.edu/v14k3/article8.pdf ("An explosion in the amount and discovery of electronically stored information (ESI) threatens to clog the federal court system and make judicial determination of the substantive merits of disputes an endangered species.").

for individual parties, but crushing for enterprises with thousands of employees, each of whom may respectively have a terabyte of potentially discoverable information."[5]

Instead of accomplishing its original goals of preventing unfair surprise at trial and ensuring the fair resolution of litigation, discovery is all too often used for strategic purposes.[6] As the Sedona Conference's Cooperation Proclamation notes, "courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether[.]"[7] Simply put: "[o]ur discovery system is broken. It is broken because the standard of 'broad and liberal discovery,' the hallowed principle that has governed discovery in the U.S. for over seventy years, has become an invitation to abuse."[8] Indeed, "[s]cholars, litigators, judges, and, more recently, even politicians have joined in unusual consensus to urge that reform of the discovery process is needed."[9]

We applaud the Committee for recognizing this problem and for its efforts to establish clear standards for the imposition of curative measures and sanctions when discoverable information is lost.[10] The proposed amendments are a significant step toward reining in the costs of civil discovery. Below, we suggest a few changes to the proposal that we think will better achieve the Committee's goals. We also suggest that as the Committee contemplates proposals in the future, it should consider amendments that address the root cause of our broken discovery system: the rule that the producing party bears the cost of production. This system, under which a plaintiff can propound broad and costly discovery requests on a defendant before there is any finding of liability, not only encourages unwieldy and costly discovery requests, but also runs afoul of a defendant's fundamental right to due process. As a result, the Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court.

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[5] Philip J. Favro & The Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 936 (2012).

[6] Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 Campbell L. Rev. 233, 258-59 (2012) (quoting *Tech. Sales Assocs. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 U.S. Dist. LEXIS 53711, at 4 (E.D. Mich. May 1, 2009)).

[7] The Sedona Conference, Cooperation Proclamation, 10 Sedona Conf. J. 331 (2009 Supp.).

[8] Gordon W. Nertzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 513 (2010); Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System at 2, http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf; *id*. at 9 (highlighting that suits of "questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them").

[9] Griffin D. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, Automatic Disclosure in Discovery – The Rush to Reform, 27 Ga. L. Rev. 1, 2 (1992).

[10] *See* Agenda Book for Advisory Committee on Civil Rules, Norman, Oklahoma, at 77, 143, Apr. 11-12, 2013 (the "Agenda Book"), http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf.

II. The Duke Conference Rules Package

From its inception in 1938, the Federal Rules of Civil Procedure have authorized a "broad and liberal" approach to discovery.[11] Concerned that the discovery rules "had formerly invited unlimited discovery if a party so desired," the Committee adopted Rule 26(b)(2)(C)(iii) in 1983.[12] That provision, which appears under the heading, ***Limitations on Frequency and Extent***, purports to address proportionality in civil discovery by providing that "[o]n motion or on its own, the court must limit the frequency or extent of discovery . . . if it determines that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[13] As the notes accompanying that amendment indicate, the provision was designed to "deal with the problems of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects for inquiry."[14]

Unfortunately, as "both judges and commentators have noted," the "proportionality requirement has not proven to be an effective limitation on the scope or costs of discovery."[15] Instead, the principle of proportionality routinely yields to the "default rule of virtually unlimited discovery."[16] This is made even worse by the fact that litigants themselves are frequently unaware of the requirements imposed by the current rule.[17] And for those who are aware of these dictates and seek to urge courts to apply them in discovery, "complaints of judicial disengagement persist and abound."[18] At bottom, neither courts nor litigants have applied the current rule to lessen the burdens imposed by the volume or geographic distribution of

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[11] Nertzorg & Kern, *supra* note 8, at 514.

[12] Richard Marcus, *The Philip D. Reed Lecture Series: Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 Fordham L. Rev. 1, 6 (2004).

[13] Fed. R. Civ. P. 26(b)(2)(C)(iii).

[14] Fed. R. Civ. P. 26 advisory committee's note to 1983 amendments.

[15] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 780-81 (2011) (footnotes omitted); *see also* Beisner, *supra* note 2, at 583 ("In reality, courts have historically ignored proportionality concerns, instead blaming companies for choosing to employ computer systems that make retrieving records more difficult or expensive.").

[16] Nertzorg & Kern, *supra* note 8, at 517; *see also* Inst. for the Advancement of the Am. Legal Sys., 21st Century Civil Justice System: A Roadmap for Reform: Pilot Project Rules 2 (2009) (explaining that the proportionality factors previously adopted by the Committee "are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise.").

[17] *See* The Honorable Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 516 (2013).

[18] Hon. Lee H. Rosenthal, *Judge's View: From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 Denv. U. L. Rev. 227, 238 (2010); *see also* Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 Duke L. & Tech. Rev. 2 (2009) ("Judges have never applied that test to meaningfully limit discovery[.]").

electronically stored information, which is often disproportionate to the value of that information to the litigation.[19]

Statistics bear out the concern that discovery continues to be a "morass, nightmare, quagmire, monstrosity, and fiasco."[20] A 2008 survey of Fortune 200 companies is illustrative, finding that in cases with total litigation costs of more than $250,000, the ratio of the average number of discovery pages to the average number of pages actually used at trial was 1,044 to 1.[21] A survey of attorneys in Chicago yielded similar findings, with practitioners estimating that 60 percent of discovery materials did not justify the cost associated with obtaining them.[22] According to that study, in more than 50 percent of complex cases, the opposing party's discovery efforts had failed to disclose significant evidence.[23] In short, "[w]hatever the theoretical possibilities," the proportionality rule "created only a ripple in the caselaw"; "no radical shift has occurred."[24]

Because Rule 26(b) has not promoted meaningful proportionality in civil discovery, scholars and courts alike have advocated further changes to the rule that would provide stronger and clearer standards for reducing the burden on the party bearing the cost of responding to discovery requests.[25] The Committee has taken heed of these calls for reform by proposing an amendment to Rule 26 that would strengthen the requirement of proportionality by providing that discovery may be obtained ***only*** if it is "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[26] This change would make clear that discovery

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19 *See* Grimm & Yellin, *supra* note 17.

20 *Id*. at 515 (collecting sources).

21 Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform 16, *Litigation Cost Survey of Major Companies* (2010), http://civilconference.uscourts.gov.

22 Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217, 230 n.24.

23 *Id*. at 234.

24 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2008.1, at 121 (2d ed. Supp. 2008); *see also* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 127 (2005) ("[T]he proportionality principle of Rule 26(b)(2) . . . is not being utilized by judges[.]"); Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 349 (2000) (describing the proportionality requirement of Rule 26(b)(2) as "seldom-used"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 162-63 (1999) (characterizing proportionality rule as "something of a dud").

25 *See* Rosenthal, *supra* note 18, at 238 ("concerns" regarding ineffectiveness of proportionality requirement "have led many to call for more amendments to the discovery and related rules").

26 Proposed Rule 26(b)(1).

is "not an unfettered right," but a reasonable process subject to "ultimate and necessary boundaries."[27]

The proposed amendment closely mirrors the Sedona Conference's Commentary on Proportionality in Electronic Discovery ("Commentary on Proportionality"), which sets forth various principles "to guide courts, attorneys, and parties" when confronting questions regarding the proportionality of discovery.[28] These principles, which include cost, burden and the importance of the information to the litigation, have been relied upon by a handful of courts in attempting to limit discovery based on proportionality. For example, in an action that had been pending for over six years, the Northern District of Illinois cited the Commentary on Proportionality and ordered a phased discovery schedule "to ensure that discovery is proportional to the specific circumstances of th[e] case, and to secure the just, speedy, and inexpensive determination of th[e] action."[29] The court directed the parties to "prioritize their efforts on discovery that is less expensive and burdensome."[30]

Many legal organizations and commentators have also espoused more aggressive proportionality principles in civil discovery. For example, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System released a report in March 2009 recommending discovery reforms, including that electronic discovery "should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens."[31] A number of commentators have endorsed a similar approach, recognizing that proportionality "creat[es] a mindset in the court and litigants that discovery needs to be focused on the real issues in the case and that cost is a consideration."[32]

The proposed amendment to Rule 26 would provide much-needed balance to discovery requests – most notably, those with the potential to unduly burden the other side. "Unless all parties concerned are placed on notice with an unequivocal statement that discovery is to be proportional, many courts and counsel will likely stick to the view that there are few bounds to liberal federal discovery."[33] The Committee's proposal would therefore help transform the default "anything goes" approach to discovery into one that protects against the worst abuses while continuing to ensure access to all needed information. In so doing, the amendment may

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[27] Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 Fed. Cts. L. Rev. 178 (2013) (internal quotation marks and citation omitted).

[28] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010), http://www.thesedonaconference.org/content/miscFiles/Proportionality2010.pdf.

[29] *Tamburo v. Dworkin*, 2010 U.S. Dist. LEXIS 121510, at *8 (N.D. Ill. Nov. 17, 2010) (quoting Commentary on Proportionality, at 294, 297).

[30] *Id*. at *3.

[31] Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *supra* note 8, at 14.

[32] John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell. L. Rev. 455, 460 (2010); *see also* Netzorg & Kern, *supra* note 8, at 527-32 (2010); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since 2006*, 14 Rich. J.L. & Tech. 3 (2008); Favro & Pullan, *supra* note 5, at 956.

[33] Favro & Pullan, *supra* note 5, at 966.

finally cultivate the "judicial 'vigor' hoped for by the Advisory Committee when the proportionality guidelines were first adopted."[34] Moreover, the proposed amendment will afford courts more time to focus on adjudicating the merits of the parties' underlying claims and defenses.

We also commend the Committee's proposal to redefine the scope of discovery in Rule 26(b)(1) to cover "any nonprivileged matter that is relevant to any party's claim or defense[.]"[35] The current rule permits discovery of any information relevant to the "subject matter involved in the action."[36] That rule goes on to specify that discovery is permitted where it "appears ***reasonably calculated*** to lead to the discovery of admissible evidence."[37] As the Supreme Court declared in *Hickman v. Taylor*, the scope of discovery is both "broad and liberal[,]" requiring parties to "disgorge whatever facts" they have that are "relevant" to the subject matter of the litigation.[38] Many courts have pledged their fidelity to this standard, while others have gone even further in describing the scope of discovery envisioned by Rule 26. Indeed, some courts have found that information is presumptively discoverable as long as there is "any possibility" that the information relates to the "general subject matter of the case,"[39] and that resisting discovery is only appropriate where the information sought has "no possible bearing" on the issues pled in the complaint or those that may arise during the litigation.[40] These principles point to one unmistakable conclusion: "the sweeping scope of Rule 26(b)(1) has translated into a strong presumption that 'relevant' discovery is allowed unless and until the responding party obtains a court order to prevent a specific request made."[41]

Under the proposed amendment, facts would only be discoverable to the extent they have ***some*** bearing on the merits of a party's ***claims or defenses***. Moreover, supposedly relevant facts would no longer be discoverable simply where they "appear[] reasonably calculated to lead to the discovery of admissible evidence" – a phrase judges and practitioners have interpreted as "obliterat[ing] all limits on the scope of discovery."[42] This important change is "consistent with

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[34] Nertzorg & Kern, *supra* note 8, at 522 (quoting Fed. R. Civ. P. 26 advisory committee's note to 2000 amendment).

[35] Proposed Rule 26(b)(1).

[36] Fed. R. Civ. P. 26(b)(1).

[37] *Id*. (emphasis added).

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

[39] *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C. 1989).

[40] *Hammond v. Lowe's Home Ctrs., Inc.*, 216 F.R.D. 666, 670 (D. Kan. 2003) (internal quotation marks omitted) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 690 (D. Kan. 2001)); *see also Foster v. Berwind Corp.*, 1990 WL 209288, at *6 (E.D. Pa. Dec. 12, 1990).

[41] Nertzorg & Kern, *supra* note 8, at 519.

[42] Agenda Book, *supra* note 10, at Tab 1A, 35; *see also* Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26 Utah Bar J. 38, 40 (2013) ("many judges and lawyers unwittingly extrapolate[] the 'reasonably calculated' wording to broaden discovery beyond the benchmark of relevance").

the general tenor of Rule 26," which already makes repeated references to a party's claims or defenses,[43] and is critical to narrow overbroad discovery.[44]

While ILR enthusiastically endorses this change, the Committee should refine the proposed amendment by adding a requirement that the information not only be relevant, but also ***material*** to a party's claim or defense. A materiality standard would strengthen Rule 26(b)(1) by ensuring an even greater relationship between relevant facts and a party's claims or defenses, without compromising a party's ability to obtain legitimately needed information.

The Committee's other proposed proportionality changes to the discovery rules should be adopted as well. These changes, which would limit the number of depositions, interrogatories and requests for admissions, and reduce the presumptive duration of depositions, will similarly streamline civil discovery without denying a party the ability to gather information for its claims or defenses. Under the proposed version of Rule 26(b)(2), like the current one, the court retains discretion to modify or alter these numerical limits.[45]

III. Proposed Rule 37(e) – Preservation And Spoliation

The Committee's proposed re-write of Rule 37(e) is needed because the effectiveness of the current rule's "rarely applied" "safe harbor"[46] has been called into question, as "electronic discovery has become a prime tool used offensively by litigants, with sanctions motions turning into their own mini[-]litigations."[47] As one commenter noted, "[i]n the Fourth Circuit there are only a handful of reported court opinions applying Rule 37(e), and there is no opinion in which the Rule barred the imposition of a sanction."[48]

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[43] Shaffer & Shaffer, *supra* note 27. For example, the disclosure provision of Rule 26 requires parties to identify individuals, documents and electronically stored information that they "'may use to support their claims and defenses.'" *Id*. (quoting Fed. R. 26(a)(1)). Similarly, Rule 26(f)(2) mandates a meet-and-confer session during which the parties must develop a discovery plan based on their "'claims and defenses.'" *Id*. (quoting Fed. R. Civ. P. 26(f)(2)).

[44] Paul V. Niemeyer, *Symposium Honoring Professor Edward Cooper: Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. Mich. J.L. Reform 673, 679 (2013) (noting that American College of Trial Lawyers has consistently supported this change, which "would help stem" the rising costs associated with modern discovery).

[45] *Compare* Proposed Rule 26(b)(2) *with* Fed. R. Civ. P. 26(b)(2).

[46] Mark S. Sidoti, Gibbons P.C., *Staying Ahead Of The E-Discovery Learning Curve*, Metropolitan Corporate Counsel (June 2013).

[47] Danielle M. Kays, *Reasons to "Friend" Electronic Discovery Law*, 32 Franchise L.J. 35, 36 (2012); *see also* Shaffer & Shaffer, *supra* note 27 ("[d]ata shows that spoliation motions are being filed more frequently"); Laura A. Adams, *Reconsidering Spoliation Doctrine Through the Lens of Tort Law*, 85 Temp. L. Rev. 137, 154 (2013) ("the frequency of motions for sanctions for spoliation of evidence has increased, generating additional costs and concerns for litigants, lawyers, and the judiciary"); Margaret Rowell Good, *Loyalty to the Process: Advocacy and Ethics in the Age of E-Discovery*, 86 Fla. Bar J. 96, 96 (2012) ("courts are increasingly imposing [discovery] sanctions on parties and, occasionally, on counsel").

[48] Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. Rev. 537, 564 (2013).

Because companies fear they will be sanctioned for missing information, preservation costs have continued to mount under the current rule. The corporate general counsel of an American company recently estimated that ten percent of the company's 200,000 employees were under a litigation hold, which required the company to save approximately twenty terabytes of data – the equivalent of approximately five hundred million pages of plain text.[49] That same general counsel also highlighted preservation efforts undertaken in connection with a matter the company reasonably anticipated would result in litigation. For that matter, the company was spending $100,000 per month, with total costs exceeding $5 million.[50]

Former United States Magistrate Judge (and now District Court Judge) Paul Grimm described the problem as follows:

> How then do such corporations develop preservation policies? The only 'safe' way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[51]

And Judge Lee Rosenthal, former Chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, similarly observed, "[t]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information."[52] Sure enough, fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information,[53] even though only an infinitesimal fraction of information that is actually preserved ends up being used by the parties in support of their claims or defenses.[54]

The Committee is correct to recognize the staggering costs of over-preservation and to acknowledge that Rule 37(e) has "not been sufficiently effective" in reducing "preservation

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[49] *See* Adams, *supra* note 47, at 155 (citing Meeting Notes, Mini-Conference on Preservation and Sanctions for the Discovery Subcommittee of the Advisory Committee on Civil Rules 2 (Sept. 9, 2011)), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

[50] *See id*.

[51] *Victor Stanley, Inc. v. Creative Pipe, Inc*., 269 F.R.D. 497, 532 (D. Md. 2010).

[52] *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

[53] Carol Stainbrook et al., Cohasett Assocs. Inc., *Electronically Stored Information (ESI) – Legal Holds & Disposition* 6 (2012).

[54] *See* Withers, *supra* note 48, at 546 ("For all their expense, preservation activities seldom return value to the parties. . . . [L]ittle of what is preserved is ever called for in litigation, implying that either little analysis is going into preservation decisionmaking, or it is driven more by fear than by need[.]") (citing Lawyers for Civil Justice, *Preservation – Moving the Paradigm to Rule Text 14* (2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Lawyers%20for%20Civil%20Justice.pdf.).

sanction risks."[55] The proposed new Rule 37(e) is an improvement over the current rule in which the only option for a court is to sanction a party for losing discoverable information. Because the goal of Rule 37(e) should be to lessen the impact of a party's loss of information on the other side – rather than to punish that party – a rule that gives courts the option of ordering curative measures is sensible. Further, the Rule's "focus[]" on curative measures may reduce "expensive and time-consuming [sanctions] motion practice and facilitate[] [the] efficient disposition of [an] action."[56] The new rule should also help mitigate the "balkanized approach to the spoliation issue that now characterizes the litigation landscape."[57]

There are two important changes that need to be made to the proposal, however. Under the proposed amendment, courts could sanction parties for the loss of information where "the party's actions: (i) caused substantial prejudice in the litigation and were ***willful or*** in ***bad faith***; ***or*** (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[58] ILR believes that the first category should be limited to conduct that is both willful ***and*** in bad faith. After all, some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind.[59] Thus, under the proposed amendment, businesses could be sanctioned for destroying information pursuant to an existing document retention policy, even if that policy were being implemented in good faith. Because sanctions should only be allowed where a party has engaged in intentionally culpable conduct – i.e., knowingly destroying evidence that the party knows should have been preserved – the Committee should change the word "or" in proposed Rule 37(e)(1)(B)(i) to the word "and."

ILR also urges that the second category, which would allow sanctions without a finding of either willfulness or bad faith, be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation "mini-litigations," described above, and impose significant costs on American companies by encouraging them to store every last byte of information. It would also be highly unfair. As one federal appeals court explained, an adverse inference instruction, one type of sanction imposed where a party has lost discoverable information, "creates a substantial danger of unfair prejudice" by "encourag[ing] the jury to speculate that the missing [information] contained admissions and other information damaging to" the party accused of spoliation.[60] This prejudice is "all but a declaration of

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55 Advisory Committee on Civil Rules, at 122, Nov. 1-2, 2012, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf.

56 Shaffer & Shaffer, *supra* note 27.

57 *Id*.

58 Proposed Rule 37(e)(1)(B)(i)-(ii) (emphases added).

59 *Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, at *4 (S.D.N.Y. Aug. 15, 2013). ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

60 *Morris v. Union Pac. R.R.*, 373 F.3d 896, 903 (8th Cir. 2004); *see also id*. at 900-01 ("When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of [a lost piece of evidence].").

victory" for the opposing side.[61] Allowing this sort of severe sanction absent willful and bad-faith conduct is simply "too strict."[62]

Proposed Rule 37(e)(2) also lays out five factors a court should consider when assessing a party's conduct before ordering curative measures and/or sanctions.[63] While these factors are well-intentioned, they should be deleted from the proposed amendment. This is so because none of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Such a standard "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle."[64]

IV. Answers To The Committee's Questions

The Committee has invited public comment on five specific questions concerning proposed Rule 37(e). Here are ILR's responses:

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

Response: The rule should not be limited to electronically stored information. Having two separate rules for electronically stored information and physical evidence will only create confusion for litigants. This is especially so given that the Committee's question itself recognizes the increasing difficulty of distinguishing between the categories of discovery. Because Rule 37(e) sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side

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61 Adams, *supra* note 47, at 151.

62 Erickson, *supra* note 4, at 892.

63 These factors are: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information. *See* Proposed Rule 37(e)(2).

64 *Orbit One Communications v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (In light of "highly elastic" reasonableness standard, "party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.'") (citation omitted).

of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

Response: As set forth above, this provision should not be included in the rule. Opening the door to sanctions absent culpability by the party that lost the information is inherently unfair. It would also encourage over-preservation and increased discovery costs, as parties fear that even good-faith, routine destruction of information may result in sanctions in the future. This new provision also threatens to create a cottage industry of spoliation-sanction litigation that focuses on whether a party's loss of information has "irreparably deprived" the other side of a "meaningful opportunity to present or defend against the claims in the" case. An invitation for additional discovery motion practice simply cannot be squared with the Committee's desire to reduce costs and burdens.

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

Response: If the Committee makes the changes proposed in our comments, then there is no need to retain current Rule 37(e).

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Response: Yes, the Committee should add a definition of "substantial prejudice" to ensure a national, uniform standard when determining whether sanctions for spoliation should be imposed on a party. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. According to the Southern District of New York, for example, this standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense."[65] But "substantial prejudice" should be defined as a more stringent standard – i.e., that the loss of information is somehow material to the party's claims or defenses.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Response: Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith – for example, as part of a routine document preservation system. In other words, sanctions should only be available where

[65] *Sekisui Am. Corp.*, 2013 WL 4116322, at *4.

a party acted, knowing that it had a duty to retain the information.[66] Such a definition would ensure that only those parties who are culpable for losing information are punished by sanctions.

V. The Committee Should Ultimately Address The Due-Process And Fairness Implications Of The Current Producer-Pays System.

We commend the Committee's efforts to reform the current civil discovery rules. As discussed above, the proposed amendments mark an important step forward in reducing the costs and burdens that characterize modern discovery. We fear, however, that "[m]ajor and systemic reform is required to attain the goals stated in Rule 1" and cannot be accomplished simply by "tinkering at the edges of the Rules of Civil Procedure."[67] Therefore, once these rules are adopted, we urge the Committee to address the root cause of our broken discovery system: the rule that the producer of discovery generally bears all of the costs associated with production. This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself.[68]

Discovery requests have become more and more expensive with the continued expansion of electronic discovery. Law Technology News has reported that the total cost of electronic discovery rose from $2 billion in 2006 to $2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually over the next few years.[69] In a more recent case study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled $1.8 million per case.[70]

A significant consequence of the current producer-pays rule is the routine settlement of even meritless claims.[71] As one report found, lawsuits of "questionable merit . . . are settled rather than tried because it costs too much to litigate them."[72] Even the Supreme Court has

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66 *See Rimkus*, 688 F. Supp. 2d at 642-43 (finding that bad faith, not just intentional conduct, was required to support an adverse-inference instruction).

67 Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century*, FDCC (May 2, 2010), http://www.thefederation.org/documents/V60N3_WhitePaper.pdf.

68 Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001) ("the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request.").

69 George Socha & Tom Gelbmann, *Climbing Back: Revenue Climbing Back for EDD Industry*, Law Tech. News (Aug. 1, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463900292.

70 *See* Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012).

71 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also* Beisner, *supra* note 2, at 549("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

72 Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *supra* note 8, at 2.

recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial.[73]

Beyond encouraging costly and burdensome discovery, the rule that a defendant bears all of the costs of responding to the other side's discovery requests also raises significant constitutional issues. Specifically, we believe that the rule violates a defendant's right to due process because it requires that party to pay exorbitant sums of money without any preliminary finding of wrongdoing. This is particularly so given that one's failure to comply with discovery obligations can result in a finding of contempt of court under Rule 37.[74] The due process clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[75] And the Supreme Court has made clear that a defendant's bank accounts qualify as the sort of property protected by this provision.[76] Such property cannot be deprived "except pursuant to constitutionally adequate procedures"[77] – most notably "notice and opportunity for hearing."[78]

This view is also the position of some legal scholars, who have explained that "impos[ing] the nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process" because it requires payment "without even a preliminary judicial finding of wrongdoing."[79] It is also a logical extension of longstanding Supreme Court precedent holding that deprivation of a property interest, based merely on a plaintiff's ability to make out a facially valid complaint, carries too great a risk of erroneous deprivation to satisfy due process.

In *Fuentes v. Shevin*, the Supreme Court invalidated laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin.[80] Under these laws, any person could file an *ex parte* application for a pre-judgment writ of replevin as long as she posted a security bond. The laws did not require any notice to be given to the other side; nor did they afford the possessor any pre-seizure opportunity to be heard.[81] The Supreme Court struck down the laws as a violation of due process. As the Court explained, while "the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ . . . those requirements are hardly a substitute

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73 *Twombly*, 550 U.S. at 558-59.

74 Redish & McNamara, *supra* note 15, at 806 (citing Fed. R. Civ. P. 37).

75 U.S. Const. amend. V.

76 *See N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (a bank account is "surely a form of property").

77 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

78 *Bell v. Burson*, 402 U.S. 535, 542 (1971).

79 Redish & McNamara, *supra* note 15, at 807-08.

80 *Fuentes v. Shevin*, 407 U.S. 67 (1972).

81 *Id.* at 69.

for a prior hearing."[82] This is so, the Court explained, because "they test no more than the strength of the applicant's own belief in his rights."[83] Instead, the court must "examine[] the support for the plaintiff's position" and "hear both sides" before depriving the defendant of a property interest.[84]

Similarly, in *Connecticut v. Doehr*, the Supreme Court held that a state law providing for a prompt post-attachment hearing did not comport with the requirements of due process.[85] There, the claimant sought an attachment of defendant's home to secure payment of a judgment he hoped to obtain on a civil assault complaint against the defendant.[86] According to the Supreme Court, the state law provision authorizing a prompt post-attachment hearing was inadequate under the due process clause because the law did not otherwise provide adequate safeguards against an erroneous deprivation. The Court explained that "[p]ermitting a court to [take away a property interest] merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would [impermissibly] permit the deprivation of the defendant's property when the claim would fail to convince a jury [or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute."[87]

The principles set forth in *Fuentes* and *Doehr* apply with equal force to the civil discovery context because a plaintiff's conclusory allegation of wrongdoing automatically triggers a defendant's obligation to pay significant amounts of money responding to a plaintiff's discovery requests. In fact, the due process concerns are even more serious in the discovery context because, unlike applications for writs of replevin, there is no requirement that a plaintiff place a security bond before proceeding to discovery. While the Supreme Court's recent decisions in *Twombly* and *Iqbal* have raised the bar for stating a claim and, thus, unlocking the keys to discovery,[88] a skilled lawyer can usually fashion a complaint that satisfies the requirements of these key decisions, irrespective of the underlying merit of the case.[89] And the fact that a defendant may be afforded a judicial hearing before a court rules on a motion to dismiss or for judgment on the pleadings is of little import to the due process question.[90] After

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82 *Id*. at 83.

83 *Id*.

84 *Id*.

85 *Connecticut v. Doehr*, 501 U.S. 1, 5 (1991).

86 *Id*.

87 *Id*. at 13-14.

88 *See Twombly*, 550 U.S. at 563 n.8 (courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct"), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

89 *See* Judicial Conference Advisory Committee on Civil Rules & Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 5-7 http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf (noting that the full impact of the Supreme Court's heightened pleading standards on discovery is unclear).

90 *See* Redish & McNamara, *supra* note 15, at 809-10.

all, "the sine qua non of a due process hearing is the ability of the judge to make a 'realistic assessment concerning the likelihood of an action's success'"; however, "[t]he evaluation of a complaint . . . occurs before the parties have had the opportunity to gather or present information in support of their claims."[91] As a result, "the adjudication of a motion to dismiss is not a constitutionally adequate hearing" to safeguard a defendant's right to due process before being deprived of its property.[92]

"[P]lacing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."[93] In determining whether an adjustment by the court is appropriate, the court should consider whether the party from whom the discovery is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies. This approach would reduce the likelihood that discovery is employed as a strategic weapon, ensuring that it is instead used to obtain information that is legitimately needed. The result would be a circumscribed, less expensive discovery system. In addition to diminishing the costs and burdens of civil discovery, such an approach would also protect defendants' due process rights because they would no longer be forced to give up large sums of money producing discovery before a court has found that they did anything wrong. This system would also facilitate greater and more direct court involvement in discovery, which is a principal purpose behind the Duke Conference Rules Package amendments, by giving courts a very direct role in balancing the burdens of discovery between the parties.

An alternative – albeit more modest – solution would be presumptive cost-shifting only for electronic discovery, which remains the most expensive form of civil discovery. While some courts have embraced cost shifting for electronic discovery,[94] the Rules currently do not ***require*** that courts consider cost shifting when overseeing discovery.[95] Creating a presumption in favor of cost-shifting whenever a party seeks electronic discovery would encourage parties to think twice before making needless discovery requests. As a result, parties would likely narrow their requests for information, lowering the costs associated with production and reducing the prospect that a defendant's due process rights will be infringed.[96] Moreover, because cost shifting is

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91 *Id*. at 810 (quoting *Doehr*, 501 U.S. at 14).

92 *Id*.

93 Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 Fla. L. Rev. 885, 894 (2012).

94 For example, in *In re Fosamax Products Liability Litigation*, 2008 WL 2345877, at *8 (S.D.N.Y. June 5, 2008), Judge John F. Keenan of the Southern District of New York not only restricted the plaintiffs' discovery, but also ordered the plaintiffs to shoulder up to $ 150,000 of the production costs.

95 James Pooley & Vicki Huang, *Multi-National Patent Litigation: Management of Discovery and Settlement Issues and the Role of the Judiciary*, 22 Fordham Intell. Prop. Media & Ent. L.J. 45, 55 (2011) (courts have "discretion to shift a portion of the costs onto the requesting party to protect the responder from 'undue burden or expense'") (quoting *Oppenheimer Fund, Inc*. *v*. *Sanders*, 437 U.S. 340, 358 (1978)).

96 *See* Grimm & Yellin, *supra* note 17, at 524 ("The bottom line is that cost containment in discovery cannot be discussed seriously without entertaining the concept of cost allocation.").

currently subject to rules that vary from court to court, the Committee should consider establishing clearer guidelines for the practice. The Committee might codify the factors articulated by the American Bar Association.[97] Enshrining these factors into the civil discovery rules would represent an important advancement over prior efforts to curtail abusive and costly discovery.

At the very least, parties requesting electronically stored information that is not reasonably accessible should be required to bear the costs of producing that information. For example, parties seeking data from backup tapes and other forms of disaster-recovery media[98] should bear the costs of retrieving, reviewing, and producing this information. Notably, such a rule has been adopted by Texas, which has succeeded in limiting discovery costs.[99]

VI. Conclusion

The Committee's proposals are encouraging news for both litigants and the courts, all of whom are harmed by the rising costs associated with modern civil discovery. Strengthening the proportionality requirement of Rule 26(b)(1), limiting discovery to information relevant to a party's claims or defenses and reducing the presumptive limit on depositions and other vehicles of discovery will help keep unbridled discovery in check, thereby lowering the costs of discovery for litigants and the judiciary. The proposal to incorporate curative measures into Rule 37(e) – giving courts an alternative to imposing sanctions – is also laudable, as it will likely reduce the volume of discovery-sanctions motions, saving parties critical resources and time. While the curative measures provision is a sensible improvement over the current sanctions-only approach, sanctions should only be authorized where a party has acted willfully and in bad faith.

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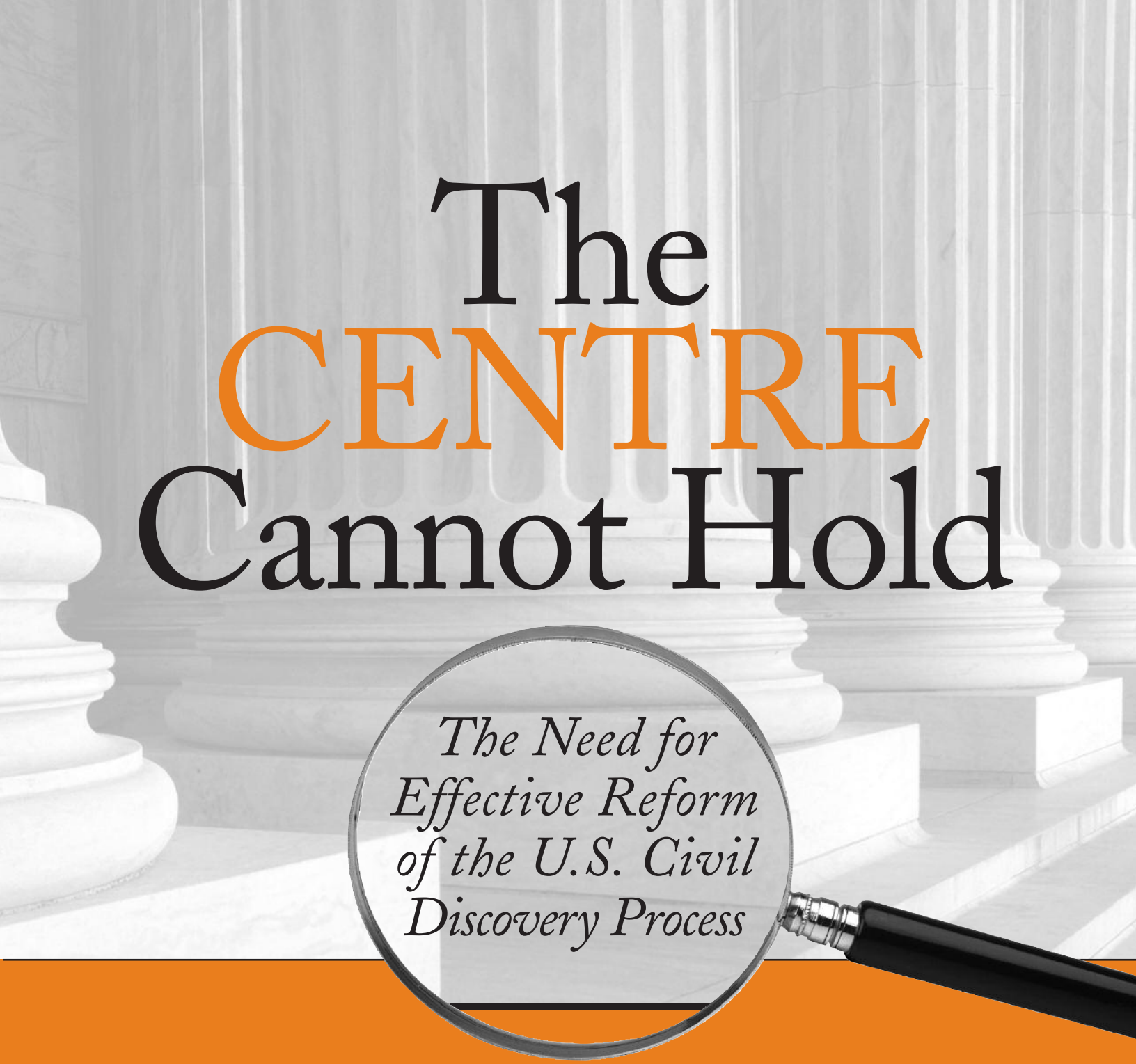
97 *See* ABA Section of Litig., Civil Discovery Standards (2004), http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf. These factors include: "A. The burden and expense of the discovery, considering among other factors the total cost of production . . . compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product . . . ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; . . . J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; . . . O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]" *Id*. at Standards 29b.iv.A-P.

98 Disaster-recovery systems are those designed to deal with and prevent IT downtime.

99 *See* Tex. R. Civ. P. 196.4 (requiring the party who makes unreasonable discovery requests to pay for the discovery).

Expanding the category of sanctions beyond truly culpable conduct will hurt American businesses, which will find themselves expending vast sums of money preserving information for the sake of avoiding sanctions.

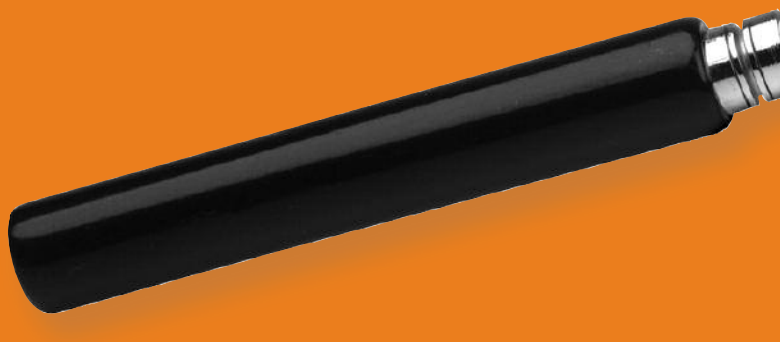
In sum, the Committee's proposals offer very positive, cost-effective reforms to the nation's civil discovery system. Over the longer term, however, the Committee should consider changing the default rule under which the party who produces discovery bears the cost of that production. It is this rule (more than any other factor) that has driven up the costs of discovery, because there is no downside to serving overbroad and burdensome discovery requests. Moreover, such a rule cannot be reconciled with a defendant's due process rights because a plaintiff's mere allegations trigger a defendant's obligation to produce information and bear the costs of doing so, without any judicial finding of wrongdoing. Accordingly, the Committee should ultimately consider an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court. Alternatively, the Committee should expand cost-shifting for electronic discovery, which remains the primary factor behind excessive discovery costs.



The CENTRE Cannot Hold

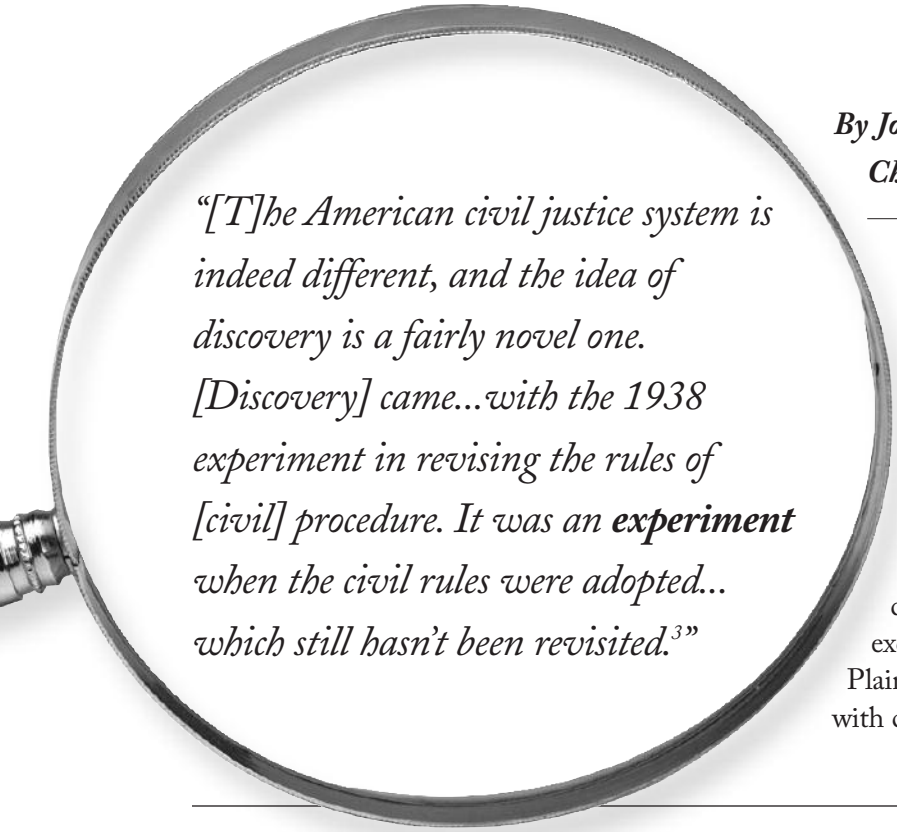
The Need for Effective Reform of the U.S. Civil Discovery Process

Released by the U.S. Chamber Institute for Legal Reform, May 2010



The CENTRE Cannot Hold[1]

The Need for Effective Reform of the U.S. Civil Discovery Process



"[T]he American civil justice system is indeed different, and the idea of discovery is a fairly novel one. [Discovery] came...with the 1938 experiment in revising the rules of [civil] procedure. It was an ***experiment*** *when the civil rules were adopted... which still hasn't been revisited.[3]"*

By John H. Beisner,[2] on behalf of the U.S. Chamber Institute For Legal Reform

Since its inception in 1938, pre-trial discovery has proven to be one of the most divisive and nettlesome issues in civil litigation in the United States. Discovery was designed to prevent trials by ambush and to ensure just adjudications, but it has fallen well short of these laudable goals.[4] Instead, a broad consensus has emerged that the pre-trial discovery process is badly dysfunctional, with litigants utilizing discovery excessively and, all too often, abusively.[5] Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-

1 William Butler Yeats, *The Second Coming* (1920) ("Things fall apart; the centre cannot hold").

2 John H. Beisner is co-head of the Class Actions And Mass Torts Practice Group at Skadden, Arps, Slate, Meagher & Flom LLP.

3 Symposium, *Controversies Surrounding Discovery and Its Effect on the Courts*, Roscoe Pound Institute Conference, 33 (Summer 1999) (remarks of Honorable Paul V. Niemeyer, Chair of the Advisory Committee on Federal Civil Rules of Civil Procedure), *available at* http://www.roscoepound.org/docs/papers99.pdf.

4 Drafters of the initial Federal Rules of Civil Procedure believed that the discovery process would not only encourage parties to settle, but also assist litigants to reach a just outcome by making all relevant evidence available to both sides. *See* Wayne. D. Brazil, *The Adversary Character of Civil Discovery: A Critique of Proposals for Change*, 30 VAND. L. REV. 1295, 1301-03 (1978); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 701, 703 (1989).

5 Griffin D. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, GA. L. REV. 1, 2 (1992) ("Scholars, litigators, judges and, more recently, even politicians have joined in unusual consensus to urge that reform of the discovery process is needed.").

ended "fishing expeditions" in the hopes of coercing a quick settlement. As a result, discovery has become the focus of litigation, rather than a mere step in the adjudication process.[6] By some estimates, discovery costs now comprise between 50 and 90 percent of the total costs of adjudicating a case.[7] Discovery abuse also represents one of the principal causes of delay and congestion in the judicial system.[8] These problems have led to perennial calls for discovery reform[9] and resulted in amendments to the Federal Rules in 1980, 1983, 1993, 2000 and 2006.[10] Anxiety over abusive discovery practices has also led many federal and state courts to experiment with local reforms. But such efforts have been largely unsuccessful in combating discovery abuse.

The exponential growth in the volume of electronic documents created by modern computer systems has exacerbated the problem and is jeopardizing our legal system's ability to handle even routine matters.[11] One recent case involved production of a volume of electronic documents equivalent to a stack of paper "137 miles high."[12] But the problem is not simply one of scope. Discovery of computer-based information costs more, takes more time and "creates more headaches" than conventional, paper-based discovery.[13] Indeed, the effort and expense associated with electronic discovery are so excessive that settlement is often the most fiscally prudent course—regardless of the merits of the case.

The foregoing assertions cannot be dismissed as mere anecdote or hyperbole. A recent joint survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System concluded unambiguously that "our discovery system is broken,"[14] and that "[e]lectronic discovery, in particular, is in need of a serious overhaul."[15] Seventy-one percent of the survey's respondents—comprised of a group of trial attorneys

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6 *Id.* at 11.

7 Federal Judicial Center, T. Willging, J. Shapard, D. Stienstra, & D. Milfich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases*, 15 (Table 4) (1997); *see also* HR Conf. Rep. No. 204-369, at 37 (1995) (stating that "discovery cost accounts for roughly 80 percent of total litigation costs in securities fraud cases") (citations omitted); THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, Vol. 31, No. 10, October 1999 ("Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used."), *available at* http://www.uscourts.gov/ttb/oct99ttb/october1999.html.

8 Louis Harris and Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, Study No. 874017 (October – December 1987) (on file with author) (poll of 200 federal and 800 state judges finding that many judges believed that discovery abuse accounts for "most of the delays and excessive costs in litigation").

9 The growing call for discovery reform was addressed at the 1976 Roscoe Pound Conference, convened at the request of Chief Justice Warren E. Burger to assess growing problems in litigation. The Conference's final report observed that "[w]ild fishing expeditions . . . seem to be the norm," and lamented the "[u]nnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement" that had come to characterize the American legal system. *See* William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978). Two years later, in 1978, the Advisory Committee for the Federal Rules of Civil Procedure discussed "refining" the scope of discovery in civil litigation. *See* Fed. R. Civ. P. 26 Advisory Committee's note.

10 Fed. R. Civ. P. 26.

11 George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. AND TECH. 10, ¶1 (2007).

12 *In re Intel Corp. Microprocessor Antitrust Litig.*, 2008 WL 2310288 (D. Del. June 4, 2008).

13 Kenneth J. Withers, *The Real Cost of Virtual Discovery*, Federal Discovery News at 3 (Feb. 2001); Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67-68 (2007) ("[E-]discovery is more time-consuming, more burdensome, and more costly than conventional discovery."); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) ("[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.").

14 Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System, 9 (Mar. 11, 2009 (Revised Apr. 15, 2009)), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053 ("ACTL/IAALS Report").

15 *Id.* at 2.

from both the plaintiffs' and defense bars—believe that discovery is used as "a tool to force settlement."[16] These views are admittedly subjective, but they are confirmed by empirical evidence. The number of discovery disputes resolved by courts has risen precipitously in the past decade, an increase that coincides with the ascendancy of electronic discovery. A search of Westlaw's "Allfeds" database for cases containing the phrase "discovery dispute" yields a total of 3,128 opinions for the nearly three-decade period between 1969 through 1998, before electronic discovery became commonplace. The same search run this year revealed 7,207 such cases since 1999.[17]

The origins of the problems in our civil discovery system are varied and complex. One principal cause is the "American rule,"[18] which obligates parties to bear their own litigation costs. This fosters the indiscriminate use of discovery and encourages parties to burden their opponents with costly and burdensome information requests. The tandem increase in cost and delay associated with discovery can also be traced to the failure of procedural rules to place reasonable boundaries on the scope and amount of discovery, a problem that has been exacerbated considerably by electronic discovery. The adversarial system itself is also a prime catalyst of discovery abuse. This system gives rise to compelling incentives to engage in abusive discovery tactics to gain a competitive advantage. Such tactics include coercing a settlement by requesting unnecessary information to increase the opponent's costs, or compelling the opponent to produce confidential, proprietary or embarrassing information. Fears of malpractice claims also lead attorneys to adopt a leave-no-stone-unturned approach to discovery. Finally, for a variety of reasons, courts have been reluctant to take a strong hand in managing the discovery process or to impose meaningful sanctions for abuses.

A recent case vividly illustrates how electronic documents, particularly email, are vastly altering the discovery landscape. In *In re Fannie Mae Securities Litigation*,[19] the Office of Federal Housing Enterprise Oversight (OFHEO), was served with a third-party subpoena to produce certain emails.[20] OFHEO's in-house counsel, apparently untutored in the ways of electronic discovery, agreed to comply with the subpoena voluntarily. Unfortunately, this representation was made before OFHEO had any understanding as to the time and expense that full compliance would entail. After OFHEO missed numerous deadlines for production of the emails, the district court held the federal agency in contempt, and ordered it to produce all documents responsive to the subpoena, even ones otherwise protected by privilege. Because many of the emails were no longer reasonably accessible, and because plaintiffs sought production of 80 percent of all of OFHEO's emails, the federal agency ultimately spent $6 million to comply with the subpoena—approximately one-ninth of its entire annual budget. The DC Circuit upheld the contempt citation, rejecting OFHEO's arguments that it should not have been compelled to comply with the subpoena in light of the excessive costs involved.[21]

The *Fannie Mae* case provides an unsettling glimpse of the future of civil litigation in the United States.

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16 *Id.* at 9.

17 The search was run on April 14, 2010. It updates a search first performed by Professor John S. Beckerman for his article, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000). Professor Beckerman notes that his figures could potentially be overstated because he made no effort to exclude criminal cases, or cases in which the phrase "discovery dispute" is mentioned only in passing (*e.g.*, "this case was free of any discovery disputes"). *Id.* n.12. We have not attempted to correct for this potential flaw. Professor Beckerman justifies his approach by opining that "judges would rarely include the words 'discovery dispute' in [a] reported opinion unless pretrial litigation actually contained a discovery dispute that the judge thought noteworthy." *Id.*

18 *See Oppenhimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("[T]he presumption is that the responding party must bear the expense of complying with discovery requests...").

19 552 F.3d 814 (D.C. Cir. 2008).

20 *Id.* at 816.

21 *Id.* at 821-22.

The burgeoning complexity and size of cases,[22] coupled with the explosive growth of electronic records, is stretching the pre-trial discovery process beyond its breaking point. Resolving this problem is critical because discovery occupies such an important role in our legal system. Without reform, the delay, waste and expense signified by the *Fannie Mae* case will become routine.

Discovery is not only expensive; it is also inefficient and, increasingly, ineffective. In one survey of attorneys in Chicago, practitioners estimated that 60 percent of discovery materials did not justify the cost associated with obtaining them.[23] More troubling, however, is that the avalanche of documents and information common in larger cases can obscure the relevant facts. A recent survey of Fortune 200 companies found that the ratio of the average number of discovery pages to the average number of exhibit pages (that is, pages actually utilized in some fashion at trial) in cases with total litigation costs of more than $250,000 was 1,044 to 1 in 2008.[24] The Chicago study revealed that in more than half of complex cases, the opposition's discovery efforts had failed to disclose significant evidence.[25] This result led the author of the Chicago survey to wonder whether the civil discovery system can be said to be functioning acceptably when "with considerable inefficiency and at great cost, it distributes information among the parties fairly evenly in less than half of the larger cases."[26]

Importantly, effective reform is possible, as some state courts have shown. For example, Oregon's rules of civil procedure require plaintiffs to plead a "plain and concise statement of the ultimate facts constituting a claim for relief."[27] This fact-based standard is more stringent than the Federal Rules' notice-pleading standard. A recent survey of dockets in Oregon's Multnomah County court, however, found that motions to dismiss complaints based on the sufficiency of the allegations were filed less frequently than in Oregon federal court, and were granted less

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22 *See, e.g.*, Bell, *supra*, at 6 (noting that "the United States has become a litigious society in which the courts are being asked to resolve an almost incomprehensible spectrum of problems.").

23 Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217, 230 n.24.

24 *Litigation Cost Survey of Major Companies*, Survey designed by Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform and administered by Searle Center on Law, Regulation, and Economic Growth, Appendix 1 at 16 (on file with author).

25 Brazil, *Views from the Front Lines*, *supra*, at 234.

26 *Id.*

27 Or. R. Civ. P. 18A.

frequently as well.[28] Similarly, Oregon's discovery rules are more limited than the Federal Rules, with no more than 30 requests for admission permitted,[29] and interrogatories not permitted at all. As a result, the Multnomah County survey found that parties in Oregon state court rarely file discovery-related motions.[30] These data suggest that Oregon's stricter pleading and discovery standards actually result in higher-quality claims being pursued in state court, with less disputed motion practice impeding the orderly administration of cases.

Similar rule changes would be the most effective way to curb discovery abuse at the federal level. In the interim, however, some of the problems can be alleviated by judges and magistrates under the existing rules. If federal courts took a more rigorous approach to discovery, the opportunities for abuse would greatly diminish. Most notably, courts should institute more formalized case management orders that set clear guidelines for discovery early in the life of a case, and they should pay closer attention to discovery disputes when they first begin to percolate.

This paper examines the escalating crisis in the U.S. civil discovery system and how it can be remedied. Part I discusses the origins and development of civil discovery in the U.S., which sowed the seeds of the current crisis. Part II discusses how electronic discovery has led to increased abuses of the discovery system. Part III discusses prior efforts to reform civil discovery in the U.S. and why they have been largely ineffective. And Part IV discusses potential remedies to the problem, taking particular note of the relative merits of the approaches being adopted in various states, as well as reforms suggested by practitioners, such as the American College of Trial Lawyers.

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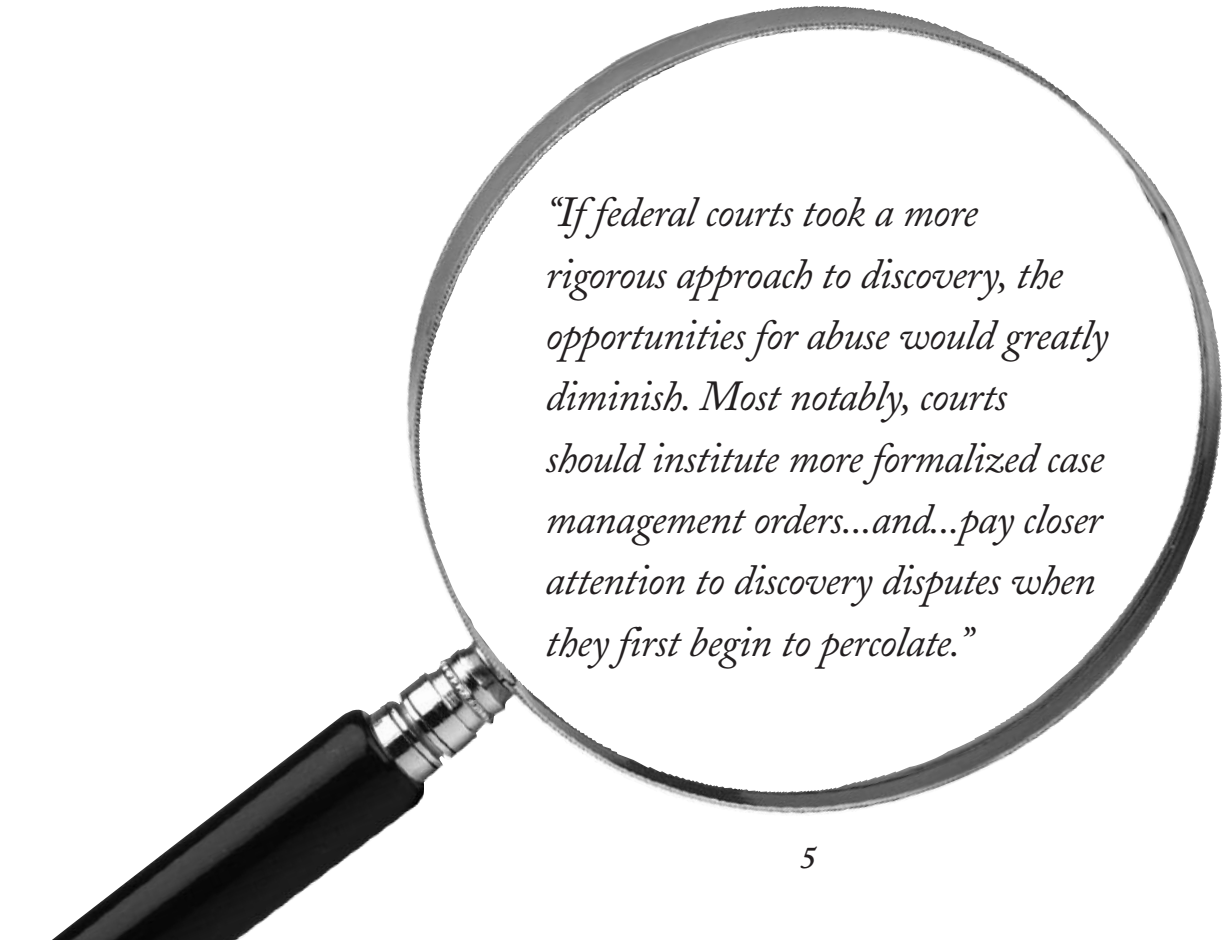
28 Institute for the Advancement of the American Legal System, *Civil Case Processing in the Oregon Courts*, University of Denver (2010), at 2, 14-15.

29 Or. R. Civ. P. 45F.

30 Institute, *Civil Case Processing in the Oregon Courts*, *supra*, at 2, 14-15.



I. Background

A. The Origins of Civil Discovery in the United States

Liberal pre-trial discovery is a fundamental component of the civil justice system in the United States. But it was not always so. American courts initially followed the approach of English courts of law, where pre-trial discovery was almost non-existent.[31] In fact, under the Field Code,[32] which served as the framework for the rules of civil procedure in most American courts throughout the late 19th and early 20th centuries,[33] a plaintiff could not even begin discovery unless he or she could independently state facts to substantiate the claims set forth in the complaint.[34] Interrogatories were strictly prohibited.[35] Depositions, document requests and other discovery practices commonplace in modern litigation were rare, and could be undertaken only with leave of court.[36] Depositions, moreover, were not as we know them today—only the opposing party could be deposed, and only in open court.[37] The antagonism of the day to discovery was captured by a Supreme Court case rejecting an attempt to "pry into the case of [an] adversary to learn its strength or weakness" as an impermissible "fishing bill."[38]

States eventually began to liberalize the discovery process, and by 1932, some permitted depositions of witnesses, while others even permitted

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31 Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. Rev. 691, 694 (1998) ("Historically, discovery had been extremely limited in both England and the United States."). Subrin explains that the notion of discovery was incongruous with early common law, which viewed litigation "not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just." *Id.* at 694-95.

32 The Field Code, which represented the first code of civil procedure in the United States, was drafted by David Dudley Field for New York, and subsequently adopted by other states. Distrustful of authority – particularly the unelected judiciary – and intent on protecting the privacy of individuals against unnecessary intrusion, the Field Code provided for extremely limited discovery. *Id.* at 696.

33 By 1928, twenty-eight states had adopted the Field Code. *See* Charles Clark, Handbook of the Law of Code Pleading, 19-20 (1928). Federal courts generally followed the Field Code as well. Under the Conformity Act of 1872, federal courts were obligated to hew "as near as may be" to the civil procedure rules of the state in which they were located. *See* Judicial Conformity Act of June 1, 1872, ch. 255 §§ 5-6, 17 Stat. 196, 197 (repealed 1938); *see also* Subrin, *Fishing Expeditions*, *supra*, at 692.

34 Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2241 (1937) ("Under the [Field] Code, a plaintiff could not even begin discovery, unless he or she could independently substantiate such suspicions, for substantiation had to be manifested in a complaint that stated facts."); Subrin, *Fishing Expeditions*, *supra*, at 694-97.

35 Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 Law and Hist. Rev. 311, 322 (1988).

36 Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 Rutgers L. Rev. 59, 601 (2002).

37 Subrin, *David Dudley Field and the Field Code, supra,* at 322 (the depositions permitted by the Code were "in lieu of calling the adverse party at the trial, and subject to 'the same rules of examination' as at trial. A pretrial deposition...was to be before a judge who would rule on evidence objections."). The few federal statutes permitting depositions, however, were designed only to preserve the testimony of witnesses who could not appear at trial, rather than to uncover new information. At the time, a federal statute (28 U.S.C. § 639) permitted depositions *de bene esse*, but only when the witness resided more than 100 miles from the court, was at sea or about to leave the United States, or was old or infirm. *See* Subrin, *Fishing Expeditions*, *supra*, at 698. A second federal statute (28 U.S.C. § 644), permitted depositions *dedimus potestatem*, which could be taken only upon a showing that it was (i) necessary to avoid the failure or delay of justice, (ii) the witness was beyond the reach of the court's process, (iii) the deposition could not be taken *de bene esse* and (iv) the deposition was requested in good faith and not for discovery purposes. *Id.* at 698-99 (citing 6 James Wm. Moore et al., Moore's Federal Practice § 26 App.100 (3d ed. 1997)).

38 *Carpender v. Winn*, 221 U.S. 533, 540 (1911). The Massachusetts Supreme Court articulated a similar disdain for discovery:

> It seems that the real purpose of taking the deposition is merely to fish out in advance what the testimony will be...This is what Lord Hardwicke termed a "fishing bill," to enable the plaintiff to learn whether he may sue his judgment against Kingsbury, and levy on the land, with prospect of success...As a bill of discovery only, we think it cannot be maintained.
>
> *Fiske v. Slack*, 38 Mass. 361 (1838), *available at* 1838 WL 2792.

interrogatories.[39] Despite these changes, pre-trial discovery remained extremely rare.[40] This held true in federal courts as well.[41]

B. Adoption of the Federal Rules

The Federal Rules of Civil Procedure were adopted in 1938.[42] The drafters recognized that the absence of pre-trial discovery sometimes placed litigants at a serious disadvantage, leading to trials by ambush.[43] Concerned that the outcomes of trials often hinged not on the merits of the case, but on the skills of counsel or the financial resources of the parties, the drafters of the federal rules determined to implement a system that would allow the parties to have the "fullest possible knowledge of the issues and facts before trial."[44] The drafters believed that wide-ranging discovery would help ensure a just determination in all matters and remedy the imbalance of power between the wealthy and the poor.[45]

The shift to liberal discovery was also premised on two practical considerations. First, the drafters believed that pre-trial discovery would greatly reduce litigation costs. Without pre-trial discovery, parties could not easily discern what positions the opposition would assert at trial.[46] Prudent litigants therefore adopted an expensive and wasteful "be prepared for anything" approach to trial preparation.[47] The drafters believed that discovery would reveal the strengths and weaknesses of each party's case at an early stage, thereby facilitating early settlements.[48] Second, the drafters concluded that pre-trial discovery would be an efficient and self-regulating process.[49] Mutual self-interest, coupled with a desire to avoid wasting clients' time and money, would minimize discovery disputes and lead to the expeditious exchange of relevant information.[50]

Importantly, however, the drafters of the original federal rules dismissed clear warning signs that these two key premises were deeply flawed. Abuse was

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39 Subrin, *Fishing Expeditions*, *supra*, at 702-04.

40 *Id.*

41 *Id.* The sole discovery permitted in cases at law (aside from a bill of particulars) were depositions. Depositions were also available in equity, but only upon a showing of "good and exceptional cause" for departing from the general rule that pre-trial discovery was not permitted. *Id.* at 698 (citing GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913) and Fed. Eq. R. 46).

42 The Federal Rules were enacted pursuant to the Rules Enabling Act. Curiously, the topic of discovery was entirely absent from the debate leading up to the passage of the Enabling Act. Instead, the principal impetus behind the reform was concern about the costs and uncertainty associated with a lack of uniformity in federal courts. *See* Subrin, *Fishing Expeditions*, *supra*, at 698 (citing GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913) and Fed. Eq. R. 46).

43 William W. Schwartzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178 (1991).

44 Bell, *supra*, at 6.

45 Schwartzer, *Slaying the Monsters*, *supra*; Kathleen L. Blaner, *Federal Discovery, Crown Jewel or Curse?*, No. 4 LITIG. 8, 8 (1998) ("Discovery was considered a crown jewel because it sought to open the courts to all elements of society. The drafters saw an imbalance of power between the wealthy and the poor. By mandating a full exchange of information, the drafters thought that they could help less powerful litigants prove their legal claims and thus redress the imbalance.").

46 Edson R. Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737, 737-38 (1939) (explaining that another problem with the pre-discovery era was that, even when the pleadings accurately revealed the parties' exact positions, they did not reveal the nature or source of the proof that would be offered in support).

47 *Id.*

48 Schwartzer, *Slaying the Monsters*, *supra*; Bell, *supra*, at 6-7.

49 Maurice Rosenberg and Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU. L. REV. 579, 581.

50 *Id.*

already prevalent even under the limited discovery that some states permitted at that time. For example, a few states permitted depositions, but required that the deposition be suspended if the parties could not resolve an objection themselves. This led to various forms of mischief, as one commentator recounts:

> *In some of the smaller towns in Indiana, Kentucky and elsewhere, local lawyers sometimes take advantage of lawyers from the city who have come to conduct an examination for discovery. Knowing that their opponents are anxious to finish the examination and return to the city and are not apt to wait over until a rather tardy judge compels an answer, they instruct their clients to refuse to answer questions which clearly are proper.*[51]

Other abusive tactics familiar to modern practitioners were also common by the time the federal rules were enacted. For instance, in states where parties were entitled to take depositions, it was not uncommon for parties to file a motion to reschedule or modify the scope of the deposition "in nearly every important case."[52] In New York, where defendants were permitted discovery only as it related to their affirmative defenses, defendants regularly included in their answers "fictitious defenses for the sole purpose of securing an examination of [the] adversary."[53] Similarly, in states that permitted requests for admissions, parties would:

> *[C]all upon their opponents to admit practically every item of evidence. Several cases were found in which as many as one hundred specific admissions had been requested. The chief use of admission procedure in such a form is as a tactical weapon, rather than as a means of eliminating undisputed items of proof.*[54]

But it was interrogatories that provided the most fertile ground for abuse at that time. As one commentator notes, the tactic of overwhelming an opponent with vast numbers of generic interrogatories even predated the arrival of modern photocopiers:

In one case, 2258 interrogatories were filed. Gradually there came into use mimeographed and printed forms which contained two, three and four hundred interrogatories. These questions were not prepared with reference to the particular case in which they were to be used, but were stock forms entirely.[55]

Respondents to interrogatories also engaged in abusive tactics. As interrogatories become more common, respondents quickly hit upon the ploy of providing vague or ambiguous answers.[56] In Massachusetts, the excessive use of interrogatories, combined with the prevalence of evasive answers, imposed a "surprisingly heavy burden" on courts, compelling them to devote "[a]lmost all of [their] motion hours...[to] deciding objections to interrogatories."[57]

Despite the sounding of these alarms by state courts, the drafters of the 1938 federal rules radically expanded both the scope of permissible discovery and the arsenal of tools parties could use to obtain it.[58] In so doing, the drafters "went further than any single jurisdiction's discovery provisions."[59]

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51 Subrin, *Fishing Expeditions*, *supra*, at 703-04 (citing George Ragland, Jr., Discovery Before Trial, 100-01 (1932)).

52 *Id.* at 704 (citing George Ragland, Jr., Discovery Before Trial, 67 (1932)).

53 *Id.* at 705 (citing George Ragland, Jr., Discovery Before Trial, 132 (1932)).

54 *Id.* (citing George Ragland, Jr., Discovery Before Trial, 201 (1932)).

55 *Id.* (citing George Ragland, Jr., Discovery Before Trial, 93 (1932)).

56 *Id.* at 707 (citing George Ragland, Jr., Discovery Before Trial, 93 (1932)).

57 *Id.* at 708 (citing George Ragland, Jr., Discovery Before Trial, 114, 119 (1932)).

58 *Id.* at 698 (citing George Frederick Rush, Equity Pleading and Practice 221 (1913) and Fed. Eq. R. 46). The new discovery tools included: depositions upon oral examination, depositions upon written examination, interrogatories to parties, requests for production of documents and things and entry upon land for inspection and other purposes, physical and mental examinations of persons and requests for admission. *See* Fed. R. Civ. P. 30-36.

59 Subrin, *Fishing Expeditions*, *supra*, at 702. The Federal Rules essentially made available all discovery tools then in existence, which no state had done at that time. *See id.* Yet the Federal Rules also included significant limits. For example, documents could be examined only upon a court order, and a showing of "good cause" was necessary for the production of documents under the original Rule 34. *See* Moskowitz, *Rediscovering Discovery*, *supra*, at 603.

C. Early Application of the Federal Rules

Federal courts initially resisted the broad discovery provisions in the rules.[60] For example, some courts limited discovery only to admissible evidence.[61] Other courts revived the limitation that discovery could be had only to build the requesting party's own case, and not to test the adversary's claims or defenses. There was even a dispute as to whether the discovery devices set out in the Federal Rules could be used cumulatively.[62]

In response to these disputes, the Federal Rules were amended in 1946. The amendments made clear that discovery extended even to inadmissible evidence, provided the evidence sought was likely to lead to admissible evidence.[63] The Supreme Court also lent its imprimatur to unfettered discovery. In the seminal case of *Hickman v. Taylor*,[64] the Court declared that the new discovery rules "were to be accorded a broad and liberal treatment" and that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."[65] Although *Hickman* cautioned that discovery could not be employed to annoy, embarrass or oppress an adversary,[66] litigants were now free to trawl for evidence with few meaningful limitations.

The effect of *Hickman* was profound. Lower courts began to endorse fishing expeditions, subject only to a nominal and increasingly soft relevance requirement.[67] And this problem was not limited to federal courts. State courts generally fell in line with the federal approach to discovery.[68]

D. 1970 Amendments to the Federal Rules

By many accounts, the discovery system in America functioned reasonably well for approximately the first thirty years.[69] But an increasing reliance on U.S. courts to address various social issues expanded litigation well beyond what the drafters of the federal rules could have imagined.[70] The passage of sweeping civil rights legislation,[71] the enactment of harsher criminal penalties[72] and the trend toward relying

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60 Jonathan M. Redgrave, Ted S. Hiser, *The Information Age, Part I: Fishing In The Ocean, A Critical Examination Of Discovery In The Electronic Age*, 2 Sedona Conf. J. 195, 199 (2001).

61 Parties were therefore barred from seeking hearsay evidence during depositions. *See, e.g.*, *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 217 (W.D. Mo. 1940); *Maryland ex. rel. Montvila v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 214-15 (D. Md. 1940); *Rose Silk Mills, Inc. v. Ins. Co. of N. Am.*, 29 F. Supp. 504, 505-06 (S.D.N.Y. 1939).

62 *Kulich v. Murray*, 28 F. Supp. 675, 676 (S.D.N.Y. 1939).

63 Redgrave & Hiser, *supra*, at 199.

64 329 U.S. 495 (1947).

65 *Id.* at 507.

66 *Id.* at 507-08.

67 *See, e.g.*, *Reed v. Swift & Co.*, 11 F.R.D. 273, 274 (W.D. Mo. 1951); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950).

68 Moskowitz, *Rediscovering Discovery*, *supra*, at 604 ("In general, state procedure rules followed the federal developments.").

69 Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747, 750 (1998); Blaner, *supra*.

70 Blaner, *supra*, at 8. As one expert noted "the drafters [of the Federal Rules] would be amazed at how immense many cases now become and how prominent a role discovery plays in that process." Subrin, *Fishing Expeditions*, *supra*, at 743.

71 Robert L. Carter, *The Federal Rules in Practice: The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2181 (1989); Blaner, *supra*, at 8.

72 *See* Stuart Taylor, Jr., *A Quiet Crisis in the Courts*, Legal Times, Jan. 20, 1992, at 23 ("The courts have been deluged by criminal trials and appeals, in large part because harsh penalties have increased defendants' incentives to go to trial rather than plead guilty. The new sentencing process is so complex and hyper technical that it takes judges roughly 25 percent more time than before."). In an interview, federal District Judge Weinstein opined that the increasing criminal caseload made it "very difficult for any judge to find the time to try civil cases." Kenneth P. Nolan, *Weinstein on the Courts*, Litig., Spring 1992, at 24.

on private litigants (rather than government agencies) to enforce certain laws[73] all combined to expand the societal role of federal and state courts and expand the overall volume of litigation.

The rise in litigation led to calls for still further expansions of pre-trial discovery. These calls were heeded in 1970, when the Federal Rules were amended to lift certain important restrictions. Crucially, the 1970 amendments did away with the requirement that a party demonstrate good cause before it could request the production of documents.[74] These amendments also allowed parties to use discovery devices as frequently as they wished.[75] The floodgates had been opened.

E. Early Reform Efforts

The 1970 amendments triggered an almost immediate backlash. A broad opposition to expansive discovery emerged within only a few years,[76] as confidence in the ability of litigants and courts to manage the discovery process began to deteriorate.[77] The 1976 Pound Conference, which had been "convened at the behest of Chief Justice Warren Burger to examine the troubled state of litigation,"[78] concluded:

> *There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.*[79]

The growing problems with pre-trial discovery compelled state courts to begin experimenting with discovery reform as early as the late 1970s,[80] and prompted the American Bar Association to

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73 Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 4-5 (1997). Judge Higginbotham notes ("Congress has elected to use the private suit, private attorneys-general, as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights, and more.").

74 *See* Blaner, *supra*, at 8; Fed. R. Civ. P. 26 (advisory committee notes to 1970 amendments).

75 *See Id.*

76 Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752 (1998). The growing dissatisfaction with the discovery process in the 1960s and 1970s is evidenced by the significant increase in the literature on the subject of discovery, and the number of conferences, reports, symposia, meetings, or studies devoted solely or primarily to the issue of discovery problems. *See, e.g.*, Brazil, *Views from the Front Lines*, *supra*; Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *Improving Judicial Controls over Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981. AM. B. FOUND. RES. J. 875; David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979); William H. Speck, *The Use of Discovery in the United States District Courts*, 60 YALE L.J. 1132 (1951); David S. Walker, *Professionalism and Procedure: Notes on An Empirical Study*, 38 DRAKE L. REV. 759 (1988-89); Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623 (1972).

77 James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 624 (1998).

78 Bell, *supra*, at 9.

79 William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

80 Patricia A. Ebener Et Al., RAND INST. FOR CIVIL JUSTICE, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 30 (1981). This survey found that 29 states and 23 of the nation's largest metropolitan trial courts had implemented reforms to expedite pretrial discovery, including using mail and telephone to expedite pretrial motions, requiring attorneys to attempt to settle their discovery disputes before requesting judicial intervention, delegating resolution of discovery motions to para-judicial employees, limiting the number of interrogatories, limiting the time allowed for discovery, holding conferences to schedule discovery and authorizing sanctions for frivolous discovery motions. *Id.*

convene a study group to examine the problem of discovery abuse. The ABA study group's 1980 report led to a tightening of the federal discovery rules in 1980 and 1983.[81] When these reforms proved inadequate, Congress passed the Civil Justice Reform Act (CJRA) of 1990, triggering a further round of study and reforms.[82] In addition, in 1993, the federal discovery rules were amended to mandate that parties meet and prepare a proposed discovery plan early in the case, and that certain relevant information and evidence be produced automatically, regardless of whether it had been requested by the opposition. The 1993 amendments also imposed limits on the number of depositions and interrogatories.[83]

These reforms, though well intentioned, failed to stem the delay and excessive costs that have become the hallmarks of pre-trial discovery. In fact, the discovery abuses common today differ little from those that so concerned the drafters of the Federal Rules.[84] The frequency and severity of these abuses, however, have changed considerably.

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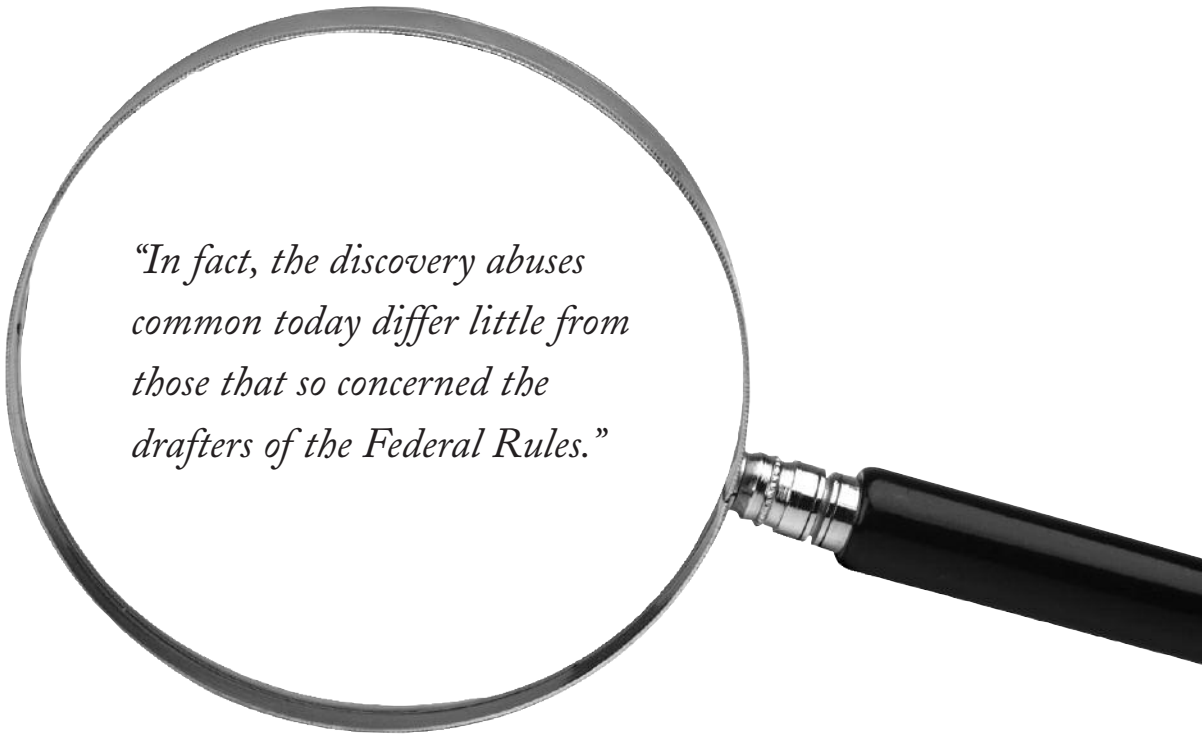
81 *See* Edward D. Cavanaugh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 778 (1985). The 1983 Amendments prohibited redundant discovery, required that discovery be proportional to the magnitude of the case and mandated court sanctions for violation of the Rules. They also explicitly provided for judicial discussion of discovery plans at pretrial conferences and for the issuance of an order scheduling discovery and other pretrial events. *Id.*

82 Kakalik, *supra*, at 624-25. The Civil Justice Reform Act ("CJRA") required each federal district court to submit a plan for improving civil case management. The CJRA encouraged courts to consider changes in discovery, including limitations on timing and amount of discovery and special programs to assist attorneys in better planning discovery activities. *Id.*

83 *Id.* at 625.

84 Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—Much Ado About Nothing?*, 46 HASTINGS L.J. 679, 701-02 (1995).



II. Electronic Discovery Deepens the Problem

A. Electronic Discovery

1. Electronic Discovery Presents Unique and Urgent Challenges

The ascendancy of electronic discovery in recent years has brought to bear the need for fundamental changes to our discovery system.[85] Modern computer systems have increased exponentially the amount of documents that companies create and retain in the normal course of business.[86] As a result, discovery costs are rising, and the time required to conduct discovery is increasing rapidly. Some basic figures help to frame the scope and urgency of the problem. Experts believe that 99 percent of the world's information is now generated electronically.[87] Approximately 3.65 trillion emails are sent worldwide annually,[88] with the average employee sending or receiving 135 emails each day.[89] Email traffic, however, is only the tip of the iceberg. Each day, more than twelve billion instant messages are sent worldwide.[90]

This surge in the creation of electronic documents is especially problematic because modern computer technology now permits companies to retain vast amounts of records almost indefinitely. In testimony before the Federal Rules advisory committee, ExxonMobil explained that, as of 2005, it was storing 500 terabytes of electronic information in the United States alone. This amounts to 250 billion typewritten pages.[91] Corporate defendants now face the dismaying prospect of combing through virtually limitless caches of electronic records every time they are threatened with litigation.

An ever-growing volume of electronic documents is only part of the problem. The harsh reality is that the costs of producing electronic documents far exceed those for paper documents. Unlike paper documents, electronic data must be heavily processed and loaded into a special database before it can even be reviewed for potential relevance.[92] Also, older electronic data is typically stored on so-called backup tapes, which can

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85 Douglas R. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶1, *available at*, http://richmond.edu/jolt/v14i3/article8.pdf.

86 Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶3 (2007) ("the explosive growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging").

87 Peter Lyman & Hal R. Varian, *How Much Information?*, 1 (2003), *available at* http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.

88 Paul & Baron, *supra*, at 9.

89 Press Release, *LiveOffice Survey Reveals Organizations are Unprepared for E-Discovery Requests*, June 25, 2007, *available at* http://www.marketwire.com/mw/rel_us_print.jsp?id=745509.

90 Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TECH NEWS WORLD, Nov. 10, 2005, *available at* http://www.technewsworld.com/story/47270.html.

91 *See* Written Comments Submitted to the Committee on Rules of Practice and Procedure, Proposed E-Discovery Amendments to Federal Rules of Civil Procedure, February 11, 2005, *available at* www.lfcj.com/admin/document_administration/document.cfm?DocumentID=161.

92 Among other things, electronic data must be subjected to a process known as de-duplication, in which identical copies of documents are removed prior to review. This process can greatly reduce review costs.

be singularly time-consuming and costly to review. The data from such tapes must first be decompressed and then processed into a reviewable format.[93] Further, the information contained on a backup tape may be recorded in a serpentine fashion, such that the tape drive must physically shuttle back and forth through the entire tape repeatedly to retrieve to the necessary data.[94] This shuttling process occurs at a glacial pace when compared to the speed with which computers normally retrieve data. Additionally, because backup tapes often lack a directory or catalogue of the information they contain, a party may need to search an entire tape—or perhaps all of its tape—to locate a single file.[95]

Restoring backup tapes for review can easily require millions of dollars in fees. In one case, the defendant spent $9.75 million to restore only 20 backup tapes.[96] The cost of reviewing backup tapes can become higher still if the data they contain were created on obsolete software or hardware, an occurrence that is far from uncommon.[97] These substantial costs have not, however, dissuaded courts from routinely ordering defendants to restore and search backup tapes for potentially responsive documents.[98]

Further escalating the costs of electronic discovery are the qualitative differences that exist between electronic and paper documents. As the drafters of the Federal Rules of civil procedure observed, most people adopt a more informal style when drafting emails, text messages and instant messages, a practice that tends to make privilege review "more difficult, and...correspondingly more expensive..."[99] The casual milieu of email and other electronic communications also gives rise to linguistic ambiguities that further complicate the reviewer's task. Employees frequently devise their own abbreviations and shorthand terminology for such correspondence,[100] a convention that leaves reviewing attorneys unable to comprehend documents without guidance from the authors.[101]

The additional costs associated with production of electronic records can be considerable. One expert

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93 Institute for the Advancement of the American Legal System, *The Emerging Challenge of Electronic Discovery: Strategies For American Businesses*, 3 (2008) (on file with author).

94 Craig Ball, *What Judges Should Know About Discovery from Backup Tapes*, at 2 (2007) *available at* http://www.craigball.com/What_Judges_Should_Know_About_Discovery_from_Backup_Tapes-corrected.pdf.

95 Sarah A. L. Phillips, *Discoverability of Electronic data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for "Not Reasonably Accessible" Data?*, N.C.L.R. 984, 991 (2005).

96 *Rowe Ent., Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

97 Institute for the Advancement of the American Legal System, *Electronic Discovery: A View From the Front Lines, Institute for the Advancement of the American Legal System*, 13, *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf. Businesses often find that older data cannot be easily retrieved because it was created with software that is no longer in production, or is stored on media that is no longer supported by the manufacturer. Restoring this type of data is a laborious and expensive process.

98 Phillips, *supra*, at 991.

99 Fed. R. Civ. P. 26(f) (Advisory Committee's note).

100 Stephanie Raposo, *Quick! Tell Us What KUTGW Mean*s, The Wall Street Journal, Aug. 6, 2009 (KUTGW stands for "keep up the good work").

101 Paul & Baron, *supra*, at 10, ¶38. These abbreviations also complicate the process of locating relevant documents in the first instance, as word searches may not incorporate these key terms.

estimates the cost of producing a single electronic document to be as high as $4.[102] Verizon, which has devoted considerable attention to electronic discovery issues, has estimated the cost of producing one gigabyte of data—the equivalent of between 15,477 and 677,963 printed pages–to be between $5,000 and $7,000.[103] Of course, far more than a single gigabyte of data will often be at issue. Commentators opine that even a typical "midsize" case now involves at least 500 gigabytes of data, resulting in costs of $2.5 to $3.5 million for electronic discovery alone.[104] Another study found that from 2006 to 2008, the average surveyed company spent between $621,880 and $2,993,567 per case. At the high end, companies reported average per-case discovery costs ranging from $2,354,868 to $9,759,900.[105]

The costs of electronic discovery are continuing to rise. One report indicates that the volume of electronically stored information is growing at a rate of 30 percent annually, a phenomenon that can be ascribed in large part to ever cheaper storage media.[106] This growing cache of electronic information drives up costs, as companies are forced to cull through ever larger stockpiles of data to identify responsive documents. According to the influential Socha-Gelbmann Electronic Discovery Survey, expenditures for the collection and processing of electronic documents in the United States will reach $4.7 trillion in 2010, an increase of 15 percent over the prior year.[107] Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege, a process that can comprise between 75 and 90 percent of the cost of producing electronic records.[108]

2.Electronic Discovery's Wide-Reaching Effects

The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system.[109] A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery "could dominate the underlying stakes in the dispute."[110] But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking down under the strain.[111] Several cases have already involved more than one billion potentially relevant electronic documents.[112] Even if only one percent of the documents in such a case were reviewed for possible production, it would likely take 100 people seven months (and $20 million) to conduct an initial review.[113] In light

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102 Ann G. Fort, *Mandatory E-Discovery: Compliance Can Create David and Goliath Issues, Reminiscent of the Early Days of Sarbanes-Oxley*, Fulton County Daily Report, Mar. 19, 2007, at 13.

103 Institute, *A View From the Front Lines*, *supra*.

104 *Id.*

105 *Litigation Cost Survey of Major Companies*, *supra,* at 3.

106 Lyman & Varian, *supra*, at 2.

107 George Socha and Tom Gelbmann, *Mining for Gold*, *available at* http://www.lawtechnews.com/r5/showkiosk.asp?listing_id=2117297.

108 James N. Dertouzos et al., RAND Institute for Civil Justice, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research* 3 (2008), *available at* http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

109 When Supreme Court Justice Stephen Breyer was informed at a conference several years ago that discovery in a routine case might cost $4 million, he remarked, "[w]e can't do that...If it really costs millions of dollars, then you're going to drive out of the litigation system people who ought to be there." *See* Daniel Fisher, *The Data Explosion*, Forbes, Oct. 1, 2007, *available at* http://www.forbes.com/business/global/2007/1001/052.html.

110 Dertouzos, *supra*, at 3.

111 Ken Withers, *E-Discovery and the Combative Legal Culture: Finding a Way Out of Purgatory*, *available at* http://www.thesedonaconference.org/content/miscFiles/SDJournal.pdf.

112 John H. Hessen, *Special Issues Involving Electronic Discovery*, 9 Kan. J.L. & Publ. Pol'y 425, 428 (2000).

113 Paul & Baron, *supra*, at ¶¶19-20 & n.56.

of projected growth rates for electronic documents, it may soon become too expensive for lawyers merely to search through their clients' computer files to identify potentially responsive documents.[114]

Electronic data also present unique challenges with regard to collecting potentially responsive documents. Most companies have little idea what documents exist in their computer systems, or precisely where those documents reside.[115] The sheer volume of electronic documents created by modern businesses simply makes it too difficult and expensive to catalogue or organize them. The ease with which computer records can be created further complicates document collection efforts. For example, employees can save huge swaths of information on desktop computers, laptops and portable storage devices without anyone else's knowledge. Merely identifying all versions of a particular document can be inordinately difficult because an employee may have forwarded the document to a large number of individuals, each of whom may have edited it and saved it on his or her own computer.[116] Unsurprisingly, cases in which companies have been sanctioned for failing to locate all responsive electronic documents abound.[117] In *Qualcomm, Inc. v. Broadcom Corp.*,[118] for example, plaintiff's counsel failed to identify key emails until after trial had begun, resulting in an $8.5 million sanction.[119]

Preservation of electronic data also presents litigants with special challenges—and costs. Once a lawsuit can be reasonably anticipated, both parties are obliged to preserve all potentially relevant evidence.[120] While this is generally a simple task for hard-copy documents, it poses considerable difficulties for electronic files, for several reasons. First, the sheer volume and diversity of electronic data makes preservation a challenge. Second, electronic data can be (and, in some cases, is intended to be) ephemeral. Dynamic databases, in which data are constantly being added, modified and removed, can be extremely difficult to preserve for an extended period of time.[121] Third, computer systems typically include housekeeping programs that automatically delete data that are no longer useful.[122] Unless suspended, these programs can destroy relevant evidence. Fourth, certain electronic information, such as deleted files and metadata,[123]

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114 *Id.* at ¶1.

115 Neither the users who create the data nor the company's information technology personnel are necessarily aware of the existence and locations of documents. A document may reside concurrently on an individual's hard drive, in a network-shared folder, as an attachment to an email, on a backup tape, in an internet cache, and on portable media such as a CD or floppy disk. Furthermore, the location of particular electronic files typically is determined not by their substantive content, but by the software with which they were created, making organized retention and review of those documents difficult. *See The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2 n.5 (June 2007), *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf; *see also The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 123 (2006) (noting that, thanks to email, it is entirely possible that documents and correspondence may reside in "unexpected" places).

116 Institute, *The Emerging Challenge*, *supra*, at 2.

117 *See, e.g.*, *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (discussing cases).

118 2008 WL 66932, at *1 (S.D. Cal. Jan. 7, 2008), *vacated in part by* 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

119 *Id.*

120 *See, e.g.*, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (noting that "the authority to sanction parties for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers...The duty to preserve attached at the time that litigation was reasonably anticipated").

121 Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH, 3, ¶7 (2007), *available at* http://law.richmond.edu/jolt/v13i3/article9.pdf.

122 *Id.*

123 Metadata, commonly described as "data about data," is defined as "information describing the history, tracking, or management of an electronic document." *See Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005). Metadata can reveal how, when and by whom a document was created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information). *Appendix F to The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, (Sept. 2005), *available at* http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf.

are not visible to normal users.[124] This invisible information can be the most vital evidence in a case,[125] yet it is frequently destroyed in the normal course of business.[126] The cost of preserving electronic information can be extreme. In its testimony before the Federal Rules Advisory Committee, ExxonMobil advised that the annual cost of maintaining its electronic data in the U.S. alone is $23.76 million.[127]

3. Electronic Discovery Encourages Abuse

The massive amounts of discoverable electronic material and the difficulties associated with its collection and preservation are making discovery "unpredictable and increasingly subject to abuse."[128] Counsel now recognize that electronically stored information is useful not only as a litigation tool, but also as a litigation tactic. This is borne out by the marked rise in the use of spoliation claims as a tactical maneuver.[129] As one expert has noted, the intricacies of modern computer systems make it all but a certainty that some relevant electronic evidence will be lost or destroyed in any given case.[130] This admittedly anecdotal observation is bolstered by a recent survey, which found that more than 90 percent of companies have failed to adopt procedures to preserve electronic data in the event of litigation.[131] As a result, savvy plaintiffs' counsel have an incentive to seek out some electronic documents, not because they are relevant, but rather in hopes of securing a large sanction when the opposing party cannot produce them.[132] Spoliation claims have given plaintiffs' attorneys a "nuclear weapon" that can be used to force large organizations to settle frivolous cases.[133]

The recent experience of one company involved in a multi-district product liability litigation vividly illustrates the unique problems presented by electronic discovery.[134] The defendant in that case initially hired a vendor to handle the preservation and collection of electronic data for the lawsuit, but the vendor quickly found itself in over its head. Technologically savvy plaintiffs' counsel seized on isolated problems with the defendant's electronic production efforts and exaggerated them in order to undermine the legitimacy of the defendant's entire electronic discovery process. Convincing the court that the defendant's problems were far more severe and wide-spread than was actually the case, the plaintiffs persuaded the court both to impose sanctions and to appoint a special master to oversee electronic discovery issues.

Unfortunately, the defendant's problems were only beginning. Plaintiffs' counsel argued that prior production efforts were so shoddy that the defendant should have to begin the process from

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124 When a user deletes a file, the document remains on the computer's hard drive until the space it occupies is needed for another document. *See* Sharon D. Nelson, Bruce A. Olson, & John W. Simek, THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK, 293 (2006) (noting that "[u]ntil portions of the unallocated space are used for new data storage, in most instances, the old data remains and can be retrieved using forensic techniques").

125 Kenneth Starr's team discovered the infamous "talking points" document on Monica Lewinsky's computer, even though she had deleted it. *See* Shira A. Scheindlin & Jeffrey Rebkin, *Electronic Discovery in Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 329 (2000).

126 Notably, a document's metadata can be destroyed merely by opening or accessing the document.

127 *See* Written Comments Submitted to the Committee on Rules of Practice and Procedure, Proposed E-Discovery Amendments to Federal Rules of Civil Procedure, February 11, 2005, *available at* www.lfcj.com/admin/document_administration/document.cfm?DocumentID=161

128 Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 207 (2001).

129 Institute, *A View From the Front Lines*, *supra*.

130 Arthur L. Smith, *Responding to the "E-Discovery Alarm"*, ABA BUSINESS LAW TODAY, September/October 2007, at 27-29.

131 Institute, *A View From the Front Lines*, *supra*.

132 Although the 2006 amendments to the Federal Rules of Civil Procedure created a safe harbor that precludes sanctions for electronic documents lost or destroyed through ordinary or good-faith computer use, courts have rarely invoked this provision, and have construed it narrowly when doing so. *See id.*

133 The risk that electronic discovery will be used as a weapon is particularly acute in cases such as employment disputes where the plaintiff possesses virtually no discoverable information. *Id.*

134 Example supplied by Adam Cohen, Senior Managing Director of FTI Technology, Inc.

scratch. The company was forced to hire a new vendor to review the prior vendor's work and to remedy any errors that had occurred. Further, because the company had no comprehensive directory of its electronic records, the new vendor had to create one, at considerable expense. Additionally, plaintiffs' counsel also succeeded in calling into question the adequacy of the defendant's preservation efforts, and was able to compel the defendant to undertake a massive effort to restore several years' worth of backup tapes. Finally, derivative litigation led to requests from numerous parties seeking production of electronic documents in different formats than those that the defendant originally produced. The defendant was compelled to create a secure website to act as a repository for all these documents so that various parties could access the documents.

The rising costs and uncertainties occasioned by electronic discovery have had another important consequence—they have lain to rest any claims that discovery abuse is a myth. Some commentators have asserted that claims of discovery abuse rest on unfounded perceptions that have been exaggerated by certain "pro-business" interests.[135] These commentators rely on empirical studies, such as ones conducted by the Federal Judicial Center,[136] that appear to contradict the "conventional wisdom...that discovery is abusive, time-consuming, unproductive and too costly."[137] According to these studies, discovery is efficient and cost-effective in the majority of cases, and instances of abuse and runaway costs are limited to a small number of highly complex and overly contentious lawsuits.[138] Yet all of these studies suffer from a common flaw: they were conducted well before the explosion of electronic discovery within the last decade. The previously unimaginable volumes of information that are now commonplace in litigation have shifted the discovery landscape to such a degree that the results of these studies are no longer valid. Indeed, the Federal Judicial Center has acknowledged as much, and has launched a new study of the impact of electronic documents on the discovery process.[139]

B. A Recent Study Confirms That Discovery Abuse and Excessive Discovery Costs Remain a Significant Problem, Particularly in Connection With Electronic Discovery.

A 2008 study conducted jointly by the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the American Legal System (the "ACTL/IAALS Report") confirms that efforts to rein in discovery costs and end discovery abuse have generally failed. The ACTL/IAALS Report concluded unequivocally that "[o]ur discovery system is broken."[140] The report found that the discovery process too often lacks focus and, as a result, "can cost far too much and can become an end in itself."[141] The report further determined that some meritorious cases are never filed because "the cost of pursuing them fails a rational cost-benefit test,"

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135 *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); *see also* Sorenson, *supra*; Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, Public Law Research Institute 1 (1995); F. Burroughs, *Mythed it Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(B)(1)*, 33 M.C.G.L.R. 75 (2001).

136 Judith A. McKenna and Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. Rev. 785 (1998); *see also* TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

137 Thomas E. Willging, Donna Stienstra, John Shapard and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 527 (1998).

138 *Id.*

139 *See* Request from Federal District Judge Mark Kravitz, Chair, Judicial Conference Advisory Committee for Civil Rules, *available at* http://www.abanet.org/litigation/survey/0709-FederalJudicialCenter.html.

140 ACTL/IAALS Report at 9.

141 *Id.*

and that cases of questionable merit and smaller cases "are settled rather than tried because it costs too much to litigate them."[142] Other notable findings from the ACTL/IAALS Report include the following:

- Nearly 71 percent of the respondents believe that discovery is used as a tool to force settlement.[143]
- Forty-five percent of the respondents believe that discovery is abused in every case.[144]
- The respondents overwhelmingly agreed that the current system is too expensive and time-consuming, and that potential costs impact access to the courts.[145]
- More than 87 percent of the respondents indicated that electronic discovery has increased the costs of litigation, and over 75 percent of the respondents agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of electronic discovery.[146]
- A strong majority of respondents agreed that "courts do not understand the difficulties in providing [electronic] discovery," and that electronic discovery "is being abused by counsel."[147]
- "83 percent of Fellows believed that litigation costs drive cases to settle that should not settle on the merits."[148]

The ACTL/IAALS Report makes clear that electronic discovery has greatly exacerbated the cost and delay already inherent in the discovery process. In fact, the ACTL/IAALS Report concludes that "[e]lectronic discovery...needs a serious overhaul."[149] One of the survey's respondents described electronic discovery as a "morass," while another characterized the 2006 Amendments to the federal rules as a "nightmare."[150] In fact, 75 percent of the respondents surveyed in the ACTL/IAALS Report agreed that "discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of [electronic discovery]."[151] An even greater number of respondents, 87 percent, said that electronic discovery "increases the costs of litigation."[152] Importantly, the ACTL/IAALS Report indicates that the additional costs associated with electronic discovery have, in fact, led to an increase in abusive tactics. Sixty-three percent of the respondents indicated that electronic discovery is being abused to gain a tactical advantage.[153]

C. Discovery Now Ranks as the Top Litigation Concern for Major Corporate Defendants.

The unchecked rise in discovery costs has attracted the attention of corporations, which now list discovery as their most pressing concern

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142 *Id.*

143 Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System A-4 (Aug. 1, 2008) ("Denver Study Interim Report") (on file with author).

144 *Id.*

145 *Id.* at A-2.

146 *Id.* at A-4.

147 *Id.*

148 *Id.* at A-6.

149 ACTL/IAALS Report at 2.

150 *Id.*

151 Denver Study Interim Report at A-4.

152 *Id.*

153 *Id.*

when litigation is imminent.[154] This concern is well founded. Discovery costs in U.S. commercial litigation are growing at an exponential rate; estimates indicate they reached $700 million in 2004, $1.8 billion in 2006 and $2.9 billion in 2007.[155] Of course, these figures do not account for the billions of dollars that corporations pay each year to settle frivolous lawsuits owing to discovery abuse.

A study conducted by the President's Council of Economic Advisers ("CEA") concluded that the direct and indirect costs of excessive tort litigation in the United States drive up production costs, which must ultimately be borne by consumers and employees.[156] The recent survey of Fortune 200 companies found that their U.S. litigation costs ate up 0.51% of their U.S.-derived revenue, while their foreign litigation costs consumed a mere 0.06 percent of their non-U.S. revenue in 2008.[157] The CEA has concluded that these additional costs impose a two percent tax on consumer prices, and a three percent tax on wages.[158] Inasmuch as discovery costs comprise the majority of litigation expenses, it is clear that discovery abuse bears the brunt of the responsibility for this "litigation tax."[159] And with the rapid escalation of discovery costs due to electronic documents, this tax is set to increase considerably.

The litigation tax has a number of adverse effects on our economy. First, it hampers productivity and innovation. Research has shown that corporations facing high expected litigation costs will forgo research and withhold new products from the market in order to conserve funds for legal expenses.[160] Indeed, under financial accounting rules applicable in the United States, public companies are obligated to create financial reserves when potential legal liabilities become sufficiently crystallized.[161] These litigation reserves divert significant funds from productive purposes, and can even drive major corporations into the red.[162] Further, this deprivation can last for a considerable period in light of the discovery-related delays endemic to our civil litigation system.

The litigation tax also hampers the competitiveness of United States companies, a crucial handicap in this era of increasing globalization. The U.S. tort liability system is now the most expensive in the world.[163] Costs associated with tort claims have risen

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154 *See* Fulbright and Jaworski LLP, Litigation Trends Survey Findings 2 (2006).

155 *See Faced With Data Explosion, Firms Tap Temp Attorneys*, Fulton Co. Daily Report, Oct. 17, 2005.

156 *See* Council of Economic Advisers, Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System (2002) *available at* http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

157 *Litigation Cost Survey of Major Companies*, *supra*, Figure 9.

158 *See* Council of Economic Advisers, Who Pays, *supra*.

159 *See Managing Discovery in a Digital Age: A Guide to Electronic Discovery in the District of Delaware*, 8 Del. L. Rev. 75, 75 (2005).

160 Council of Economic Advisers, Who Pays, *supra*.

161 Accounting for Contingencies, Statement of Financial Accounting Standard No. 5, ¶8 (Financial Accounting Standards Bd. 1975). Under this standard, a company must create a litigation loss reserve if a loss is "probable" and the amount of the expected loss is material and reasonably estimable.

162 *See, e.g.*, *Xerox Posts Loss on Litigation Charge*, Los Angeles Times, Apr. 18, 2008; Steven E.F. Brown, *Lawsuit Settlement Pushes McKesson To $20M Loss*, San Francisco Business Times, Jan. 26, 2009; *HealthSouth Takes 2Q Loss On Litigation Charge*, BusinessWeek, Aug 10, 2009; Sherri Begin Welch, *Kelly Services Blames Litigation Charge for 3Q loss*, Crain's Detroit Business, Nov. 14, 2008; Ruthie Ackerman, *Hutchinson Hit By Litigation Charge*, Forbes, Jan. 30, 2008.

163 *See The Economics of U.S. Tort Liability: A Primer*, 20, Congressional Budget Office (Oct. 2003), *available at* http://www.cbo.gov/ftpdocs/46xx/doc4641/10-22-TortReform-Study.pdf.

almost continuously since 1951.[164] Tort costs in this country as a percentage of GDP are triple those of France, and almost double those of Germany and Japan.[165] Even the United Kingdom, whose system of jurisprudence served as the model for our own, is seen by foreign investors as having a "significant cost advantage compared to the United States."[166]

Finally, the litigation tax and the uncertainties inherent in the U.S. tort liability system dissuade foreign companies from opening factories and otherwise doing business in the United States. This is a keenly felt loss in this era of economic retrenchment and declining employment.[167] One report concludes that rising litigation costs are even threatening the preeminence of the U.S. securities markets.[168]

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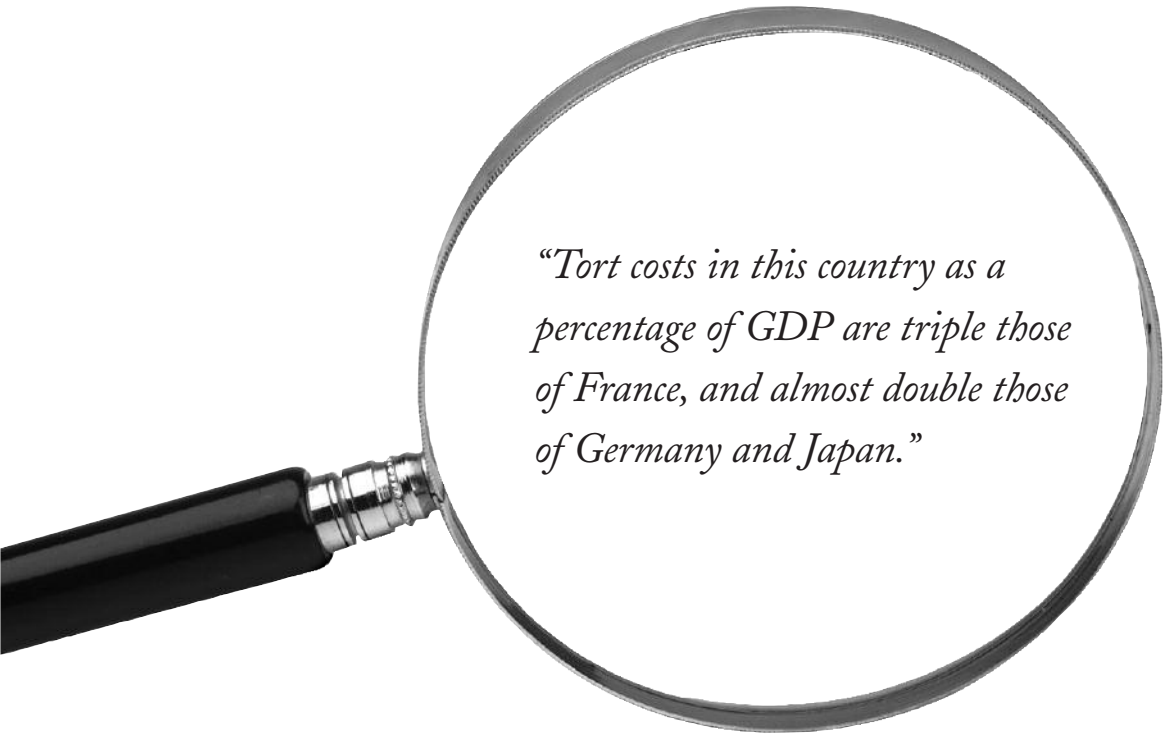
164 Tillinghast Insurance Consulting, *2006 Update on U.S. Tort Cost Trends*, Towers Perrin, Stamford, Conn. p.5, *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf.

165 United States Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, 1, *available at* http://www.locationusa.com/USDepartmentOfCommerce/pdf/litigationFDI.pdf.

166 *Id.* at 4 (as this article notes, Lord Leonard Hoffman has offered a pithy explanation of the reasons that even the U.K. has lower tort costs than the United States: "no punitive damages, limits on pain and suffering, no contingency fees, loser pays, no juries in most civil cases, and a trial bar with almost no political influence").

167 *Beyond Tort Reform*, The New York Sun, Feb. 5, 2007 ("Foreign companies are being scared away in part...by soaring costs of American law."); United States Department of Commerce, *The U.S. Litigation Environment*, *supra*, at 5-6.

168 McKinsey & Company, *Sustaining New York's and the U.S.' Global Financial Services Leadership*, Report for New York City Mayor Michael Bloomberg and New York Senator Charles Schumer, pp.75, 77 (New York: McKinsey & Company, 2006).



III. Recent Efforts to Curb Discovery Abuse

Growing anxiety over the rapidly escalating costs and delay endemic to civil litigation has spawned two attempts to reform federal discovery rules over the last decade. These reforms include limits on the scope of discovery and attempts to address the new challenges posed by electronic documents. But both reform efforts have proven largely ineffectual.

A. The 2000 Amendments

Prior to the 2000 Amendments to the Federal Rules of Civil Procedure, parties were entitled to discovery into "any matter...relevant to the *subject matter* involved in the pending action."[169] The 2000 Amendments sought to narrow the scope of permissible discovery by establishing a new two-tiered discovery protocol. Under this new protocol, parties are initially entitled to discover only information that is "relevant to the *claim or defense* of any party."[170] If such discovery is inadequate, the court can—"[f]or good cause"—permit discovery into "any matter relevant to the subject matter involved in the action."[171] The two-tiered procedure was designed to prevent parties from using discovery "to develop new claims and defenses that are not already identified in the pleadings."[172]

The other main change effected by the 2000 Amendments involved pretrial disclosures—early disclosures that are intended to clarify what documents each party has and diminish the need for formal discovery requests. Prior to 2000, courts could promulgate local rules setting forth whether or not parties were required to make initial disclosures. More than half of the federal district courts opted out of the requirement, resulting in a "patchwork and fragmented system."[173] The 2000 Amendments implemented two changes with respect to initial disclosures. First, they required all parties (except in specified types of cases) to make initial disclosures, unless the parties otherwise agree or the court otherwise orders.[174] Second, they limited the information that must be disclosed to information that the disclosing party may use to support its position.[175]

Like its predecessors, the 2000 Amendments failed to rein in abusive discovery practices.[176] The bench

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169 Fed. R. Civ. P. 26(b)(1) (prior to the 2000 Amendments).

170 Fed. R. Civ. P. 26(b)(1) (2000).

171 *Id.*

172 *Id.* (Advisory Committee's note).

173 Peter J. Beshar & Kathryn E. Nealon, *Changing the Federal Rules of Civil Procedure*, New York L.J. at 1 (Dec. 1, 2000).

174 Fed. R. Civ. P. 26(a)(1), 26(a)(1)(E) (2000) (Advisory Committee's note).

175 Fed. R. Civ. P. 26(a)(1) (2000) (the Advisory Committee's note explains that initial disclosure obligation issues unrelated to expert witness testimony have "been narrowed to identification of witnesses and documents that the disclosing party may use to support its claim or defenses").

176 In one sense, this should come as no surprise, given that the drafters of these amendments "determined expressly not to review the question of discovery abuse..." Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice and Procedure, 192 F.R.D. 354 (May 11, 1999); *see also* Denver Study Interim Report at 10 (noting that two-thirds of respondents believe that amendments to the Federal Rules of Civil Procedure between 1976 and 2006 have not remedied the problem of discovery abuse).

and bar have largely ignored the amendments' limitation on the scope of discovery, clinging instead to entrenched notions of liberal information gathering.[177] The reasons are numerous, but they stem in large part from an inability to discern a meaningful difference between the pre- and post-2000 discovery standards. Attempting to distinguish between information relevant to "a claim or defense" and information relevant to "the subject matter of the dispute" has been dismissed by one court as "the juridical equivalent to debating the number of angels that can dance on the head of a pin..."[178] The 2000 Amendments also fail to provide any practical guidance as to when "good cause" exists for broadening discovery to include information relevant to the subject matter of the dispute.[179] The absence of such guidance has led courts to generally ignore the two-tiered discovery system and apply the more familiar pre-2000 discovery standard.[180] As a result, plaintiffs can still routinely engage in fishing expeditions and compel the production of documents and information that are only tangentially related to the claims or defenses at issue.[181]

Moreover, plaintiffs have found it easy to circumvent the limitations imposed by the 2000 Amendments. For example, those amendments did not modify Rule 11(b)(3), which provides that, by signing a court pleading, plaintiffs' attorneys certify that the pleading's "factual contentions have evidentiary support or, if specifically so identified, *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."* Thus, the rule allows plaintiffs to make unfounded allegations if they will likely be able to develop support for them through discovery. Consequently, plaintiffs need only assert strategic claims to broaden discovery in any way they deem advantageous. The discovery system established by the 2000 Amendments thus fosters discovery abuse

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177 *See* Noyes, *Good Cause*, *supra*, at 61 ("despite the 2000 amendments, the Rule has been ignored"); *Id.* at 67 ("Instead, many lower courts have acknowledged the 2000 Amendments but have interpreted them as having changed nothing."); Ronald J. Hedges, *A View From the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 126 (2005) ("What has been my experience with the concept of bifurcated discovery under the 2000 amendment? (1) Attorneys do not as a general rule attempt to limit discovery to that which is relevant to a claim or defense; (2) attorneys do not as a general rule address the existence of good cause, either to argue for broader discovery under Rule 26(b)(1) or to counter such arguments."); Thomas D. Rowe, *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 24-25 (2001) ("First, in nearly all instances it appears that the outcomes would have been the same under either version of the rule; indeed it is striking how little the courts' opinion[s] reflect any apparent serious effort by the parties who are resisting discovery to make anything out of the new and perhaps still unfamiliar scope definition.").

178 *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 171 (D. Md. 2001).

179 John S. Beckerman, *Confronting Civil Discovery's Fatal Flaw*, 84 MINN. L. REV. 505, 541 (2000) ("[the amendment] offers no assistance in determining what constitutes 'good cause' that should be sufficient for a judge to justify granting discovery relevant to the subject matter of the action rather than simply to the claims and defenses of the parties"); Noyes, *Good Cause*, *supra*, at 21 ("despite the 2000 amendments, the Rule has been ignored").

180 For example, in *World Wrestling Federation Entertainment, Inc. v. William Morris Agency, Inc.*, the court declared, "the amendments to Rule 26(b)(1) do not dramatically alter the scope of discovery…". 204 F.R.D. 263, 265 n.1 (S.D.N.Y. 2001). Similarly, in *Richmond v. UPS Service Parts Logistics*, the court declared that "[t]he implementation of amended Rule 26 did not necessarily impact the so called 'liberal discovery' standard as evidenced by cases interpreting the post-amendment rule." 2002 WL 745588, at *2 (S.D. Ind. Apr. 5 2002). And in *Saket v. American Airlines, Inc.*, the court remarked that "the Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad." 2003 WL 685385, at *2 (N.D. Ill. Feb. 28, 2003); *see also United States v. Louisiana Clinic*, 2003 WL 21283944 (E.D. La. June 4, 2003); *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 (S.D.N.Y. Oct. 3, 2002); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001); Noyes, *Good Cause*, *supra*, at 61 (citing Written Statement, Ronald J. Hedges, U.S. Magistrate Judge, Comments on Proposed Amendments to Rules 26 and 37 of the Federal Rules of Civil Procedure 4 (Feb. 8 2005), *available at* http://www.uscourts.gov/rules/e-discovery/04-CV-169.pdf .

181 *In Sheldon v. Vermonty*, for example, an individual plaintiff sought discovery from the broker defendant in a securities fraud suit seeking proceeds data for a five year period. *See* 204 F.R.D. 679 (D. Kan. 2001). The defendants, however, argued the only relevant time period was one year when the plaintiff contemplated and purchased the stock. *Id.* at 689. Ruling in favor of the plaintiff, the court declared its understanding of the scope of discovery in light of the new standard. "Relevancy is broadly construed, and...discovery should be allowed unless it is clear that the information sought can have *no possible bearing* on the claim or defense of a party," the court concluded. *Id.* (emphasis added). Similarly, in *Bryant v. Farmers Insurance Co.*, the plaintiff in an age and gender discrimination suit sought disciplinary and audit information regarding not only the supervisor in question, but other supervisors and employees. 2002 WL 1796045, at *3 (D. Kan. July 31, 2002). Rejecting the defendant's claims that the requests were overbroad and not limited in scope, the court stated that relevancy is established "under the amended rule if there is *any possibility* that the information sought may be relevant..." *Id*. at *2.

by encouraging plaintiffs to assert borderline claims to expand the scope of discovery.[182]

Moreover, even the two-tiered approach to the scope of discovery, which the 2000 Amendments imposed, has been largely ineffectual in preventing discovery abuse by plaintiffs.[183] The case law so far suggests that the second tier's "good cause" element is an obstacle in name only,[184] such that plaintiffs are frequently able to convince the court that they should be entitled to the traditional "subject matter" scope of discovery.

The 2000 Amendments' other principal change—namely, to make initial disclosure mandatory—has failed to have a noticeable impact, particularly in complex cases where abuse and delay are most severe.[185] This should come as no surprise. Critics have long pointed out that mandatory disclosure requirements can lead to the overproduction of marginally relevant information, thus increasing delay and expenses for both sides.[186] An empirical study of mandatory disclosure in Arizona state courts confirms this. According to that study, mandatory disclosure did not significantly reduce costs or delay in complex cases.[187] In fact, 63 percent of the attorneys participating in the Arizona study said that mandatory disclosure actually increased costs.[188]

B. The 2006 Amendments

The federal rules were amended again in 2006, this time to address the growing importance—and costs—of electronic discovery.[189] In an effort to alleviate the burdens imposed by electronic discovery, the 2006 Amendments implemented a two-tiered, "proportionality" approach to the scope of electronic discovery. As an initial matter, a party does not need to produce electronically stored information from sources that the party identifies as "not reasonably accessible because of undue burden or cost."[190] This includes, for example, electronic information stored on backup tapes or in off-line legacy systems, which can be time-consuming and expensive to restore. If a party wishes to obtain discovery of electronic data that is not reasonably accessible, the requesting party must demonstrate "good cause."[191] The good-cause analysis incorporates a proportionality standard,

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182 *See*, *e.g.*, Summary of Public Comments-Preliminary Draft of Proposed Amendments: Civil Rules Regarding Discovery 90 (1998-99), *available at* http://www.uscourts.gov/rules/archive/1999/summary.pdf. ("This change will...put pressure on lawyers to assert thin or borderline frivolous claims or defenses... Under the current rules plaintiff would file a breach of contract suit and take discovery about the possibility of fraud. Under the amended rule, one is pushing the plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate for discovery.").

183 *See* Christopher Frost, *Note, The Sound and The Fury or The Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of The Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1071 (2003).

184 *See Thompson*, 199 F.R.D. at 172 (warning counsel that taking a "rigid view of the narrowed scope of discovery...would run counter to the underlying purpose of the rule changes"). One court succinctly noted, "[t]he minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26(b)(1)." *See Anderson v. Hale*, 2001 WL 503045, at *3 (N.D. Ill. May 10, 2001). In *Sanyo Laser Products, Inc. v. Arista Records, Inc.*, the court granted subject matter discovery without a meaningful discussion of how the requesting party demonstrated good cause. 214 F.R.D. 496 (S.D. Ind. 2003). Instead, the court highlighted that the 2000 rule "change, while meaningful, [was] not dramatic, and broad discovery remains the norm." *Id.* at 500.

185 Edward D. Cavanaugh, *Twombly, The Federal Rules Of Civil Procedure And The Courts*, 82 ST. JOHN'S L. REV. 877, 886 (2008) (noting that mandatory automatic disclosure "never fulfilled its potential...").

186 Bell, *supra*, at 41.

187 Hon. Robert D. Meyers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 20-26 (1993).

188 William T. Birmingham and Charles D. Onofry, *Mandatory Disclosure of Information: One State's Experience*, FOR THE DEFENSE, 7, 12 (July 1994).

189 COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 22-23 (2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.5; Adoption and Amendments to Civil Rules, U.S. Order 06-20, 2006 C.O. (Apr. 12, 2006).

190 Fed. R. Civ. P. 26(b)(2)(B) (2006).

191 *Id.* The Advisory Committee's notes include several examples of data that is not reasonably accessible, including information stored only for disaster-recovery purposes (*i.e.*, backup tapes), legacy data and information that was deleted and is retrievable only with forensic techniques. *Id.*

requiring the court to "balance the requesting party's need for the information against the burden on the responding party."[192]

The 2006 Amendments also attempted to ease the burdens of preserving electronic information. This was done by creating a "safe harbor" provision, under which the destruction of electronic data through "routine, good-faith business procedures," such as an email system that automatically deletes old emails after a certain period, cannot be sanctioned as spoliation unless there are "exceptional circumstances."[193] The 2006 Amendments also sought to address another key problem associated with electronic documents: the tremendous burden of reviewing unprecedented volumes of documents for privilege. The 2006 Amendments sought to ease this burden by allowing the parties to agree beforehand that the inadvertent production of privileged materials does not automatically waive the privilege.[194]

It may still be too early to gauge the effectiveness of the 2006 Amendments,[195] but many experts believe these changes will prove no more successful than the 2000 Amendments, for a number of reasons. One reason for this is that the 2006 Amendments suffer from the same fatal flaws that undermined the 2000 Amendments, including the failure to define the term "good cause."[196] This omission leaves courts and practitioners alike with no useful guidance when grappling with the question whether discovery of data that is not reasonably accessible is appropriate.[197] Moreover, a similar proportionality requirement was incorporated into Rule 26 in the early 1980s in a futile effort to rein in the abuses that had become rampant in the wake of the "photocopier revolution" of the late 1960s.[198] Having proven largely ineffective in dealing with traditional discovery issues, a proportionality requirement can hardly be expected to have a significant impact on the far larger and more complex world of electronic discovery.[199] In reality, courts have historically ignored proportionality concerns, and have instead blamed companies for choosing to employ computer systems that can make it more difficult or expensive to retrieve records.[200] These courts reason that, having benefited from the day-to-day convenience of modern computer systems, companies cannot complain when they must incur additional expense to meet their discovery obligations.[201] In reality, of course, this is a Hobson's choice, as competitive pressures leave companies no realistic alternative to utilizing modern computer systems.

The 2006 Amendments also do not insulate defendants from the rising costs associated with electronic discovery. In fact, the 2006 Amendments

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192 *Id.* (Advisory Committee's note).

193 Fed. R. Civ. P. 37(f) (2006).

194 Fed. R. Civ. P. 26(b)(5)(B) (2006).

195 *See* Dertouzos, *supra*, at 11 (noting the lack of studies on the effect of the 2006 Amendments and proposing options for further research).

196 Noyes, *Good Cause*, *supra*, at 71-72.

197 *See* Scott A. Moss, *Litigation Discovery Cannot be Optimal But Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 905 (2009) ("[T]he main problem with [the 2006 Amendments] is not that they are old news. Rather, the problem is that such limits [referring to the 2006 Amendment's cost-benefit proportionality approach] never worked terribly well and appear unlikely to work well for e-discovery."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 181 (2006), *available at* http://thepocketpart.org/2006/11/30/rosenthal.html.

198 Moss, *Litigation Discovery Cannot Be Optimal*, *supra*, at 899-900.

199 *See id.* at 900.

200 *See id.* at 900-01.

201 *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1991 WL 111040, at *8-9 (E.D. Pa. June 17, 1991); *see also Kaufman v. Kinko's, Inc.*, 2002 WL 32123851, at *2 (Del. Ch. Apr. 16, 2002) ("Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored."); *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. Ct. June 16, 1999) (stating that, by using certain technology, the defendant assumed the risk that it would have to produce the information).

arguably worsened the problem by building additional costs into each case.[202] In particular, because the Federal Rules provide that parties must produce electronically stored information that is not reasonably accessible in the event the opposing party demonstrates "good cause," the Rules encourage plaintiffs to seek broad electronic discovery from sources from which it will be costly for defendants to retrieve information, and invent reasons why such information is necessary or reasonably accessible. The Rules thus provide plaintiffs an additional mechanism to use discovery to drive up the costs of litigation for defendants.

Critics of the 2006 Amendments have also expressed misgivings about the usefulness of the safe-harbor provision that protects parties from sanctions if they destroy electronic data through "routine, good-faith business procedures," such as an email system that automatically deletes old emails after a certain period. This provision provides no guidance regarding what data must be preserved, or the manner in which it must be maintained.[203] Further, the circumstances under which sanctions may be imposed remain vague and discretionary. For example, some experts posit that the safe harbor provision would not apply in the absence of a formal discovery order, or when judges are exercising their inherent power to manage cases.[204] In light of these uncertainties, companies facing even small lawsuits have little recourse but to continue to expend vast sums to preserve all potentially relevant evidence.

These numerous shortcomings lead inexorably to the conclusion that, like the 2000 Amendments, the 2006 Amendments will not give rise to a radical shift in the case law. As one commentator put it: "Whatever the theoretical possibilities, the [2006 Amendments] created only a ripple in the case law...no radical shift has occurred."[205]

Below are five reform proposals that aim to address the root causes of discovery abuse in the United States, taking into account the lessons learned from prior discovery reform efforts. These proposals attempt to diminish incentives for engaging in discovery abuse and to increase court involvement in preventing potentially abusive discovery. While some of these reforms will require amendments to the Federal Rules of Civil Procedure, others can be implemented by judges immediately—and have already been adopted by some courts.

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202 Gregory P. Joseph, *Federal Litigation-Where Did It Go Off Track?* SN058 ALI-ABA 587, 592 (Feb. 2008).

203 Dertouzos, *supra*, at 11.

204 *Id.*

205 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2008.1 at 121 (2d ed. Supp. 2008). *See also* Dertouzos, *supra*, at 11 ("despite the sweeping nature of these changes [referring to the 2006 Amendments], even some of the most ardent proponents of the new rules (typically from the corporate community) argue that they do not go far enough"); Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 Rev. Litig. 633, 661 (2006) ("Those amendments [referring to the 2006 Amendments] will contribute to the handling of this form of e-discovery, but they will hardly revolutionize it. Indeed, one strong objection to adopting several of them was that they do not really add a great deal to the current rules."); Phillips, *supra*, at 986 ("This comment argues that despite the protective language proposed for addition to Rule 26(b)(2), the amendment offers electronic data identified as not reasonably accessible no greater protection from discovery than the current version of the Rule provides because the good cause requirement in the proposed amendment is not strict enough.").

IV. Proposals for Reform

A. Establish Clear Guidelines For Cost-Shifting for Electronic Discovery

The most pernicious problem with our discovery system is that it incentivizes parties to seek overbroad and burdensome discovery.[206] The drafters of the Federal Rules have already recognized this, but their efforts to remedy the problem have failed. Attorneys on both sides continue to seek large amounts of documents and—especially—electronic data that bear only tangentially on the claims or defenses at issue, simply to burden the other side and improve their prospects of a favorable settlement.

As discussed above, the ubiquity of modern computer systems—and the ever-growing caches of information they contain—has led to a tremendous surge in the costs of electronic discovery that shows no signs of abating.[207] To check these rising costs—and the abusive discovery tactics they have fostered—the rules should require courts to consider cost-shifting every time a party seeks electronic discovery. The Federal Rules should also set forth a series of factors for courts to consider in deciding whether cost shifting is warranted. A good starting point for establishing these factors are the factors identified by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC:* (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[208] Courts could also be directed to consider the factors set forth in the American Bar Association's Civil Discovery Standards.[209]

Finally, parties requesting production of electronic documents that are not reasonably accessible should be required to bear the costs of doing so. In particular, parties seeking data from backup tapes and other forms of disaster recovery media should be made to bear the costs of retrieving, reviewing and producing this information. This has been the rule for some time in Texas, which has enjoyed

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206 Bruggman, *supra*, at 2.

207 ACTL/IAALS Report at 16.

208 217 F.R.D. 309 (S.D.N.Y. 2003). The Advisory Committee Notes to Rule 26(b)(2) (2006) reference these factors for determining whether cost-shifting is appropriate for data that is not reasonably accessible. But because the notes are not binding, courts are free to go their own way, leading to greater uncertainty for parties.

209 These factors include: (a) the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy; (b) the need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; (c) the complexity of the case and the importance of the issues; (d) the need to protect the attorney-client privilege or attorney work product; (e) the need to protect trade secrets, proprietary, or confidential information; (f) whether the information or the software needed to access it is proprietary or constitutes confidential business information; (g) the breadth of the discovery request; (h) whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; (i) whether the requesting party has offered to pay some or all of the discovery expenses; (j) the relative ability of each party to control costs and its incentive to do so; (k) the resources of each party as compared to the total cost of production; (l) whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; (m) whether the responding party stores electronic information in a way that makes it more costly or burdensome to access the information than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and (n) whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable. American Bar Association Civil Discovery Standards, Standard 29, *available at* http://www.abanet.org/litigation/discoverystandards/.

considerable success in limiting discovery costs.[210] Such a requirement would represent a significant step in reducing discovery abuse in connection with electronic discovery.

B. Adopt the English Rule for Discovery Disputes

The current discovery problems can be traced in large part to the "American Rule,"[211] which generally requires parties to bear their own litigation costs, including the costs of discovery disputes. This rule is perhaps the greatest single catalyst of discovery abuse, as it allows plaintiffs to impose tremendous costs on defendants, at virtually no cost to themselves.[212] The perverse incentives to which the American Rule gives rise have been exacerbated considerably in recent years by the rising costs associated with electronic discovery. The American Rule also encourages fishing expeditions, as there is nothing to dissuade plaintiffs from requesting virtually limitless volumes of documents and evidence. In addition, the American Rule also contributes to excessive discovery by encouraging parties to request information and documents in lieu of performing their own diligent preparation and research.

In contrast to the American Rule, the losing party in English courts is required to pay the winning party's reasonable attorneys' fees. This rule, designed to dissuade meritless lawsuits, was rejected in this country because of its propensity to limit access to the courts. But there is no such risk when discovery motions are involved.[213] In the limited context of discovery disputes, the English rule would serve to ensure that neither party adopts an irrational position with regard to discovery issues. Further, the risk of having to pay the opposing party's expenses for contesting a discovery issue would help attorneys resist clients urging them to adopt unreasonable positions.[214] The Federal Rules should therefore be revised to mandate that the losing party in a discovery dispute bear the opposing party's attorneys' fees for that dispute.

C. Define Preservation Obligations Early in the Litigation Process

With the increasing prevalence of electronically stored information, data preservation has become one of the costliest aspects of litigation, both in terms of the expense of maintaining the physical media on which the data are stored, and of the expense of fighting spoliation motions. To mitigate these costs, the rules should require that the parties meet to discuss preservation issues as early as possible, even before the pretrial conference mandated by Federal Rule of Civil Procedure 16 and its state counterparts.[215] The parties' preservation obligations begin as soon as the suit can reasonably be anticipated, but pretrial conferences typically do not take place until several months after a case has been filed. By that time, the defendant, with only the complaint's broad allegations to serve as a guide, has been forced to guess at the extent of its

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210 Tex. R. Civ. P. 196.4 (2009).

211 *See Oppenhimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (noting that "the presumption is that the responding party must bear the expense of complying with discovery requests").

212 Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 St. John's L. Rev. 680, 726 (1983).

213 Paul D. Carrington, *Renovating Discovery*, 49 Ala. L. Rev. 51, 66 (1997).

214 *Id.* at 66.

215 ACTL/IAALS Report at 12-14.

preservation obligations.[216] This uncertainty typically fuels a costly and wasteful preservation of excessive amounts of documents and data. Mandating an early meeting between the parties to discuss this topic would obviate this waste. Further, the rules should mandate that the court hold an electronic-data conference early in the case if the parties cannot reach an agreement on their respective preservation obligations.

Moreover, the Federal Rules should make clear that parties' preservation obligations do not extend to every last document or electronic file in their possession.[217] Rather, the Federal Rules should emphasize that the parties' preservation obligations generally extend only to actively maintained files and sources of electronic data, and not to metadata.[218] The Federal Rules should also provide that, in the event a party desires its opponent to preserve inaccessible forms of electronic data, such as backup tapes and metadata, the party must demonstrate a particularized need for this information.[219] Finally, parties requesting the preservation of inaccessible data should be made to bear the reasonable costs of doing so.

D. Limit Sanctions for Failure to Preserve Electronic Documents Only to Cases of Intentional Destruction or Recklessness

The task of preserving electronic information is fraught with pitfalls, even for the wary.[220] As noted above, electronic information by its very nature is ephemeral, and is routinely altered and deleted in the normal course of a company's operations. Further, the ease with which it is created, transmitted and stored makes it surpassingly difficult for companies to locate all electronic data that may require preservation. Indeed, given the large volumes of computer records that now exist in some companies, it may be virtually impossible to preserve all potentially relevant electronic data.[221] For these reasons, sanctions for spoliation should be imposed only in the event that a party has intentionally destroyed evidence, or has been demonstrably reckless in failing to preserve it.

The 2006 Amendments to the Federal Rules attempted to address this problem by creating a so-called "safe harbor" for electronic document

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216 *Id.*

217 In fact, a number of district courts have adopted local rules requiring the parties to discuss preservation issues. *See, e.g.*, District of Delaware, Default Standard for Discovery of Electronic Documents ("E-Discovery"); *available at* http://www.ded.uscourts.gov/Announce/HotPage21.htm .

218 *The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, supra* at 45.

219 The Federal Rules make clear that a party can move for a protective order to clarify its preservation obligations. Fed. R. Civ. P. 26(b)(2)(B). This proposal would shift the burden to the requesting party to demonstrate a need for preserving otherwise inaccessible data, rather than requiring parties to preserve all potentially relevant information unless and until they can convince the court that the cost and burden of doing so is unwarranted.

220 As the Managing Director of the Sedona Conference noted in a recent article:

> [E]lectronically stored information can easily be rendered inaccessible though negligence, unfamiliarity of custodians with computer technology, or routine operations of computers and networks. The simple act of opening a file on a computer changes the information in the "date last accessed" field of that file's metadata, creates or overwrites various system files, and may change substantive information in the file itself. Computers are configured to run routine maintenance and "clean up" functions that will change or overwrite electronically stored information. Networks are configured to eliminate files that have not been accessed for a reasonable period of time, or automatically delete the oldest emails in a user's email box. Disaster recovery backup tapes regularly create electronically stored information by copying it from the computer hard drives, and regularly are recycled, thus destroying that information. Halting these routine operations in response to a "legal hold" may be difficult, impossible, unduly costly or unduly burdensome.
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> Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. OF TECH. & INTELL. PROP. 171, ¶55 (2006).

221 For example, in *Procter & Gamble Co. v. Haugen*, an unfair trade practices case, the Tenth Circuit reversed the trial court's dismissal of the plaintiff's Lanham Act claims, based on the plaintiff's failure to produce a database maintained by a non-party contractor. The Tenth Circuit held that the trial court's order compelling production failed to take into account the logistical difficulties of doing so, which would have involved the purchase of a mainframe computer or paying the non-party an estimated $30 million to maintain an archived version of the database. The circuit court held that the violation of the order was not willful and the prejudice to the defendant was not clearly established. 427 F.3d 727, 736-740 (10th Cir. 2005).

preservation. Under new Rule 37(e), "absent exceptional circumstances," courts may not impose sanctions "on a party" if electronic documents are lost "as a result of the routine, good-faith operation of an electronic information system." Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, if fails to take into account the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. Second, the term "routine, good-faith operation of an electronic information system" is too vague to provide clear guidance as to a party's preservation obligations. For example, it is unclear whether sanctions would be available against a party that fails to suspend a routine operation of its information system that deletes or overwrites data that is not reasonably accessible, such as backup tapes. Third, the rule fails to explain what "exceptional circumstances" might warrant the imposition of sanctions even when data is lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to non-parties, who play an increasingly important role in litigation. Federal and state rules should adopt the approach recently implemented by California, in which a safe harbor is provided not only for destroyed evidence but also for evidence that has been "lost, damaged, altered or overwritten" in good faith.[222]

Finally, the rules should require courts to consider the degree of prejudice resulting from a party's failure to preserve the electronic data in determining whether sanctions are warranted. This factor should also inform the court's decision-making when it determines the severity of a sanction.[223]

E. Suspend Discovery During the Pendency of a Motion to Dismiss

Another critical reform is to stay all fact discovery during the pendency of any motions to dismiss. Such a rule already applies to securities class actions under the Private Securities Litigation Reform Act ("PSLRA"). In passing the PSLRA, Congress sought to curtail the broadside discovery requests that plaintiffs' attorneys used to secure quick settlements and to launch fishing expeditions before a court had even determined that the plaintiff's legal claims were viable.[224] Recognizing that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions,"[225] Congress imposed an automatic stay on discovery during the pendency of a motion to dismiss in private securities cases.[226] This small but significant change has proven extremely effective in reining in vexatious lawsuits.

In light of this success,[227] Congress and state legislatures should establish a similar requirement in all civil cases. Under the current system, even an entirely frivolous lawsuit can compel a defendant to expend millions of dollars collecting, reviewing,

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222 Cal. Civ. Proc. Code §1985.8(l)(1) (2009).

223 Withers, *Electronically Stored Information*, *supra*, at ¶106.

224 At congressional hearings debating the PSLRA, proponents of reform alleged that nearly every stock price decline greater than 10 percent resulted in a strike suit. Further, public accounting firms contended that "entrepreneurial lawyers" would identify public companies with some sort of financial anomaly, such as a 10 percent drop in stock value, and name the auditing firm to the lawsuit not for its culpability, but for its "deep pockets." Lead plaintiffs' counsel would then make voluminous discovery requests that were so expensive to comply with that the only rational course of action for the company was to settle the lawsuit. *See* Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance In The Private Securities Litigation Arena With A Screening Panel Approach*, 44 Washburn L.J. 413, 422-23 (2005).

225 H.R. Conf. Rep. No. 104-369, at 37 (1995).

226 15 U.S.C. § 78u-4(b)(3)(B).

227 The success of the ban is perhaps best illustrated by the fact that Congress later had to extend it to parallel actions filed in state courts when there was a likelihood that granting discovery to the state court plaintiffs would operate as an end-run around the PSLRA's stay in the federal securities action. 15 U.S.C. §78u-4(b)(3)(D) (the Securities Litigation Uniform Standards Act).

producing and preserving records. Given the exponential rise in electronic discovery costs, this exerts enormous pressure on defendants to settle cases quickly. An automatic stay would greatly reduce the in terrorem value of lawsuits, and would ensure that lawsuits "stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed."[228]

A number of federal courts have already adopted this approach, recognizing that since the very purpose of a motion to dismiss is to decide whether a complaint has enough merit to open discovery, it makes no sense to launch discovery before that threshold decision has been made.[229] As one court put it: if the parties begin discovery—and a court ultimately grants a defendant's motion to dismiss the complaint—then the initial discovery "would constitute needless expense and a waste of time and energy."[230]

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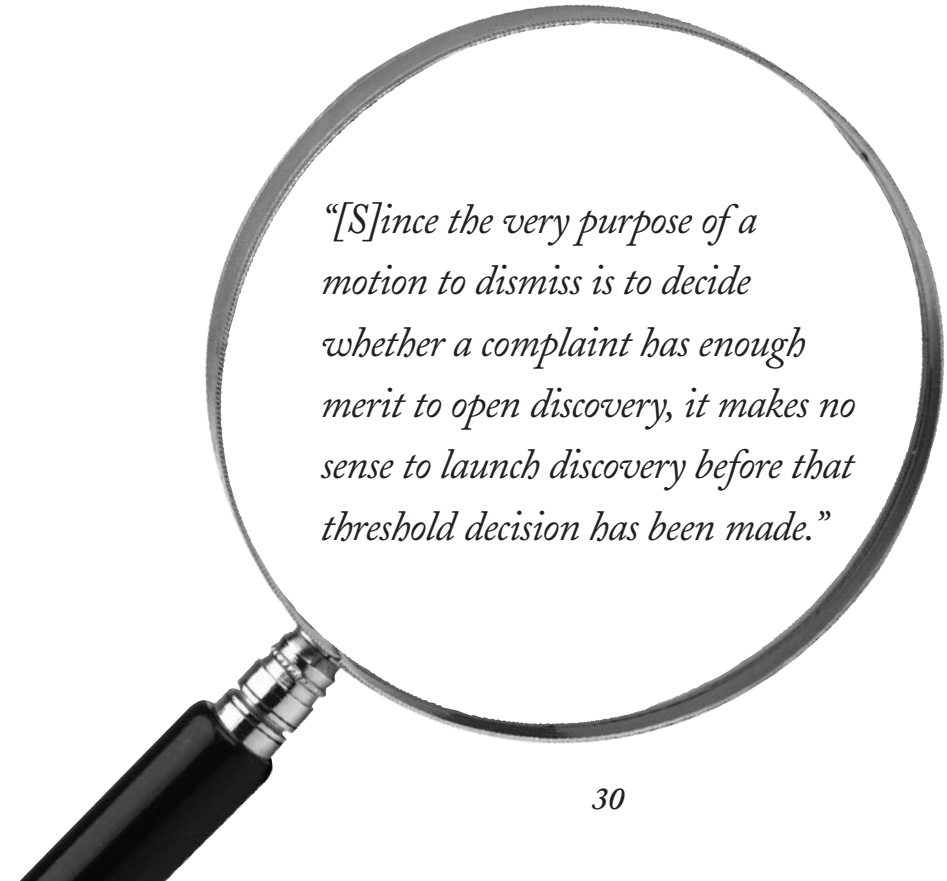
228 *S.G. Cowen Sec. Corp. v. United States Dist. Ct.*, 189 F.3d 909, 912 (9th Cir. 1999) (noting that, in enacting the PSLRA's automatic stay, "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed").

229 *See West v. Johnson*, 2009 U.S. Dist. LEXIS 74996, at * 3 (W.D. Wash. July 16, 2009) ("[a] short stay of discovery is appropriate until a decision can be made on the various Defendants' motions to dismiss"); *Tostado v. Citibank (S.D.), N.A.*, 2009 U.S. Dist. LEXIS 116032, at *3 (W.D. Tex. Dec. 11, 2009) (granting defendant's motion to stay discovery pending adjudication of motion to dismiss); *Allmond v. City of Jacksonville*, 2008 U.S. Dist. LEXIS 57389, at *6 (M.D. Fla. July 8, 2008) (granting motion to stay discovery pending a ruling on a motion to dismiss because "upon cursory glance of Defendants' motions to dismiss the resolution of the motions could dispose of the entire case"); *Port Dock & Stone Corp. v. OldCastle N.E., Inc.*, 2006 U.S. Dist. LEXIS 94944, at *3-5 (E.D.N.Y. Mar. 31, 2006) (granting defendant's motion to stay discovery pending resolution of motion to dismiss where defendants "raise[d] substantial issues with regard to the viability of plaintiffs' complaint"); *Howse v. Atkinson*, 2005 U.S. Dist. LEXIS 7511, at *4-5 (D. Kan. Apr. 27, 2005) (granting motion to stay discovery pending ruling on motion to dismiss raising issues related to immunity defenses). *See also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563 n.8 (2007) (recognizing that courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct").

230 *See Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.*, 2008 U.S. Dist. LEXIS 96902, at *31 (E.D. Wis. Nov. 14, 2008).



Conclusion

Discovery abuse not only continues to be a serious problem in our civil justice system; it is rapidly growing more pernicious. Plaintiffs' counsel continue to rely on the same calculus: i.e., that the time and expense defendants must devote to responding to voluminous discovery requests will make settlement more attractive. Responding to burdensome discovery requests forces defendants to devote considerable resources to identifying, collecting and copying documents. These requests also impose hefty legal fees because all documents must be reviewed by counsel prior to production to ensure that they do not contain material protected by the attorney-client privilege or the work-product doctrine. Plaintiffs can also impose substantial costs by seeking to depose the defendant's key employees. The time needed to prepare for, travel to and participate in such depositions can distract these employees from their normal duties for extended periods.[231] Broadly worded interrogatories also sidetrack the defendant's employees, forcing them to spend considerable time gathering information and conveying it to their attorneys.

Plaintiffs' attorneys also continue to engage in fishing expeditions. Broad document requests and numerous depositions seeking mostly irrelevant information impose significant costs on defendants, as employees must spend time searching for responsive documents and responding to interrogatories seeking information of little, if any, relevance.[232] Even the Supreme Court has recognized the deleterious effects of fishing expeditions, denouncing them as "a social cost, rather than a benefit."[233] And the noxious effects of fishing expeditions are not limited to needless and excessive costs. Plaintiffs' attorneys also use fishing expeditions in an attempt to uncover embarrassing information about the defendant or its employees, or to force a competitor to divulge trade secrets or other proprietary information.[234]

The tactical jockeying that is now commonplace during discovery has also given rise to more subtle forms of harassment. As one plaintiff's attorney boasted, "a nice way to tie up the other side" is to secure a protective order that limits the number of the defendant's employees with whom opposing counsel can share information and discuss the case. Such orders, this attorney explained, "can impair an attorney's capacity to prepare for trial and can force him to spend time and money trying to justify a

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231 *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (noting the high costs of discovery and discovery-related abuse); *see also* Federal Judicial Center, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases*, *Supra* 1-2, 4, 8, 14-16 (Tables 3-5) (1997) (study detailing the costs of discovery); The Brookings Institution, *Justice For All*, *supra,* at 6-7 (1989) (lawyers surveyed estimated that 60 percent of litigation costs in federal cases can be attributed to discovery and abuse of the discovery process).

232 *See* Janet Novack, *Control/Alt/Discover*, FORBES, Jan. 13, 1997, at 60.

233 *See Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 741 (1975) ("But to the extent that [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.").

234 Brazil, *Views from the Front Lines, supra* (the respondents of this survey of Chicago-area attorneys offered a number of examples of this type of harassment: "demanding that an opponent produce his income tax returns to capitalize on fears that disclosure of income could lead to difficulties with the government or a spouse, exploring politically sensitive subjects in suits against public agencies or officials to capitalize on fears of political repercussions, inquiring into the dating habits of a separated spouse or threatening to depose the third member of a relationship whose triangularity would best be kept secret, and focusing discovery probes on arguably illegal and clearly embarrassing corporate 'contributions' to foreign governments or officials").

modification" to the order.[235] Such efforts to game the system clearly serve no legitimate purpose.

These abuses have profoundly negative consequences for our courts and, ultimately, our economy. Justice is denied as defendants deem litigation too expensive to pursue. Cases languish as parties work to collect and review previously unimaginable volumes of documents. Judges are distracted from substantive matters to referee increasingly acrimonious discovery disputes. Consumers are harmed as the costs of companies' increased litigation exposure is passed to them in the form of higher prices. The uncertainty and cost associated with frivolous lawsuits dissuade foreign companies from doing business in America, depriving our economy of a much needed source of jobs and investment.

More troubling still is that this situation is deteriorating rapidly. An immediate and comprehensive response is therefore necessary. The system needs new procedural rules that will allow parties to litigate matters in a timely and cost-efficient manner. In the meantime, however, even modest measures, such as more standardized case management orders and increased, early attention to discovery issues by judges and magistrates, could have a significant impact in alleviating discovery abuse. Finally, courts must be given additional resources to manage cases, particularly the larger, more complex cases that are most susceptible to abuse.

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235 Brazil, at 232 n.27.

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LAWYERS FOR CIVIL JUSTICE

PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

REDUCING THE COSTS AND BURDENS OF MODERN DISCOVERY: WHY THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE ARE URGENTLY NEEDED (WITH A FEW IMPORTANT IMPROVEMENTS)

August 30, 2013

I. Introduction and Summary

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") concerning the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments").[2] In doing so, LCJ commends the Advisory Committee for its extensive work to fashion just and workable reforms and suggests measured changes to support that effort.

The proposed amendments are a significant step towards a national, uniform spoliation sanction approach and a fair and practical revised scope of discovery. Fundamental discovery reform is necessary[3] because the costs and burdens associated with discovery, especially electronic

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] This Comment addresses a number of issues related to the proposed amendments in addition to the five questions on which the Committee specifically invited comment. Please see section II. B. 5. below for a concise summary of LCJ's views on the Committee's five questions.

[3] Another critical and interrelated piece of needed reform is the creation of incentive-based cost default rules. We look forward to working with the Advisory Committee as the Discovery Subcommittee undertakes a meaningful review of the economic incentives in discovery.

discovery, have put our civil justice system in "serious need of repair."[4] In a significant fraction of cases, discovery rather than the underlying merits drives the outcome of legal disputes.

There is widespread agreement that discovery costs are affecting the outcome of cases. A survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System[5] found that 80 percent of chief legal officers or general counsels disagree with the statement that "outcomes are driven more by the merits of the case than by litigation costs." That survey also found that over 70 percent of chief legal officers or general counsels believed that parties "overuse permitted discovery procedures" by going beyond what is necessary or appropriate for the particular case, and 97 percent believe that litigation is too expensive.

Corporate defense counsel are not alone in perceiving a serious problem. The American College of Trial Lawyers data[6] and that of the American Bar Association,[7] both representative of views from plaintiffs' and defense bar, show a widespread opinion that discovery is too expensive; that costs, rather than the merits, forces settlements; and that e-discovery is abused. Put simply, there is solid agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery are skewing the civil justice system.

It is no wonder that more and more litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, settling cases early and without regard to the merits in an effort to avoid the expense and unpredictability of litigation—meanwhile, serious discussion about the vanishing jury trial and what it means for civil justice continues.

Because of the Advisory Committee's decision to move forward with the proposed amendments discussed herein, there is now an opportunity to have a real impact on the costs and burdens of discovery—a goal that many before have attempted but failed to achieve. LCJ supports this effort while strongly urging the Committee to make important additions and modifications to the proposed rules that will enable the Committee to achieve its goal of improving our civil justice system.

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[4] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT 2 (2009), *available at* http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i.

[5] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf .

[6] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (Sept. -Oct. 2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf .

[7] AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

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

A. A New Preservation Rule is Urgently Needed.

Preservation of electronically stored information (ESI) has developed into one of the major cost drivers in litigation. The electronic information explosion is not the problem. The unfettered scope of discovery and the lack of a uniform, national preservation standard have created an environment in which ancillary litigation about preservation thrives.

Preservation issues are currently decided on a case-by-case basis by courts that have created their own *ad hoc* "litigation hold" procedures. Without clearly defined preservation rules, parties struggle to draw the line on the scope of preservation—especially in the period prior to commencement of litigation—and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. Organizations must divert resources to "defensive preservation" and individual litigants are faced with costly spoliation/sanctions battles that they simply do not have the economic resources to fight.[8] There has been a dramatic escalation in reported decisions on the topic, indicating the tip of an iceberg of motion practice and unfairness.[9]

The only alternative to costly over-preservation is to risk severe and embarrassing sanctions for failing to preserve what might be pertinent ESI. Many courts impose severe sanctions, such as an adverse-inference jury instruction, on the basis of a party's unintentional failure to meet *ad hoc* requirements that do not exist in any rule and may vary from jurisdiction to jurisdiction.

In other words, the lack of a clear preservation rule forces a Hobson's Choice: Preserve too much, incurring high storage costs, significant burdens on custodians, and the resulting challenges of analysis and production of huge volumes of information, or preserve too little, and face the risk of second-guessing with spoliation allegations that can result in a case-altering jury instruction that a party was a "bad actor" (even without a finding of bad faith), which inevitably causes an adverse judgment.

Often lost in this discussion is that fact that most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue. For example, Microsoft Corporation reported in 2011 that that "[f]or every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1." [10] In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are preserved, but only 142 are actually used.[11] Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.

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[8] *Bozic v. City of Washington*, 912 F. Supp. 2d 257, 260, n. 2 (W.D. Pa. 2012) ("Neither state of affairs is a good one.").

[9] There has been a dramatic escalation in spoliation motions and rulings since the already elevated levels reported to the 2010 Duke Litigation Conference. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 791 (2010) ("an all-time high").

[10] Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (August 31, 2011).

[11] *Id.*

The fear of sanctions and the inability to navigate the conflicting standards has bred an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information.

Proposed Rule 37(e)(1)(B) is a significant improvement over the current rule,[12] but as explained in the next section, the proposal must be confined to a clear and simple standard without the current unpredictable and unmanageable exceptions.

B. Proposed Rule 37(e) Must Be Improved to Be Effective.

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

The exception set forth in proposed Rule 37(e)(1)(B)(ii) ("the (B)(ii) exception") would permit sanctions or an adverse inference instruction without a showing of willfulness or bad faith when a party is "irreparably deprived" of a meaningful opportunity to present or defend a law suit.[13] This exception is based on the Fourth Circuit decision in *Silvestri* v. *General Motors,*[14] where the prejudice from loss of evidence in a products liability case was clear and it was unfair to require the defendant to defend the action.

However, there is no need, based on policy or case law, for the (B)(ii) exception, since ample measures exist to handle that type of rare case. Absent willfulness and bad faith, there should be no authority for harsh sanctions based solely on assertions of irreparable prejudice, an allegation which can be (and often is) routinely made. Crafting a separate rule for the one-in-a-million case,[15] when balanced against the potential to undermine the entire proposed Rule 37(e), creates risks that vastly outweigh the possibility of its usefulness. [16]

a. Removing the (B)(ii) Exception Will Not Lead to Results Adverse to Existing Spoliation Law.

Proposed Rule 37(e) is sufficiently comprehensive without the (B)(ii) exception to address situations where a key item of evidence is lost or destroyed. The facts of S*ilvestri*[17] are illustrative. The plaintiff in *Silvestri* was allegedly injured when the airbag in the car he was driving failed to deploy during an accident. Plaintiff's experts were provided an opportunity to inspect the car soon after the accident. However, despite their admonitions to Plaintiff's counsel that General Motors would need to inspect as well and that the car should, therefore, be preserved, the car was eventually sold and repaired before such an opportunity was provided.

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[12] The Advisory Committee has specifically invited comment on whether the provisions of the current Rule 37(e) should be retained in the proposed rule. Because proposed Rule 37(e) covers all of the conduct that the current rule does, as explained in the proposed Note, LCJ believes that it is unnecessary to retain the current 37(e) language in the proposed rule.

[13] Proposed Rule 37(e)(1)(B)(ii).

[14] *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

[15] Even the circuit court in *Silvestri* acknowledged the "peculiar circumstances" of the case. 271 F.3d 583, 595 (4th Cir. 2001).

[16] This exception risks harming parties of all sizes, but may pose the most risk to an innocent single plaintiff who may not understand the importance of key evidence.

[17] 271 F.3d 583 (4th Cir. 2001).

Because plaintiff claimed the airbag was faulty, GM's lack of opportunity to inspect presented a major issue in the case. The lack of opportunity was exacerbated by the deficiencies in plaintiff's own experts' reports, which failed to include any measurements, for example. Ultimately, because of the substantial prejudice caused by the loss of the key piece of evidence, plaintiff's case was dismissed.

If this case had been analyzed under the proposed Rule 37(e) without the (B)(ii) exception, the outcome could have been the same. The *Silvestri* court noted that the failure to preserve the car "may have been deliberate."[18] In so finding, the court cited counsel's knowledge that the vehicle was the "central piece of evidence in his case against General Motors and that he had been reminded that this piece of evidence should be preserved or that General Motors should be notified."[19] Instead, "the vehicle was not preserved, and neither Silvestri nor his attorneys notified General Motors of Silvestri's claim until almost three years after the accident,"[20] which by then was too late—the vehicle had already been repaired. Thus, under proposed Rule 37(e)(1)(B)(i), sanctions would likely have been available to GM because the court could have deemed the conduct at issue to be willful ("deliberate"), in bad faith and prejudicial.

Moreover, under the proposed Rule, the availability of remedial or curative measures would have permitted equivalent relief. The *Silvestri* court could have reached an essentially similar result without the (B)(ii) exception by precluding plaintiff's experts' reports and testimony and allowing comment by counsel at trial.

Situations with significant missing evidence with limited culpability often can be addressed by selecting remedies short of the harsh sanction of dismissal, given the alternatives available to a court. A clear example is *Allstate Texas Lloyd's v. McKinney*.[21] In *Allstate*, the court could have resorted to *Silvestri* to dismiss the case since the "prejudice to McKinney is that he cannot physically or visually test the sample Allstate relied on to deny the claim.[22] The court instead allowed the case to continue but prevented Allstate and its experts from relying upon the missing evidence.

A similarly instructive result was reached in *Byrd v. Alpha Alliance*.[23] In *Byrd*, the majority reversed the district court's dismissal of plaintiff's case based on destruction of a glass stove top central to a fire investigation. The Sixth Circuit held that dismissal was "excessively harsh in light of other available options, such as an adverse instruction." The dissent, on the other hand, would have let the dismissal stand in the absence of bad faith because "*Silvestri* does not require a complete inability to defend, but [only] a substantial impairment …. where the spoliator's conduct falls short of bad faith." The reasoning of the dissent highlights the danger of the (B)(ii) exception. Although well intentioned, the exception permits harsh sanctions absent a finding of bad faith.

[18] *Id*. at 594.
[19] *Id*. at 593.
[20] *Id*. at 594.
[21] No. 4:12-CV-02005, 2013 WL 3873256 (S.D. Tex. July 24, 2013).
[22] *Id*. at *5.
[23] No. 12–5400, 2013 WL 1223886 (6th Cir. Mar. 26, 2013) (unpublished opinion).

These examples clearly illustrate that the removal of the B(ii) exception will not "overturn" the *Silvestri* line of cases. In all the examples, sanctions would likely have been available to the prejudiced party under the proposed rule absent the (B)(ii) exception. Thus, fears that spoliation will go unaddressed are unfounded.[24]

b. The Proposed "Irreparable Deprivation Standard" Will Create Ancillary Litigation, Not Reduce It.

As demonstrated by the *Byrd* trial court and dissent, it is entirely foreseeable that including the (B)(ii) exception would result in an increase in motions seeking harsh sanctions in cases that lack any showing of bad faith—thus dangerously undermining a uniform national standard requiring bad faith as a prerequisite to harsh sanctions and unnecessarily preventing a court from dealing with cases on the merits. The (B)(ii) exception would permit "case-dispositive" sanctions listed in Rule 37(b)(2)(A) (such as a default judgment or a non rebuttable adverse-inference jury instruction) *merely* because a party has been "irreparably" deprived of a "meaningful opportunity" to present or defend against claims without any wrongful conduct by the opposing party. This is unwise in the extreme.

Where a party seeks such a remedy using the exception, this would be tantamount to seeking a tort-based spoliation recovery with all the confusion and interpretive problems that have led most state jurisdictions to reject its use. This would also be inconsistent with the limitations in 28 U.S.C. § 2072(b) given that "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, 'from a court's inherent power to control the judicial process.'"[25]

Additional problems with this approach also are apparent. The (B)(ii) exception conceivably could permit a jury to assess damages in an underlying claim where a court has directed a judgment without anyone knowing the impact, if any, of the missing evidence, thus encouraging rank speculation. All that would be needed to justify such a holding is the fact that key evidence was lost—through no fault of the party opposing the motion—along with a showing of the lack of a meaningful opportunity to present or defend against claims.

The circumstances under which a party is "irreparably deprived" of the means to prove or defend a case are amorphous and will be difficult to identify. Does it require proof that the spoliation proximately caused the plaintiff to be unable to prove the underlying cause of action, or would it be sufficient that the loss merely impaired their ability to prove the claim?

A determination of what is sufficient to trigger the (B)(ii) exception would differ from judge to judge, and from court to court, leading to inconsistency amongst the federal courts—and in any state courts that also adopt the amended rule. This potential exposure could cause individuals and

[24] The Advisory Committee has specifically invited comment on whether proposed Rule 37(e) should be limited to ESI or include tangible things as well. LCJ believes the rule should apply to all discoverable matter, both because of our conclusion that the proposed rule, absent the (B)(ii) exception, will not overturn existing spoliation case law, and because the distinction between ESI and other discoverable matter is vanishing in many instances due to technological innovation.

[25] *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. Feb. 4, 2009).

entities to take extraordinary measures to retain documents at substantial cost and perpetuate the exact problems that motivated the Committee to re-write the rule.

c. The (B)(ii) Exception Will Encourage Expansion of the "Gotcha Game."

It is already clear that the "gotcha game" associated with routine spoliation allegations is a wide-spread problem.[26] The (B)(ii) exception would only exacerbate the problem, not tame it. Including the (B)(ii) exception in the new rule 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.

Eliminating the (B)(ii) exception, on the other hand, will ensure that proposed Rule 37(e) delivers a consistent and uniform national standard and a change of the paradigm. Courts will be able to focus on the merits of litigation and whether enough evidence exists to prosecute or defend a claim, rather than on what was lost or whether any mistakes were made while trying to ensure every piece of relevant evidence was preserved. Accordingly, we urge the Committee to remove the (B)(ii) exception from proposed Rule 37(e).

2. Sanctions Should Require a Showing of Willfulness and Bad Faith

Proposed Rule 37(e)(1)(B)(i) would establish "willful or in bad faith" conduct as the threshold culpability standard for imposition of sanctions and, coupled with the "substantial prejudice" requirement, provide an elevated threshold to distinguish conduct that should be sanctioned from that which is appropriate for labeling as spoliation.

However, "willful" can be defined as intentional or deliberate conduct without any culpable state of mind.[27] This was recently and remarkably illustrated in *Sekisui American Corp. v. Hart*,[28] in which Judge Shira Scheindlin applied the following standard:

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[26] *See* LAWYERS FOR CIVIL JUSTICE ET AL., COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, PRESERVATION – MOVING THE PARADIGM 11-12 (Nov. 10, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=17. ("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/articles.cfm?articleid=40 ("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 . . . .").

[27] *See* BLACK'S LAW DICTIONARY 1737 (9th ed. 2009) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious"; defining "willfulness" as "[t]he fact or quality of acting purposely or by design; deliberateness; intention"); *Powell v. Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008) (defining "willful" as "deliberate or intentional").

[28] *Sekisui American Corp. v. Hart*, ---F. Supp. 2d---, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013).

> "The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently."[29]

Under this standard, the act of establishing a standard auto-delete function, for example, could be characterized as "willful" because it is intentional, even if not done in bad faith. If that act would be defined to meet the "willful or in bad faith" prong of proposed Rule 37(e)'s test, allowing sanctions in that context would run counter to the goal of sanctioning only intentionally culpable conduct—*i.e.*, destruction of evidence known to be relevant to pending or potential litigation in order to deprive the requesting party of its use.[30]

Accordingly, we urge the Committee to substitute the conjunctive "and" for the disjunctive "or" in the proposed rule to make clear that an intentional act carried out in good faith is not a sufficient basis for sanctions.[31] It must also involve intentional failures to preserve[32] that are "purposefully"[33]or deliberately undertaken.[34] That type of misconduct stems from a desire to suppress the truth[35] because the missing information might damage the spoliating party's case.[36]

In the alternative, the Committee could—consistent with recent treatment of the issue—define "willful" to require a scienter or knowledge.[37] Either approach would further the aims: (1) to

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[29] *Id.* at *4 (footnote omitted).

[30] Not only is the "willful" as "intentional" standard an inappropriate basis for the imposition of sanctions, but it is also an incorrect premise for the extrapolation that "intentional" destruction allows a presumption of relevance. Judge Scheindlin explained:

> When evidence is destroyed willfully, the destruction alone "is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." "[T]he intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful." "Similarly, a showing of gross negligence in the destruction ... of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party."

Id. at *5 (footnotes omitted).

[31] We have not been able to identify any evidence that the Advisory Committee or Discovery Subcommittee has considered and rejected the use of "and" in place of "or."

[32] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (contrasting sanctions where a litigant has engaged in "bad-faith conduct or willful disobedience of a court's orders" with those for conduct that merely fails to meet a reasonableness standard); *see also Victor v. R.M. Lawler*, No. 12-2591, 2013 WL 1681425, at *2 (3d Cir. April 18, 2013) (refusing to find "willful spoliation" in absence of intentional conduct).

[33] *Adeptech Sys., Inc. v. Fed. Home Loan Mortg. Corp.*, 502 Fed. Appx. 295, 296, 2012 WL 6720927 (4th Cir. Dec. 28, 2012) (overwriting of email pursuant to normal retention policies is not "purposeful" destruction in anticipation of litigation).

[34] *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. Aug. 20, 2008) ("document destruction, although not conducted in bad faith, [can] yet be 'intentional,' 'willful,' or 'deliberate'").

[35] *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. Jan. 15, 2013).

[36] For an excellent chart showing the role of "willfulness" in connection with adverse inference instructions, *see* Hon. David C. Norton et al., *Fifty Shades of Sanctions: What Hath the Goldsmith's Apprentice Wrought?*, 64 S.C. L. REV. 459, 485-486 (2013).

[37] *See, e.g., Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his willful conduct resulted in its loss or destruction"); *McCargo v. Texas Roadhouse, Inc.*, No. 09-cv-

sanction only that conduct in which the actor has a culpable state of mind; and (2) to ensure uniformity among federal courts in sanctioning such conduct.

3. The Factors Listed in Rule 37(e)(2) Do Not Belong in the Rule.

a. The Committee's Purpose in Including the Factors No Longer Applies to the Current Proposed Rule.

The E-Discovery Panel at the 2010 Duke Litigation Conference suggested inclusion of "bright-line" rules that would provide a sufficient articulation of preservation conduct to provide a "safe harbor" from sanctions, and to bring certainty to the pre-litigation efforts to preserve. Testimony at the Dallas Mini-Conference supported this approach, especially in regard to the onset or "trigger" of the duty to preserve and its scope of its implementation, including the numbers of custodians and the types of electronic information that should presumptively be retained.

However, that approach was abandoned by the Committee for a variety of reasons, not the least of which was a concern about the rule-making authority. Instead, proposed Rule 37(e) leaves it to the courts to determine whether discoverable information that should have been preserved in anticipation of litigation or its conduct has not been preserved. The proposed rule does "not attempt to prescribe new or different rules on what must be preserved."[38] The reviewing court retains the responsibility for determining whether a failure to preserve has occurred, as modified (in ways that will vary) by the culpability and prejudice thresholds supplied by the proposed rule. However, in determining compliance with common law obligations, courts are encouraged to consider all relevant factors, including those listed in proposed Rule 37(e)(2).[39]

The listed factors emphasize consideration of the role of "notice" that litigation is likely, that the information is "discoverable"[40] and the role of preservation demands,[41] while encouraging early

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02889-WYD-KMT, 2011 WL 1638992, at *8–9 (D. Colo. May 2, 2011) (describing willful as intentional destruction of records known to be relevant); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction); Connecticut Practice Book § 13-14(d) (2013) (no sanctions "in the absence of intentional actions designed to avoid known preservation obligations").

[38] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 274 (2013) [hereinafter *Preliminary Draft of Proposed Amendments] available at* http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

[39] The listed factors are:

> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
> (B) the reasonableness of the party's efforts to preserve the information;
> (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
> (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
> (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

[40] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316(Proposed Rule 37(e)(2)(A)).

[41] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316-317 (Proposed Rule 37(e)(2)(C)).

court involvement in resolving any unresolved disputes.[42] They also speak of the "reasonableness" of preservation efforts and their "proportionality" to anticipated or ongoing litigation.[43] Over time, an original list of eight factors was reduced to five by combing redundant factors and deleting one factor related to "a party's resources and sophistication in litigation."

b. The Factors Do Not Address the Analysis Required by the Proposed Rule.

Unfortunately, the list of factors is incomplete and potentially misleading in its implications. None of the factors informs the assessment of culpability and prejudice, the considerations most crucial to the spoliation analysis. Indeed, neither "willful" nor "bad faith" is defined.[44] The role of "intent" is not even mentioned, and there is no relative ranking of the factors' importance in the proposed rule or in the draft Committee Note that is offered to explain the factors. In contrast, a district judge in the Southern District of New York has modified the list of factors (published as guidance applicable to cases before her) to emphasize the need to focus on whether a failure to preserve was the result of culpable conduct and resulted in prejudice.[45]

Moreover, despite the emphasis on reasonable conduct, there is limited discussion of the impact of its absence. While the promotion of good preservation practices is to be encouraged, their absence in a particular case is not decisive under Rule 37(e) when the culpability threshold is not met or substantial prejudice does not ensue. That is the heart of the proposed Rule. Curative measures short of sanctions are provided for those instances where the thresholds for sanctions are lacking. Accordingly, the factors fail to address the key determinations that courts would be required to make under the proposed rule and should be removed.

Moreover, some of the factors can be read to imply certain preferences,[46] despite the fact that, as pointed out in *Orbit One Communications, Inc. v. Numerex Corp.*, "sanctions [are not] warranted by a mere showing that a party's preservation efforts were inadequate,"[47] including any contemporary preservation standard such as those listed in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC.*[48] A mere failure to preserve that

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[42] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 317 (Proposed Rule 37(e)(2)(E)).
[43] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 316-317 (Proposed Rule 37(e)(2)(B)&(D)).
[44] The Advisory Committee has specifically invited comment as to whether there should be an additional definition of willfulness and bad faith under proposed Rule 37(e)(1)(B)(i) and, if so, what should be included in that definition. LCJ believes these terms should be defined, and urges the Committee to include in the definition of willfulness an element of malice. Doing so would make clear that sanctions are limited to acts executed in bad faith and that cause substantial prejudice.
[45] *See* Honorable Lorna G. Shofield, United States District Judge for the Southern District of New York, *Individual Rules and Procedures for Civil Cases*, at 5-6 (July 2013), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=820.
[46] Some of the factors compete with each other. The rule seems to advocate, for example, adherence to open-ended "demands" while simultaneously encouraging proportional measures. There are ample grounds for concerns about pre-litigation demands of that nature. *See, e.g., Aaron v. Kroger Ltd. P'ship I*, No. 2:10CV606, 2012 WL 78392 (E.D. Va. Jan. 6, 2012) (sanctioning non-compliance with demand without assessing relevance, prejudice or culpability).
[47] 271 F.R.D. 429, 441(S.D. N.Y. Oct. 26, 2010).
[48] 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (listing "contemporary standards" which mandate sanctions as a grossly negligent *per se*, dispensing with the need to show that any resulting loss is even relevant or materially prejudicial to

is found to have occurred without the culpability or preservation thresholds being met could require, at the most, additional discovery or other curative actions under Rule 37(e)(1)(A).

c. The Factors, If Incorporated Into the Rule, Will Create a Significant Risk of New Mandates and Will Spur Ancillary Discovery.

Incorporating the factors into the rule text creates several risks. First, courts may cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule. For example, the current draft Committee Note states that "as under the current rule," the prospect of litigation may call for "altering [any] routine operation"[49] and "[t]he party's issuance of a litigation hold is often important [on this point]."[50] It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate.[51]

In *Arista Records LLC v. Usenet.com, Inc.*,[52] for example, a District Judge cited the Rule 37(e) Committee Note as indicative of "what steps parties should take" and made it clear that intervention in the operation of an information system through use of a litigation hold was "required." It is not hard to imagine, absent clarification, that a court would take the same approach to proposed Rule 37(e)(2) and misread discussion of its factors as expressing mandates for action.

Other risks that are likely to emerge as courts construe the language of the factors include 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 circumstances constituting such notice are not defined with any precision in the Rule or the draft Committee Note, which merely states that a "variety of events" may alert a party to the prospect of litigation.[53]

2. Proposed subsection 37(e)(2)(B) requires an evaluation of the reasonableness of preservation efforts. Reasonableness is an inherently vague standard and the mere fact that some discoverable information is lost does not preclude its presence. The discussion in the draft Committee Note risks perpetuating the unfortunate myth that unless a party has preserved all relevant evidence ("perfection"), a party has "crossed the line" without

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innocent party) *abrogated in part by Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012) ("rejecting" notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*).

[49] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 319 (Proposed Rule 37(e) Committee Note).

[50] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 325 (Proposed Rule 37(e)(2) Committee Note).

[51] *See* FED. R. CIV. P. 37 advisory committee's note (2006) (stating that good faith may "involve a party's intervention to modify or suspend certain features" as "one aspect of what is often called a 'litigation hold.'"); *see, e.g., Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.,* 242 F.R.D. 139, 146 (D.D.C. 2007) (holding that "this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation").

[52] 608 F. Supp. 2d 409 (S.D.N.Y. 2009).

[53] As discussed in the next section, this factor would be entirely unnecessary if Rule 37(e) defined a clear preservation trigger, such as the commencement of litigation.

the necessity of proof of intent to impair the ability of a requesting party to prosecute or defend a claim or actual resulting prejudice.

3. Proposed subsection 37(e)(2)(C) requires a court to assess whether a party receiving a preservation demand has engaged in good-faith consultation regarding it. This could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.[54] The draft Committee Note states that "reasonableness and good faith may not require any special preservation efforts despite the request," improperly implying that the reverse may be true in some instances even if the requisite culpability or prejudice does not result.[55]

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 principle, neither the proposed Rule nor the draft Committee Note spells out presumptive categories of data which need not be preserved absent prior notice.[56] Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands and can also help to stimulate early discussions.[57] Further, the risk of this factor is that proportionality will be applied to decide bad faith which should have no bearing on culpable conduct.

5. Proposed subsection 37(e)(2)(E) requires courts to evaluate whether the party "timely sought the court's guidance on any unresolved" preservation disputes. While such an effort may be useful in some cases, requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to provide guidance.

Thus, proposed subsection 37(e)(2) risks transforming proposed Rule 37(e) into one that encourages costly ancillary discovery unrelated to the merits, often involving pre-litigation work product and attorney client communications. It could encourage over-broad preservation and gamesmanship. These outcomes do not comport with the Committee's goals in re-writing Rule 37(e).

d. The Factors Do Not Belong in the Rule.

The factors included in proposed subsection 37(e)(2) work against the Advisory Committee's intended purpose of proposed Rule 37(e). At their best, factors in rules can be "a way for a

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[54] A requesting party which would not have to live up to the same standard of preservation it seeks would benefit from making the broadest demands it can fashion, thereby increasing the costs on the other side, or by creating conditions where some data loss can be used as leverage in motion practice. This "gaming" the system should not be encouraged.

[55] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 326.

[56] Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 374 (2008) (a requesting party should take steps to put the responding party on notice of the relevance and unique nature of the ephemeral data it plans to request).

[57] [Proposed] Standing Order Relating to the Discovery of Electronically Stored Information, Seventh Circuit Electronic Discovery Pilot Program (listing six categories of ESI whose possible preservation or production must be raised "at the meet and confer or as soon thereafter as practicable"), *available at* http://www.discoverypilot.com/.

district judge to think about what to do, not a series of conditions precedent before the judge can do anything, and not a script for making what the district judge does appeal-proof."[58]

Ultimately, the interpretation of the proposed rule is committed to the discretion of the trial court.[59] In *Altercare v. Clark*,[60] for example, a state appellate court ignored a similar list of factors associated with the Ohio version of Rule 37(e)[61] while affirming dismissal of a complaint by a lower court based on its independent review of the facts.[62] Similarly, the factors provide only a vague "checklist" approach and does not provide criteria whose satisfaction constitutes bright-line guidance. An incomplete list of this sort is unlikely to be useful to courts and will be confusing to parties seeking to ensure compliance with their preservation obligations.

In short, the factors do not belong in the discovery rules. They should only be mentioned, if at all, in the Committee Note, given the limited role they are intended to play. Doing so would not only reflect the Committee's historical practice with factors, but also would be more consistent with the goal of providing a uniform national standard and clear guidance to parties. In particular, a clear statement needs to be made in the Committee Note that a failure to preserve—or to meet any contemporary preservation standard such as those identified by *Pension Committee*[63]—does not, in and of itself, justify sanctions without a separate showing of culpability and substantial resulting prejudice.

4. A Bright-Line Preservation Trigger Is Needed.

It is time for a clear, bright-line standard to clarify that the *affirmative* duty to preserve information is triggered only upon commencement of litigation.[64] Proposed Rule 37(e) enshrines the vague "foreseeability" standard in its opening sentence:

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

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[58] *Woodward v. Ford Motor Co.*, No. 1:11-cv-3092-CL, 2013 WL 3024828, at *3 (D. Or. June 13, 2013).
[59] Robert G. Bone, *Who Decides: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2016 (2007) ("[w]hile a comprehensive list of factors might restrain judges from relying on illegitimate considerations, it does nothing to constrain judges who act in good faith, at least not without some normative direction to guide the balancing process").
[60] *Altercare v. Clark*, No. 12CA010211, 2013 WL 3356577 (Ohio Ct. App. June 28, 2013) (affirming dismissal because the party was "greatly hampered" by a failure to produce a computer for forensic examination).
[61] Ohio R. Civ. P. 37(F) (2008) ("The court may consider the following factors in determining whether to impose sanctions under this division . . ."). The five factors were (1) whether and when the duty was triggered, (2) whether "ordinary use" of the system was involved, (3) whether a party "intervened" in a timely fashion, (4) whether a party complied with agreements and (5) "other facts relevant to its determination."
[62] *Altercare*, 2013 WL 3356577 at *6 (producing party had no satisfactory explanation for the failure to preserve and produce).
[63] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) *abrogated by Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).
[64] *See* Letter from Robert Owen to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (Oct. 24, 2011) (distinguishing between intentional destruction of information and the affirmative duty to preserve), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

Instead, we urge the Committee to adopt a bold, clear and reasonably balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps, combined with continuing authority to sanction the willful and bad faith destruction of material that causes substantial prejudice to a potential adversary, i.e., traditional spoliation.

Currently, parties and their lawyers are driven to wasteful over-preservation by their shared fear of a sanction order, even for conduct undertaken in good faith prior to commencement of litigation, which can tarnish a company's brand and devastate a lawyer's career. Companies must guard against even the potential of risk associated with spoliation because the impact of an adverse finding (including the assertion of recidivism as found in *Voom Holdings LLC v. Echostar Satellite L.L.C.*[65]) are incalculable. The Committee received eloquent written and oral evidence of this at and after the 2011 Dallas Mini-conference.[66]

Judicial decisions in bad-facts cases have transformed the traditional spoliation rule that was a brake on *plaintiffs'* conduct prior to suit ("don't destroy a crucial piece of evidence if you want to sue about it") into a new rule that placed great affirmative burdens on *defendants* to preserve *all* potentially relevant material regardless of the strength of its connection to the claims and defenses at issue in the case. The burdens of this transformed rule of law are exaggerated by the current "reasonable anticipation of litigation" trigger standard which, essentially, mandates a form of guessing.

A bright-line trigger rule would yield vast benefits without materially damaging any party's ability to prove or defend any claim. Rarely if ever has there been a perfect documentary trial record, and our centuries-old "preponderance of the evidence" standard takes that into account, for the benefit of the plaintiffs, of whom perfection is not required. For the benefit of defendants, the Committee should likewise reject the goal of perfection that is embedded in the "reasonable anticipation" test, and adopt a more sensible proposal.

Under the "reasonable anticipation" trigger standard, preservation decisions must be made prior to the receipt of a scope-defining complaint, the appearance of an opposing lawyer with whom to negotiate, or the assignment of a judge available to resolve preservation issues. Over-preservation is inevitable. Once an action is commenced by the filing of a complaint, all three of these factors are resolved.

What about auto-delete?

A hypothetical involving auto-delete[67] is often posed in opposition to a commencement-as-trigger rule. (In reality, this is often the *only* objection to the proposal.) The hypothetical assumes the following: An event that is certain to lead to litigation against a party occurs (e.g.,

[65] 93 A.D. 3d 33, 939 N.Y.S.2d 321 (N.Y. App. Div. 2012).

[66] *See* Materials submitted to the Dallas Mini-Conference, as collected at http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/dallas-mini-confrence-sept-2011.aspx.

[67] Auto-delete functions exist on many email systems, and purge emails that have attained a pre-set age. Folders containing Deleted Items typically have the shortest auto-delete life spans, and folders that contain useful material like the Inbox and user-created subfolders thereof have the longest. Many companies, for business reasons or to meet regulatory requirements, have very long auto-delete periods or none at all.

an airliner crashes, or a patient dies on the operating table), but since the party (the airline, the hospital) has set a very short auto-delete period, and the party does nothing to suspend auto-delete, some potentially discoverable materials are destroyed.

Critics of the commencement of litigation trigger employ this scenario to justify continuing the massive uncertainty, cost and risk that vex litigants today as they grapple with the "reasonable anticipation of litigation" trigger. But the hypothetical does not reflect reality, ignores the availability of other sources of information and ignores that there are many other determinants of parties' document retention decisions besides the Committee's procedural litigation rules.

First, there is no evidence before the Committee that the use of short auto-delete periods on important email folders is a widespread practice without alternative sources of the same information remaining. In fact, in our experience, such a practice is rare. Most entities and individuals make arrangements to retain important materials in alternate, longer-term term storage. Entities that generate ESI have many other reasons to save data for longer than minimal periods, and many use auto-delete in ancillary or secondary roles only.

Second, those entities that do use auto-delete without alternatives or a backup have valid business reasons for it, and are not doing so to thwart future litigants. Even if they were, however, the Supreme Court has given its unanimous blessing to document retention policies even where those policies are adopted to "keep certain information from getting into the hands of others, including the Government."[68] The good faith establishment of an auto-delete policy deserves respect by courts.

Third, the hypothetical assumes that the auto-delete function erases all copies of relevant material, but that is highly unlikely. Auto-deletion of one email in one folder will not cause all of the other copies of it to disappear. Moreover, technology has made the forensic retrieval of deleted items much more available when absolutely necessary.

Fourth, a retroactive finding that an auto-delete practice is per se unlawful affects primary business conduct, as to which there are already many regulatory rule-making or legislative bodies other than the Committee which are better equipped to make that assessment (and have not done so). Other actors in our country's complex economy have influence over how businesses manage their information. Insurers, for example, may raise or lower insurance rates based on a particular insured's information management practices. Moreover, reckless governance of information can often lead to liability, not exoneration, such as when a record is needed to rebut a plaintiff's allegations.

Finally, since plaintiffs control the timing of initiation of litigation, they could file quickly to trigger affirmative preservation duties and seek prompt redress if the ample (and soon to be upgraded under the proposed rules) provisions for early discussions and discovery plans were not satisfactory. Or they could, in extreme cases, seek to give the type of pre-litigation notice contemplated in Rule 27 (which could be amended to allow pre-filing applications for preservation orders in urgent situations).

[68] *Arthur Andersen v. United States*, 544 U.S. 696, 704 (2005).

The commencement of litigation trigger is a fair line that creates a framework for both plaintiffs and defendants to control preservation decisions and reduce gamesmanship. We urge the Committee to incorporate this standard into proposed Rule 37(e).

5. Answers to the Committee's Questions.

The Advisory Committee has invited public comment on five specific questions concerning proposed Rule 37(e). Here are LCJ's responses:

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

Response: Proposed rule 37(e) should apply to all types of discoverable information. As a matter of rulemaking, a single standard is vastly superior to the creation of two separate standards. This is particularly true where, as the Committee's question indicates, the ability to distinguish between ESI and physical evidence is highly likely to become more complicated with future technological innovation. Also, as explained in section II. B. 2. a. of our Comment, proposed rule 37(e), absent the (B)(ii) exception, is sufficiently comprehensive to address physical evidence issues so there is no reason to limit the proposed rule's application to ESI.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

Response: The exception contained in 37(b)(1)(B)(ii) must be removed from the proposed rule in order to achieve the Committee's goal of providing a uniform, national standard for culpability and prejudice sufficient to deter over-preservation and provide meaningful and predictable standards for planning. The (B)(ii) exception, although well-intended for the one-in-a-million case, risks overwhelming the primary rule by providing an avenue for harsh sanctions where no culpability exists. As set forth in section II of our Comment, the factors that incentivize ancillary litigation, over-preservation and the "gotcha" game will continue if the Committee provides an exception to the principle that no sanctions are warranted absent culpable conduct and substantial prejudice.

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

Response: There is no need to retain the current Rule 37(e) language based on the clear intention of the Committee that the proposed Rule 37(e) covers all of the conduct that the current rule covers. The Committee's proposed Note explains this clearly. If, however, the provisions of

proposed Rule 37(e) are materially changed, it could be necessary to retain the current safe harbor provisions.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Response: Yes, it is important that the Committee add a definition of "substantial prejudice" to the rule in order to clarify that materiality to claims and defenses is the key to this standard. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in *Sekisui American Corp. v. Hart*, 2013 WL 4116322 (S.D.N.Y.) at *4, FN 48.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Response: If the Committee were to adopt the "willful *and* in bad faith" standard urged in section II. B. 3. of our Comment, there may be no need to define the terms "willful" and "bad faith" in the rule. However, as currently drafted, the proposed rule may be, in the view of some courts, open to an interpretation that "willful" conduct—meaning intentional actions—that occurred in good faith will still provide grounds for harsh sanctions. In order to prevent this loophole, the Committee should define "willful" in the rule to include the element of scienter or bad faith.

III. Scope and Proportionality: Rules 26(b)(1) and 26(c)

A. The Proposed Amendments' Focus on Claims, Defenses and Proportionality Is a Much-Needed Reform.

The broad scope of discovery as interpreted under current Rule 26(b)(1) is a fundamental cause of the discovery problems addressed above and in LCJ's prior comments.[69] The ill-defined boundaries of modern discovery result in the preservation and production of staggering volumes of data which ultimately contribute little to the resolution of the case. A survey of "major" companies revealed that, although the average number of pages produced in discovery in major cases that went to trial was 4,980,441, the average number of exhibit pages totaled just 4,772—a mere 0.10% of the total production.[70] Such statistics, together with the costs and burdens of

[69] 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 (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.

[70] LAWYERS FOR CIVIL JUSTICE ET AL., STATEMENT ON LITIGATION COST SURVEY OF MAJOR COMPANIES, App. 1 at 16 (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

producing documents make it unsurprising that e-discovery has been described as a "morass"[71] that "is crushing"[72] or "could ruin"[73] the civil justice system.

LCJ strongly supports the Committee's proposal to amend Rule 26(b)(1). These modest edits would produce an important reduction in abusive discovery practices without depriving anyone of necessary information. No longer would parties be left to divine the amorphous boundaries of discovery based on the ill-defined and troublesome standard of what is "relevant to the subject matter involved in the action." Instead, the claims and defenses pled by any party would provide a clear anchor to which any discovery must be attached.

Thus, a single question becomes the measurement by which to proceed in discovery: "How is this information relevant to a claim or defense asserted by any party?" While the "relevance" of particular evidence may remain open to some interpretation, to be sure, the ability to articulate the clear tie between any potentially discoverable information and a claim or defense plead by any party would provide a meaningful and useful standard upon which to base discovery decisions.

By reducing the amount of information subject to discovery in any case—as the proposed amendment is intended to do—the costs of discovery will necessarily also go down. Moreover, to the extent parties will nonetheless be obligated to expend time and resources on their discovery efforts, the information at issue will have greater potential actually to affect their case.

Rule 26(b)(1) would also benefit *greatly* from the emphasis on inclusion of the considerations that bear on proportionality, currently in Rule 26(b)(2)(C)(iii). The concept of proportionality has been present in the rules for many years, but is routinely ignored in favor of notions of broad and liberal discovery. Despite this, recent jurisprudence has made clear that considerations of proportionality have an important place in discovery and should be seriously considered by all parties.[74] Explicitly referencing proportionality in Rule 26(b)(1) will encourage its early application and thus reduce the likelihood that ultimately unhelpful information is nonetheless caught up in a party's discovery efforts.

B. Adding a Materiality Standard Would Further the Goal of Encouraging Proportional Discovery.

Despite our strong support for the proposed amendments to Rule 26(b)(1), LCJ remains concerned that historically broad notions of discovery and relevance could prevent the

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[71] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT B-1 (Aug. 1, 2008) *available at* http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3650.

[72] *Id.* at B-4.

[73] *Id.* at B-3.

[74] *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to the case and consistent with clearly established applicable standards.").

amendment from fulfilling its potential unless the Advisory Committee adds a materiality requirement to Rule 26(b)(1). Such a materiality standard would be added as follows:

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

This small but impactful addition to the rule would promote the proper purpose of discovery, namely "the gathering of material information,"[75] and ensure proportionality in both preservation and production by clearly signaling the end to expansive interpretations of scope and relevance. Prior efforts to reign in the scope of discovery, when matched against such notions, have unfortunately fallen short. Indeed, the effects of the 2000 amendment to Rule 26(b)(1) (which bifurcated discovery into two tiers: attorney-managed and court-managed), is an instructive example. That amendment was unsuccessful in its goal to focus discovery on the claims and defenses involved in the action.[76] Instead, it has been widely reported that the amendment was generally ignored.[77]

A materiality standard has proven successful in other jurisdictions. In England, for example, Rule 31.6, which defines what must be disclosed in a party's "standard disclosure," has been interpreted to require production of only those documents upon which a party relies in support of their contentions in the proceedings and those documents which "*to a material extent* adversely affect a party's own case or support another party's case."[78] After 15 years, this model of disclosure remains in effect and has reportedly resulted in significant curtailment of excess discovery. 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."[79] We urge the Committee to make this improvement.

C. Incorporating Cost Allocation into Rule 26(c) is a Positive Step.

We also support adoption of the proposed amendment to Rule 26(c) adding an express recognition that protective orders may allocate expenses for discovery. As the Committee is well aware, LCJ has long supported changes to the current cost allocation models in the American civil justice system and in particular to the default "rule" that a producing party must pay for the costs of responding to an opposing party's discovery requests.[80] Although a small step toward

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[75] An E-Discovery Model Order, Introduction 2 (Fed. Cir. 2011) *available here*: http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html.

[76] FED. R. CIV. P. 26 advisory committee's note (2000) ("The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.").

[77] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY, 7-9 (Sept. 2010) *available at* http://www.lfcj.com/articles.cfm?articleid=1 .

[78] 1 WHITE BOOK SERVICE, at 909 (The Right Honourable Lord Justice Jackson ed., 2012) (emphasis added).

[79] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, at 227, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

[80] A requester-pays rule would encourage parties to focus discovery requests on evidence that is important to proving or defending against the claims, and would significantly reduce if not eliminate any tactical reason to engage in overbroad discovery. *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY

our larger vision of reform, express recognition of the court's authority to allocate discovery expenses is an important first step.[81] Such express recognition of this authority, in addition to emboldening the courts to address more effectively the rampant problems of disproportional discovery, will place requesting parties on notice that they may be required to bear the costs of responding to their requests, and thus encourage more careful deliberation regarding the true needs of the case.

IV. Cooperation: Adding "Parties" to Rule 1's Reach, and an Exhortation to Cooperate in the Note, Is Unneeded and Risks Ancillary Litigation about an Undefined Duty.

The proposed amendments to Rule 1 and the Committee Note aim to bolster Rule 1's goal of a "just, speedy and inexpensive" resolution by (1) explicitly stating that the rules are to be "employed by . . . the parties" (i.e., attorneys) to reach that result, and (2) incorporating into the Note an exhortation that attorneys should "cooperate." These changes are intended to "encourage cooperation by lawyers and parties directly," and to "provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short."[82] While we believe cooperation is a valid aspirational goal, we do not believe the rules should be used as a tool to enforce it.

Since 1938, Rule 1 has been understood as embodying the goals of the Federal Rules of Civil Procedure and has not been used to impose any affirmative duty on parties or their lawyers. The 1993 Committee Note makes clear that attorneys, as officers of the court, share responsibility while at the same time making it clear that the Federal Rules of Civil Procedure are intended to be a tool for the c*ourt* to utilize. The Advisory Committee's proposed amendment risks transforming the rule's uncontroversial statement of general goals into a duty, the breach of which could lead to sanctions and more.

The incorporation of "parties" risks providing an inappropriate opportunity to game the system. Attorneys could file motions under Rule 1 claiming that the actions of opposing counsel have failed to secure the goals of the rules by inadequate cooperation. As the courts' experience with the first version of Rule 11 shows, arming adversaries with additional pathways to complain about choices made by counsel spur wasteful motions and burden the courts in unanticipated ways. It is not difficult to imagine a scenario where an opponent could deem even ordinary discovery decisions as reflecting a lack of cooperation.

The Advisory Committee originally considered adding a duty of cooperation in the text of the rule, but properly abandoned that idea when many commentators expressed concerns about the incorporation of an amorphous cooperation duty into the rules. As the Committee itself

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COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVIZES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (April 1, 2013) *available at* http://www.lfcj.com/articles.cfm?articleid=169; 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 (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40 .

[81] 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.

[82] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.

explained, "[i]t is "difficult to identify a proper balance of cooperation with legitimate, even essential adversary behavior."[83] The drafters also determined that a "general duty of cooperation could conflict with professional responsibilities of effective representation."[84]

Those concerns remain under this proposal. How can a legal duty to cooperate be smoothly incorporated into a system that for centuries has functioned as unapologetically adversarial? However, without doing anything more than noting those concerns, the Committee has proposed adding references to cooperation into the Committee Note. If amended as proposed, the Note could reasonably be read as enshrining a duty to cooperate in the rules, and parties will likely find themselves in the same uncertain position as if the drafters had written the duty to cooperate directly into the rule itself.

The term "cooperate" does not define specific actions. Advocates of "cooperation" have attempted to define cooperation, but have only created new ambiguities and more uncertainty, not less. For example, in the wake of its *Cooperation Proclamation*, The Sedona Conference® has published two resources to guide courts and counsel in understanding the meaning of cooperation – *The Case for Cooperation*[85] and *Guidance for Litigators & In-house Counsel*.[86] Although well-intended, these publications merely state that cooperation does not mean "capitulation."[87] The meaningless contrast between cooperation, on the one hand, and capitulation on the other becomes a no man's land in which attorneys are left not knowing the boundaries of either. *Guidance for Litigators* merely contains "cooperation points" that are intended to serve as examples of cooperative behavior.[88] Although instructive and helpful in certain circumstances, the points do not provide a definitive description of what it means to "cooperate" for purposes of evaluating an attorney's compliance with a legal requirement.[89] For example, Cooperation Point #3 directs an attorney to "appreciate and address opposing counsel's legitimate concerns" and to propose "creative and sincere" solutions.[90] This seems to suggest that attorneys show a level of empathy to the adversary that can and will affect the decision making processes. At what point does identifying with the opponent's concerns go too far and negatively affect an attorney's professional responsibilities and effective representation?

There are many serious questions involved. For example, must one disclose information that is not sought in discovery but which may be helpful to opposing counsel and would that level of cooperation not run afoul of the ethics rules concerning loyalty and diligence to the client? Should opposing counsel be permitted to bring a "Rule 1" motion against the party/attorney in

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[83] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.
[84] *Preliminary Draft of Proposed Amendments*, *supra* note 38, at 270.
[85] The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009 Supp.) [hereinafter *The Case for Cooperation*].
[86] THE SEDONA CONFERENCE, COOPERATION PROCLAMATION: GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL (March 2011) [hereinafter GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL] *available for download at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Cooperation%20Guidance%20for%20Litigators%20%2526%20In-House%20Counsel .
[87] *The Case for Cooperation*, *supra* note 85, at 340 ("Cooperation is not capitulation.").
[88] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 2.
[89] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 2. The purpose of the guidance is to "identify opportunities for constructive, mutually beneficial cooperation with opposing counsel." Its purpose is not to define the outside limits on cooperative behavior.
[90] GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 86, at 4-5.

that circumstance? If the answer is "no" to these questions, where would a lawyer or judge seeking the meaning of the new Rule 1 and the Committee Note find that?

Until the concept of "cooperation" can be defined to provide objective ways to evaluate a party's compliance—including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation—the Committee Note should not be amended to include an unlimited exhortation to cooperation. It is settled that a court may find a rule unconstitutional that penalizes or sanctions a person when the rule is so vague that it fails to provide notice to the persons to whom the rule is directed.[91] Rules that incorporate terms with "no settled usage or tradition of interpretation in law" and where an attorney finds himself or herself forced to understand the rule by "guess[ing] at its contours" are especially at risk. "Cooperation" is such a term.

The Advisory Committee should reject and reconsider the proposed amendment to Rule 1 because the imposition on parties of a new substantive duty should be more carefully considered and expressly defined, especially when it would go to the heart of our centuries-old adversary system. As for the Committee Note, if the Committee decides to adopt the proposed amendment to the Note, it should add an express statement that the Note is exhortative only and should not be construed to expand substantive duties.

V. Case-Management Proposals: Rules 4(m), 16(b) and 26(d) & (f)

We encourage the adoption of these proposed amendments *as part of a larger package*. Although the individual proposals are generally sound, they are unlikely to result in a significant improvement in the orderly administration of justice and would do little to address the major problems of modern litigation and discovery. Thus, we encourage the Committee to continue to focus on the more substantial proposed amendments and to adopt the case management proposals only as part of a larger amendments package.

VI. Presumptive Numerical Limits: Rules 30, 31, 33 and 36

LCJ supports adoption of the presumptive numerical limits to discovery *as part of a larger amendments package*. We believe that lower limits will be useful in encouraging parties to reflect on the true needs of each case[92] (proportionality) and will result in an adjustment of expectations concerning the proper amount of discovery in civil litigation.[93] This adjustment in expectations is particularly vital in light of the recent explosion of electronic information and its problematic effects on modern discovery.

We are aware that the lowering of the numerical limitations has engendered opposition from plaintiffs' counsel, and in particular those involved in employment litigation. Comments seem

[91] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991).

[92] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (discussing proposed numerical limitations on depositions and explaining that the "*lower limit can be useful in inducing reflection on the need for depositions*, in prompting discussions among the parties and - when those avenues fail - in securing court supervision.") (emphasis added)).

[93] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (discussing proposed numerical limitations on depositions and explaining: "Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.").

particularly focused on the potential difficulty of obtaining relevant information if the proposed amendments are adopted. Such fears are unfounded, however, in light of the presumptive nature of the proposed limitations, which is made clear in the text of the affected rules. If amended, for example, Rule 30 would specifically state that "the court must grant leave" to take additional depositions "to the extent consistent with Rule 26(b)(1) and (2)." Similar language is also present in the other affected rules. Thus, the proposed amendments merely seek to encourage more careful contemplation of the true needs of each case and the best way to accommodate them. This is specifically confirmed in the language of the proposed Committee Note to Rule 33, which explains that "[a]s with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices."

To ensure parties' understanding of the purpose of the amendments and the need for proportionality in discovery, we present one minor proposal. We propose the inclusion of specific language outlining the "purpose" of the presumptive limitations in each affected rule's Committee Note, similar to that currently proposed for Rule 33. Specifically, each Committee Note should expressly state that the purpose of the presumptive limitations is to "encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices." To the extent parties and courts are unlikely to read the Committee Notes for rules not directly at issue in a particular case or motion, it is important to include a statement of purpose in each Note.

In response to arguments that lower presumptive limitations will result in increased motions practice, we echo the words of the Advisory Committee which, when addressing the proposed presumptive limitations to the number of allowed depositions, acknowledged that some cases will require more and noted that "*parties can be expected to agree, and should manage to agree, in most of these cases*."[94] Moreover, motions practice regarding current limitations is relatively uncommon, and there is little reason to think parties will be less able to cooperate on these issues as a result of the proposed amendments.

In short, the proposed presumptive numerical limitations would serve to address the problems of modern discovery by both limiting the volume of information subject to discovery in most cases and by encouraging proportionality, even in cases where the presumptive limitations may need adjustment.

VII. Conclusion

The American civil justice system is in crisis. Litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, are settling cases early and without regard to the merits. This is due to what an overwhelming percentage of legal practitioners observe in their daily experience: the costs and burdens of discovery are too high and discovery, particularly e-discovery, is being abused. The proposed amendments are a commendable, and in some cases, essential antidote for many of the ills affecting the American system of civil justice. LCJ applauds the Committee's work in developing the proposed rules, which hold the promise of rescuing the system. But we strongly urge the Committee to make the necessary changes

[94] *Preliminary Draft of Proposed Amendments, supra* note 38, at 268 (emphasis added).

discussed in this Comment in order to ensure that the Committee's efforts—unlike so many that have failed before—result, this time, in meaningful reform.

Respectfully submitted,

Lawyers for Civil Justice

Statement of

LAWYERS FOR CIVIL JUSTICE

Before the

SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

Hearing on

"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

November 5, 2013

I. Introduction and Summary

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Subcommittee on Bankruptcy and the Courts concerning the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments") currently pending before the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee").

The proposed amendments are a significant step towards a national, uniform spoliation sanction approach and a fair and practical revised scope of discovery. Fundamental discovery reform is necessary because the costs and burdens associated with discovery, especially electronic discovery, have put our civil justice system in "serious need of repair."[2] In a significant fraction of cases, discovery rather than the underlying merits drives the outcome of legal disputes.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT 2 (2009), *available at* http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i.

There is widespread agreement that discovery costs are affecting the outcome of cases. A survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System[3] found that 80 percent of chief legal officers or general counsels disagree with the statement that "outcomes are driven more by the merits of the case than by litigation costs." That survey also found that over 70 percent of chief legal officers or general counsels believed that parties "overuse permitted discovery procedures" by going beyond what is necessary or appropriate for the particular case, and 97 percent believe that litigation is too expensive.

Corporate defense counsel are not alone in perceiving a serious problem. The American College of Trial Lawyers data[4] and that of the American Bar Association,[5] both representative of views from plaintiffs' and defense bar, show a widespread opinion that discovery is too expensive; that costs, rather than the merits, forces settlements; and that e-discovery is abused. Put simply, there is solid agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery are skewing the civil justice system.

It is no wonder that more and more litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, settling cases early and without regard to the merits in an effort to avoid the expense and unpredictability of litigation—meanwhile, serious discussion about the vanishing jury trial and what it means for civil justice continues.

Because of the Advisory Committee's decision to move forward with the proposed amendments discussed herein, there is now an opportunity to have a real impact on the costs and burdens of discovery—a goal that many before have attempted but failed to achieve. LCJ supports this effort while strongly urging the Advisory Committee to make important additions and modifications to the proposed rules that will enable the Advisory Committee to achieve its goal of improving our civil justice system.

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

A. A New Preservation Rule is Urgently Needed.

Preservation of electronically stored information (ESI) has developed into one of the major cost drivers in litigation. The electronic information explosion is not the problem. The unfettered scope of discovery and the lack of a uniform, national preservation standard have created an environment in which ancillary litigation about preservation thrives.

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[3] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf .

[4] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (Sept. -Oct. 2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf .

[5] AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

Preservation issues are currently decided on a case-by-case basis by courts that have created their own *ad hoc* "litigation hold" procedures. Without clearly defined preservation rules, parties struggle to draw the line on the scope of preservation—especially in the period prior to commencement of litigation—and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. Organizations must divert resources to "defensive preservation" and individual litigants are faced with costly spoliation/sanctions battles that they simply do not have the economic resources to fight.[6] There has been a dramatic escalation in reported decisions on the topic, indicating the tip of an iceberg of motion practice and unfairness.[7]

The only alternative to costly over-preservation is to risk severe and embarrassing sanctions for failing to preserve what might be pertinent ESI. Many courts impose severe sanctions, such as an adverse-inference jury instruction, on the basis of a party's unintentional failure to meet *ad hoc* requirements that do not exist in any rule and may vary from jurisdiction to jurisdiction.

In other words, the lack of a clear preservation rule forces a Hobson's Choice: Preserve too much, incurring high storage costs, significant burdens on custodians, and the resulting challenges of analysis and production of huge volumes of information, or preserve too little, and face the risk of second-guessing with spoliation allegations that can result in a case-altering jury instruction that a party was a "bad actor" (even without a finding of bad faith), which inevitably causes an adverse judgment.

Often lost in this discussion is that fact that most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue. For example, Microsoft Corporation reported in 2011 that that "[f]or every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1."[8] In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are preserved, but only 142 are actually used.[9] Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.

The fear of sanctions and the inability to navigate the conflicting standards has bred an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information.

[6] *Bozic v. City of Washington*, 912 F. Supp. 2d 257, 260, n. 2 (W.D. Pa. 2012) ("Neither state of affairs is a good one.").
[7] There has been a dramatic escalation in spoliation motions and rulings since the already elevated levels reported to the 2010 Duke Litigation Conference. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 791 (2010) ("an all-time high").
[8] Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (August 31, 2011).
[9] *Id.*

Proposed Rule 37(e)(1)(B) is a significant improvement over the current rule, but as explained in LCJ's Public Comment,[10] the proposal will meet its potential only if the rule is confined to a clear and simple standard without the current unpredictable and unmanageable exceptions.

III. Scope and Proportionality: Rules 26(b)(1) and 26(c)

A. The Proposed Amendments' Focus on Claims, Defenses and Proportionality Is a Much-Needed Reform.

The broad scope of discovery as interpreted under current Rule 26(b)(1) is a fundamental cause of the discovery problems addressed above and in LCJ's prior comments.[11] The ill-defined boundaries of modern discovery result in the preservation and production of staggering volumes of data which ultimately contribute little to the resolution of the case. A survey of "major" companies revealed that, although the average number of pages produced in discovery in major cases that went to trial was 4,980,441, the average number of exhibit pages totaled just 4,772—a mere 0.10% of the total production.[12] Such statistics, together with the costs and burdens of producing documents make it unsurprising that e-discovery has been described as a "morass"[13] that "is crushing"[14] or "could ruin"[15] the civil justice system.

LCJ strongly supports the Advisory Committee's proposal to amend Rule 26(b)(1). These modest edits would produce an important reduction in abusive discovery practices without depriving anyone of necessary information. No longer would parties be left to divine the amorphous boundaries of discovery based on the ill-defined and troublesome standard of what is "relevant to the subject matter involved in the action." Instead, the claims and defenses pled by any party would provide a clear anchor to which any discovery must be attached.

Thus, a single question becomes the measurement by which to proceed in discovery: "How is this information relevant to a claim or defense asserted by any party?" While the "relevance" of particular evidence may remain open to some interpretation, to be sure, the ability to articulate the clear tie between any potentially discoverable information and a claim or defense plead by any party would provide a meaningful and useful standard upon which to base discovery decisions.

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[10] LAWYERS FOR CIVIL JUSTICE, PUBLIC COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES (August 30, 2013) *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267.

[11] 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 (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.

[12] LAWYERS FOR CIVIL JUSTICE ET AL., STATEMENT ON LITIGATION COST SURVEY OF MAJOR COMPANIES, App. 1 at 16 (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[13] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT B-1 (Aug. 1, 2008) *available at* http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3650.

[14] *Id.* at B-4.

[15] *Id.* at B-3.

By reducing the amount of information subject to discovery in any case—as the proposed amendment is intended to do—the costs of discovery will necessarily also go down. Moreover, to the extent parties will nonetheless be obligated to expend time and resources on their discovery efforts, the information at issue will have greater potential actually to affect their case.

Rule 26(b)(1) would also benefit *greatly* from the emphasis on inclusion of the considerations that bear on proportionality, currently in Rule 26(b)(2)(C)(iii). The concept of proportionality has been present in the rules for many years, but is routinely ignored in favor of notions of broad and liberal discovery. Despite this, recent jurisprudence has made clear that considerations of proportionality have an important place in discovery and should be seriously considered by all parties.[16] Explicitly referencing proportionality in Rule 26(b)(1) will encourage its early application and thus reduce the likelihood that ultimately unhelpful information is nonetheless caught up in a party's discovery efforts.

B. Adding a Materiality Standard Would Further the Goal of Encouraging Proportional Discovery.

Despite our strong support for the proposed amendments to Rule 26(b)(1), LCJ remains concerned that historically broad notions of discovery and relevance could prevent the amendment from fulfilling its potential unless the Advisory Committee adds a materiality requirement to Rule 26(b)(1). Such a materiality standard would be added as follows:

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

This small but impactful addition to the rule would promote the proper purpose of discovery, namely "the gathering of material information,"[17] and ensure proportionality in both preservation and production by clearly signaling the end to expansive interpretations of scope and relevance. Prior efforts to reign in the scope of discovery, when matched against such notions, have unfortunately fallen short. Indeed, the effects of the 2000 amendment to Rule 26(b)(1) (which bifurcated discovery into two tiers: attorney-managed and court-managed), is an instructive example. That amendment was unsuccessful in its goal to focus discovery on the claims and defenses involved in the action.[18] Instead, it has been widely reported that the amendment was generally ignored.[19]

A materiality standard has proven successful in other jurisdictions. In England, for example, Rule 31.6, which defines what must be disclosed in a party's "standard disclosure," has been

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[16] *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to the case and consistent with clearly established applicable standards.").

[17] An E-Discovery Model Order, Introduction 2 (Fed. Cir. 2011) *available here*: http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html.

[18] FED. R. CIV. P. 26 advisory committee's note (2000) ("The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.").

[19] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY, 7-9 (Sept. 2010) *available at* http://www.lfcj.com/articles.cfm?articleid=1 .

interpreted to require production of only those documents upon which a party relies in support of their contentions in the proceedings and those documents which "*to a material extent* adversely affect a party's own case or support another party's case."[20] After 15 years, this model of disclosure remains in effect and has reportedly resulted in significant curtailment of excess discovery. 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."[21]

C. Incorporating Cost Allocation into Rule 26(c) is a Positive Step.

We also support adoption of the proposed amendment to Rule 26(c) adding an express recognition that protective orders may allocate expenses for discovery. LCJ has long supported changes to the current cost allocation models in the American civil justice system and in particular to the default "rule" that a producing party must pay for the costs of responding to an opposing party's discovery requests.[22] Although a small step toward our larger vision of reform, express recognition of the court's authority to allocate discovery expenses is an important first step. Such express recognition of this authority, in addition to emboldening the courts to address more effectively the rampant problems of disproportional discovery, will place requesting parties on notice that they may be required to bear the costs of responding to their requests, and thus encourage more careful deliberation regarding the true needs of the case.

IV. Presumptive Numerical Limits: Rules 30, 31, 33 and 36

LCJ supports adoption of the presumptive numerical limits to discovery *as part of a larger amendments package*. We believe that lower limits will be useful in encouraging parties to reflect on the true needs of each case[23] (proportionality) and will result in an adjustment of expectations concerning the proper amount of discovery in civil litigation.[24] This adjustment in

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[20] 1 WHITE BOOK SERVICE, at 909 (The Right Honourable Lord Justice Jackson ed., 2012) (emphasis added).

[21] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, at 227, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

[22] A requester-pays rule would encourage parties to focus discovery requests on evidence that is important to proving or defending against the claims, and would significantly reduce if not eliminate any tactical reason to engage in overbroad discovery. *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVIZES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (April 1, 2013) *available at* http://www.lfcj.com/articles.cfm?articleid=169; 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 (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40 .

[23] *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure,* at 268 (discussing proposed numerical limitations on depositions and explaining that the "*lower limit can be useful in inducing reflection on the need for depositions*, in prompting discussions among the parties and - when those avenues fail - in securing court supervision.") (emphasis added)), *available at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.*

[24] *Preliminary Draft of Proposed Amendments, supra* note 24, at 268 (discussing proposed numerical limitations on depositions and explaining: "Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.").

expectations is particularly vital in light of the recent explosion of electronic information and its problematic effects on modern discovery.

We are aware that the lowering of the numerical limitations has engendered opposition from plaintiffs' counsel, and in particular those involved in employment litigation. Comments seem particularly focused on the potential difficulty of obtaining relevant information if the proposed amendments are adopted. Such fears are unfounded, however, in light of the presumptive nature of the proposed limitations, which is made clear in the text of the affected rules. If amended, for example, Rule 30 would specifically state that "the court must grant leave" to take additional depositions "to the extent consistent with Rule 26(b)(1) and (2)." Similar language is also present in the other affected rules. Thus, the proposed amendments merely seek to encourage more careful contemplation of the true needs of each case and the best way to accommodate them. This is specifically confirmed in the language of the proposed Committee Note to Rule 33, which explains that "[a]s with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices."

In response to arguments that lower presumptive limitations will result in increased motions practice, we echo the words of the Advisory Committee which, when addressing the proposed presumptive limitations to the number of allowed depositions, acknowledged that some cases will require more and noted that "*parties can be expected to agree, and should manage to agree, in most of these cases*."[25] Moreover, motions practice regarding current limitations is relatively uncommon, and there is little reason to think parties will be less able to cooperate on these issues as a result of the proposed amendments.

In short, the proposed presumptive numerical limitations would serve to address the problems of modern discovery by both limiting the volume of information subject to discovery in most cases and by encouraging proportionality, even in cases where the presumptive limitations may need adjustment.

V. Conclusion

The American civil justice system is in crisis. Litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, are settling cases early and without regard to the merits. This is due to what an overwhelming percentage of legal practitioners observe in their daily experience: the costs and burdens of discovery are too high and discovery, particularly e-discovery, is being abused. The proposed amendments are a commendable, and in some cases, essential antidote for many of the ills affecting the American system of civil justice. LCJ supports the Advisory Committee's work in developing the proposed rules, which hold the promise of rescuing the system. But we strongly urge the Committee to make the necessary changes discussed in our Public Comment[26] in order to ensure that the Committee's efforts—unlike so many that have failed before—result, this time, in meaningful reform.

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[25] *Preliminary Draft of Proposed Amendments, supra* note 24, at 268 (emphasis added).

[26] LAWYERS FOR CIVIL JUSTICE, PUBLIC COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES (August 30, 2013) *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267.