Statement of

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

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of the

Committee on the Judiciary, United States Senate

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Chairman Coons, Ranking Member Sessions, and members of the Subcommittee:

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. I am honored to appear before the Subcommittee to discuss the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure released for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

My law practice focuses on advising clients with respect to legal strategy in trial courts as well as representing them in appellate courts and the Supreme Court (I also am co-director of the Yale Law School Supreme Court Clinic, which provides pro bono representation to parties in approximately a dozen cases each year). In addition, my firm has significant expertise in electronic discovery matters, and represents numerous clients with respect to discovery issues.[1]

My testimony makes five basic points:

- The cost of the U.S. legal system – which is growing significantly as a result of electronic discovery – is increasingly producing outcomes unrelated to the merits of cases, but rather tied to the defendants' litigation costs. A key barrier to foreign investment in the United States is the concern, expressed repeatedly by leaders of non-U.S. businesses, about excessive litigation costs in our country. These costs also make it more difficult for U.S. companies to compete with businesses headquartered in other countries.

- The tremendous growth in electronically stored information – combined with discovery rules formulated for the typewriter-and-paper era – have produced an exponential growth in discovery-related litigation costs. A recent independent study found a *median cost of $1.8 million per case* for producing electronically stored information, and companies must incur additional costs, in the millions of dollars, to preserve electronic information that might be demanded in discovery.

[1] My testimony today is not on behalf of any client or my firm; it represents only my own views.

- The principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the Rule – requiring that discovery be proportional to the needs of the case – in order to give it increased emphasis. As the Advisory Committee observed, "[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands." The proposal is designed to remedy that deficiency, and hopefully it will have that effect.

- The amendments also would modify the provisions of the current rules establishing presumptive limits on some forms of discovery, modestly reducing existing limits on depositions and interrogatories and establishing a new presumptive limit for requests for admissions. The proposed limits are based on information regarding the norms in most federal court litigation, and the Advisory Committee's eminently reasonable conclusion that "it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number." Nothing prevents a court from allowing a greater number of discovery requests upon a proper showing.

- Finally, the current vague and uncertain standard for determining when sanctions should be imposed for failure to preserve electronic information is forcing companies to incur very substantial costs to "over-preserve" electronic information. The proposed amendments address this problem by replacing the existing rule with a new, somewhat clearer standard. Two modifications to the proposal would significantly increase the chances that it will have a significant effect in reducing the over-preservation costs that now plague businesses and other organizations.

The Troubled U.S. Legal System

Our legal system has significant problems:

- Federal district courts are already overburdened[2] and, because government fiscal constraints are likely to increase in the coming years, the problem is likely to worsen.

- A procedural system adopted 75 years ago – the Federal Rules of Civil Procedure, which incorporated some procedures that had been in place for hundreds of years – that has not been subject to a comprehensive review in light of the revolutionary changes in every aspect of the society in which our judicial system operates: technology, law practice, government, business, and the personal lives of every American. It is difficult to think of any other process used by hundreds of thousands of private individuals and government employees, whether in the public or the private sector, that has not been substantially revised to account for these dramatic changes.

- Most everyone agrees that civil litigation costs too much and takes too long.

[2] For example, the number of civil and criminal cases filed per authorized district court judgeship increased from 408 in 1970, to 462 in 1990, to 533 in 2010 – an increase of 30%, notwithstanding the more-than-doubling of the number of authorized judgeships. (Analysis based on Administrative Office of U.S. Courts, *Judicial Facts and Figures*, *available at* http://www.uscourts.gov/Statistics.aspx.)

- Asymmetry between the costs of litigation for plaintiffs and for defendants has increased tremendously – largely as a result of the cost of electronic discovery.

As the American College of Trial Lawyers and Institute for the Advancement of the American Legal System put it in their final report – based on a survey of plaintiff and defense lawyers:

> "Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."[3]

These problems are producing very substantial real-world adverse consequences.

First, Resolutions Are Increasingly Unrelated To the Merits of the Underlying Claim. If every lawsuit filed were meritorious, the litigation costs imposed on defendants would be a matter of much less concern. Although litigation would be inefficient and the transaction costs associated with litigation would still be unduly large, the burden would at least fall only on actual wrongdoers.

But every lawsuit filed is not meritorious. These costs therefore fall to a significant degree on defendants who have been wrongly accused, and they are costs that those defendants almost always are forced to bear themselves. Moreover, these unjustified, excessive costs are – as the American College of Trial Lawyers recognized – forcing innocent defendants to settle meritless cases. A survey of chief legal officers of large and small companies found that "the merits of a case generally do not prevail over cost considerations in determining the result. Over 80% disagreed with the statement that 'outcomes are driven more by the merits of the case than by litigation costs.'"[4]

The decision to settle is rational, indeed economically compelled, when the costs of litigating exceed the costs of settling. That is true even when the defendant is certain that it would prevail if it litigated the case to conclusion. And it is true when, as is more likely the case, the defendant believes that it has a strong chance of prevailing but cannot be certain of the outcome.

As the costs of litigating increase, moreover, plaintiffs can demand higher settlement payments, because it remains economically sensible for defendants to settle at any price lower than the litigation costs. Because electronic discovery is substantially increasing defendants' litigation costs, it is also substantially increasing the incentive to settle, and producing higher settlement costs.

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[3] American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report* at 2 (2009) ("*Final Report*").

[4] Institute for the Advancement of the American Legal System, *Civil Litigation Survey of Chief Legal Officers and General Counsel* 19 (2010) ("*CLO Survey*"), *available at* http://www.uscourts.gov/uscourts-/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20General%20Counsel%20Survey.pdf.

The bottom line: it is easier today for a plaintiff filing a meritless claim to command a large settlement as long as the case can survive a motion to dismiss.[5] That phenomenon does not just create a significant incentive for the filing of meritless claims, it also diminishes respect for our legal system.

Second, Foreign Investment in the United States is Deterred. Just last week, President Obama – speaking at a conference to encourage foreign businesses to invest in the US – stated:

> "There are a lot of wonderful countries out there. But this is a place where you can do business, create great products, deliver great services, make money, and do good at the same time. So you should find out why there's no substitute for those proud words: 'Made in America.' And here's three more words: 'Select the USA.'"[6]

This emphasis on encouraging foreign investment in the United States makes good sense. Foreign-owned firms employ 5.6 million Americans and, according to the White House, compensation for those employees "has been consistently higher than the U.S. average over time, and the differential holds for both manufacturing and non-manufacturing jobs."[7] These firms also account for 16% of the private sector's research and development spending.[8]

Our country has many advantages over other nations. An educated workforce; good infrastructure; declining energy costs; top research universities.

But the cost and inefficiency of the U.S. legal system is a significant disadvantage when businesses compare the United States to other countries around the world. Survey after survey shows that litigation costs here are higher than anywhere else.[9] The message is unavoidable: "You'll get sued in the USA."

Business executives are well aware of this fact. A survey of global business leaders conducted under the auspices of Senator Schumer and Mayor Bloomberg found that a key disadvantage of

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[5] Denial of the motion to dismiss says nothing about the ultimate merit of the claim, of course, because the court must assume that the allegations of the complaint are true. They often are not.

[6] Remarks by the President at SelectUSA Investment Summit (Oct. 31, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/10/31/remarks-president-selectusa-investment-summit.

[7] U.S. Department of Commerce and President's Council of Economic Advisers, *Foreign Direct Investment in the United States* (Oct. 31, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/10/31/new-report-foreign-direct-investment-united-states.

[8] *Id*.

[9] *See, e.g.,* 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/; U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 4-5 (Oct. 2008) ("*Commerce Department Report*"), *available at* http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_007457.pdf; *see also CLO Survey* at 17 ("an astonishing 97% of respondents responded that the system is 'too expensive,' with 78% expressing strong agreement").

New York, when compared to London and other key financial hubs, was "the high legal cost of doing business. . . . When asked which aspect of the legal system most significantly affected the business environment, senior executives surveyed indicated that propensity to legal action was the predominant problem."[10]

The U.S. Department of Commerce reached the same conclusion, stating that "the concerns with excessive litigation and navigating what is seen as an expensive U.S. legal system are among a small number of issues that are front and center whenever the U.S. climate for [foreign direct investment] is discussed."[11] Also, "[f]ear of litigation is among the top issues listed by senior executives who manage internationally-owned U.S. businesses."[12]

Those of us who grew up in the U.S. legal system can forget how very different it is from the global norm. I've several times had the experience of explaining our system to the general counsel of a foreign-based company sued in a U.S. court.

The client will call, having read the complaint, and say, "Most of what they assert is not true – let's point that out right away." I'm forced to respond, "That isn't how our system works. First, a court will evaluate the legal sufficiency of the claim and assume that every fact alleged in the complaint is true – even though we know many of them are not."

"If the complaint is legally sufficient, then the plaintiff will be entitled to require us to turn over documents, including electronic information, and perhaps interview a couple of employees. That could cost $1 million or more."

"Then, we will be able to argue that the facts alleged in the complaint are wrong and we are entitled to judgment."

The client asks, "And if we win, will I be entitled to get my $1 million back?"

"No," I have to respond. "In the U.S. system, those costs can be recovered only rarely and it would cost more money to try to do that."

"So," the client says, "I'm innocent, but I have to pay $1 million to prove it and that money is gone forever."

"Yes," I say, "that is the U.S. legal system."

It is extremely difficult to defend the rationality of that result.

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[10] *Sustaining New York's and the US' Global Financial Services Leadership* 75 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[11] *Commerce Department Report* at 2 (footnote omitted).

[12] *Id*. (footnote omitted); *see also* Robert E. Litan, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* (Aug. 2007), *available at* http://www.instituteforlegalreform.com-/uploads/sites/1/Chamber_Litan_book_LO_RES.pdf (discussing adverse effect of U.S. legal system on foreign investors' willingness to invest in the United States).

The reason our system is so "foreign" to the rest of the world is that many other countries' legal rules would require the losing party in my example to pay the prevailing party's litigation costs, including attorneys' fees. But the "American rule," under which each party pays its own fees in the absence of a statutory rule to the contrary, is firmly embedded in American law.[13]

That means there is little reason for a plaintiff not to file a lawsuit – the filing fee is minimal; the plaintiff's litigation costs, including discovery, will be minimal compared to the costs inflicted on the defendant; and there is no real risk of having to pay the defendant's costs in the event it prevails. And the higher the litigation cost faced by the defendant, the more likely the defendant will settle, which in turn increases the incentive to file cases with minimal merit.

As the President recognized last week, global businesses have many choices in deciding where to locate factories, or regional headquarters, or research facilities. The U.S. litigation system is well-recognized as a disadvantage to doing business here. Failing to address the deficiencies of our system – and allowing them instead to fester – will increase this barrier to foreign investment in the United States. In an increasingly globalized and competitive world, that is something our Nation simply cannot afford.

Third, the Global Competitiveness of US Companies is Harmed. The excessive costs of the U.S. legal system do not simply deter foreign investment in our country. They also disadvantage U.S. companies seeking to compete in other markets around the world.

U.S. companies typically locate their central operations here – including their corporate headquarters, research and development facilities, factories, training facilities, etc. Indeed, we want to encourage U.S. companies to do just that in order to maximize employment opportunities for our citizens.

These companies also are more likely to have a disproportionate share of their business in the U.S., which, after all, is their home market.

As a result of all of these U.S.-based activities, U.S. companies have substantial exposure to the U.S. legal system.

Companies headquartered elsewhere, on the other hand, have a disproportionate exposure to *their* home country's legal system. That system almost certainly will impose significantly lower costs on them than the U.S. legal system imposes on U.S.-based companies.

What happens when two companies – one headquartered in the U.S. and one headquartered elsewhere – compete in a third country?

The U.S. company, weighed down by the larger costs of the inefficient U.S. legal system, starts with a disadvantage. Luckily, American ingenuity often finds other ways to level the playing

[13] The Supreme Court has recognized that the American rule regarding attorneys' fees "is deeply rooted in our history and in congressional policy." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975).

field and win. But that does not eliminate the fact that our companies have a competitive burden that makes it more difficult for them to compete effectively.

We wouldn't send U.S. runners to the Olympic Games with fifty-pound weights tied to their ankles. We shouldn't impose the same sort of burdens on U.S. companies competing in today's globalized economy.

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The proposal released for public comment by the Rules Committee begins to address these problems – and the associated adverse consequences – through measured steps that may, depending on how they are implemented by federal judges across the country, moderate the crushing burden of electronic discovery costs.

The Tremendous – And Wholly Asymmetric – Costs of Electronic Discovery

"The internet changes everything" has become a cliché, but it is no exaggeration to say that electronically stored information has revolutionized discovery practice in civil litigation.

Some of us may be old enough to remember a world in which "mail" meant physical letters delivered by the Post Office; a "document" was produced on typewriters using paper and ink; a "file" was composed of physical documents stored in a physical filing cabinet; and conversations took place either in person or over the telephone.

Those days – the very days in which the current discovery rules were formulated – are long past. E-mail, text messaging, and chats have replaced conversations and physical letters. While some documents may be produced in physical form, often temporarily, all exist electronically. And electronic filing on massive servers has largely replaced physical file rooms.

The result has been explosive growth in the amount of electronically stored information possessed by businesses and other organizations – a trend that is likely to continue for the foreseeable future. For example:

- "'In the three year period from 2004 to 2007, the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte)'" – which is *fifty times* the amount of text in all of the books in the Library of Congress. Over the same time period, the average data sets at 9,000 American, midsize companies grew from two terabytes to 100 terabytes – or five times the text in all of the Library of Congress's books.[14]

[14] Gregory P. Joseph, *Electronic Discovery and Other Problems* at 2-3 n.5 (2009) (citation omitted), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/-Gregory%20P.%20Joseph,%20Electronic%20Discovery%20and%20Other%20Problems.pdf.

- Businesses alone are estimated to send 100 billion emails *each day* this year, an amount predicted to increase to 132 billion per day in 2017.[15]

- One company explained to the Civil Rules Advisory Committee that the average amount of electronic information generated per employee whose data was preserved for litigation purposes increased by 250% in just three years (from 2008-2011) – from 7 gigabytes (the equivalent of 306,271 pages) to 17.5 gigabytes (765,678 pages). It explained that "[s]ome of this growth stems from the fact that . . . employees store increasing amounts of data in Outlook folders, and some comes from the increased use of new technologies."[16]

The tremendous growth in electronically stored information – combined with discovery rules formulated for the typewriter-and-paper era – have produced an exponential growth in discovery-related litigation costs. These costs fall into two basic categories.

First, the expenses associated with responding to discovery requests. A recent study by the RAND Institute for Civil Justice of discovery costs in a representative sample of cases found a *median cost of $1.8 million per case* for producing electronically stored information.[17] The cost-per-case ranged from $17,000 to $27 million.[18]

The RAND study found that, in general, the cost of producing electronic data was $18,000 per gigabyte of data reviewed for relevance and privilege.[19] In 2008 even a midsize case was likely to involve 500 gigabytes of data[20] – which equates to a cost of $4.5 million if only half of the data reaches the review stage. It is easy to see how these costs will continue to multiply as the amount of electronic data continues to grow.

Moreover, an organization is forced to incur additional costs in connection with producing electronic data. According to one expert, companies should plan on spending an average of $500,000 for the IT support needed for cases involving documents from 10 or more employees and/or more than three different systems. If a company has 5 lawsuits involving documents from 10-20 employees in a year, the IT support costs alone could be between $25 and $50 million.[21]

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[15] The Radicati Group, Inc., *Email Statistics Report, 2013-2017* at 4 (April 2013), available at http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf.

[16] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

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

[18] *Id*. These costs are incurred in collecting electronically stored information, processing it to a form suitable for review and other tasks, and revising it to identify responsive documents and withhold privileged materials. *See id*. at 27-28.

[19] *Id*. at 20.

[20] Institute for the Advancement of the American Legal System, *A View from the Front Lines* 5 (2008).

[21] Debra Logan & John Bace, *E-Discovery: Project Planning and Budgeting 2008-2011* (Feb. 2008).

Second, parties incur significant costs to preserve electronically stored information beginning when a legal claim is reasonably anticipated and during the entire course of a litigation, because of the threat of onerous sanctions in the event a party is subsequently found to have erased information deemed to be subject to discovery – even if the deletion was unintentional. The standards governing preservation are vague and uncertain, and sanctions are applied by courts in hindsight. Companies are forced, therefore, to take a conservative (and thus expansive) approach to preservation in order to avoid the adverse consequences, both within a litigation and more generally to brand and reputation, of a spoliation finding.

For example, Microsoft informed the Civil Rules Advisory Committee in 2011 that "[t]he burden of over-preservation grows heavier by the day"; it reported that, on average, 6,732 of the company's employees are subject to litigation holds (a remarkable 12.5% of Microsoft's U.S. employees), meaning that it is storing 115 terabytes of information, or *more than five times* the text of all of the books in the Library of Congress.[22]

The costs of storing this information are quite substantial. For example, one witness testified before the House Judiciary Committee in 2011 that the preservation of information for just a single case, amounting to 16 million pages of data – a small fraction of the amount of information stored by Microsoft – cost $100,000 per month.[23] In addition, the fixed costs of implementing a system to preserve documents for litigation can be very large: "[t]wo companies report that implementing such systems cost approximately $800,000 to$900,000, with upkeep and maintenance costs of $150,000 per year. Other examples include a tool for collecting data to be preserved separately that cost $4,800,000 to implement. One company's data vault system cost $12,000,000 to implement and maintain in 2010."[24]

Moreover, when a lawsuit involves a claim by an individual or small entity against a large business or other organization, both of these categories of costs fall disproportionately – indeed, almost exclusively – on the business or large organization. After all, the plaintiff in such a case will have little or no electronically stored information – and therefore will incur little or no costs – but the defendant (or defendants) will have extensive amounts of electronic information. While it always has been true that defendants are likely to bear a heavier burden from discovery than plaintiffs in cases of this sort, the weight of that burden and the degree of the disparity have increased geometrically as a result of the explosion of electronic information.

Unfortunately, there is significant evidence that plaintiffs' attorneys exploit this asymmetric burden to gain a litigation advantage unrelated to the merits of the underlying claim. The American College of Trial Lawyers/Institute for the Advancement of the American Legal System report concluded that "cases of questionable merit and smaller cases are settled rather than tried

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[22] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

[23] *Costs and Burdens of Civil Discovery*: Hearing before the House Committee on the Judiciary, 112th Cong., 1st Sess. 318 (2011).

[24] *Id*. at 74.

because it costs too much to litigate them" and 71% of the lawyers surveyed (including both plaintiff and defense attorneys) "thought that discovery is used as a tool to force settlement."[25]

The continued application, in this new environment, of discovery rules largely formulated in an earlier era is allowing these problems to fester. As the American College of Trial Lawyers/Institute for the Advancement of the American Legal System report put it,

> "Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a 'morass.' Another respondent stated: 'The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare.'"[26]

The Moderate Proposal Released by the Advisory Committee

In the face of this indisputable evidence, the Rules Committee has released for comment a modest proposal for changes in the rules governing discovery, with the principal focus on proposed changes in the scope of discovery, in the presumptive limits on various forms of discovery, and in the standard for imposing sanctions.

The Scope of Discovery (Rule 26). Rule 26(b)(1) establishes the general scope of permissible discovery. The proposed amendment would change this provision in three basic respects:

- Place more emphasis on the existing requirement that discovery must be proportional to the case by moving the "proportionality" language currently in Rule 26(b)(2)(C)(iii) into Rule 26(b)(1).

- Eliminate the court's power to authorize, for good cause, discovery that is not relevant to the parties' claims or defenses but is in some way relevant to the "subject matter involved in the action," while making clear that a party may obtain discovery relevant to newly-uncovered claims or defenses by moving to amend the pleadings to add those claims or defenses.

- Confirm that the standard for permissible discovery requires that the "matter" sought must itself be relevant to the claim or defense, not merely calculated to lead to the discovery of relevant information.

Proportionality

Much attention has been focused on the proportionality issue. But proportionality *is already an element of Rule 26's scope-of-discovery test*. Rule 26(b)(2)(C) today provides that

> "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . **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**

[25] *Final Report* at 2, 9.

[26] *Id*. at 2.

> **issues at stake in the action, and the importance of the discovery in resolving the issues**."

And Rule 26(b)(1) today expressly states: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)," which of course includes the language quoted above.

What the proposal would do is eliminate the cross-reference and move the Rule 26(B)(2)(C) factors into Rule 26(b)(1), so that the provision would read, in pertinent part (new material underlined, deleted material stricken out):

> "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expensive of the proposed discovery outweighs its likely benefit ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter~~.

The Advisory Committee explained that "[a]lthough the rule now directs that the court 'must' limit discovery, on its own and without motion, it cannot be said to have realized the hopes of its authors. Surveys . . . indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior. The number of these cases and the burdens they impose present serious problems. Those problems have not yet been solved."[27]

The Advisory Committee noted that many observers found the proportionality criteria "suitably nuanced and balanced"; "[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands."[28] It therefore is proposing to "transfer[] the analysis required by present Rule 26(b)(2(C)(iii) to become a limit on the scope of discovery," with the intent that the proportionality analysis be undertaken more frequently by judges and invoked more frequently by litigants subject to unreasonable discovery demands.

It is difficult to understand the objection to this proposal.

Does anyone seriously believe that significant discovery burdens should be imposed on a party even when that discovery is disproportional to the needs of the case, considering not just the amount at issue but also the importance of the issues, the importance of the discovery to resolving those issues, and whether the burden outweighs the benefit? The only basis for such a conclusion would be the view that every plaintiff in every case is entitled to the full range of permissible discovery – even if the demand cannot be justified on any rational basis.

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[27] 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* 265 (Aug. 2013) ("*Preliminary Draft*").

[28] *Id*.

Perhaps such an approach could have merit in a system in which the losing party is obligated to pay the winner's costs of litigating, because the threat that it could eventually have to shoulder the cost of an irrational discovery demand might moderate a party's willingness to push to the limits of permissible discovery. But that approach guarantees unfair gamesmanship in a system in which the party complaining about discovery burdens is likely to be stuck with the entire cost of the other's side's demands.

Not surprisingly, the proportionality approach has been endorsed by a broad range of participants in the legal system. The Sedona Conference – which includes both plaintiff and defense lawyers – has specifically endorsed proportionality, stating that "[i]n the electronic era, it has become increasingly important for courts and parties to apply the proportionality doctrine to manage the large volume of [electronically stored information] and associated expenses now typical in litigation," and specifying a list of recommended principles that closely resemble the factors listed in the proposed amendment.[29] And the American College of Trial Lawyers/Institute for the Advancement of the American Legal System report specifically endorsed the application of a proportionality test to discovery.[30]

If the merits of the proportionality standard cannot reasonably be disputed, then the only argument against the proposal would be that federal judges cannot be trusted to apply this standard fairly. But where is the evidence for such a claim? Our entire legal system is based on the assumption that trial judges will fairly apply a myriad of procedural and substantive legal rules, subject to review and correction when appropriate (although the realities of the litigation process place many decisions off-limits to appellate review and correction). No one has explained, or can explain, why the opposite should be presumed here.

Indeed, the history in the discovery area is one of judicial *reluctance* to intervene to stop abuses or address overbroad requests, as the Advisory Committee pointed out. Certainly that is borne out by the available data regarding electronic discovery, which reveal a tremendous disparity between the pages of documents produced and the pages used as exhibits.

For example, Microsoft has provided the following information regarding the production of electronically stored data in an average case in 2011:

- Collected and processed: 12,915,000 pages
- Privilege/relevance review: 645,750 pages
- Produced: 141,450 pages
- Used as evidence: 142 pages[31]

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[29] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* 4 (Jan. 2013).

[30] *Final Report* at 7, 14.

[31] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

Another study of litigation involving Fortune 200 companies found that an average of 4,980,441 pages of documents were produced in discovery, but the average number of exhibit pages totaled 4,772—the same 1000:1 ratio found in the Microsoft data.[32] Needless to say, there appears to be significant leeway available for more efficiency in requests for electronically stored information.

Some of the objections to this proposed amendment seem to rest on the belief that the party receiving a discovery request is entitled to make a unilateral proportionality analysis that is not subject to review by the court. That is plainly wrong. A party declining to comply with a request on the ground that the scope of the request violates Rule 26(b)(1) would be required by Rule 34 to state that objection in responding to the discovery request. The requesting party could then move under Rule 37 for an order compelling disclosure on the ground that the objection lacks merit. That would bring the issue before the court, which would decide the proportionality question for itself.

In sum, the proportionality proposal is a modest alteration in the rules designed to focus additional attention on a legal standard that already exists.

Limitation of Discovery to Matters Relevant to the Parties' Claims or Defenses

The purpose of discovery is to enable the parties to obtain evidence relevant to the issues in the case; in the words of the rule, "matter that is relevant to any party's claim or defense." A second aspect of the proposed amendment to Rule 26(b) would eliminate the court's authority to expand the scope of discovery – by removing the sentence in the current rule stating, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

This sentence, which was added to the Rule in 2000 in connection with the distinction between party-controlled and court-controlled discovery, has not proven necessary in practice. As the Advisory Committee explains in recommending the sentence's deletion, "[i]f discovery of information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate," and further discovery relating to those new issues will then be permissible under the general discovery standard. There is no need for this additional authority.

Confirmation that Material Sought Must be "Relevant" to the Parties' Claims or Defenses

Although material sought in discovery must be "relevant" to a claim or defense, it has long been recognized that discovery should not be denied solely because the information sought would not be admissible evidence. As the Advisory Committee explained, "[a] common example was hearsay. Although a witness often could not testify that someone told him the defendant ran through a red light, knowing who it was that told that to the witness could readily lead to admissible testimony."[33] To address this concern, Rule 26(b)(1) now includes the following

[32] Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* 17 (2010).

[33] *Preliminary Draft* at 266.

sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

The Advisory Committee explained that the word "relevant" was added in 2000 to address "concern that the 'reasonably calculated' standard 'might swallow any other limitation on the scope of discovery.' 'Relevant' was added 'to clarify that information must be relevant to be discoverable.'"[34] However, "[d]espite the 2000 amendment, many cases continue to cite the 'reasonably calculated' language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery."[35]

The proposed amendment replaces the sentence that has caused this confusion with the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." That ensures—in the words of the Committee Note—that "[d]iscovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case."

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The proposed amendments to Rule 26(b)(1) thus serve primarily to clarify and emphasize pre-existing legal standards, rather than creating new limitations on the scope of discovery. Indeed, the proposal does not include a number of other valuable suggestions for addressing the electronic discovery explosion – such as limiting discovery to matters that are "relevant ***and material***" to the parties' claims or defenses, which would clearly prevent burdensome discovery targeted on only insignificant matters; changes in the presumption that each party should bear the costs imposed by discovery requests (a matter that the Advisory Committee will consider in future meetings); and defining the scope of the preservation obligation, which would have a significant effect in reducing over-preservation.

The public comment process now underway will provide a wealth of information for the Rules Committee to consider in its final deliberations. Hopefully, the proposals that the Committee sends forward to the Supreme Court will have a real impact on the dramatic increase in discovery-related legal costs. Otherwise further measures will surely be necessary to preserve fairness in our legal system.

Presumptive Limits on Depositions, Interrogatories, and Requests for Admission (Rules 30, 31, 33, and 36). The current civil rules establish presumptive limits on some forms of discovery: ten depositions per side with seven hours for an oral examination; and 25 written interrogatories. There is no presumptive limit for requests to admit.

The Preliminary Draft released for comment includes proposals to reduce the presumptive limits on depositions from ten to five and the presumptive limit on an oral examination from seven hours to six hours; to reduce the presumptive limit on interrogatories from 25 to 15; and to establish a presumptive limit of 25 for requests for admission. These are reasonable reforms

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[34] *Id.*

[35] *Id.*

designed to encourage lawyers to be more efficient, and therefore decrease cost and delay, while preserving judicial discretion to allow additional discovery in appropriate cases.

For example, as the Advisory Committee explained in its transmittal memorandum, a number of judges have "expressed the view that civil litigators over-use depositions," and Federal Judicial Center research "suggests that a presumptive limit of 5 depositions will have no effect in most cases" and that, "when both plaintiffs and defendants take more than five depositions, about 43% of plaintiffs' lawyers and 45% of defendants' lawyers report that they consider the discovery costs to be too high relative to their clients' stakes in litigation."[36] "[T]he 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. The Committee Note addresses the concerns expressed by those who oppose the new limit by stressing that leave to take more than 5 depositions must be granted when appropriate."[37]

The shortened presumptive length of a deposition was based on "experience in some state courts. Arizona, for example, adopted a 4-hour limit several years ago. Judges in Arizona federal courts often find that parties stipulate to 4-hour limits based on their favorable experience with the state rule."[38] The Advisory Committee received comments that four hours would be too short for some cases, but also that "squeezing 7 hours of deposition time into one day, after accounting for lunch time and other breaks, often means that the deposition extends well into the evening."[39] The Advisory Committee stated that "[t]he reduction to 6 hours is intended to reduce the burden of deposing a witness for 7 hours in one day, but without sacrificing the opportunity to conduct a complete examination."[40]

With respect to the presumptive limit on interrogatories, the Advisory Committee stated that "15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number."[41]

Finally, the presumptive limit on requests to admit "did not draw much criticism" from commenters. Significantly, the proposal "exempts requests to admit the genuineness of documents, avoiding any risk that the limit might cause problems in document-heavy litigation."[42]

Sanctions Authority (Rule 37). The ubiquity of electronically stored information has created an enormous problem for businesses and other organizations: the risk that information deleted inadvertently or as a result of the routine operation of an information management policy will produce a motion for sanctions for alleged spoliation of evidence. This is not a hypothetical

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[36] *Preliminary Draft* 267.

[37] *Id*. at 268.

[38] *Id*.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id*. at 269.

concern – the frequency of such motions has increased very significantly in recent years, principally grounded in claims of failure to preserve electronically stored information.[43] Indeed, many observers believe that a significant number of discovery requests are not motivated by the desire to obtain information, but rather by the hope that information will have been mistakenly deleted and provide grounds for a spoliation claim.[44]

Because the standards applied by courts deciding such motions are varied and uncertain, companies are forced to implement standards that "over-preserve" electronic information. As one former United States Magistrate Judge (now a District Judge) has explained:

> 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.[45]

The 2006 amendments attempted to address this problem by adding Rule 37(e), which was designed to provide protection against unjustified sanctions. It provided: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."

Unfortunately, this provision has not served its intended purpose. The "safe harbor" has been applied rarely, with courts pointing to the Committee Note observing that the prospect of litigation might require alteration of the routine operation of an information system. Courts have used widely varying standards to determine whether sanctions are appropriate in particular cases and – because of the absence of a clear, uniform rule – over-preservation of electronically stored information continues to be the norm for most companies. The Microsoft example discussed earlier demonstrates the point.

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[43] *See, e.g.*, Laura A. Adams, *Reconsidering Spoliation Doctrine Through the Lens of Tort Law*, 85 Temp. L. Rev. 137, 154 (2013); 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, 204 (2013); Dan H. Willoughby, Jr., *et al*., *Sanctions for E-Discovery Violations: By the Numbers*. 60 Duke L.J. 789, 791 (2010).

[44] "[S]ome attorneys may seek [electronically stored information] that likely does not exist, rather than seeking out the specific evidence to make their case, hoping to get a severe sanction against the opposing party when that party is unable to produce the requested information. This search for the absence of evidence, rather than the evidence itself, raises troublesome ethical questions." Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* 21 (2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_-Front_Lines2007.pdf; *see also* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 570-71 (2010).

[45] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010); *see also Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("[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") (Lee Rosenthal, J.).

The Advisory Committee's proposal would replace existing Rule 37(e) with a new provision that would:

- Apply to all failures to preserve discoverable information, not just a failure to preserve electronically stored information.

- Authorize the court to order additional discovery or other curative measures, and to require the party that lost the evidence to pay the expenses and attorneys' fees resulting from the loss.

- Permit the imposition of sanctions only if the court finds that the party's actions either "caused substantial prejudice in the litigation and were willful or in bad faith" or "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed amendment includes a list of factors for courts to consider in making the willfulness/bad faith determination.

There is much that is positive in the proposed amendment. The Advisory Committee's goal is "to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard."[46] And the proposal specifically rejects a Second Circuit decision holding that negligence is sufficient to support sanctions.[47] Moreover, the focus on curative measures should help redirect attention away from "gotcha" requests designed to lay the foundation for sanctions motions and toward the real purpose of discovery: to provide information relevant to the issues in the case.

The proposed amendment appropriately applies to all types of discoverable information. As the line between "electronic" and "physical" blurs, a standard limited to electronic information would produce wasteful litigation over that dividing line. And the considerations identified in the proposed rule are equally applicable to all types of information.

Although the proposal is an improvement over the current rule, changes are needed to achieve the goal of providing sufficient certainty to stop the wasteful "over-preservation" now endemic among businesses and other organizations.

First, the Rules Committee asked for public comment on the question whether sanctions should be available in the absence of a showing of bad faith, based solely on a finding that a party was "irreparably deprived . . . of any meaningful opportunity to present or defend against the claims in the litigation." The answer to that question is "no."

The Advisory Committee states that this provision is intended to apply only "[i]n a very narrow group of cases" where there was a "crippling loss of evidence," "the affected claim or defense

[46] *Preliminary Draft* at 272.

[47] *Id.*

was central to the litigation," and "the catastrophic loss was caused by 'the party's actions'" and not "a natural disaster or malicious action of a third person."[48]

All of those caveats, however, appear in the Advisory Committee's explanation and Committee Notes, not in the text of the Rule. Any spoliation claim asserted today could be reframed to fit the language of the Rule, and courts would be required to make case-by-case determinations about when a loss of evidence is "crippling" or "catastrophic" (must the claim be impossible to prove or is it sufficient that proof is much more difficult?); when a claim or defense is "central" (what if the plaintiff has alternative theories of recovery, or alternative means of proving the claim in question, but those alternatives would lead to reduced damages?); and when the loss resulted from a party's actions (would but-for causation suffice or would proximate causation be required?). The litigation over this standard would exceed the litigation over today's spoliation claims.

More fundamentally, the entire notion of sanctions inherently requires proof of *wrongdoing* as an indispensable element. And that proof should be required given the substantial adverse consequences for the reputation of a party, and of its counsel, that result from a finding of spoliation. But this standard eliminates any such requirement.

Some courts have argued that imposing sanctions only upon proof of wrongdoing will lead parties to shirk their preservation obligations, secure in the knowledge that they can avoid sanctions. That view, however, ignores the ethical obligations of counsel (both in-house and external counsel) to ensure that clients comply with the law – the assumption that those obligations will be carried out is the basis for many presumptions in our legal system and it applies here is well. Also, although bad faith is a higher standard than strict liability, no rational business could decide to ignore its legal obligations, because the business could not be sufficiently certain that a fact-finder viewing the circumstances in hindsight would refuse to impose sanctions. That is especially true in view of the draconian impact of sanctions. And the proposed amendment's emphasis on curative measures and imposition of the financial burden on the party that failed to preserve information provide an additional, significant incentive to comply with preservation obligations.

Finally, the Advisory Committee is wrong in its belief that this exception to the wrongdoing requirement is needed to conform to existing caselaw. For example, in one of the cases cited by the Committee – *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) – the evidence was more than sufficient to support a finding that the plaintiff's sale of the car in which he was injured constituted intentional wrongdoing: the plaintiff's experts inspected the car soon after the accident, the plaintiff's counsel was aware that the car was a central piece of evidence and should have been preserved, and the defendant was not notified of the claim for three years. The court in the other case cited by the Committee – *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005), found that a plaintiff who similarly failed to preserve a vehicle had engaged in culpable conduct for similar reasons, including the fact that he was on notice of the defendant's desire to inspect the vehicle.

[48] *Preliminary Draft* at 273.

Although these courts may not have grounded their decisions in a finding of culpable conduct, because the legal standard being applied did not require such a determination, the parties subject to sanctions clearly had engaged in wrongdoing. There simply is no basis for authorizing sanctions in the absence of such a finding.

Second, the proposal's principal standard for the imposition of sanctions – "caused substantial prejudice in the litigation and were willful or in bad faith" – should be revised to address the ambiguity inherent in the term "willful." (The Rules Committee has asked for public comment on whether it should add to the proposal a definition of "willfulness" or "bad faith.")

As the Supreme Court has recognized, "willful . . . is a word of many meanings, its construction often being influenced by its context."[49] That term can mean "[m]erely voluntary . . . as distinguished from accidental,"[50] only excluding acts undertaken involuntarily, such as under the influence of alcohol or mental disability. Or it can require "some element of evil motive and want of justification."[51]

For the reasons discussed above, the sanctions standard should require proof of culpable conduct. Therefore, the standard should be revised to replace "willful or in bad faith" with "willfully ***and*** in bad faith," "***purposefully or otherwise*** in bad faith," or some other formulation that will eliminate this ambiguity.

The proposed amendment, with these changes, would have a significant effect in reducing the over-preservation costs that now plague businesses and other organizations.

Thank you again for the opportunity to testify before the Subcommittee today. I look forward to answering your questions.

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[49] *Spies v. United States*, 317 U.S. 492, 497 (1943).

[50] *Id*.

[51] *Id*.