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

Dear Committee Members:

As an attorney who has been litigating cases for more than 30 years, I write to provide my personal comments on the proposed amendments. My background includes participation in a wide variety of litigation, both on behalf of plaintiffs and on behalf of defendants, but virtually always representing business organizations. Over the past 10 years my practice has been particularly focused on discovery and e-discovery, including helping to found and lead e-discovery practice groups at two AmLaw 50 law firms.

During my testimony at the November 7, 2013 Washington, D.C. public hearing, I noted that, in my experience, the time and money spent on discovery in many litigation matters are disproportionate to any benefit any party gains from the discovery. Our Records & E-Discovery (“RED”) practice group at Reed Smith employs over 70 full-time e-discovery attorneys whose primary function is to review documents, at least 5 days per week, at least 8 hours per day. Few of those documents are actually used in the litigation matters, because so few are actually material<sup>1</sup> to any disputed issues. Discovery has become so broad that fewer than 1/10 of 1% of documents preserved and collected are ever used in the litigation—at any deposition or in support of any motion—much less at trial.<sup>2</sup> Our RED practice group came into existence to use technology and other means to reduce the costs of discovery. We have been successful doing that, but the cost of discovery is still so high that those costs often have more influence on the outcome of litigation than the merits. Litigants frequently pay to settle cases that they view as having little or no merit, simply because the cost of settling is lower than the cost of winning, after incurring discovery and other litigation costs. As a result, only about 1.2% of civil cases brought in federal court ever go through trial.<sup>3</sup> Our justice system will benefit by requiring discovery to be more limited, more focused, and more proportional to the issues at stake in each case.

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<sup>1</sup> “Relevance” is a very broad standard for discovery. Most documents that are merely “relevant” to a claim or defense will never be used, because many of them are duplicative, cumulative and/or do not go to any issue that is actually in dispute.

<sup>2</sup> See Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies*, 3 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf>. (“Inefficient and expensive discovery does not aid the fact finder... In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages actually were marked.”).

<sup>3</sup> U.S. Courts Judicial Facts and Figures 2012, *U.S. District Courts – Civil Cases Terminated, by Action Taken*, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table410.pdf>.

The Rules Committee is to be commended for its efforts to ameliorate these problems through reforms to the Federal Rules of Civil Procedure. The above statistics are consistent with my experience, and I have seen no empirical evidence to the contrary. Yet many of the public comments submitted to date reflect that even smart and well-meaning participants in our legal system, including some very bright judges, oppose some of the proposed rule reforms. Rather than repeat many of the arguments in support of the Rules amendments, which have been made very well by prior commentators, I will focus the balance of this comment on trying to identify and respond to questions raised by some criticisms of two of the proposed amendments: those relating to Rule 26(b)(1), and those relating to Rule 37(e).

#### **A. Rule 26(b)(1): Changes to the Rules Relating to the Scope of Discovery**

##### **1. Is narrowing/focusing discovery really necessary?**

Some individuals who have submitted comments, including United States District Court Judge Shira A. Scheindlin, have questioned whether it is necessary to narrow the scope of permissible discovery. Judge Scheindlin notes that she is not aware that the current scope of discovery is causing any problems.<sup>4</sup> Respectfully, judges see what is presented or argued to them, but rarely get the “behind the scenes” perspective of parties. When parties pay “nuisance settlements” before litigation is filed, judges rarely become aware of that. Even when settlements are entered into after litigation starts, judges often are not privy to what motivated the settlement. Judge Scheindlin also noted that she has “not heard any disputes regarding the scope of permissible discovery.” Her experience may be unique, because the scope of appropriate discovery has been an issue in virtually every significant commercial litigation matter in which I have been involved. We frequently handle such disputes through objections to discovery requests and negotiations with opposing counsel and, when those are not successful, through motions for protective order or opposing parties’ motions to compel. Under today’s rules and precedents, however, all such negotiations and motions practice are colored by the extremely broad scope of permitted discovery. Almost any litigator can devise credible arguments that even the broadest requests may lead to “relevant” evidence. Rarely are requesting parties today required to show that the evidence is actually material to deciding any disputed issues, non-cumulative, and/or proportional to the amounts at issue in the case. The proposed proportionally addition to Rule 26(b)(1) is absolutely necessary to help correct that imbalance.

##### **2. Will the proposed rule change lead to more motions practice and/or more delays?**

There is no reason to believe that the proposed changes will lead to additional motions practice or delays, and there is much reason to believe they will lead to less. When a party is faced with overbroad discovery demands, response deadlines almost always must be extended because of the time it takes to appropriately and sufficiently respond. Our clients are sometimes faced with requests that implicate millions of documents—word searches can be done to narrow the population, but ultimately most of the remaining documents require review for responsiveness and privilege.<sup>5</sup> Moving at 50

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<sup>4</sup> See Judge Scheindlin’s January 13, 2014 correspondence to the Rules Committee, at 2.

<sup>5</sup> Predictive coding technology offers hope of reducing this burden in the future, but is almost never a complete substitute for human review today because, absent proportionality rules, requesting parties have little motivation to agree to reduce the

documents per hour (a relatively rapid pace), 8 hours per day, 5 days per week, it will take a team of 20 lawyers 6 full months to review a million documents.

Discovery motions tend to be time-consuming and expensive, so parties are only motivated to file motions where (i) they have a reasonable chance of prevailing; and (ii) the benefits of the motion will likely outweigh the cost. Wherever the balance is drawn about how broad discovery should be, there will be room at the margins to debate whether a particular discovery request or objection falls within the allowable standard. Where a responding party has much to lose under today's rules—where the cost of discovery is high and the benefit of the discovery is minimal—there is greater motivation to stand on objections and/or resort to motions practice. Where the amended rules would add to proportionality considerations, requesting parties would have little motivation to press non-proportional discovery requests, and therefore there may be a greater likelihood of negotiated agreements without any need to resort to motions practice and the delays attendant to more discovery and more motions. Thus, the amendments should lead to fewer delays and fewer motions.

3. Will the proposed rule changes preclude discovery of relevant metadata?

This question has been raised by Judge Scheindlin and others. There is every reason to believe, however, that the standard applicable to metadata will be the same as to all other information: is the discovery relevant to any claim or defense and proportional to the needs of the case? Even with today's very broad discovery, most metadata is not produced in the majority of cases. For most native documents there are dozens of fields of metadata and even the most ardent requesting party cannot claim relevance for most. Some fields, such as those that make the ESI more easily searchable, are provided in almost every case and that will continue because the value clearly outweighs the burden under a proportionality analysis. Other fields, such as metadata that shows earlier versions of documents, are completely irrelevant for the vast majority of documents produced, but potentially make privilege reviews and logs more difficult and expensive with no corresponding benefit. The review and production of that kind of metadata should be limited to those documents where earlier versions might be relevant to a claim or defense—virtually never more than a very small proportion of the total document universe. The same proportionality considerations that apply to what documents should be produced will be applied to what metadata should be produced, with similar beneficial effects for reducing litigation costs and leading to more just outcomes.

4. Should the Rules assign a “burden of proof” to discovery disputes?

Some commentators have suggested that the proposed rules are likely to place a burden on requesting parties to prove proportionality, rather than placing a burden on responding parties to prove a lack thereof. The proposed rules, like the existing rules, do not place the burden on either party. Such comments give rise to the further question of what is the value of a “burden of proof” on discovery disputes? Regardless of whether a burden is placed on the requesting party, the responding party, or

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burden on responding parties and responding parties usually will not take the risk of relying on predictive coding without opposing party consent. Producing parties also have legitimate concerns about producing documents that have not been subject to human attorney review for privilege, especially while most providers of predictive coding technology disclaim reliance on their tools for making final privilege determinations.

neither party, both parties will make their arguments, with the requesting party arguing that the requests are reasonable and proportional and the responding party arguing the converse. Judges hear arguments on both sides and make decisions every day, on discovery and other issues, without the benefit of any burden of proof or “tiebreaker” rules. There is no reason to handicap either side in such determinations. Judges will continue to do the best they can to resolve any discovery disputes, and the new scope rule simply re-confirms that proportionality considerations should be part of the analysis.

5. Should the lack of perfect information preclude proportionality considerations?

Judge Scheindlin and others have pointed out that proportionality decisions can be difficult to make. At the outset of a case it is difficult to determine what sources of information may be useful, how much particular discovery is likely to cost, and how each factor in the proportionality analysis impacts particular discovery requests. It is absolutely correct that decisions are not always easy to make. In close cases no one will be particularly surprised if judges fall back on old habits, resolving doubts in favor of more discovery rather than less (with or without any explicit burden of proof). Yet reminding judges and litigants of the mandate to consider proportionality, even in the absence of perfect information, is much better than the alternative of continuing to ignore proportionality in most cases.

Civil cases involving significant discovery can be roughly divided into two categories. In “symmetrical” discovery cases, both sides have much information to preserve and produce, so discovery burdens fall relatively equally on both sides. In those kinds of cases there tend to be fewer issues for judges to resolve, because both sides are motivated to be reasonable about weighing costs and benefits (*i.e.* proportionality) in deciding on the proper scope of discovery.

Far bigger problems tend to arise in “asymmetrical” discovery cases. In those cases one side has the vast majority of information subject to discovery and, under our existing rules, bears the vast majority of discovery costs. Requesting parties in that circumstance have little motivation to be reasonable—on the contrary, the more difficult and expensive they can make discovery for their adversary, the more their adversary will be motivated to offer in settlement (completely independent of any case merits) and the fewer resources the responding party may have to devote to other aspects of case preparation.

The newly proposed proportionality rule will help to “level the field” in those cases. That, and the proposed change to Rule 26(c)(1)(B) and associated comment, allowing courts to consider cost-shifting when granting discovery from sources that are “not reasonably accessible,” put costs back into the equation for both sides. Requesting parties will have less ability to burden responders with excessive discovery with little or no consideration of legitimate cost/benefit calculations. Allowing any proportionality, cost-shifting, and/or cost-sharing consideration by judges, even if not perfect, is a huge improvement over the current system where proportionality often is entirely ignored.

6. Will elimination of the “subject matter” and “reasonably calculated” language be beneficial?

Those who have objected to the proposed changes to Rule 26(b)(1) have argued that those changes will send a message that discovery should often be more limited than it is today. I believe they

are right about that, and it is a good thing, because discovery today is too frequently wasteful, expensive, time-consuming and counterproductive to the fair and just resolution of disputes.

In my experience, when most judges address discovery disputes—and when parties argue about them—they rarely have memorized the language of the existing scope rule, proportionality rule, or other rules. Rather, most have adopted general attitudes and “rules of thumb” regarding discovery. In today’s litigation world, requesting parties often make loose arguments about how their requests are within the proper scope of discovery because they allegedly relate to the subject matter of the case, or *may* lead to relevant evidence. The predominant “rule of thumb” most judges seem to use is that discovery is extremely broad, and if a request may lead to something relevant it will be allowed— little attention or weight typically is afforded to troublesome considerations of burden, expense, or the likelihood that the requested information truly will be material, even though such proportionality considerations are already set forth in Rule 26(b)(2)(C). There are, of course, exceptions to this generalization, with some judges already being more open to proportionality considerations, but these rule changes are needed precisely to educate and encourage more judges to engage in such considerations.

Likewise, elimination of “subject matter” and “reasonably calculated” language in Rule 26(b) will not prevent judges from considering reasonable discovery requests that go to the subject matter of the action or that are reasonably calculated to lead to the discovery of admissible evidence. Those kinds of requests can also fit within the retained language as being “relevant to any party’s claim or defense.” Relevance remains a broad standard and one certainly subject to judicial interpretation when determining what discovery to allow. A major benefit of eliminating the “subject matter” and “reasonably calculated” language will be atmospheric—that is, elimination of that language may help rein in the broadest “fishing expeditions” that occur today, without precluding reasonable discovery, aimed at relevant evidence, and proportional to the needs of a particular case.

## **B. Rule 37(e): Changes to the Rules Regarding Sanctions**

Beyond changes to the scope rules, perhaps the other proposed changes that have engendered the most comments (and criticisms) are those to Rule 37(e). Comments made by some critics of those changes give rise to the following questions.

### **1. Is there a need to limit discovery “sanctions”?**

Several of those submitting comments, including United States District Court Judge James C. Francis IV, have questioned whether any limitation of sanctions is necessary, noting that the opinions reporting the most severe sanctions typically have involved egregious conduct.<sup>6</sup> Some of these commenters may not be aware, however, of the devastating impact that any sanctions can have, whether severe or merely intended to be curative, on the reputation of companies and their counsel. One of the great benefits of the proposed amendments to Rule 37(e) is that they retain the ability to allow curative measures in non-egregious circumstances, without the stigma of the “sanctions” label.

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<sup>6</sup> See Judge Francis’s January 10, 2014 correspondence to the Rules Committee, at 2. Judge Francis’s letter recognizes, however, the positive benefits of distinguishing between sanctions and curative measures, while arguing that the current boundary is misplaced. *Id.* at 5.

For a company, the reputational impact of having been sanctioned can be far worse than the monetary cost imposed. Not only may that generate bad headlines immediately, but it can have negative impacts for many years to come. In any future case in which the company and/or its personnel are involved, they start with a strike against them, as savvy opposing counsel will bring up that they have been sanctioned for their discovery conduct in the past.<sup>7</sup>

For inside and outside counsel the results can be even more devastating, sometimes resulting in loss of their employment or ability to practice freely. For example, over the years I have been admitted *pro hac vice* in numerous jurisdictions to assist with particular cases. In virtually every instance one of the questions I have to answer in applying for admission is whether I have ever been sanctioned by any court in any jurisdiction. If the answer were “yes,” that could disqualify me from many representations. I have faced similar questions in responding to company requests for proposals to provide legal services, with similar potential consequences. These consequences occur under today’s rules, with no intentional misconduct, and some courts have been less than charitable in finding of “gross negligence,” perhaps not fully appreciating how easy it is to miss or delay finding some ESI, even when parties and their counsel act in good faith.<sup>8</sup> The amendments to Rule 37(e) go a long way toward solving this problem, even where the “curative measures” do not differ from what were previously denominated as “sanctions.”

## 2. Will those changes really cut down on over-preservation?

Judges Francis and Scheindlin, among others, have suggested that while these changes were designed to cut down on over-preservation, they may not accomplish that.<sup>9</sup> Having counseled dozens of companies on legal hold obligations and decisions, I have reached the opposite conclusion. My views are shared by many companies who are involved in preservation decisions on a continual basis,<sup>10</sup> as well as those who have conducted surveys on preservation obligations.<sup>11</sup>

Companies today often face difficult preservation questions with few uniform standards to guide them. Does a large company that is frequently faced with threats of suit (*e.g.* from terminated employees), where those threats rarely come to fruition, have to put in place an expensive legal hold every time such a threat is made? Do they have to initiate preservation steps that may cost \$25,000-

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<sup>7</sup> See, *e.g.*, *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 46 (N.Y. App. Div. 2012) (upholding sanctions award, finding that a party “was well aware of its preservation obligations and of the problems associated with its automatic deletion of e-mails” due to having been sanctioned in a different case seven years prior).

<sup>8</sup> See, *e.g.*, *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413, \*9 (S.D.N.Y. May 22, 2006)(when some responsive ESI was not found and produced until the close of discovery, court sanctioned company and outside counsel, finding company negligent for not identifying the ESI earlier, and outside counsel “grossly negligent” for not further checking client’s representation that all sources of responsive ESI had been investigated).

<sup>9</sup> See Judge Francis’s January 10, 2014 letter, at 3-4; Judge Scheindlin’s January 13, 2014 letter, at 8.

<sup>10</sup> See, *e.g.*, the corporate letter submitted on February 13, signed on behalf of 308 companies (“Proposed Rule 37(e)... holds great promise in addressing these problems” [of over-preservation, processing and production]).

<sup>11</sup> See William H.J. Hubbard, J.D., Ph.D., *Preservation Costs Survey Summary of Findings prepared for Civil Justice Reform Group*, February 5, 2014 (“A benefit of the proposed amendments [to Rule 37] is a likely modest but meaningful reduction in preservation costs.”).

\$50,000 in response to a claim for \$10,000? How broad should each hold be, especially where there is not yet any complaint or other pleading setting forth the scope of the claims? When and how broadly is it necessary to preserve backup media, suspend auto-deletion protocols or try to recover data that was previously deleted in the regular course of business? Companies struggle with these issues every day, and do their best, but always with the possibility that their decisions will be challenged by an adverse party in the future, or second-guessed by a court. When the result is “curative measures,” that can be an expensive and unfortunate outcome for them. However, when the result is “sanctions,” that can be an absolute disaster for the company and its counsel, not only because of the more severe penalties that may be imposed, but also because of the reputational and future litigation consequences noted above.

Faced with such severe consequences, the default response may be to try to comply with the more extreme preservation rules and views that judges may espouse in more difficult jurisdictions. Replacing “sanctions” with “curative measures” (in cases involving no intent to conceal or destroy evidence or other bad faith) will not eliminate over-preservation entirely—even curative measures can be very expensive for a party—but the change will at least eliminate the worst consequences and stigma attached to “sanctions.”

3. Will the proposed changes create a uniform national standard?

Even some critics of the proposed change agree that uniform standards are helpful to parties.<sup>12</sup> At least two arguments have been made, however, that the proposed rule change would not result in a national standard: (1) the “willful or in bad faith” language is still ambiguous because in some circuits “willful” has been interpreted **not** to require any intent to conceal or destroy evidence,<sup>13</sup> while in other circuits such intent is required; and (2) state courts are not bound by federal standards.<sup>14</sup> Both criticisms have some merit, but neither is a valid reason not to amend the rule. With regard to the first criticism, this issue can be solved either by changing the “or” to an “and” or by expressly defining “willful” to encompass bad intent. Either solution would solve the problem and further the interest of allowing the remedy to fit the situation, both in terms of fault and in terms of consequences. With regard to the second criticism, most state courts consider, and ultimately adopt, most federal procedural rules and standards. Having a uniform federal rule that most state courts will probably follow is certainly an improvement over having no uniform rule.

4. Will the proposed change encourage a failure to engage in proper preservation?

In a footnote in the *Sekisui* case<sup>15</sup> and in her January 13 letter to the Committee,<sup>16</sup> Judge Scheindlin has suggested that elimination of sanctions for conduct that does not involve bad faith, would eliminate incentives for parties to engage in proper preservation practices. Those comments ignore,

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<sup>12</sup> See, e.g., Judge Scheindlin’s January 13, 2014 letter at 8 (“I agree that a single national standard for the federal courts is advisable...”).

<sup>13</sup> See, e.g., *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002).

<sup>14</sup> See *id.*; Judge Francis’s January 10, 2014 letter at 2-3.

<sup>15</sup> *Sekisui American Corp. v. Hart*, 945 F.Supp.2d 494, 503 n.51 (S.D.N.Y. 2013).

<sup>16</sup> Judge Scheindlin’s January 13, 2014 letter, p. 10 (“Such a rule would encourage sloppiness and disregard for the duty to preserve.”)

however, the substantial motivation that companies and their lawyers have to act properly, and the potential cost of curative measures if they are found to have lost evidence unintentionally, or if a court otherwise disagrees with any decisions in regard to the scope of preservation efforts. The potential curative measures include additional discovery, and paying the reasonable expenses including attorneys' fees of their adversary, among other remedies that a court may order. Such curative measures will almost always cost more than the cost of original preservation, and there is residual stigma of a judicial determination that the company did not act properly and that curative measures are needed. Additionally, in today's electronic world there tend to be multiple sources of similar evidence, and multiple ways of uncovering the true facts, which is one reason why the vast majority of what is preserved and produced is never used in litigation. Where truly unique and important evidence is not preserved, sanctions will still be an option, both because such preservation failures raise the likelihood of bad faith, and because of the option to impose sanctions anyway when a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against claims.

In my experience, the vast majority of companies, and their counsel, try to act properly and ethically with regard to their preservation duties, and there will be ample motivation for that to continue.<sup>17</sup> What the rule change will accomplish is to eliminate the stigma of sanctions where they are not merited, and the threat of sanctions being used primarily for tactical purposes by parties taking advantage of the current rules.

5. Should the Committee allocate the burden of proof on sanctions and curative measures?

As with Rule 26(b)(1), the question has been raised as to whether Rule 37(e) would be improved if it allocated to one side or the other the "burden of proof" on willfulness or bad faith. For reasons similar to those addressed above, I do not think that is necessary. Judges are accustomed to making many kinds of decisions where burdens of proof are not pre-assigned. Judges should have the freedom to make determinations based on the facts and circumstances in each case, with neither side having a pre-determined handicap. For example, a case where a judge disagrees, at the margins, with the scope of preservation efforts may be handled differently (in terms of any burden of proof) than a case where a party failed to implement a hold as to clearly relevant evidence in a matter that was in, or clearly headed toward, litigation.

6. Should the factors listed in Rule 37(e)(2) be eliminated or retained?

Rule 37(e)(2) lists factors to be considered in assessing a party's conduct. Some have suggested that those factors should be moved to a comment rather than left in the rule, and others have suggested that those factors should be eliminated altogether. I agree with Judge Scheindlin's comment that those factors seem to make more sense in a determination of negligence or recklessness than in a determination of bad faith, but believe that some courts may still find useful this non-exclusive list of factors when "determining whether a party failed to preserve discoverable information that should have

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<sup>17</sup> I agree with Judge Francis (January 10 letter, at 4) that we should *not* take the dim view that that lawyers "think like criminals" and that sanctions are required to force attorneys to act ethically. However, we should also recognize that lawyers and their clients **will** act rationally, and will over-preserve before subjecting themselves to sanctions risks, even where they think that sanctions should not be imposed.

been preserved....”<sup>18</sup> Indeed, Judge Francis correctly notes that salutary benefits of listing those factors include “making clear that a party’s preservation efforts are expected to be proportional and reasonable, not perfect” and “encourag[ing] parties to engage with one another with respect to preservation....”<sup>19</sup> For these reasons, I think that the list of factors should be retained.

### **Conclusion**

The proposed amendments to Rules 26(b)(1) and Rule 37(e) will have an important positive impact in cutting litigation costs, eliminating waste, reducing over-preservation, and focusing discovery where it is most useful. Those amended rules will strike a reasonable balance between the interests of requesting parties and responding parties. While some further fine-tuning may be appropriate, such as changing “or” to “and” in Rule 37(e)(1)(B), the Committee has already accomplished a great deal, and should move forward with the process of finalizing and recommending approval of the amended rules.

Respectfully submitted,

David R. Cohen

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<sup>18</sup> Proposed Rule 37(e)(2).

<sup>19</sup> Judge Francis’s January 10, 2014 letter at 6.