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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comments to Proposed Amendments to the Federal Rules of Civil Procedure

Dear Advisory Committee on the Civil Rules:

ARMA International is a not-for-profit professional association and the authority on governing information as a strategic asset. It welcomes the opportunity to submit a public comment to the Federal Rules Advisory Committee. Established in 1955, ARMA International is comprised of more than 27,000 professionals world-wide in the field of records and information management ("RIM") and includes information managers, information governance professionals, archivists, corporate librarians, imaging specialists, legal professionals, IT managers, consultants, and educators. These dedicated professionals work in a wide variety of industries, including government, legal, education, health care, financial services, insurance, manufacturing, energy, retail, telecommunications, and many other industries in the United States, Canada, and more than 30 other countries around the globe. ARMA International is recognized as the leading authority in the field.

ARMA International's members design, implement and maintain information governance programs at a broad scope of organizations, from non-profits with only a few employees, to governmental institutions, to large multi-national corporations. Information governance presence within an organization can range from one individual with multiple responsibilities to teams of dedicated staff at larger organizations.

ARMA International has been instrumental in developing or contributing to the development of standards and best practices in the area of information governance around the world. Working closely with professionals in other fields, such as legal and information technology, ARMA International has prepared a number of standards and principles, the most widely known of which are the Generally Accepted Recordkeeping Principles™. These Principles reflect global records and information standards and best practices that have existed for decades. Included as Appendix A is a white paper that contains a discussion of the overlapping roles of IT, legal, and records management professionals in the realm of information governance.[1]

Information Governance Programs Are Directly Affected by Multiple Judge-Made Preservation Standards

Information governance is "an accountability framework that includes the processes, roles, standards, and metrics that ensure the effective and efficient use of information in enabling an organization to achieve its goals."[2] As such, information governance encompasses and reconciles the various legal and compliance requirements and risks addressed by different information-focused disciplines, such as RIM, privacy, information security, and, most importantly for this submission, preservation.[3]

The work of RIM professionals is closely tied to issues that arise in the context of regulatory compliance, preservation, and civil discovery, including e-discovery. As a result, RIM professionals and/or their programs work closely with lawyers in numerous ways. They serve as experts and provide evidence of official records management policies; support the consistent, defensible disposition of information in accordance with an organization's legal, regulatory, and operational requirements; and enable organizations to know what information is within their custody and control, enabling them to identify, preserve, retrieve, search, produce, and, when appropriate, legally destroy obsolete information in the normal course of business.[4] RIM professionals also protect against loss of content that could lead to sanctions, financial loss, and brand risk during e-discovery; help effectuate responses to document requests by locating and preserving relevant information; and help ensure that evidence can be authenticated. To put it simply, RIM professionals have become crucial agents in the areas of compliance and litigation

A core principle of information governance is that documents have a life cycle (regardless of the medium they are stored in). They are created, maintained while they have value to the organization, and then disposed of when they no longer have value to the organization. Documents lose their value for multiple reasons: they do not reflect the current policies or procedures of the organization; they no longer meet the regulatory reporting requirements for which they were created; the organization stopped relying on the documents for day-to-day business purposes; they

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[1] *How the Information Governance Reference Model Complements ARMA International's Generally Accepted Recordkeeping Principles* (EDRM 2011).

[2] ARMA International, *Generally Accepted Recordkeeping Principles® Executive Summaries* (http://www.arma.org/docs/sharepoint-roadshow/the-principles_executive-summaries_final.doc) (*citation omitted*).

[3] *Id.*

[4] *See, generally, id.*

are not used for reference purposes due to their age or content. In other words, they no longer serve a useful purpose and have lost their value. When this happens, documents have reached the end of their useful life cycle.

When properly governed by an organization, documents that have lost their value to the organization are considered expired documents and may be destroyed – unless there is a legal duty to preserve the documents related to government investigation or litigation. This is good information governance.[5] The end of the information lifecycle, however, has become the part of good information governance principles that our members and their organizations are struggling with the most. Due to the variety of judicial preservation standards, it is very difficult for organizations to ascertain whether their good faith efforts will meet any particular judge's preservation standard.

Overview of ARMA International's Position

As the leading international organization dedicated to information governance, ARMA International has a strong interest in efforts to provide a consistent and predictable national standard applicable to the preservation of information relevant to civil litigation, amendments regarding the possible sanctions for unintentional failures to preserve, and a clear, reasonable definition of the scope of discovery in civil litigation.

Preservation presents a unique problem for information governance professionals, because sanctions opinions are issued on a case-by-case basis and rarely offer concrete guidance on acceptable organizational standards of care. Even following the most stringent preservation standards is no guarantee that sanctions can be avoided.[6] As a result, it is extremely difficult to develop, promulgate, and promote generally accepted information governance principles related to preservation. It is also difficult to develop programs that train information governance professionals on standards or best practices that can be applied to the complex issues surrounding preservation. The specter of sanctions leads some stakeholders within an organization to challenge the proven wisdom of following generally accepted information governance principles, including

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[5] Retaining expired records (when no duty to retain them exists) is the antithesis of good information governance resulting in unnecessary retention costs with no associated business purpose. Business efficiencies dictate disposition of useless data. Conversely the costs of civil discovery increase exponentially in relation to the volume of additional useless or expired data that must be analyzed as part of civil litigation. Following are a few general industry metrics to consider:

- If the organization does nothing, unstructured information (i.e., word processing documents, emails, presentations, image files and spreadsheets) is estimated to grow at a rate of 40% to 50% per year. *See Active Navigation*, available at http://activenavigation.com/solutions/ last accessed Jul. 3, 2013.
- More than 50% of unstructured data is redundant, obsolete or trivial. It is essentially "eTrash" having no business value. This information can be identified and discarded without end user impact.
- Industry averages show that litigation costs can be reduced by 33% to 70% by following consistent disposition practices (includes shared drive cleanup and email deletion). *See Litigation Trends Survey*, (Norton Rose Fulbright, Oct. 18, 2011) available at http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9902&site_id=286 last accessed on Jul. 7, 2013.

[6] *See, e.g., 7 Steps for Legal Holds of ESI and Other Documents* (J. Isaza and J. Jablonski, ARMA International 2009).

disposition of unnecessary or expired data and records. The "keep everything just in case" approach is not a sound information governance principle. Yet, our members read about organizations sanctioned despite the lack of evidence that the organization was acting in bad faith.

Operational decisions about which documents should be preserved are, at times, affected by fear of sanctions, particularly to those (e.g., an organization's management levels) who are not thoroughly familiar with the actual incidence of sanctions. This dynamic can impact managerial decisions related to preservation, regardless of actual empirical evidence. The routine destruction of records, or mere data for that matter, is an important component of the information lifecycle and generally accepted information governance principles.[7] Preservation for civil litigation is an acknowledged exception to the routine destruction of records that have reached the end of their useful life cycle. The difficulty for information governance professionals exists when determining the proper scope of preservation and when information is lost or destroyed through no fault of the organization. ARMA International believes that the Committee has proposed rules that will provide much needed guidance for organizations working to comply with the duty to preserve information relevant to litigation by proposing a national, uniform standard (one requiring a showing of bad faith in most circumstances before an organization can be sanctioned for the inadvertent loss or destruction of information) and addressing the limits of discoverable information (by revising the language regarding the scope of discovery).

ARMA International supports the proposed amendment to Rule 37(e), but respectfully suggests to the Committee that sanctioning a party for conduct deemed "willful," without a showing of bad faith, may have unintended consequences for our members who are adhering to generally accepted information governance principles. ARMA International also believes that permitting sanctions without a showing of fault will have unintended consequences for our members under proposed Rule 37(e)(1)(B)(ii), which permits sanctions if a party to a lawsuit "irreparably deprived" the opposing party of a "meaningful opportunity to present or defend" against the litigation. Lastly, ARMA International supports the clarification of the scope of discovery through the incorporation of proportionality into Rule 26(b)(1).

Proposed Amendments to Rule 37(e) and Notes

As discussed above, ARMA International's interest in the proposed amendments to the Federal Rules of Civil Procedure is directly related to the impact they will have on information governance and, specifically, their effect on the legal requirement to preserve information in civil litigation in federal court. While Rule 37 is focused on sanctions and the proposed amendments to Rule 37(e) focus on the elements and standards for sanctioning the spoliation of electronically stored information, these amendments will directly affect how organizations govern their information.

[7] *See* Appendix A. Under the Principle of Disposition, "[a]n organization shall provide secure and appropriate disposition for records and information that are no longer required to be maintained by applicable laws and the organization's policies."

As such, ARMA International believes that the Committee should understand the wider implications of the proposed amendments and weigh them in its decisions on the amendments.

ARMA International generally supports the proposed amendments to Rule 37(e) insofar as they create a single, national standard for evaluating sanctions for spoliating evidence in federal court. ARMA International does not profess expertise in managing discovery in litigation and does not express an opinion about the best way to prevent spoliation or manage civil litigation. However, a uniform spoliation standard will be clearer for organizations and make it easier to implement rational, reasonable, and precise preservation protocols. Preservation or litigation holds are the largest exceptions to a records manager's maxim to retain documents and information for only as long as it has business value or is statutorily required. Simplifying this standard should significantly ease the burden on records managers and organizations implementing preservation processes within their information governance framework.[8]

ARMA International disagrees with those commenters who have argued that this standardization is illusory because the Federal Rules of Civil Procedure do not bind state courts and therefore organizations will need to address the variety of preservation standards found across the country. Not only do many state courts explicitly look to the federal rules and courts on issues of preservation and e-discovery (*e.g.*, New Jersey, Illinois, Texas), but the underlying premise is flawed. Simply because the Advisory Committee cannot fix the problem of multiple standards entirely does not mean that it should not do what it can to solve the problem and create a uniform standard in federal court.

ARMA International also agrees with the aim of the Advisory Committee to raise the culpability standard above mere negligence, to a more strict standard.[9] Because the Second Circuit has adopted a negligence standard in *Residential Funding Corp. v. DeGeorge Fin. Corp.,* many organizations have had to manage their preservation behavior according to this broad standard.[10] This has contributed to – if not been one of the principal causes of – massive over-preservation and the retention of countless gigabytes of irrelevant data at great cost. This is not because organizations do not want to be reasonable in their preservation efforts. With the potentially devastating effect of spoliation sanctions hanging over their heads, organizations make preservation decisions out of fear as to how they will be second guessed after-the-fact.[11]

ARMA International also disagrees with commenters who dismiss the culpability standard as the cause of over-preservation or who blame over-preservation on parties' failure to implement reasonable records management practices. For example, Magistrate Judge Francis commented

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[8] *See Determining the Scope of Legal Holds: Waypoints for Navigating the Road Ahead*, (J. Isaza, , Information Management Journal, Mar./Apr. 2008) ("The law is far from clear as to what documents to hold in cases of anticipated or contemplated litigation, particularly in an age of increased complexity and reliance on electronic records and storage.") *available at* http://content.arma.org/IMM/MarchApril2008/determining_the_scope_of_legal_holds.aspx.

[9] *See,* Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules, *Memorandum Re: Report of the Advisory Committee on Civil Rules* (May 8, 2013).

[10] 306 F.3d 99 (2d. Cir. 2002). For many organizations there is simply no way to predict whether they will be involved in litigation in the Second Circuit and in turn, subject to potential spoliation sanctions based on mere negligence.

[11] *See, e.g., Rimkus Consulting Grp. v. Cammarata,* 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on the reasonable need for information.").

that over-preservation has multiple causes and focused on organizations that did not have "rational information disposition policies."[12] Citing an ARMA International report, Judge Francis, highlighted that 9% of surveyed organizations stated they did not have a records retention policy and 21% did not have policies that covered electronically stored information.[13] This only illustrates that the overwhelming majority (at least 70%) of organizations do have record retention policies and are attempting to govern their information and data. If anything, organizations are over-preserving information because they have responsible records management professionals attempting to meet the currently uncertain requirements of the law. As to the remaining 30%, it is likely that at least some percentage of it involves the position that it is simply better to have no retention policy at all, since legal preservation requirements would eviscerate a retention policy anyhow (i.e., there is no harm in keeping everything).

The reality is that the current culpability standard for preservation sanctions has a practical effect on how organizations manage their data and the potential cost of information. This is best illustrated by the data disposition processes, complex decisions, and the onerous lengths that organizations with any significant litigation portfolio must employ in order to dispose of documents and data. Because of the explosion of information and communication channels and the decentralization of data storage and management, organizations (and their legal and information governance departments) struggle to achieve comprehensive visibility into their data.[14] Therefore, as organizations attempt to systematically and reasonably identify data for potential deletion, they need to retroactively determine if such documents need to be retained because a duty to preserve has arisen. The question then becomes how much effort needs to be expended to understand the documents at issue (*e.g.* 100 boxes at Iron Mountain; 500 unlabeled CDs; a disconnected server; a set of old SharePoint sites; 100 gigabytes of legacy data) and map it back to the organization's preservation topology. After all, the question is not whether the organization is acting in good faith or if it knowingly deleted relevant information, but whether a court will agree *after-the-fact* that the organization acted reasonably before deciding to wipe the drive or shred the box. The specter of sanctions disrupts generally accepted data disposition principles because, even though the effort to undertake this process for any particular piece of data is significant, the cost to the organization (and the decision maker) of being accused of spoliation is vastly more significant. As a result, costly over-preservation is the lesser of two costly alternatives.

From the perspective of the information governance professional, the uncertainty of the negligence standard drives an over-abundance of caution which not only makes the whole process more expensive – meaning that it takes longer to address data sources – but prevents the deletion of irrelevant data due to the fear of after-the-fact sanctions. This problem is even more acutely felt in cases of orphan or legacy data, but this is the data that organizations are most keen to delete as it has little or no business value and is likely to have no regulatory retention requirements, and may pose operational and legal risks when there are multiple iterations of an organization's documents that have been preserved. In fact, the analysis and disposition of paper files can be the

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[12] *Comment from James Francis, NA*, Docket No. USC-RULES-CV-2013-0002, Comments to Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 14, 2014) (available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0395).

[13] *Id.*

[14] *See* Note 1, *supra* ("The ability to properly and consistently retain all information is especially important today, as organizations are creating and storing enormous quantities – most of it in electronic form.")

most expensive because they often cannot be searched or analyzed using analytical software without costly imaging processes. The proposed changes advocate for a clearer standard that would provide progress for those trying to decide, in good faith, what information should be retained and what information should continue through its natural life cycle as dictated by the Generally Accepted Recordkeeping Principles.

This leads to the Advisory Committee's first question: "Should the rule be limited to sanctions for loss of electronically stored information?"[15] ARMA International's answer is "no." There does not appear to be any principled reason to limit the sanctions methodology delineated in Rule 37(e) to electronically stored information. It is a core principle of ARMA International's information governance framework that organizations manage information based on its value, not on arbitrary conditions like its format or the media on which it is contained.[16] While the cost to retain, preserve, manage, search, and use paper documents and electronically stored information differs (and has implications related to proportionality of preserving), the Rules regarding sanctions for spoliation should apply equally to paper documents.

ARMA International does not express an opinion as to the remaining Advisory Committee questions, except for the last question regarding whether there should be a definition of "willfulness or bad faith." ARMA International does not feel it is its place to comment on whether willfulness should remain in the Rule or what the exact culpability standard for sanctions should be. Whatever standard the Advisory Committee does choose, not only should it be greater than negligence (as discussed above), but it must be tied to a party's obligations to the Court and other litigants. A standard divorced from these obligations – such as the mere act of *intentional* or purposeful destruction of information without evidence of malicious intent.

Keeping "willfulness" as a culpability standard alone (i.e., the mere act of destruction pursuant to established records management policies, without intent as to a particular matter or case) would likely cause significant problems for records managers and information governance professionals, potentially creating even more problems than a mere negligence standard does.

The heart of information governance is the concept that documents have a life cycle: they are created; maintained while they have value; then *intentionally* destroyed when they are no longer required to be maintained by applicable laws or regulations or if the information has simply reached the end of its useful business purpose.[17] This practice is good information governance and is the part our members and their organizations are struggling with the most. The contradictions for information governance professionals would become exponentially worse if companies could be sanctioned for spoliation for intentionally deleting data after they have followed, in good faith, a disposition protocol that included reasonable due diligence. The danger

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[15] ARMA International is only answering questions 1 and 5 as ARMA International believes these are the only questions posed by the Committee for which it can contribute useful answers based on ARMA International's subject matter expertise.

[16] *See* Note 1, *supra* ("[O]rganizations, regardless of their type or activities, must subscribe to and implement governance standards and principles for governing information in all formats and on all media.")

[17] *See* Note 1, *supra* (stating that routine disposition "will make the remaining information, which has on-going value to the organization, more identifiable and accessible, enhance system performance, and reduce the maintenance costs of storage, backup, and migration.").

lies when it turns out after-the-fact that the deleted data was relevant after all to a pending (or reasonably anticipated) litigation.[18]

Ideally, organizations that work in good faith to manage their information and fulfill their preservation obligations should not fear spoliation motions and case-altering sanctions. The Advisory Committee has gone a long way toward solving this problem by explicitly raising the culpability standard above negligence; it should not undermine that progress by allowing the standard to devolve to intentional destruction. Otherwise, all records managers, organizations, and even all employees could effectively be deemed spoliators because even good faith data destruction can be described as intentional. Therefore, including willful as a standard effectively implicates all record managers, organizations, and employees who destroy information daily – as they should – pursuant to generally accepted information governance practices.

Proposed Amendments to Rule 26(b)(1)

ARMA International supports the proposed amendments to Rule 26(b)(1). By defining the scope of discovery in terms of proportionality, the amended Rule will give records management professionals a more rational, predictable, and reasonable framework with which to assist legal counsel. Moreover, the amendments will indirectly ease the burdens of over-preservation that have come to bedevil organizations both great and small. Information governance will invariably become more effective in light of these amendments.

As things stand today, the scope of discovery under Rule 26 is not uniform or predictable in federal court. The current scope of discovery under Rule 26(b)(1), absent good cause and an order of the court, should be limited to claims and defenses, which is the goal of the amendments. In practice, however, courts have ignored this change in the Rule and have allowed broader "subject matter" discovery as a matter of course.[19] Moreover, some courts have tied the scope of *preservation* to this broader and more nebulous standard, which necessarily expands the scope of this duty and further complicates information governance.[20] Exacerbating this problem are courts misreading the sentence: "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," from current Rule 26(b)(1). As the Committee has observed, this single sentence has been bent to make *all* information discoverable as long as it is reasonably calculated to lead to the discovery of relevant, admissible evidence.[21] Specifically, the current formulation of Rule 26(b)(1) makes compliance with the

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[18] It is for this reason that ARMA International does not favor the exception under proposed Rule 37(e)(1)(B)(ii) as it has no culpability requirement and could, in theory, put organizations in the same conundrum, though it is much less likely given the narrow exception.

[19] *See, e.g.*, *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 at *n.7 (D. Kan. 2001) (noting that the standard pre-2000 Amendment standard allowing for discovery of any "subject matter involved in the pending action" remained good law because of the current Rule 26(b)(1)'s provision stating that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

[20] *See, e.g., Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("The duty [to preserve] extends to information that is relevant to the claims or defenses of any party, or which is '*relevant to the subject matter involved in the action.'*") (*emphasis added*).

[21] *See,* Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules, *Memorandum Re: Report of the Advisory Committee on Civil Rules* (May 8, 2013).

industry standards embodied in the Generally Accepted Recordkeeping Principles difficult and expensive.[22] When practically any piece of information could be considered "relevant," a records manager is left second-guessing otherwise reasonable and efficient data retention policies. While this effect is most keenly felt in the context of sanctions under Rule 37(e), the clearer scope of discovery under the amended Rule will help records managers develop information governance practices that further core organizational goals as well as assist counsel in providing quick, responsive answers to discovery requests.

By eliminating the two-tiered scope of discovery and rewording the language regarding inadmissible evidence, the proposed amendments make the scope of discovery more concrete. This should help limit over-preservation and reduce preservation and information governance costs. As proposed, the Rule should be easier for lawyers and records managers to readily understand the "claims and defenses" at issue – as delineated in the complaint and answer[23] – and should allow for more precise preservation. Moreover, by clarifying the language and explicitly explaining that irrelevant, inadmissible information is not discoverable, the proposed amendments resolve a misunderstanding that has frequently led to vast, unnecessary expansions in discovery.

Likewise, the inclusion of proportionality principles directly into the scope of discovery is important for good information governance and records management. At its heart, proportionality is about "value and cost," something that is intrinsic to information governance and records managers.[24] While proportionality in discovery is about the marginal value of the information to one's opponent or to the truth-seeking process, while value from the perspective of information governance is about the marginal value to the organization, this is still a framework that information governance professionals understand and can implement – even when it is not necessarily a monetary value.

Not all data or information is equally important or equally relevant. This needs to be accounted for proactively at the beginning of discovery so that a rational plan for preserving, searching and analyzing information can be developed and implemented.

Comment Summary

In summary, the proposed amendments to the Federal Rules of Civil Procedure cannot solve all of the challenges facing ARMA International members when it comes to preservation, generally accepted information governance. and potential sanctions for failing to properly preserve documents related to civil litigation in federal court. The proposed amendments to Rule 26(b)(1) and Rule 37(e) have the potential to improve the situation considerably and should help information governance professionals make sound, principled preservation decisions without fear caused by the current patchwork of individual judicial preservation standards. ARMA

[22] For a comprehensive explanation of the Generally Accepted Recordkeeping Principles, please refer to http://www.arma.org/r2/generally-accepted-br-recordkeeping-principles.

[23] Of course, the proposed amendments do not render the scope of discovery completely clear as it is still a fact-intensive question and a duty can be triggered prior to the service of a complaint. Nevertheless, the proposed amendments do help to clarify the scope of discovery and are an improvement over current practices.

International commends the Committee for its efforts, but respectfully requests that the Committee consider addressing the current culpability standard in Rule 37(e) by removing "willful" as a standard for awarding spoliation sanctions. We believe this is necessary to ensure that organizations are not subject to case-altering sanctions for intentional disposal of information pursuant to routine destruction carried out as part of an information governance program. In the digital age, organizations must be able to dispose of information that they believe in good faith has no business value and is not relevant to any threatened or pending litigation, without fear that after-the-fact determinations of relevance will expose their organizations to sanctions.

Thank you for your consideration.

Respectfully submitted,

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