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February 12, 2014

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VIA ELECTRONIC FILING

Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Ste. 7-240
Washington, D.C. 20544

Re: Orrick, Herrington & Sutcliffe, LLP's Comments on the Proposed Amendments to the Federal Rules of Civil Procedure

Dear Honorable Committee Members:

Thank you for the opportunity to comment on the proposed revisions to the Federal Rules of Civil Procedure (FRCP or "Rules"). Orrick, Herrington & Sutcliffe, LLP ("Orrick") is a global law firm with over 450 litigators in North America, Europe and Asia. Orrick's global litigation team is called upon by more than a third of the Fortune 100 companies and other global leaders. With over 200 cases tried in the last decade and a dedicated E-Discovery & Information Governance practice group, we have deep experience with and understanding of the objectives and intentions of the proposed revisions to the discovery rules.

Orrick strongly supports the Advisory Committee's proposed revisions to Rules 16 and 37, as outlined more thoroughly below. We also applaud the Committee for adopting the proportionality and cost shifting language contemplated in revised Rule 26 as a meaningful effort to minimize the occurrence of, and tolerance for, discovery requests using the phrase "any and all." The proposed changes to these rules should reduce the cost and burden of discovery in large cases and greatly improve the efficient, timely resolution of claims on the merits.

We do, however, suggest 1) making the pre-motion conference provision in Rule 16 mandatory; 2) further revising Rule 34 to include presumptive limits on requests for production; and 3) removal of the "willful" language in Rule 37. To provide context to these comments, Orrick undertook the following analysis.¹

¹ The data cited here and throughout is not the product of formal statistical analysis, but rather represents information collected from a small number of courts and a limited number of legal matters handled by Orrick.



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I. Proposed language in Rule 16(b)(3)(B)(v) permitting scheduling orders to require a conference with the court before parties may file discovery motions:

According to the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, the proposed revision to Rule 16(b)(3)(B)(v) is designed to reduce formal motion practice resulting from discovery disputes. Another goal of the proposed amendment is to reduce the expense of resolving such disputes. Our experience has shown that early judicial intervention in discovery disputes does indeed reduce both the cost and time involved in resolving them.² Empirical data collected by Orrick appear to bear this out as well.

Results of Comparative Analysis:

In order to determine the effect of rules requiring an informal conference with the court before parties are permitted to file discovery motions, we examined the dockets of eight federal judges from two states between January 1, 2011 and December 20, 2013. Specifically, we studied four district court judges from Ohio and four from California. Two judges in each state employ a standing order or local rule requiring consultation with the court before parties may file a formal discovery motion—either by letter brief or informal conference—while the other judges from each state employ no such rule. Judges were chosen for comparison from geographically similar areas to maximize the degree of comparability. Below is a summary of our findings.³

In Ohio, we compared the frequency of discovery motions filed in cases pending before two judges from the Northern District of Ohio that require a pre-motion conference with the frequency such motions were filed in cases before two judges from the Southern District of Ohio without such pre-motion requirements.⁴

In California, we compared the frequency of discovery motions filed in cases pending before two judges from the Northern District of California who require parties to confer with the court via

² Our assertions regarding judicial intervention are not meant to contravene the current push for party cooperation. On the contrary, we fully support cooperation between parties to resolve most discovery disputes. We encourage all parties to present only a few, well-framed issues that remain for judicial resolution after failing to resolve the disputes through thoughtful negotiation.

³ The language of the judges' rules (if applicable) is listed in Appendix A. Our findings are also detailed in chart format in Appendix B.

⁴ See Hon. James G. Carr, *From the Bench: Fixing Discovery: The Judge's Job*, LITIG., Summer-Fall 2012, available at http://www.americanbar.org/publications/litigation_journal/2011_12/summerfall/from_bench_fixing_discovery.html (citing the Northern District of Ohio's Local Rule requiring a pre-motion conference as a method by which burdensome discovery can be curtailed).



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a short, letter brief before any formal discovery motions may be filed with the frequency such motions were filed in cases before one judge from the Central District of California and one judge from the Northern District of California who employ no similar requirement.

According to our data, significantly fewer formal discovery motions were filed before judges employing a local rule or standing order requiring consultation with the court before discovery motions may be filed than those without such a rule. Indeed, in the cases we examined, formal discovery motions were filed in 3.15% of the cases without a pre-filing conference requirement, but in only 0.81% of cases before judges with a standing order, local rule or both. This represents a **74.2% reduction** in the percentage of cases where a formal motion was filed. The reduction is even more significant when counting multiple motions filed in the *same* case. Controlling for the number of cases on each judge's docket, the ratio of discovery motions to cases pending before judges without a pre-filing conference requirement was .056, or 5.59%. In courts with such a requirement the ratio was .014, or 1.37%. This represents a **75.4% reduction** in the percentage of formal discovery motions filed. Thus, as the data suggest that early judicial intervention in the form of an informal conference can prevent disputes from deteriorating into costly and time-consuming legal battles, we support the proposed revision to Rule 16(b)(3)(B)(v) and hope that many courts will make the pre-motion conference requirement mandatory as part of their local rules.

II. Presumptive limits contemplated for Rule 34 requests for production:

Orrick supports the proposal contemplated by the Advisory Committee to presumptively limit the number of requests for production to 25, and urges the Committee to reinsert this language into revised Rule 34. As illustrated by the model protocols published by the United States Court of Appeals for the Federal Circuit, the United States District Court for the Eastern District of Texas, the United States Court of Appeals for the Seventh Circuit and other jurisdictions, presumptive limits are necessary to avoid asymmetrical burdens and to address the challenge presented by exponential growth in the volume of Electronically Stored Information (ESI). Our experience has shown that use of presumptive limitations on discovery effectively focuses the parties on creating narrowly tailored, targeted discovery requests and facilitates meaningful cooperation. Empirical data collected by Orrick also support this conclusion.

Results of Comparative Analysis:

In order to quantify the savings presumptive limits can achieve, we compared the time and expense of processing, searching and reviewing documents for matters where presumptive limits were imposed to matters where no presumptive limits were imposed. Specifically, we compared intellectual property cases in which the Federal Circuit's Model Order Regarding E-Discovery in Patent Cases⁵ or other similar order was entered ("ESI Limit") to similar cases in which no such

⁵ The complete Model Order Regarding E-Discovery in Patent Cases can be found in Appendix C.



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order was entered.⁶ Far fewer review and processing hours were recorded in the ESI Limit matters than in the matters in which there were no initial limits placed on requests for production. In fact, on average there **were 18% fewer hours** recorded in the ESI Limit matters than in similar matters where no presumptive limits were imposed.

Despite these savings, it is worth noting that the average number of hours spent processing, searching and reviewing ESI in these matters still substantially exceeded the presumptive 160 hour limitations recommended by Judge Paul W. Grimm of the United States District Court for the District of Maryland in his Model Discovery Order and in the Eastern District of Michigan's Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI. Thus, presumably, use of an hours-based presumptive limitation such as the one suggested by Judge Grimm could facilitate even further cost savings.

Proposed Rules Setting Presumptive Limits:

In light of these results, we propose setting the following presumptive limitations on the scope of discovery permitted under Rule 34 either through further revision of the rule or in discussion in the commentary:

- Parties must negotiate a date range limitation for each request;
- Parties must negotiate custodians and, absent good cause, must not exceed a presumptive limit of ten custodians;
- Absent good cause, parties will be allowed no more than 25 requests for production; and
- Global de-duplication is permissible.

These limitations are consistent with those employed with great success in the Federal Circuit's Model Order Regarding E-Discovery in Patent Cases, the Model Order Regarding E-Discovery in Patent Cases in the Eastern District of Texas, and other e-discovery protocols and model orders created over the past few years by other jurisdictions. Making such limitations presumptive requirements under Rule 34 would serve to greatly reduce the time and expense of discovery in cases of all sizes and provide a meaningful incentive to counsel for all parties to cooperate. To be clear, we are not advocating a "one size fits all" approach to requests for production. Indeed, in some smaller cases the presumptive limit of 25 would be inappropriate. Orrick proposes that the Committee adopt the presumptive limits as a "ceiling, not a floor" in an effort to encourage thoughtful and narrowly-tailored discovery requests.

⁶ To obtain this data, we compared Orrick's matters wherein an ESI Limit was imposed to those wherein no such limit was imposed. One hundred seventy matters total were compared. We compared hours recorded rather than time billed to limit the impact of write-downs, discounts and other time and pricing inconsistencies.



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III. Proposed revision of Rule 37(e) setting “willful or bad faith misconduct” as the standard for issuing spoliation sanctions:

Orrick also supports the Advisory Committee’s efforts to clearly enunciate standards for the application of sanctions for spoliation. However, spoliation sanctions should be limited in most cases to situations involving “bad faith.” Requiring bad faith will discourage parties from filing frivolous sanctions motions and engaging in gamesmanship and offer greater certainty to businesses attempting to establish sound document management and information governance practices.

Results of Comparative Analysis:

Requiring bad faith would reduce frivolous motions for spoliation sanctions. To validate this assertion, we examined sanctions rulings from four circuits: the Second Circuit, the Eighth Circuit, the Tenth Circuit and the Eleventh Circuit. All sanctions orders and opinions from these circuits were included to generate a pool of 119 cases. We grouped these cases into two categories: cases where a finding of bad faith was required before sanctions for spoliation would be considered and cases in which a lower standard was applied. We hypothesized that a higher percentage of motions for sanctions would be granted where the court required a showing of bad faith, because a high standard would discourage frivolous motions. The data support this conclusion.

Of the 119 orders examined, 32 used bad faith as a standard while the other 87 used a lesser standard. Sanctions were issued in 40 of the 87 cases in which a lower standard was used, resulting in a 45% success rate. In contrast, of the 32 cases where the court required bad faith, sanctions were imposed in 20 of the cases for a success rate of 62%.⁷ Thus, a higher percentage of motions were indeed granted in cases where bad faith was required. As bad faith is a higher standard, the greater percentage of successful motions in bad faith cases may indicate that the filed motions were highly meritorious. Accordingly, the adoption of a bad faith standard for spoliation sanctions under Rule 37(e) will provide relief for meritorious claims while reducing the cost and burden of frivolous motions.

Removal of “Willfulness” Language Needed:

Unfortunately, some of the clarity offered by the bad faith standard the Committee proposes is compromised by the addition of the word “willful.” A central tenet of information governance practice and thoughtful e-discovery management is the making of willful decisions regarding document management, retention and preservation. Such decisions are often made before a complaint is ever filed. Under the current proposed language, a scenario could easily be envisioned in which a party is sanctioned for decisions that were reasonable and defensible at the time they were made, but seemingly inappropriate in hindsight because those decisions were willful.

⁷ Graphical representation of these statistics can be found in Appendix D.



The inclusion of the word “willful” creates the wrong incentives for litigants and perpetuates the tendency of parties to play the “gotcha” game with sanctions motions. Parties should be encouraged to act carefully and deliberately when it comes to preserving evidence. They should not be encouraged to avoid anything that could later be construed as a willful decision. Accordingly, Orrick urges the Committee to adopt the proposed language requiring bad faith, but does not support the imposition of sanctions where a party’s actions are merely willful, and suggests that this term be removed from the proposed rule.

Responses to Questions Posed by the Committee:

Orrick would also like to respond to the questions presented by the Advisory Committee regarding the proposed amendments to Rule 37(e) listed below:

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

A: The Rule should not be so limited. It is important that the rule address the loss of electronically stored information, tangible things and paper documents.

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

A: Rule 37(e)(1)(B)(ii) should not be retained. Sanctions should be limited to situations involving bad faith conduct. Retaining Rule 37(e)(1)(B)(ii) is likely to lead to costly and inefficient collateral litigation regarding whether a party has been denied “a meaningful opportunity to present or defend” its case, is ineffective as an instrument of deterrence and is unnecessary to ensure parties meet their preservation obligations.

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

A: The Committee should retain the provisions of current Rule 37(e). The so-called “safe-harbor” provision provides important clarity that loss of information “as a result of the



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routine, good-faith operation of an electronic information system” is not sanctionable. This is a crucial protection for honest litigants.

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

A: The rule should include a definition of “substantial prejudice” to ensure that courts weigh the probative value of lost information and the availability of alternative sources. Such an addition would focus the parties’ and the court’s analysis on the true impact of lost information on a case, if any, rather than the mere fact that information was lost. Many of the more recent and thoughtful preservation opinions already consider this factor as part of their sanctions analysis and providing a baseline definition of “substantial prejudice” will encourage more uniformity across decisions.

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

A: Definitions of “willful” and “bad faith” are not necessary in Rule 37(e)(1)(B)(i). Courts have a great deal of experience determining the existence of bad faith in a variety of contexts and there is a large body of existing case law to draw upon. The analysis is, by its nature, highly fact-specific and situational. Thus, we recommend allowing courts flexibility in conducting this analysis, guided by the factors identified in proposed Rule 37(e)(2), rather than risk imposing a new definition that will lead to uncertainty and additional litigation until a suitable body of case law applying it has been developed. As stated above, we discourage the adoption of the term “willful” that is currently contained in the proposed revisions to the Rules.

Very truly yours,

A handwritten signature in blue ink, appearing to read "WBC", with a horizontal line extending to the right.

Wendy Butler Curtis

Enclosure(s)

Appendix A: Language of Local Rules and Standing Orders Requiring Pre-Filing Conferences or Letter Briefs

Ohio: Standing Orders and Local Rule:

Northern District of Ohio Local Rule 37 (in relevant part):

Rule 37.1 Discovery Disputes

(a) In the absence of a Judicial Officer establishing an alternative procedure for handling discovery disputes, the following procedure shall apply.

- (1) Discovery disputes shall be referred to a Judicial Officer only after counsel for the party seeking the disputed discovery has made, and certified to the Court the making of, sincere, good faith efforts to resolve such disputes.
- (2) The Judicial Officer may attempt to resolve the discovery dispute by telephone conference.
- (3) In the event the dispute is not resolved by the telephone conference, the parties shall outline their respective positions by letter and the Judicial Officer shall attempt to resolve the dispute without additional legal memoranda.
- (4) If the Judicial Officer still is unable to resolve the dispute, the parties may file their respective memoranda in support of and in opposition to the requested discovery by a date set by the Judicial Officer, who may schedule a hearing on the motion to compel.

Northern District of Ohio Judge Example 1 (Standing Order):

3. Discovery Disputes

Follows Local Rule 37.1. The order for resolving discovery disputes under this rule is: (1) a good faith resolution effort by counsel, (2) a telephone conference call with the court, triggered by a short letter from counsel, (3) position letters, if solicited by the court, and (4) a formal Fed.R.Civ.P. 37 discovery motion. Does not usually refer discovery matters to a magistrate judge.

Northern District of Ohio Judge Example 2 (Standing Order):

3. Discovery Disputes

Follows Local Rule 37.1. The order for resolving discovery disputes under this rule is: (1) a good faith resolution effort by counsel, (2) a telephone conference call with the court, triggered by a short letter from counsel, (3) position letters, if solicited by the court, and (4) a formal Fed.R.Civ.P. 37 discovery motion. The court may refer discovery matters to a Magistrate Judge at the court's discretion.

California: Standing Orders:

Northern District of California Judge Example 3 (Standing Order):

All other requests for discovery relief must first be summarized in a letter no longer than three pages from the party seeking relief after having met and conferred. Up to twelve pages of attachments may be added. In the letter, counsel should identify themselves in the

signature block as “counsel for _____.” The letter should be electronically-filed in the official file along with the discovery-dispute requests and responses, as well as any timely letter cancelling the hearing if settlement is reached. (Please note that with all communications with the Court by e-filing, a hard copy must be lodged in the Court’s mail box in the Clerk’s Office on the sixteenth floor in the time frame requested by local rule.) The Court will then advise the parties whether a response, written motion or a telephone conference or court hearing will be required. After the telephone conference or hearing, counsel should submit their proposed order (agreed as to form) by e-filing it. This paragraph applies only to cases wherein discovery is being supervised by the district judge rather than by a magistrate judge or special master.

Northern District of California Judge Example 4 (Standing Order):

Discovery disputes will be referred to a Magistrate Judge. After the parties have met and conferred, the parties shall prepare a joint letter of not more than 8 pages explaining the dispute. Up to 12 pages of attachments may be added. The joint letter must be electronically filed under the Civil Events category of “Motions and Related Filings >Motions-- General > Discovery Letter Brief.” The Magistrate Judge to whom the matter is assigned will advise the parties of how that Judge intends to proceed. The Magistrate Judge may issue a ruling, order more formal briefing, or set a telephone conference or a hearing. After a Magistrate Judge has been assigned, all further discovery matters shall be filed pursuant to that Judge’s procedures.

Appendix B: Comparison of Formal Discovery Motions Filed in Courts Requiring a Pre-Filing Conference or Letter Brief⁸

No Rule Requiring Conference						Rule Requiring Conference					
Court & Judge	Average Number of Cases on Docket	Number of Cases in which Discovery Motions were Filed	Percentage of Cases on Docket with Motions Filed	Total Number of Motions Filed	Percentage of Motions Filed per Judge	Court & Judge	Average Number of Cases on Docket	Number of Cases in which Discovery Motions were Filed	Percentage of Cases on Docket with Motions Filed	Total Number of Motions Filed	Percentage of Motions Filed per Judge
Southern District of Ohio – Judge Example 1	2011–330 2012–334 2013–337 Avg: 333.67	37	3.70%	59	5.89%	Northern District of Ohio – Judge Example 1	2011–473 2012–727 2013–407 Avg: 535.67	15	0.93%	21	1.31%
Southern District of Ohio – Judge Example 2	2011–330 2012–334 2013–337 Avg: 333.67	34	3.40%	34	3.39%	Northern District of Ohio – Judge Example 2	2011–473 2012–727 2013–407 Avg: 535.67	25	1.56%	38	2.36%
Central District of California – Judge Example 3	2011–545 2012–562 2013–526 Avg: 544.33	60	3.67%	106	6.49%	Northern District of California – Judge Example 3	2011–471 2012–501 2013–442 Avg: 471.33	4	0.28%	14	0.99%
Northern District of California – Judge Example 4	2011–471 2012–501 2013–442 Avg: 471.33	28	1.98%	33	2.33%	Northern District of California – Judge Example 4	2011–471 2012–501 2013–442 Avg: 471.33	5	0.35%	10	0.71%
Total Average			3.15%		5.59%				0.81%		1.37%

Average difference of cases with discovery motions filed between courts without requirement versus with = 2.34% ($t = 9.04, p < .001$)
 Average difference of total discovery motions filed between courts without requirement versus with = 4.21% ($t = 12.38, p < .001$)

⁸ The number of cases on each court's docket was obtained from United States District Courts, National Judicial Caseload Profile (Sept. 2013), available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-september-2013.pdf&page=1>. These numbers include *pro se* cases and other civil matters in which discovery motion practice is less likely in general, which explains why even in courts without a pre-filing requirement the percentage of cases involving discovery motion practice is relatively low.

Appendix C: The Federal Circuit's Model Order Regarding E-Discovery in Patent Cases

Addendum: Discovery Model Order

Plaintiff,

v.

Defendant.

Case No.

[MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES

The Court ORDERS as follows:

1. This Order supplements all other discovery rules and orders. It streamlines Electronically Stored Information ("ESI") production to promote a "just, speedy, and inexpensive determination" of this action, as required by Federal Rule of Civil Procedure 1.

2. This Order may be modified for good cause. The parties shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil Procedure 16 conference. If the parties cannot resolve their disagreements regarding these modifications, the parties shall submit their competing proposals and a summary of their dispute.

3. Costs will be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a party's nonresponsive or dilatory discovery tactics will be cost-shifting considerations.

4. A party's meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.

5. General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include metadata absent a showing of good cause. However, fields showing the date and time that the document was sent and received, as well as the complete distribution list, shall generally be included in the production.

6. General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include email or other forms of electronic correspondence (collectively "email"). To obtain email parties must propound specific email production requests.

7. Email production requests shall only be propounded for specific issues, rather than general discovery of a product or business.

8. Email production requests shall be phased to occur after the parties have

exchanged initial disclosures and basic documentation about the patents, the prior art, the accused instrumentalities, and the relevant finances. While this provision does not require the production of such information, the Court encourages prompt and early production of this information to promote efficient and economical streamlining of the case.

9. Email production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms and proper timeframe.

10. Each requesting party shall limit its email production requests to a total of five custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional custodians per producing party, upon showing a distinct need based on the size, complexity, and issues of this specific case. Should a party serve email production requests for additional custodians beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

11. Each requesting party shall limit its email production requests to a total of five search terms per custodian per party. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional search terms per custodian, upon showing a distinct need based on the size, complexity, and issues of this specific case. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (e.g., "computer" and

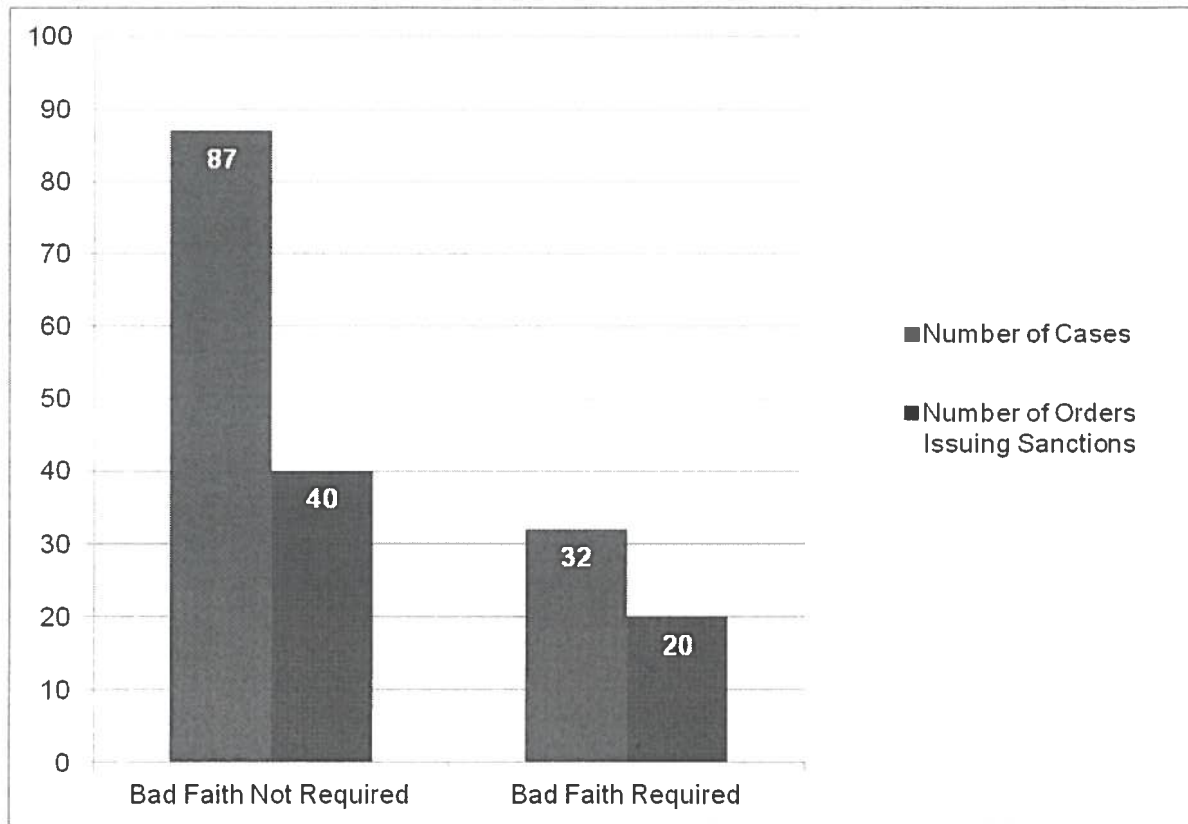
"system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (e.g., "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. Use of narrowing search criteria (e.g., "and," "but not," "w/x") is encouraged to limit the production and shall be considered when determining whether to shift costs for disproportionate discovery. Should a party serve email production requests with search terms beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

12. The receiving party shall not use ESI that the producing party asserts is attorney-client privileged or work product protected to challenge the privilege or protection.

13. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of a privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding.

14. The mere production of ESI in a litigation as part of a mass production shall not itself constitute a waiver for any purpose.

Appendix D: Comparison of Motions for Spoliation Sanctions to Orders Issuing Sanctions in Cases in which Bad Faith Was Required versus Cases in which Bad Faith Was Not Required⁹



⁹ Difference of sanctions granted between courts requiring “bad faith” vs. no requirement = 16.52% ($z = 1.60$, $p = .054$).