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February 14, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

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

Dear Members of the Committee:

One of our former bosses, Representative Morris K. Udall, in an effort to bring long-running congressional committee hearings to a close would observe that "everything has been said; just not everyone has said it." In that spirit, we hope the members of the Committee still have an open ear to the comments below regarding the proposed amendments to the Federal Rules of Civil Procedure.

We offer these comments as two attorneys who for well over a decade have been in the trenches of electronic discovery battles in large litigation matters. We have seen first-hand the complex challenges created by the collision of technology and litigation and the substantial costs borne by our clients to address these issues consistent with the evolving law and procedural and ethical rules. These problems are not academic to us or our clients. Rather, they have a real impact on our client companies and their employees who are not in the business of preserving, collecting, and producing electronic documents and data.

Here then, are some hard-earned observations that may provide some perspective to the Committee as it considers the current slate of amendments aimed at addressing electronic discovery. These are our personal views and they are not necessarily shared by other attorneys at Dechert LLP or our clients.[1]

First, rules governing civil procedure will always and necessarily trail technology. Technology simply evolves too quickly for the rules to keep pace and any attempt to predict or anticipate future technological changes is a fool's errand.

Second, despite widespread calls for cooperation among counsel and issuance of high-minded principles, electronic discovery remains a popular and potentially powerful weapon in high-stakes litigation, particularly when coupled with now-standard sanctions motion practice.

[1] We wish to acknowledge and thank Quinn C. Shean of Dechert LLP for her considerable contributions to this submission.

The issuance and publication of sanctions orders that impact trials or create settlement leverage, particularly based on allegations of failure to preserve data or documents years earlier, result in companies continuing to engage in costly and unnecessary defensive discovery. Moreover, given the very small percentage of cases filed that actually go to trial, discovery and discovery disputes have become de facto trials, further reducing the incentives to resolve discovery issues through negotiations.

Third, it is important for the Committee to understand that most high-profile disputes will not be limited to civil litigation governed by the Federal Rules of Civil Procedure. It is far more common for companies to face parallel or serial litigation or investigations where the limits or protections currently in the federal rules or being considered by the Committee simply do not exist. In fact, it is now a common tactic to seek broad discovery in these other matters and then attempt to leverage rulings or production agreements to evade or avoid the restrictions on discovery that exist in federal court.

Fourth, the true cost of electronic discovery for companies is not limited to individual matters and must take into account the investment in time and resources to develop and keep current standardized discovery processes across litigation matters. Adverse discovery rulings in one area of electronic discovery or repeated rule changes require companies to consider and potentially revise their processes in order to avoid greater exposure and expense in future litigation. Again, the cost of such sensible protective and preventive measures diverts critical resources to areas outside of companies' core business functions and objectives.

Fifth, consideration of these new amendments must be tempered by the relatively limited impact prior rule changes have had on electronic discovery issues. These previous attempts to limit electronic discovery have been frustrated by the inherent limitations of the "fix this by more rules approach" and agreements among counsel and courts not to apply the limiting rules in major matters. In some instances, the new rules simply created new sets of discovery disputes that replaced the old disputes the prior amendments attempted to address. This experience does not mean that the Committee should not move forward with consideration and approval of the current proposals. Rather, there needs to be an understanding that not all the issues surrounding electronic discovery will be resolved by new rules.

Finally, in our view, the only way to bring about fundamental change to the area of electronic discovery and return it to its original purpose – preparation for trial – is for courts to use the existing and proposed rules to fairly allocate the costs of discovery to all parties. While a producing party should in most cases pay the cost of producing an initial core set of relevant documents and data, at some point it is perfectly appropriate for a party to fund all or part of the discovery they seek. It is not a question of cost-shifting but of cost allocation. In our experience, when opposing counsel are required to fund their fishing expeditions in whole or in part, they become much more reasonable in framing discovery requests and resolving discovery disputes. We would encourage the Committee to focus its attention specifically on this area as we believe it offers the best hope of resolving the electronic discovery morass.

A. Proposed Rule 26(c)(1)(B): Allocation of Expenses

We support the Committee's proposed addition of expense allocation language to Rule 26(c)(1)(B) and hope it will prompt courts to fairly apportion the costs of discovery. We believe, however, that the proposed change does not go far enough to address the disproportionate financial burden discovery imposes on responding parties.

As the Committee recognized, courts hold the power to apportion discovery costs under the current rule.[2] But under the current rule and the proposed amended rule, expense allocation is available only if a party seeks a protective order. Under either the current or the proposed rule, the possibility of cost allocation is too remote to incentivize a party to limit its requests at the outset.

We believe discovery expense allocation should be the standard in most cases, rather than just an available remedy. With a general presumption of allocating expenses, parties would be deterred from serving over-burdensome discovery requests as an initial matter. Such a rule would force litigants to focus on the discovery they really need to prove their claims or defenses at trial, which would lead to more timely and efficient adjudication of cases.

We acknowledge and applaud the Committee's intention to "begin to focus on proposals advanced by some groups that greater changes should be made in the general presumption that the responding party should bear the costs imposed by discovery requests."[3] We believe further analysis of this issue should lead to a general standard embodied in the Rules that the costs of discovery will be allocated among the parties.

B. Proposed Rule 26(b)(1): Proportionality Analysis and Scope of Discovery

We support and welcome the Committee's proposed revision of Rule 26(b)(1) to incorporate a proportionality analysis. We also support the proposed elimination of the "reasonably calculated" standard under the current Rule. In our experience many litigants consistently try to misuse the current Rule to argue they are entitled to discovery of *any* information that "appears reasonably calculated to lead to the discovery of admissible evidence."

C. Proposed Rule 26(b)(1): The Committee Should Remove "The Parties' Resources" from the Proportionality Analysis

We believe that the Committee should delete "the parties' resources" from the proposed list of factors a court should consider when determining whether discovery is "proportional to the

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[2] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure* ("*Proposed Amendments*") at 298 (Oct. 29, 2013).

[3] *Proposed Amendments* at 266.

needs of the case."[4] Each of the other factors listed – the amount in controversy, the importance of the issues at stake in the action, the importance of discovery in resolving the issues and whether the burden or the expense of the proposed discovery outweighs its likely benefit – bears on the magnitude of the case and the importance of the proposed discovery to resolution of the case. In contrast, the parties' resources are irrelevant to whether particular discovery requests are proportional to the needs of a case. A court's consideration of the parties' resources will only serve to shift the inquiry away from the "needs of the case" to the identity of the parties. Doing so could lead to arguments that discovery requests that are otherwise disproportional to the needs of the case are justified because the responding party (e.g., a multinational corporation) has vast resources, while the requesting party (e.g., an individual plaintiff) has relatively minimal resources. Including resource considerations will exacerbate – not resolve – the current problem in such so-called asymmetrical litigation.[5]

The Committee moved the language regarding the "parties' resources" from the current Rule 26(b)(2)(C)(iii), where it is a sub-factor in determining whether "the burden or expense of the proposed discovery outweighs its likely benefit." While the parties' resources certainly relate to the "burden . . . of the proposed discovery," they do not shed light on whether the proposed discovery is proportional to the needs of the case. Indeed, such a factor will always weigh against large corporations irrespective of the scope of the litigation or the merits of the requested discovery. Further, inclusion of "parties' resources" in the proportionality analysis could invite satellite or collateral litigation early in the case regarding the parties' financial resources and ability to pay for discovery.

For these reasons, we recommend that the Committee remove this factor from its proposed amendment to Rule 26(b)(1).

D. Proposed Rule 26(d): Early Case Management

We do not support amending Rule 26(d) to allow parties to serve discovery requests prior to the Rule 26(f) conference. While we recognize the Committee seeks to allow parties to advance the Rule 26(f) conference and target their discussion of Rule 34 requests, we believe this proposed Rule will hinder rather than expedite discovery. From our experience, parties will use the opportunity for "early discovery" to serve overly broad requests that will begin the Rule 26(f) conference at a stalemate rather than in a spirit of cooperation. We are concerned that scrutiny of the requests at the Rule 26(f) conference will come at the expense of time spent on developing a workable discovery plan.

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[4] *See id.* at 289.

[5] Further, in cases involving contingency-fee arrangements, lawyers – not parties – often bear the costs of discovery, making any inquiry into the parties' resources even less meaningful.

E. Proposed Rules 30(a)(2)(A)(i), 30(d)(1), 33(a)(1), 36(a)(2): Limitations on the Number and Length of Depositions, the Number of Interrogatories, and the Number of Request for Admission

We support the Committee's amendments to these Rules and believe the revised presumptive limits reinforce the Committee's larger effort to incorporate proportionality into the Rules. Our experience shows, however, that these limitations will likely be rendered meaningless in the largest cases (such as multi-district litigation) where the burdens of discovery are often the greatest. In those cases, the parties will usually agree to exceed the presumptive limits.

To the extent the parties do not agree to exceed the Rules' presumptive limits, courts considering parties' requests to take additional depositions or to serve additional discovery requests should apply the proportionality analysis in the proposed amendments to Rule 26(b)(1). We believe that the Advisory Committee Notes should expressly indicate that the proportionality factors apply when parties disagree over the presumptive limits.

F. Proposed Rule 34(b)(2)(C): Objections to Requests for Production

We do not support the proposed change to Rule 34(b)(2)(C) that would require the responding party to state whether anything was being "withheld" on the basis of the objection. We have had to respond to similar demands in multiple litigation matters, including the requirement that our clients produce "non-production logs" (i.e., lists of documents not being produced with reasons for the non-production).

Not only does this proposal turn the historic concept of relevance on its head, it suggests that counsel are not adequately performing their traditional task of identifying and producing relevant documents and data in discovery. The actual evidence is to the contrary. It is only in rare instances that counsel falls short of this standard, and in such instances, sanctions are available and may be appropriate depending on the circumstances in an individual case.

In addition, our experience indicates that this proposed amendment is unworkable and will only serve to increase the already overwhelming burden on responding parties. For example, a party responding to a grossly overbroad request for production (e.g. "all documents related to the subject matter of this lawsuit") will have to assess and collect the entire universe of documents responsive to the request notwithstanding its meritorious overbreadth objection. Furthermore, the proposed change could incentivize both broad discovery requests and meritless discovery motion practice by providing the requesting party a wish list of the universe of materials in the responding party's servers and databases.

G. Proposed Rule 37(e): Failure to Preserve Discoverable Information

The proposed amendments to Rule 37(e) have been addressed extensively and thoughtfully by others. We agree with the recommendation by other commenters[6] to replace the phrase "willful or in bad faith" in the Committee's proposed amendments to Rules 37(e)(1)(B)(i) and 37(e)(2) with "willful and in bad faith" to underscore that an intentional act undertaken in good faith is not sufficient to impose sanctions.

H. Proposed Rule 16: Early Case Management

We support the Committee's proposed amendments to Rule 16. In our experience, early and active court involvement in case management issues leads to more efficient litigation.

We thank the Committee for the opportunity to comment on the proposed rules and would be happy to provide any additional information the Committee members would find useful in their deliberations.

Respectfully submitted,

Benjamin R. Barnett

Erik W. Snapp

[6] *See, e.g.*, Comments by Lawyers for Civil Justice at 7-8 (Sept. 3, 2013); Comments from John F. Murphy on behalf of Shook, Hardy & Bacon at 5 (Oct. 29, 2013); Comments by J. Michael Weston on behalf of DRI – *The Voice of the Defense Bar* at 8 (January 15, 2014).