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By Electronic Filing
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts, Suite 7-240
Washington, D.C. 20544
Attention: Honorable Jeffrey S. Sutton, Chair

Re: *Comments on Proposed Rules Amendments (Rules 26, 34, and 37)*

Dear Judge Sutton:

Mintz Levin compliments the Committee and supports the proposed amendments to the Federal Rules of Civil Procedure because, on balance, the proposals seek to reduce the costs of discovery and litigation of document preservation issues while at the same time providing some degree of national uniformity. Over the past several years, concerns about these issues have created increasingly high barriers to an efficient process for litigating disputes.

While we generally support the proposed amendments, we have some suggestions on how the currently proposed amendments could be further clarified and improved. We are also providing specific responses to some of the questions promulgated by the Committee for public comment.

Comments Regarding Proposed Amendments to Rule 26

Rule 26(b)(1)

The Committee's stated purpose for amending the scope of discovery as provided by Rule 26(b)(1) seems to be primarily to keep the scope of discovery the same as it was, while awakening attorneys and the courts to the need to consider factors other than relevance. In this regard, the Committee's Memorandum, dated August 15, 2013, notes:

> "Although the rule now directs that the court 'must' limit discovery, on its own and without motion, it cannot be said to have realized the scope of its authors.";

and

> "The problem is not with the rule [26(b)(2)(C)(iii)] text but with its implementation – it is not invoked often enough to dampen excessive discovery demands."

The Committee apparently seeks to solve the lack of implementation of the existing rules by redefining "scope" of discovery in Rule 26(b)(1). So the Committee Report[1] states, "These considerations frame the proposal to revise the scope of discovery defined in Rule 26(b)(1) by transferring the analysis required by present Rule 26(b)(2)(C)(iii) to become a limit on the scope of discovery, so that discovery must be 'proportional to the needs of the case ….'" (Emphasis added.) The proposed Committee Note states, "Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. …"

With that in mind, we recommend revising the beginning of Rule 26(b)(1) for clarity. The word "proportional" as used in the proposed rule does not modify discovery or the scope of discovery; it appears to modify "matter". The proposed rule also opens with superfluous words. Such potential ambiguity might generate unnecessary ancillary litigation.

We also suggest that the proportionality considerations should include "any rights at stake" in the litigation.

We therefore propose to amend Rule 26(b)(1) to read as follows:

> 26(b)(1): ***Scope in General***. The scope of discovery must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues and any rights at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Within that limit, unless ~~Unless~~ otherwise limited by court order, ~~the scope of discovery is as follows: Parties~~ parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. ~~and proportional to the needs of the case,~~

[1] "Committee Report", as used in this letter, refers to the Memorandum, dated August 15, 2013, to the Bench, Bar, and Public, from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Re: Request for Comments on Proposed Rules and Forms Amendments.

> ~~considering the amount in controversy, the importance of het issues and any rights at stake in the action, the parties resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit~~. Information within this scope of discovery need not be admissible in evidence to be discoverable."

Rule 26(d)(2)

Rule 26(d)(2) introduces a new and useful concept, namely delivery (but not service) of Rule 34 discovery requests before a Rule 26(f) conference has been held. The rule deems service of such delivered requests to be effective as of the date of the first Rule 26(f) conference; therefore, the receipt of Rule 34 requests before a Rule 26(f) conference does not give rise to any obligation until after that conference has been held. Such early delivery of discovery requests may prompt the parties to begin discussing discovery issues. Indeed, the Committee Report indicates that the amendment is intended to "facilitate the [Rule 26(f)] conference by allowing consideration of actual requests, providing a focus for specific discussion."

The proposed rule includes a seemingly unnecessary, and perhaps unhelpful, 21-day moratorium that prevents delivery of discovery requests until 21 days after a party has been served. As drafted, the moratorium has a quirk: not every defendant is guaranteed a 21-day gap between (i) service of the summons and complaint and (ii) delivery to it of Rule 34 requests. In any case with two or more defendants where the plaintiff has served the summons and complaint on a defendant on day 1, that defendant can deliver discovery requests to the other defendants on day 22, regardless of when those other defendants were served. Instead of fixing this quirk, the better approach is to eliminate the moratorium.

Since the goal is to facilitate discussion by the parties, there is no reason to force the parties to wait to deliver requests and begin talking. The moratorium seems to fulfill no purpose and may, at times, impede discussion by the parties. We, therefore, propose to strike Rule 26(d)(2) as written and replace it with the following language:

> Rule 26(d)(2): ***Early Rule 34 Requests***. A request under Rule 34 may be delivered before a Rule 26(f) conference. A request so delivered is considered served at the first Rule 26(f) conference.

Comments Regarding Proposed Amendment to Rule 34(b)(2)(C)

Proposed Rule 34(b)(2)(C) would require parties objecting to discovery requests to "state whether any responsive materials are being withheld on the basis of that objection." The Draft Committee Note indicates that a party may satisfy that requirement by providing "[a]n objection that states the limits that have controlled the search for responsive and relevant materials …."

We recommend further amending the Rule to require disclosure of both a party's search limits, if any, and whether responsive materials are being withheld. The additional disclosure will aid in resolving disputes over objections and will prevent an objecting party from withholding responsive documents while disclosing only its search limits. Accordingly, we propose to amend Rule 34(b)(2)(C) as follows:

> 34(b)(2)(C): *Objections*. An objection must state (i) whether any responsive materials are being withheld on the basis of that objection, and (ii) whether and to what extent the objecting party limited its search for responsive materials. An objection to part of a request must specify the part and permit inspection of the rest.

Comments Regarding Proposed Amendments to Rule 37(e)

The Committee Report states, "[a] central objective of the proposed new rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard." Bringing a uniform set of rules/analysis ought to be helpful and to reduce uncertainty, especially for companies having a presence in, or doing business in, more than one circuit. But we note, too, the Committee Report's statement that "[t]he amendment does not seek to change the [preservation] obligation." We think that the amended Rule 37(e) achieves the limited purpose described in the Committee Report.

While the proposed amendments to Rule 37(e) will not likely reduce significantly the costs or expenses associated with the storage, preservation, and production of electronically stored information, it will provide for some guidance to parties as they attempt to determine their preservation obligations and will provide greater efficiency and certainty for sanctions applications.

- Benefits of a single standard. Adoption of a single standard for imposing sanctions is important because many companies have offices, locations and/or litigate in several different jurisdictions. Being subjected to differing standards across these jurisdictions unnecessarily increases the costs of adopting

company-wide policies and processes aimed at ensuring that evidence is properly stored, preserved, and produced.

- Incorporation of proportionality concept. By making the failure to preserve "discoverable information" the trigger for potential sanctions, proposed Rule 37(e) incorporates the concept of proportionality in proposed Rule 26. While it is unlikely that this proposed amendment will provide additional clarity at the front-end of the process (i.e., at the time a party sends a preservation notice out), incorporation of proportionality into Rule 37(e) is beneficial in that it will require another step in the analysis in determining whether curative measures or sanctions are appropriate. Courts will first have to apply the proportionality analysis in determining whether the lost information was "discoverable" in the first instance. Having to conduct this proportionality analysis as part of any Rule 37(e) proceeding provides further protection for ensuring that the drastic step of ordering curative measures or sanctions is only applied in the truly appropriate circumstances. Indeed, it may be advantageous to include in Rule 37(e)(1) an express reference to the scope of discovery (as provided in Rule 26(b)(1)) as follows:

> 37(e)(1): ***Curative measures; sanctions***. If a party failed to preserve ~~discoverable~~ information that falls within the scope of discovery and that should have been preserved in the anticipation or conduct of litigation, the court may: …

Answers to Committee's Questions Regarding Rule 37(e):

We provide the following answers to the questions promulgated by the Committee for public comment on Rule 37(e):

1. 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 to litigation is a recurrent concern in litigation today.

   The rule should not be limited to electronically stored information because we do not see any reason why the benefits of the rule should not extend to all discoverable matter. Moreover, we agree that the line between hard copy documents and electronically stored information is sufficiently blurred that

application of the rule could seem inconsistent. For example, if the rule only applied to electronically stored information, then it would not apply to hard copies of graphs or charts generated from electronically stored data, but would apply to the data itself. Applying the rule to only the data set and not any derivative hard copies created from the data set would create an inconsistency without any principled basis.

2. Should Rule 37(b)(1)(B)(ii) 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?

   This provision should not be included in the new Rule 37 primarily because it could be used to sanction a party without any finding of fault or culpability. This provision likely would be litigated in almost every preservation motion, regardless of whether it truly applies; a party moving for sanctions has no incentive not to pursue this theory as a hedge against an inability to establish willfulness or bad-faith.

   The Committee indicated that the idea for this provision arose from tort cases where an allegedly defective product was destroyed prior to or during the litigation. We do not believe that the proposed generally applicable rule is appropriate to remedy such a specific issue because the rule will end up being applied in cases that it was never truly designed to address.

3. 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.

   Current Rule 37(e) should be retained, especially if Rule 37(b)(1)(B)(ii) is implemented. Current Rule 37(e) provides an important safe harbor against non-negligent information loss, and companies have relied on that language as a safe harbor in designing and implementing records management systems. While it is likely (although not certain) that the new provisions in Rule 37(e) would make current Rule 37(e) superfluous, having an express endorsement in the Rules for the creation and maintenance of a records management system would still have benefits.

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.

We recommend that the phrase "substantial prejudice" be changed to "incurable and substantial prejudice." By including "incurable," the rule will establish that sanctions under Rule 37(e)(1)(B) are not awardable when curative measures under Rule 37(e)(1)(A) are sufficient. The use of the word "substantial" need not be defined and will permit a court to exercise discretion when determining whether the failure to preserve evidence might have a significant, meaningful effect on the proceeding.

5. 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?

   No; there is well-developed case law defining these terms and providing sufficient guidance to litigants as to the type of conduct these terms describe.

In closing, Mintz Levin thanks the Civil Rules Advisory Committee for a thorough, deliberate, and reasoned process in developing the proposed amendments. We are available to discuss these comments if the Committee would like additional information.

Respectfully,

s/Kevin N. Ainsworth

Kevin N. Ainsworth

s/Breton Leone-Quick

Breton Leone-Quick