Backgrounder: Proposed Amendments to the Federal Rules of Civil Procedure

The Advisory Committee on Civil Rules ("Advisory Committee") has proposed to amend the Federal Rules of Civil Procedure in order to reducing the costs and burdens of discovery.

Arguably, the two most important amendments are (1) a revision to Rule 26(b)(1) which re-defines the scope of discovery; and (2) a re-write of Rule 37(e), which regulates sanctions for failure to preserve discoverable information. The proposed amendments also include changes to rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.

Here are some key points about the proposed amendments:

Rule 26(b)(1) – Scope of Discovery

- The Advisory Committee's proposed amendment to Rule 26(b)(1) would re-define the scope of discovery to be "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." The amendment deletes the "subject matter involved in the action" from the scope of discovery in order to make clear that discovery is defined by the claims and defenses identified in the pleadings. This change would provide a meaningful improvement compared to the overbroad scope of discovery defined by current Rule 26(b)(1), which is a fundamental cause of the high costs and burdens of modern discovery.

- The proposed amendment would also strike the well-known phrase, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery so long as it is relevant (a principle the proposed amendment preserves).

- Moving the current proportionality language from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1) is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean to each individual case.

- One factor that could prevent the amendment from fulfilling its potential is the historically broad notions of discovery and relevance. The Advisory Committee could help avoid that risk by adding a materiality requirement to the scope of discovery, defining it as "any non-privileged matter that is relevant *and material* to any party's claim or defense . . . ." Such a materiality standard would strengthen Rule 26(b)(1) while still ensuring that parties can obtain the information they need to bring or defend against any claim.

Rule 37(e) – Failure to Preserve Discoverable Information

- The proposed new Rule 37(e) would prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." This proposal holds great promise to establish a much-needed uniform national

standard that would curtail costly over-preservation and ancillary litigation over allegations of spoliation. Unlike the current Rule 37(e), the proposed rule would not be limited to electronically stored information.

- Unfortunately, an exception contained in subsection (1)(B)(ii) could "swallow the rule" by allowing courts to impose sanctions absent any willfulness or bad faith where the loss of information "irreparably deprives" a party of any ability to present or defend the action. Although the Advisory Committee intends for the exception to apply in only in the very rarest of situations, it is likely that courts would use the exception to avoid the primary rule. The exception should be removed before the proposal is adopted.

- The proposed Rule 37(e) would authorize sanctions for "willful or in bad faith" conduct, which is problematic because some courts define "willfulness" as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. The Advisory Committee should substitute the conjunctive "and" for the disjunctive "or" to make clear that sanctions apply only to conduct that is both willful and in bad faith.

- The list of "factors to be considered in assessing a party's conduct" in subsection (2) of the proposed rule should be deleted or, at most, included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts. Even more importantly, there is a high degree of risk that misinterpretation of the various factors could convert them into mandates whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule.

- The proposed Rule 37(e) needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, wasteful over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard incorporated into the proposed rule requires preservation decisions to be made prior to the receipt of a scope-defining complaint, the appearance of an opposing lawyer with whom to negotiate or the assignment of a judge available to resolve preservation issues. Instead, the Advisory Committee should adopt a clear "commencement of litigation" trigger for when a party must take affirmative preservation steps, balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary. This would yield vast benefits without materially damaging any party's ability to prove or defend against any claim.

<u>Rules 30, 31, 33 and 36 – Presumptive Numerical Limits</u>

- The Advisory Committee has appropriately proposed to reduce the presumptive numerical limits in several categories of discovery. The proposals include reducing the number

of oral depositions from 10 per party to 5 and the presumptive duration of a deposition from 7 hours to 6 (Rule 30); the number of written depositions from 10 to 5 (Rule 31); the number of Rule 33 interrogatories from 25 to 15; and adopting a presumptive limit of 25 for Rule 36 requests to admit. These limits would have a beneficial effect on the costs and burdens in many cases. They would encourage parties to make discovery proportionate to the true needs of each case, while the parties can still secure needed expansion in individual cases by agreement or upon court motion.