ARNOLD & PORTER LLP

+1 202.942.5000
+1 202.942.5999 Fax

555 Twelfth Street, NW
Washington, DC 20004-1206

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

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Ladies and Gentlemen of the Committee:

We are litigators at Arnold & Porter LLP, an Am Law 100 firm that has more than 800 lawyers working in nine offices across the U.S. and Europe. More than half of our attorneys are litigators with an active trial practice in federal and state courts across the country. We represent parties in a diverse array of cases ranging from antitrust to products liability and more. We make these comments in our individual capacity as lawyers who work on litigation matters every day.

The existence of electronic data has changed the face of litigation, but the Federal Rules of Civil Procedure have not kept up. The amount of email, electronic documents and other data that are created every day and thus available for preservation, collection, review, and production in litigation is staggering. Equally staggering is that even after all of the data are secured, processed, reviewed, and produced to opposing parties, very little of it, if any, is ever presented at trial. Indeed, time and again, we have seen that the parties who demand such data too frequently do not even review most or all of it. The burden imposed by the requests themselves is often the goal, not obtaining substantive discovery.

Because of the astronomical costs of discovery, litigants far too often find it more economical to settle than to seek justice. This in turn sustains an industry of meritless filings and gamesmanship in which litigants and their counsel know that they may see a payday without ever being put to their proof -- simply because of the burdens that they can impose on the other side through discovery. This unnecessarily burdens both parties and the courts that face the constant flow of cases of questionable merit.

The current critical need to amend the Rules related to discovery has not only become a question of fairness, but implicates the credibility of the entire system.

In light of the above, we truly appreciate the work of the Federal Judicial Conference's Civil Rules Advisory Committee to modernize the Rules. The Committee has incorporated into the proposed amendments themes that will better promote the "proportionality" concept in order to help bring discovery back into balance, and eliminate the discovery games on document preservation issues that have become endemic. We therefore heartily support the Committee's efforts and the adoption of the amended provisions as a first step towards reigning in the unreasonable discovery costs of modern litigation.

Others have submitted detailed comments supporting the proposed amendments with citations to case law, studies and academic literature on the burdens imposed by the current discovery Rules. We will not repeat those arguments and citations but write instead to offer our perspective from the litigation "trenches" as every day we see -- on behalf of our clients -- the need for modernizing the discovery Rules.

In particular, we focus on the proposed amendments to Rule 26 and Rule 37, which we wholeheartedly support, and propose a few additional minor modifications to better effectuate what we understand to be the Committee's goals.

A. Rule 26 Should Be Amended to Further Emphasize the Concepts of Proportionality and Materiality

The concept of proportionality is critical to restoring a balanced approach to discovery. As such, we support the proposed amendments to Rule 26(b)(1), which further emphasize that courts should consider whether discovery "is proportional to the needs of the case."

As currently framed, the proposed rule would now require that discovery be "proportional to the needs of the case considering the amount in controversy, the importance of the issues . . . the parties' resources, the importance of the discovery in resolving the issue, and whether the burden or expense of the proposed discovery outweighs its likely benefit." We respectfully submit, however, that the amended Rule also should make clear that the "amount in controversy" factor alone does not justify expensive and burdensome discovery simply because a plaintiff has made a large demand. All would agree that a party should not be required to incur $50,000 in discovery in a $75,000 case. But we do not wish courts to come away with the

misimpression that expensive discovery should be the norm in cases involving claims for high damages simply because "amount in controversy" is first in the list of factors articulated. Unfortunately, we are frequently confronted with cases in which a party has generated an astronomically high damages claim or counterclaim, unsupported by the evidence, simply to gain settlement leverage. We ask that the Committee make clear that discovery in *all* cases should be evaluated based on "whether the burden or expense of the proposed discovery outweighs its likely benefit," with the amount in controversy simply informing that balance and not serving as a touchstone for the inquiry. We accordingly propose that the Rule contain an explicit Advisory Comment note that "a large amount in controversy alone should not justify a discovery request where the burden or expense of the discovery outweighs its likely benefit."

We also commend and strongly support the proposed amendment specifying that "discovery of inadmissible evidence should not extend beyond the scope of discovery simply because it is 'reasonably calculated' to lead to the discovery of admissible evidence." Far too often litigants have no explanation as to how the discovery they seek is relevant or conceivably admissible, but they fall back on the refrain that their requests are appropriate because they are "reasonably calculated to lead to the discovery of admissible evidence." That standard has, in practice, been used to swallow any reasonable limits on discovery.

We likewise support the proposed amendment to Rule 26(c) to expressly authorize courts to fairly apportion the expenses of document production. Currently, the "producing party pays" rule creates every incentive for the proponent of discovery to initiate broad discovery solely to impose pain on the other side and extort a settlement based on discovery costs and not the merits of the case. When our clients have succeeded in including cost-shifting provisions in their Rule 26(c) protective orders, opposing parties have been far more likely to seek relevant discovery but not discovery that serves only to increase costs and impose additional burdens. We have seen this effect with Rule 45 discovery requests as well: when we offer the subpoenaing party whatever discovery they want as long as they cover costs, requests are dramatically narrowed to what the party truly wants and needs. While the proposed amendment does not go as far as a "requestor pays" rule, the amendment should at a minimum encourage courts to take a more proactive role in managing discovery through cost shifting.

Taken together, these proposed amendments to Rule 26 will help streamline federal court litigation and -- through their persuasive influence on states -- state court litigation as well.

Our experiences support the importance of these reforms. Document requests our clients receive frequently include dozens of requests for "all documents" on exceptionally broad topics. Such broad requests often represent a deliberate effort to pressure our clients to settle for reasons wholly divorced from the merits of the claims. For example, earlier this year, in an ongoing antitrust litigation, opposing counsel stated explicitly that one of the topics for the first meet and confer session with each defendant would be the costs and burdens of discovery compared to the benefits of simply settling. It is notable that those same counsel were provided millions of pages of documents from defendants 18 months earlier as part of initial disclosures, but had not bothered to complete their review before propounding new document requests that called for literally every document each defendant had related to the products at issue and many requests that went far beyond even the products at issue.

Under the current rules permitting broad discovery that is "reasonably calculated to lead to the discovery of admissible evidence," time and again, discovery requests have almost no relation to finding admissible evidence. In one large antitrust litigation involving the financial industry, over *180 million pages* of documents were produced by all parties, but the recipient's trial exhibit list contained fewer than 9,000 of those documents.

In a recent class action litigation, document-related discovery costs were several million dollars in a case that settled for less than $10 million. At the time of settlement, the document review was projected to cost more than $1 million to complete (plus the discovery vendor's cost to host and produce documents). With document discovery projected to cost over $4 million, the defendant was highly incentivized to settle as soon as possible. Throughout the case, the plaintiffs never relied on more than a handful of defendant's documents and none were relevant to the substantive issues in the litigation.

The same is true in our products liability practice, where litigants have frequently sought broad discovery with the hope of pressuring their opponents to settle meritless cases, or in the hope of uncovering some inadvertent production misstep that could generate a sanctions request. For example, in one single-plaintiff product liability action brought against a firm client, defendants faced 30 sets of written discovery totaling 295 individual requests. All too often such discovery is not about ensuring production of relevant documents but simply finding ways to expand discovery burdens and pressure settlement.

These are mere examples of the type of gamesmanship that the proposed modifications to Rule 26 will help ameliorate by encouraging courts to become more actively involved in

discovery so as to ensure that burdens are manageable and appropriately tailored to the needs of the case.

B. Rule 37(e) Sanctions Should Be Available Only upon a Showing of Bad Faith.

We support the modifications of Rule 37(e) "to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." However, we propose that Rule 37(e) be written in the conjunctive -- limiting sanctions to conduct that is both "willful and in bad faith" -- to ensure that sanctions are levied only when a party knowingly destroys documents to thwart the discovery process and not due to an innocent preservation decision. We also are concerned that the proposed exception to this standard introduced in subsection (1)(B)(ii) -- that will allow for sanctions where the loss of information "irreparably deprives" a party of the ability to present or defend the action even absent willfulness of bad faith -- will swallow the Rule the Committee intends to adopt and propose eliminating the exception.

Today, counsel often focus as much on finding some hint of lost data as they do on discovering support for the merits of a claim or defense. Most initial discovery requests include a request related to preservation efforts. Attempts to obtain Rule 30(b)(6) depositions fishing for a potential gap in preservation efforts are common even when there has not been any suggestion of missing evidence material to the claims. If a gap is found, the opposing side uses that as leverage to extort meritless settlements.

As other commentators have summarized well, courts have applied corrective sanctions, ranging from monetary sanctions to adverse inference instructions at trial, without a showing of bad faith -- and even recognizing that the party acted in good faith. The consequence of such rulings is that companies and their counsel are frequently left with no choice but to engage in overly defensive preservation that is enormously costly and burdensome on the day-to-day operation of the business. Most of the documents preserved will never be collected, let alone produced, reviewed, and used at trial. The predicament in which litigants find themselves is made all the more difficult because claims and defenses frequently evolve throughout the course of a litigation.

By amending the Rules to explicitly require a finding of both willfulness *and* bad faith, the Committee would make clear that a party who makes a conscious, but entirely

innocent, preservation decision is not subject to the threat of draconian sanctions. We are concerned that absent such a change, parties seeking sanctions might wrongly argue that "willful" is ambiguous and would permit sanctions of a party that makes an intentional preservation decision resulting in the loss of evidence, no matter the legitimate reasons for the decision at the time. Expressly requiring a finding of both willfulness and bad faith would avert this unwarranted outcome while keeping in place the courts' power to sanction those parties who truly shirk their preservation obligations.

Finally, we also are concerned that the proposed exception in Rule 37(e)(1)(B)(ii) -- allowing for sanctions where the loss of information "irreparably deprives" a party of the ability to present or defend the action even absent willfulness of bad faith -- threatens to swallow the Rule. Again, we submit that a party who acted in good faith at the time a preservation decision is made should not be exposed to the risk of harsh sanctions based on hindsight. Moreover, although we understand that the intent is that this exception should apply rarely, it may provide parties a ready avenue for avoiding the Rule itself. This exception could invite a new round of gamesmanship, and thus we recommend against including subsection (1)(B)(ii) in Rule 37(e).

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We appreciate the opportunity to submit these comments and again commend and thank the Committee for its work on modernizing the Federal Rules of Civil Procedure to help ameliorate abuses of the discovery process going forward.

Respectfully Submitted

Daniel Pariser
Michael Rubin
Sharon Taylor
Joseph Barber