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Submitted Electronically Only

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, D.C. 20544

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

To the Committee:

I write on behalf of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker Donelson") in response to requests for public comment on the current proposed amendments to the Federal Rules of Civil Procedure ("FRCP") that were published for comment on August 15, 2013. Baker Donelson is a full-service law firm with more than 650 attorneys working from 18 offices across the Southeastern United States, including Washington, D.C. Approximately 300 of our attorneys are engaged primarily in litigation and thus have exposure to and experience with the FRCP.

Within the past decade, we have often observed that clients elect to settle and pay litigated claims that have little or no merit because of the broad scope and attendant expense of discovery. Unfortunately, one of the casualties of ever-escalating discovery expense also appears to be that hallmark of the American civil justice system: the jury trial. Baker Donelson supports the proposed FRCP amendments insofar as they attempt to address some of the inequities resulting from the current versions of Rules 26(b) and 37(e) and the construction thereof. Baker Donelson agrees generally with those comments expressed in the Public Comment dated August 30, 2013 and Supplementary Public Comment dated February 3, 2014, both submitted by Lawyers for Civil Justice. We write separately to comment specifically on certain of the proposed changes.

Regarding Rule 26, Baker Donelson supports transferring the proportionality factor in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) and hopes that such change will force courts, attorneys and parties to be more cognizant of that factor in fashioning, reviewing, and/or ruling on the reasonableness of discovery requests. Baker Donelson further supports the deletion of the term "subject matter involved in the action" from Rule 26(b)(1), so that discovery is limited to the parties' claims and defenses as pled in the action.

Baker Donelson believes the most significant change to Rule 26(b)(1) in practice will be the amendment to the penultimate sentence, which omits the "reasonably calculated to lead to the discovery of admissible evidence" language. This term has been used by both plaintiffs and defendants in all types of litigated cases to broaden unnecessarily the scope of discovery. We believe the proposed amendment, if understood and enforced by the courts, will go far toward alleviating excessively broad and expensive discovery forays.

Regarding Rule 37(e), Baker Donelson supports the change that will make the Rule applicable to all discovery and not solely to electronically stored information. There are three points that we specifically want to address in the proposed amendments to this Rule.

First, Baker Donelson supports changing the "or" to "and" in the proposed amendment to Rule 37(e)(1)(B)(i), so that a failure to preserve or produce information must be willful and in bad faith to subject a party to sanctions.

Second, Baker Donelson is concerned that the exception in Rule 37(e)(1)(B)(ii), which is to be applied to a "narrow group of cases" according to the Advisory Committee's May 8, 2013 Memorandum (as supplemented June 2013), will be construed too broadly by courts and swallow up the requirements of willfulness or bad faith in subsection (i). Baker Donelson supports the addition of an adjective such as "tangible" to that subsection as proposed by the Lawyers for Civil Justice.

Third, the five factors listed in Rule 37(e)(2) fail to include expressly a consideration of the relevance of the information that was not preserved to the claims and defenses in the matter, and further fail to include any consideration of whether the requesting party was prejudiced in the litigation by the failure. While courts may implicitly read the Rule as requiring a weighing of those factors, we support the express addition of them as primary considerations to guide courts in determining whether sanctions are appropriate.

In Baker Donelson's recent experience, less than ten percent of electronic information received from a client as potentially relevant and/or discoverable is actually produced in litigation in response to discovery requests. For example, recently a client transferred to Baker Donelson approximately 22 gigabytes of data, of which 1.9 gigabytes were produced during litigation. Baker Donelson believes this over-inclusive gathering of data, which it observes on a regular basis, is a function of (1) severely overbroad discovery requests that historically have been countenanced by the courts, and (2) clients' fears regarding potential sanctions for the inadvertent failure to preserve and/or produce electronically stored information. The proposed Amendments to the FRCP, if adequately followed by the parties, counsel, and courts, offer a reasonable resolution to these recurring problems.

Baker Donelson appreciates the opportunity to comment on the proposed amendments and further appreciates the hard work that the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure have undertaken to draft these thoughtful amendments.

Very truly yours,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

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