Ballard Spahr LLP

1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Mark S. Stewart
Tel: 215.864.8225
Fax: 215.864.8999
stewartm@ballardspahr.com

January 16, 2014

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

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Committee:

On behalf of Ballard Spahr LLP, thank you for the opportunity to comment on the proposed changes to the Federal Rules of Civil Procedure regarding discovery that were approved for publication and comment in June 2013.

Ballard Spahr is a national law firm headquartered in Philadelphia, PA with more than 500 attorneys practicing in 14 offices across the country. Among other practices, we specialize in representing businesses in complex litigation matters that involve significant electronic discovery. As counsel in such matters, we are very familiar with the ways in which creative counsel can exploit the current Federal Rules to impose unfair and unbalanced discovery burdens on our business clients. For the reasons set forth in more detail below, we strongly support the Advisory Committee's proposed amendments to Rules 26(b)(1) and 37(e), but have concerns about the proposed amendment to Rule 1.

The proposed amendments to the discovery rules should help curb abusive discovery practices that have become common in federal litigation. In particular, the amendments should ameliorate the problem of sweeping, overly broad discovery demands. The rising cost of electronic discovery makes such demands an increasing problem for litigants, particularly businesses.[1] A recent study concluded that the median cost of electronic discovery is $26,000 per gigabyte of data collected, processed, and reviewed.[2] Given the widespread use and storage of electronic communications within a typical corporate enterprise, it is not uncommon for a corporate witness to have over ten gigabytes of data stored in his or her email accounts and hard drive. It is therefore no

[1] According to a leading market report, the U.S. electronic discovery market was valued at $3.0 billion in 2010 and is expected to grow to $7.2 billion by 2017. *eDiscovery (Software and Service) Market: Global Scenario, Trends, Industry Analysis, Size, Share & Forecast*, 2010–2017 (Transparency Market Research, 2012).

[2] Nicholas M. Pace & Laura Zakaras, *Where the Money Goes* 21 (Rand Institute for Civil Justice, 2012), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

surprise that in a survey of 45 cases spanning the range from large to small, a Rand Institute study reported a median electronic discovery cost of $1.8 million.[3]

The high cost of electronic discovery distorts the litigation process, often forcing litigants to choose between paying large discovery bills or settling cases that they otherwise would not settle. A survey conducted by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System found that 71% of the nearly 1500 lawyers surveyed believe that litigation costs, and not the merits of a case, determined whether the case settles.[4] Indeed, the high cost of discovery and its "abuse" were factors that led the Supreme Court in *Bell Atlantic Corp. v. Twombly* to move away from the traditional notice pleading standard to the more robust "plausibility" requirement to state a claim.[5] Despite the altered pleading standard and the development of new tools to streamline discovery, overall costs of discovery will continue to rise because the volume of data subject to production is increasing exponentially.

The nature of modern electronic discovery thus tilts toward an asymmetrical burden. Many plaintiffs—in particular, plaintiffs in mass tort or class-action securities cases, and patent assertion entities—generally do not bear anywhere near the same discovery burden as corporate defendants in those cases. Overbroad discovery requests increase the defendants' burden even more and often force early settlement of even non-meritorious claims. Moreover, plaintiffs' counsel in such cases frequently focus on the discovery process itself as a means of obtaining strategic leverage, using corporate representative depositions and questionnaires to obtain information about the way defendants intend to conduct electronic discovery, hoping to find even a shred of evidence upon which to base a spoliation claim.

In short, discovery gamesmanship has become a widespread feature of litigation in federal court, wasting party resources and distracting the court from the merits of the case. We therefore laud the Committee's willingness to consider amending the Federal Rules to rein in these abusive practices. Below, we express our support for, and a few concerns about, specific aspects of the current proposal that will impact litigants' ability to use discovery as a tool to raise litigation costs and avoid resolution of claims on the merits.

- **The proposed amendment to Rule 37(e), which authorizes sanctions only for "willful or bad faith" conduct that results in "substantial prejudice," will provide needed uniformity and reduce discovery gamesmanship.**

The current iteration of Rule 37(e) provides a safe harbor for parties that fail to produce relevant electronically stored information ("ESI") lost due to the "routine, good-faith operation of an electronic information system." In practice, however, Rule 37(e) has not been widely applied and has done little to stem the tide of discovery sanctions that arise out of the failure to preserve data lost

---

[3] *Id.* at 17.

[4] Am. Col. of Trial Lawyers et al., *Final Report on the Joint Project of the Task Force on Discovery of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System* 9 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

[5] 550 U.S. 544, 558–59 (2007).

through simple technological mistakes. One reason Rule 37(e) currently provides so little protection for innocent loss of ESI is that the safe harbor applies only in a limited situation—the "good faith operation of an electronic information system"—which has proven to be a nebulous and confusing standard for federal courts to apply. Moreover, the current rule does not take into account either the intent of the party that has lost relevant ESI or whether the loss of such ESI prejudiced the receiving party, even though these are generally the factors that courts focus on in weighing sanctions motions.

In the absence of a clear rule governing the imposition of sanctions for the loss of ESI, federal courts across the country have developed inconsistent standards. Some courts have held that any destruction of documents under any circumstances following notice of litigation makes sanctions appropriate.[6] Others consider whether the litigant instituted a document retention policy,[7] took steps "proportional" to the case and "consistent with clearly established applicable standards,"[8] or instituted reasonable precautions to secure potentially relevant documents.[9] Still others focus on a litigant's state of mind, with some requiring bad faith to impose sanctions,[10] and others deeming less culpable motives sufficient.[11]

Because of these disparate standards, companies that operate in multiple jurisdictions have adopted strategies that err on the side of over-preservation of ESI, which drives up discovery costs. The uniform standard contemplated by the proposed amendment to Rule 37(e) will allow companies to formulate a single strategy geared toward complying with that national standard. What is more, a federal standard likely will impact state court practice. As seen with past state responses to the creation of federal standards, codifying sanction-worthy conduct in the Federal Rules will increase uniformity between federal and state courts, too.[12]

---

[6] *See In Hous. Rights, Ctr. v. Sterling*, No. 03-cv-859, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005); *Pandora Jewelry, LLC v. Chamilia LLC*, No. 06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008).

[7] *Haynes v. Dart*, No. 08-4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).

[8] *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

[9] *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004).

[10] *See Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1321–23 (S.D. Fla. 2010); *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 679 F. Supp. 2d 1001, 1035 (N.D. Ill. 2010); *In re Global Technovations, Inc.*, 431 B.R. 739, 780 (Bankr. E.D. Mich. 2010); *Wright v. City of Salisbury*, No. 07-cv-0056, 2010 WL 126011, at *2 (E.D. Mo. Jan. 7, 2010); *Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150, 152 (D.N.J. 2009).

[11] *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002); *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite, Inc.*, No. 07-cv-0894, 2010 WL 743792, at *15 (S.D. Cal. Mar. 1, 2010); *Pipes v. UPS, Inc.*, No. 07-cv-1762, 2009 WL 2214990, at *1 (W.D. La. July 22, 2009); *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 123 (D. Me. 2000); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 179 (D. Md. 2008).

[12] Following the proposal and adoption of eDiscovery requirements into the Federal Rules in 2006, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Louisiana, Maine, Minnesota, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Utah, Vermont, Washington, Wisconsin, and Wyoming adopted similar eDiscovery requirements.

Restricting the scope of potentially sanctionable conduct should also have tangible benefits for plaintiffs. Before the use of social media became widespread, plaintiffs' counsel (particularly in asymmetrical cases) generally did not have much reason to pay attention to the possibility of being sanctioned. Today, the increasing importance of social media in cases brought by individuals changes that calculus. As one court recently observed, there is "no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms."[13] Moreover, studies show that the perceived practical benefit of filing spoliation motions has most probably been overstated. A 2010 study conducted by the Federal Judicial Center demonstrated that spoliation motions are infrequently granted, generally double the time it takes to resolve a case, and make it twenty-seven times more likely that the case will proceed to a trial.[14] Limiting sanctions to intentional misconduct will reduce this expensive and time-consuming motion practice and facilitate efficient case disposition that will ultimately benefit both plaintiffs and defendants.

We respectfully recommend two additional changes to Rule 37(e). First, the proposed exception in subsection (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 or bad faith, may paradoxically undermine the amendment's purpose. The exception should theoretically apply only rarely, but courts may use the exception to avoid the rule. Requiring intentional misconduct by the litigant accused of spoliation is necessary to achieve the amendment's desired effects. We accordingly recommend against including subsection (1)(B)(ii) in Rule 37(e).

Second, the Committee should revise the proposed language to read "willful *and* bad faith." Without that change, some courts may find the willfulness component satisfied because a party had purposefully acted in a way that caused data to be lost without intending to prejudice a litigant. This is not an illusory concern. In a recent case, the plaintiff, for reasons wholly separate from the litigation, deleted computer files to free server space six months after sending a notice of claim.[15] Despite finding that the plaintiff acted without a "malevolent purpose," the court found that the intentional destruction of evidence after the duty to preserve attached amounted to willful destruction and sanctioned the plaintiff. By revising the language to authorize sanctions only for "willful *and* bad faith" conduct that prejudices the opposing party, the Committee would avoid such harsh results

---

[13] *Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 12-cv-00127, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012).

[14] Emery G. Lee III, *Motions for Sanctions Based on Spoliation of Evidence in Civil Cases* 5 (Fed. Judicial Ctr. 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf.

[15] *Sekisui American v. Hart*, No. 12-cv-3478, 2013 WL 4116322, at *6 (S.D.N.Y. Aug. 15, 2013). The District Court for the Southern District of California's analysis in a recent case also illustrates the danger of the "willfulness or bad faith" phrasing. Analyzing a case under the circuit law that sanctions are available "not only for bad faith, but also for willfulness or fault," the court observed that "bad faith must require more than destruction with notice of relevance" and adopted a definition of "bad faith as intent to impede the opposition." *In re Hitachi Television Optical Block Cases*, 08-cv-1746, 2011 WL 3563781, at *13 (S.D. Cal. Aug. 12, 2011). The court implicitly endorsed a definition of "willful" that does not require any intent to prejudice the opposing party.

and restrict sanctions to those cases in which the party destroying evidence did so with the aim of disadvantaging the opposition.

- **Proposed Rule 26(b)(1) includes a much-needed proportionality requirement that will greatly reduce the burden and expense of discovery without depriving litigants of necessary information.**

Discovery is not an unfettered right. Courts have recognized the need to rein in "fishing expedition[s]"[16] and to exercise "their power to restrict discovery" to reconcile the discovery process with Rule 1's goals of "just, speedy and inexpensive determination" of a matter.[17] The proposed changes to Rule 26(b)(1) will aid courts in doing so by clarifying that litigants can seek to discover only *relevant* information and that proportionality must factor into the discovery plan.

Under the current version of Rule 26(b)(1), relevancy "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[18] This construction has long been used by litigants to justify overbroad demands, best exemplified in the familiar and boilerplate request for "any and all documents" related to a particular topic. The fact that such requests are defensible under the current rules discourages more realistic negotiations about the proper scope of discovery in a given case and frequently results in the production of huge volumes of irrelevant data.

Litigants sometimes seek this irrelevant data to expand the scope of the issues in a case or to find evidence for other cases. For example, in mass tort litigation, and in particular in pharmaceutical litigation, discovery has become a commodity. In such litigation, plaintiffs' firms across the country typically share general liability documents and often seek discovery of company documents concerning drugs not specifically relevant to their claims in order to supplement discovery in, or create a basis to pursue, other cases involving the same defendant. In other instances, the volume of discovery produced in multi-district litigation and coordinated proceedings becomes a basis upon which plaintiffs' firms allocate global settlement costs and fees.

The proposed changes to Rule 26(b)(1) would allow parties to obtain discovery that is relevant and necessary to pursue or defend their claims, while eliminating wasteful discovery that only decreases the speed at which the case proceeds and increases its expense. Requiring litigants to be more specific about the information they seek will also force more fruitful negotiations about the proper scope of discovery.[19] Litigants will no longer be able to contend that broad discovery requests are appropriate because they are "reasonably calculated to lead to the discovery of admissible

---

[16] *See, e.g.*, *Woodward v. Emulex Corp.*, 714 F.3d 632, 636 (1st Cir. 2013) (affirming decision to limit discovery to prevent "a fishing expedition into possibly barren waters"); *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1163 (10th Cir. 2010) ("Rule 26(b), although broad, has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition . . . .").

[17] *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (acknowledging the need to firmly apply "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant'").

[18] *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

[19] The Federal Rules already provide a forum for such negotiations. *See* Fed. R. Civ. P. 26(f).

evidence." The proposal would also reduce the focus on how a company is conducting discovery until such a focus is justified by information suggesting that spoliation has occurred.[20]

To further these goals, we also suggest that the Committee consider adding a materiality requirement to proposed Rule 26(b)(1), which would then read in relevant part "any non-privileged matter that is relevant *and material* to any party's claim or defense." Adding this materiality requirement would require parties to focus on the facts and issues central to the claims and defenses, providing litigants and courts with a better understanding of the proper scope of discovery. Alternatively, the Committee could include in the Notes to Rule 26 guidance that, when considering whether request information would be "relevant," courts should consider whether the information would be "material" to a claim or defense.

- **The proposed inclusion of a duty to cooperate in Rule 1 is unnecessary and may lead to abusive motion practice.**

Finally, we recommend *against* including a duty to cooperate in the text of Rule 1. That duty is already a first principle of the discovery process. The spirit of Rule 26(f) mandates that parties cooperate in discovery, and Rule 37(f) permits sanctions against a party that fails to participate in good faith in developing a discovery plan. Moreover, over 120 U.S. District Courts have signed on to the Sedona Cooperation Proclamation,[21] and parties that fail to cooperate in the discovery process already face potential sanctions.[22] A more formal duty to cooperate is not necessary when litigants already have an obligation to do so.

Indeed, because the proposed amendment does not clearly define cooperation, the amended version of Rule 1 may very well provide a new basis for motion practice without altering the parties' obligations in a way that materially advances the discovery process. The discovery process in federal court was intended to be, and works best, as an extrajudicial process.[23] Imposing new and

---

[20] For example, the proposed change would curtail the use of early Rule 30(b)(6) depositions for the purpose of obtaining detailed information about a litigation hold before any evidence of a discovery violation has surfaced. Information typically sought in these depositions includes: the name of the individuals who received the hold; when the hold was issued; what documents were covered in the hold; the manner of hold distribution and tracking; and any known examples of data destruction or non-compliance with the litigation hold. Formal discovery of a party's process for preserving documents is not relevant until there has been some evidence of a discovery violation. Before that point, the proper forum for questions about the mechanics of the discovery process is during the Rule 26(f) conference and not Rule 30(b)(6) depositions. *See* Comment to Fed. R. Civ. P. 26(f).

[21] The Sedona Conference, *Cooperation Proclamation*, 10 Sedona Conf. J. 331 (Nov. 2009 Supp.).

[22] *See, e.g.*, *In re Seroquel Prods. Liability Litig.*, 244 F.R.D. 650, 661 (M.D. Fla. 2007).

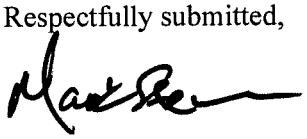
[23] Fed. R. Civ. P. 26(g) advisory committee's note (1983); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 734 (3d Cir. 1995) ("Since 1938, civil discovery has been an attorney-initiated, attorney-focused procedure. The vast majority of federal discovery tools operate, when used properly, almost entirely without the court's involvement.").

unnecessary standards on litigants threatens to increase gamesmanship and embroil courts in manufactured discovery disputes.

By and large, the rule changes currently before the Committee will make it more likely that disputes will be resolved in just, speedy, and cost-efficient ways. With a few additional changes, as this comment proposes, the discovery rules will go even further toward aiding in the accomplishment of Rule 1's worthwhile goals.

We thank the Committee for the chance to comment and urge it to adopt the proposed amendments with the modifications suggested herein.

Respectfully submitted,



Mark S. Stewart
Chairman