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Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Campbell and Members of the Advisory Committee:

As a litigator with more than 20 years of experience, I have extensive experience litigating complex and class action litigation. My practice is principally on behalf of investors and consumers; I also have experience representing companies as plaintiffs and defendants.

RELEVANT EXPERIENCE

Over the last 11 years, I have developed extensive experience in the area of e-Discovery and been deeply involved in the development of best practices for this quickly-evolving area of law and technology. In addition to building a successful e-Discovery practice at Milberg LLP, I served for 5 years as Chair of Working Group 1, focused on Electronic Document Retention and Production, of The Sedona Conference®, and now serve as Chair Emeritus. I am a member of the Advisory Board of Georgetown Law's Advanced eDiscovery Institute. I am a member of the Advisory Committee to the Judicial Improvements Committee for the District Court for the Southern District of New York, and a member of the Discovery Subcommittee, for the development of the Southern District of New York's Pilot Program for Complex Litigation; in that capacity, I served among the select group of lawyers responsible for drafting aspects of the Pilot Program, including, in particular, the Joint Electronic Discovery Submission/Order. I have also been an active observer of the Federal Rules amendment process, attending most meetings, engaging in active dialogue and providing written and oral comment, including for the 2006 Amendments. Most recently, I attended and provided oral testimony at the February 7, 2014 hearing relating to the proposed amendments to the Federal Rules of Civil Procedure relating to

discovery. These comments, which are my own and provided in my personal capacity based on my experience, are intended to supplement that testimony.

PRESUMPTIVE LIMITS ON DEPOSITIONS, INTERROGATORIES AND REQUESTS FOR ADMISSION

As of this writing, the Committee has received more than 1,900 written comments, with a decisive majority being in opposition to the proposed amendments. Many of the submissions focus on the reductions of the presumptive limits on the number of depositions, interrogatories and requests for admission – these particular changes seem to have become the primary magnet for comment, perhaps because they are an easy target and easiest to understand insofar as immediate and obvious impact. I, too, oppose these proposals for the following reasons, among others:

- An across the board reduction in the presumptive limits of depositions, interrogatories AND requests for admission by its very nature limits access to the truth. Each of these discovery mechanisms provides a means of gathering facts to support and/or defend one's claims. These mechanisms are intended to complement one another. In some instances, these mechanisms are used in tandem; in others, they are used for different discovery purposes or different aspects of a particular case.

- Much discussion over the last several years has focused on discovery of electronically stored information ("ESI"). In order to manage, and even agree to reduce, the scope of production, requesting parties often strive to understand the sources, forms and locations of relevant and responsive information. Depositions, pursuant to Rule 30(b)(6), have proven to be a useful tool. In fact, this tool, which once was ignored or at least underutilized, has found new footing and proven to be particularly useful in relation to discovery of ESI. The reduction in the number of depositions, with no carve-out for depositions pursuant to Rule 30(b)(6), will necessarily impact the proactive and effective use of depositions under Rule 30(b)(6), such that disputes about discovery and "discovery about discovery" will be inevitable.

- There has been no showing of any empirical evidence (nor, to my knowledge does any exist) that these discovery mechanisms are overused or abused in any significant number or particular category of cases, and thus there is no evidentiary support for the proposed reduced limits that would have a transubstantive effect. In other words, to the extent there is sufficient reliable data to show abuse of these discovery mechanisms in certain types of cases such that the presumptive limits should be reassessed, that alone does not warrant a change that would affect all cases, regardless of their type and size. Moreover, to the extent such data exists, I would venture to guess that the results would support an increase rather than a

decrease in the presumptive limits for these discovery tools (*e.g.*, in complex and class actions).[1]

- Additional limitations on discovery inevitably will result in increased motion practice, further constricting the ability of the judiciary to engage in the early, active case management that is truly needed to control the costs and burdens of discovery in large, complex cases.[2]

- Reducing the current limits will force requesting parties in need of more than the limits to negotiate for more. Negotiating up is always harder than negotiating down. One might analogize it to the pressures associated with negotiating under some form of duress, *i.e,* from a position of weakness rather than strength. In having to negotiate up, a requesting party will necessarily give up a bargaining chip that might be otherwise necessary to protect a client's substantive rights or interests.

- Although presumptive limits for certain discovery mechanisms permitted under the Federal Rules were discussed during the 2010 Duke Conference, they did not appear as part of the package for proposed amendments until relatively late in the development process; in contrast, the principal focus of the Committee's work had been on the issue of over-preservation and a proposed rule to govern sanctions as a proposed solution.[3] The topic of presumptive limits has attracted great attention, and indeed opposition, so much so that proposed Rule 37(e) regarding sanctions has been the subject of significantly less attention during this public comment period. I am concerned by the distraction that the presumptive limit topic has posed given the fact that the focus of the Committee's work over the last 3+ years has principally been proposed Rule 37(e).

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[1] There certainly has been no empirical data to justify a reduction in the number of hours of a deposition from 7 to 6. Such a reduction will, by its terms, allow less substantive information to be obtained during each deposition; increased gamesmanship and resulting motion practice are likely to further reduce the substantive utility of depositions and increase costs.

[2] The need for early, active case management was a hot topic during the 2010 Duke Conference and has remained an area of broad consensus, supported by many lawyers representing various constituencies. Given the already stressed resources of the judiciary, such case management can only occur in the absence of unnecessary distractions, such as motion practice about presumptive limits or other discovery disputes which can otherwise be resolved through cooperation.

[3] The Discovery Subcommittee mini-conference to consider proposals on preservation issues was held in September 2011; the Duke Subcommittee mini-conference to consider changes to presumptive limits and other potential amendments was held in October 2012. *See also* Addendum to Agenda Materials for the Meeting of the Advisory Comm., March 22-23, 2012, containing extensive submissions on preservation issues from the U.S. Dept. of Justice, Center for Constitutional Litigation, The Sedona Conference Working Group I Steering Committee, Lawyers for Civil Justice and Thomas Allman. *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

RULE 26 – PROPORTIONALITY AND SCOPE OF DISCOVERY

I also oppose the proposed amendments to Rule 26 governing proportionality and scope, which will place unfair burdens on requesting parties and will also lead to extensive motion practice on an uneven playing field. I readily acknowledge that the concept of proportionality is currently in Rule 26(b)(2)(C). The fact that some lawyers and courts have failed to recognize this fact is not sufficient reason to now alter the rule.[4] Education and emphasis perhaps through the Advisory Committee Note, are more appropriate solutions.

There simply is no doubt in my mind that the "moving up" of the concept of proportionality and the ordered articulation of the factors to be considered in Rule 26 will lead to discovery disputes which an already overtaxed judicial system cannot handle. *See supra* n.1. Responding parties will use this change as an arrow in their quiver to not only limit but perhaps even prevent discovery at an early stage in litigation, when the requesting party is not yet in possession of adequate information to respond to the enumerated criteria. Literalists, including some judges, will apply the criteria in prioritized sequence. In addition, I, along with many other critics, believe that the proposed changes to Rule 26 will result in a shifting of the burden from responding party, who is in possession of the very information sought, to the requesting party, who is likely unable to meet that burden. Such a shift is contrary to the historic intent and application of discovery under our justice regime and will necessarily limit if not prevent access to justice.

I also oppose the limitation on the scope of discovery. To limit discovery to the claims and defenses in a litigation will lead to objection and/or preclusion of discovery of meaningful facts and events. Two simple examples are: (i) corporate policies or practices that have an overarching effect or are otherwise relevant to an entity's marketing or sale of a particular product at issue in the litigation; and (ii) actions or events that occurred but are outside of an asserted "class period" but which clearly are pertinent to satisfying one's burden of proof. Again, there simply has been no compelling data to justify the change in the scope of discovery; at best, there have been the cries of excess (much like Chicken Little, that "the sky is falling") -- surely this is insufficient to justify such a drastic rule change.

RULE 37(E) – SANCTIONS AND OVER-PRESERVATION

I also oppose proposed Rule 37(e), which, in my opinion, is the most complex and challenging of the pending amendments. The issues of preservation and sanctions have been subjects of attention since long before the development of the current proposal. Indeed, preservation was a topic that was considered but ultimately set aside in the review process

[4] See Statement of Arthur R. Miller before the Advisory Comm. (Jan. 9, 2014) ("Rule amendments should be undertaken only with great caution, respond to a demonstrated need, and be adopted only [in] the absence of less Draconian solutions."). *Available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0386.

leading up to the 2006 amendments, considered by some to be too thorny to tackle and, by some others, untouchable under the regime of the Rules Enabling Act.[5]

Not surprisingly, development of the current proposal has been extraordinarily difficult and taken several years to articulate. As late as April 2013, the Committee was still considering alternative versions of the proposal for publication and wordsmithing continued until publication. The public comments submitted since the release of the August 2013 package of proposed amendments about 37(e) reflect a vigorous debate about the most fundamental issues, such as the difference between curative measures and sanctions, culpability standards and the bearer of the burden. Who bears the burden of proof for each of the elements of proposed Rule 37(e)? Some lawyers posit that this point is unclear but hope and presume it is the requesting party seeking the sanction, waiting with bated breath for its enactment; and others, even some Committee members, have suggested that the burden resides with the party opposing the sanction request. Of course, lack of clarity can only lead to increased motion practice and should raise a red flag. More importantly, imposing the burden on the requesting party, who lacks the information to satisfy the burden, is simply unjust.

If it is, in fact, the intent of the amendment to place the burden on the requesting party, that point should be stated clearly in the proposed rule and public comment on this very issue should be invited. I have no doubt that opposition to the Rule would be far more intense even than it has been. The burdens placed on litigants seeking to right wrongs should not be further increased, and access to justice further restricted. In this regard, I share the sentiments expressed by Professor Arthur Miller, Judge Scheindlin and Judge Francis, to name just a few.

As I and others have reported, even the Sedona Conference Working Group 1 – which exists for the very purpose of forging consensus on discovery issues – after months of work, could not reach consensus on an acceptable rule governing sanctions. Although the Steering Committee, in contrast to the Working Group, ultimately did submit a proposed rule founded on "good faith" (rather than "bad faith" as in the proposed amendment), that process was also extremely difficult and the end result was a proposal that that did not reflect unanimous agreement as to the rule and some of its subparts. The disclaiming footnote was added to the submission for this reason and the significance should be readily apparent.

The divide on this proposal between those who represent corporations and those who promote civil, consumer and investor rights is not just large – it is deeper and darker than I have seen on any other proposed change to the rules governing discovery. That, in and of itself, should lead the Committee to reconsider this proposal – not only the articulation of the rule but whether the rule is even warranted – which I strongly contend, it is not.

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[5] *See* Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 Rich. J.L. & Tech.. 9 (2007) at ¶ ¶ 12-13, available at http://law.richmond.edu/jolt/v13i3/article9.pdf.

To the extent that costs of preservation and discovery are higher than they need to be, the fault lies not within the rules, but rather with those who use, apply and enforce them and with the way we all create and manage (or choose not to manage in a reasoned and defensible way) information.[6] The empirical evidence that proponents argue support this rule does not, in fact, show that the system is broken. A three-year study funded by a group of corporate counsels to Fortune 100 companies, conducted by Professor William Hubbard, apparently yielded no useful data on the costs of preservation or discovery (certainly, no data that Professor Hubbard shared with the Committee when he testified on February 7, 2014).[7] Indeed, Professor Hubbard testified that the rule would likely, at best have a "modest" or even "small" impact on corporate data preservation in the context of litigation. This is consistent with the acknowledgement of some corporate counsel that the proposed amendment, even if enacted, will make NO difference in their preservation practices.[8]

Simply put, the rule will not alleviate over-preservation. Education and information governance is the key to controlling preservation costs – indeed there is *finally* a real movement afoot. The Sedona Conference is actively working in this area. Information governance was the hottest topic at Legal Tech earlier this month in New York. Just as TAR (technology assisted review), last year's hot topic, has proven to be a key solution to cutting down discovery costs and making discovery far more efficient for both producing and requesting parties, advances in information governance will do the same.

If, in the future, empirical evidence reveals a problem that can be addressed by a rule, then a rule of the proper scope and application may be warranted. But it is clear that Rule 37(e) as proposed is not the solution to any current problem. There is no valid reason to insulate producing parties, including companies who have the ability and the means to manage their data, from consequences of destroying relevant evidence.

As Judge Francis wrote in his comments (posted on January 14, 2014), this proposal will not solve the problems it was intended to address. It will create greater uncertainty about preservation and sanctions than currently exist. And it will not simply, as Judge Francis wrote, undermine public perception of the fairness of our nation's justice system, it WILL undermine the fairness of the system.

If a decision is made to proceed with an amendment to Rule 37(e), I urge the committee to use Judge Francis' thoughtful proposal, based on real and repeated experience with these

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[6] *See* Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not In Our Rules...*, 2011 Fed. Cts. L. Rev. 4 (February 2011).

[7] William H.J. Hubbard, Preservation Costs Survey Summary of Findings (February 5, 2014), distributed at the Advisory Comm. hearing on February 7, 2014.

[8] *See, e.g.,* Testimony of Lily Claffee, General Counsel, U.S. Chamber of Commerce before the Advisory Comm. (Nov. 7, 2014) ("[A]s a result of the committee's suggested amendments, I'm not going to change how I preserve.). Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf.

issues, as a baseline for Committee discussion and work, with a new public comment period to follow in the future.

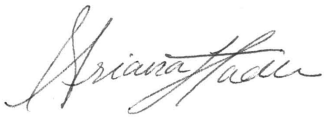
RULE 1 - COOPERATION

I fully support the incorporation of cooperation into the Rules, but would urge the Committee to fully endorse the concept by placing it in the text of Rule 1 and using the Committee Note to explain what is expected. Cooperation, when sincerely applied, is widely acknowledged to be the best, if not the only, way to guard against excessive discovery. The argument that cooperation should not be added to the aspirational principles of Rule 1 because the term is amorphous is unconvincing. Cooperation is no more amorphous than "speedy" or "inexpensive," and certainly no harder to define than "just." Indeed, it is worth noting that "just," given primary placement in Rule 1, is implicitly the ultimate and most important goal of the Federal Rules. Cooperation goes hand in hand with this concept, seeking to attain a level of fairness. As officers of the Court, we should all seek to practice with such a goal in mind.

CONCLUSION

Again, I have had the opportunity to personally witness the hard work and commitment of the members of the Committee since the Duke Conference, particularly in connection with proposed Rule 37(e), and for that I thank each of you. I consider myself fortunate to live in a country where I personally have the opportunity to participate as an active observer and contributor to the process of developing the law and best practices. I am hopeful that the next step in this process will be in favor of ensuring access to justice and resolving cases on their merits through the truth-seeking process upon which our system is based and we as citizens rely.

Sincerely,



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