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Via Electronic Submission
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- Supporting Adoption with Certain Modifications

Dear Members of the Advisory Committee on Civil Rules:

Thank you for the opportunity to provide comments regarding the proposed amendments to the Federal Rules of Civil Procedure ("proposed amendments") currently under consideration by the Advisory Committee on Civil Rules ("Committee"). The proposed amendments are of significant importance, and I appreciate the Committee's dedication to improving the rules governing our discovery process.

By this letter, I would like to reinforce and supplement my remarks at the Hearing in Dallas on February 7, 2014, particularly with regard to my general support for the proposed amendments to Rule 37(e), with certain modifications.

Background

I am a partner of Nelson Mullins Riley & Scarborough LLP, and lead the Firm's information governance and electronic discovery practice, Nelson Mullins Encompass.[1] My practice focuses primarily on discovery, information management, products liability and business

[1] Headquartered in Columbia, South Carolina, with dedicated review facilities with a combined capacity to seat over 300 review professionals in Columbia, South Carolina and in Nashville, Tennessee, Nelson Mullins Encompass serves as enterprise e-discovery and discovery and review counsel for Fortune 500 companies and companies in heavily regulated industries. Our discovery and review counsel work includes advocating for clients on discovery-related issues, advising on information governance practices, and handling discovery-related review projects for clients in connection with internal investigations, government investigations, third party subpoena responses, and a range of litigation, including multidistrict, patent, and commercial litigation.

litigation. I help clients develop defensible information governance practices and electronic discovery strategies, advise and advocate in connection with discovery protocols and process, lead our review counsel services, and prepare company witnesses to address challenging data-related issues, in addition to providing other discovery and review counsel-related services. I have served as enterprise electronic discovery counsel, global discovery and review counsel, national coordinating counsel, and as local counsel for clients in connection with discovery-related issues in litigation.

In my role as discovery and review counsel, I have represented clients across various industry sectors, including pharmaceutical, healthcare, technology, manufacturing, and financial. I am very familiar with the challenges clients face in connection with defensibly managing data that is being produced at ever-increasing rates by global businesses in a fast-paced environment. I offer my comments from this perspective.

Statement of Support

As stated during my recent testimony at the Dallas hearing, I am generally supportive and very appreciative of the Committee's work on the proposed rules. For purposes of this letter, my comments below focus on my support for proposed amendments to Rule 37(e), with certain modifications. In addition, I am also generally supportive of written comments regarding the proposed amendments filed on August 30, 2013 and February 3, 2014, by Lawyers for Civil Justice ("LCJ").[2] These comments are a cogent presentation of the importance of and need for the proposed amendments to help minimize the costs, burdens and business disruption associated with discovery in today's business and legal environment. They also identify concerns presented by certain elements of the proposed amendments, and offer reasonable and measured solutions that would help address practical realities of implementing discovery and information governance programs in today's business environment.

There is a growing consensus that discovery costs affect the outcome of cases and unfairly marginalize the importance of merits in litigation decision-making. The proposed amendments can help place greater emphasis on the actual controversies before our courts and stem the rising tide of litigants opting for alternate forms of dispute resolution or settling cases merely to avoid the needless volatility associated with litigation. The proposed amendments also represent a significant step forward in addressing the challenges presented by the enormous growth in data and advancements in business-related technology and related work practices in today's global business environment, and offer promise for companies seeking to implement reasonable and defensible information governance programs.

Rule 37(e) Offers Promise to Address Preservation Paralysis

In my role as discovery counsel, I routinely see clients in "preservation paralysis mode." This could be: a healthcare company that can't confidently rule out whether dispose of archived

[2] LCJ's public comments and supplementary public comments of August 30, 2013 and February 3, 2014, respectively, can be found at: http://www.regulations.gov/#!docketBrowser;rpp=10;po=10;np=15;D=USC-RULES-CV-2013-0002.

media of no business value, or a pharmaceutical company with three-fourths of its product lines subject to perpetual holds, or smaller clients facing data and information challenges in connection with company decisions to migrate from one email system to another or from Windows 7 to Windows 8.

Data is growing at astounding rates. Some recent statistics include:

- A 2011 report notes that 90% of the world's data was created in the last two years[3]
- For most organizations, information volume doubles every 18-24 months[4]
- In 2013, business email accounts total 929 million mailboxes[5]
- In 2013, the majority of email traffic comes from business email, which accounts for over 100 billion emails sent and received per day[6]

This explosive data growth, together with unchecked, fear-driven over-preservation places significant strain on companies striving to strike the right balance and implement fair, well-reasoned approaches to business information management, litigation readiness programs and discovery-related practices. During the hearing in Dallas and at prior hearings, some witnesses suggested that the Committee might wait to see whether technology might solve the problems that technology is helping to create. I disagree with that sentiment, and do not think that technology will solve these problems. I urge the committee to continue to advance its efforts in connection with the proposed amendments, and outline below some specific comments for consideration in connection with proposed Rule 37(e).

Overall, the proposed revisions to Rule 37(e) represent a significant improvement over the current Rule, and I support the Committee's aim to establish a uniform national sanctions standard. However, Rule 37(e)(1)(B)(i) would allow for sanctions when a party's actions "caused substantial prejudice in the litigation and were willful *or* in bad faith." In my view, the Rule's use of the conjunction "or" collapses the distinction between actions that are intentional, but performed in good faith, and those actions that are intentional and performed in bad faith.

An intentional, good faith action should not serve as the basis for sanctions. However, as the Rule is currently drafted, litigants could perform perfectly well-intentioned preservation measures but face sanctions based on arguments by opposing counsel that these preservation measures somehow caused substantial prejudice. Because of the way in which electronic information-management systems operate, it is literally impossible to prevent all types of data loss. Despite this, the "or" language could provide a basis for sanctions if, at some future point in time, it turns out that some data lost arguably had some relevance to the litigation. This risk will continue to create undue burdens and stifle innovation among businesses located

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[3] *Information Lifecycle Governance Leader Reference Guide: A Model for Improving Information and eDiscovery Economics with Information Lifecycle Governance,* at 5 (IBM Corp. Feb. 2012) (citing *Big Data: The Next Frontier for Innovation, Competition, and Productivity* (McKinsey & Co. 2011)).

[4] *Id.*

[5] *Email Statistics Report, 2013-2017, Executive Summary* at 2, The Radicati Group, Inc.

[6] *Id.* at 3.

in the United States. For example, companies sometimes refuse to implement innovative and beneficial technologies because of concern that those technologies may not allow for the preservation of information in some future, as-yet filed litigation. This undermines innovation and further illustrates the validity of the LCJ's observation that, "[p]eople and their businesses should be coming here because of the great justice system. . . . not citing it as a reason to stay away."[7]

Consequently, the "or" language frustrates the proposed Rule's ability to place proper emphasis on the merits, rather than the costs of litigation. Said another way, the proposed Rule 37(e)(1)(B)(i) poses the risk that litigants will continue to fear costs and burdens in the form of frivolous motions for sanctions. Thus, I recommend the Committee revise the proposed language to read "willful *and* in bad faith."

The term "willful" could be interpreted to mean any degree of action or inaction, and should be addressed. In this regard, I endorse the definition of "willful" suggested by LCJ in its Supplementary Public Comment: "acting with specific intent to deprive the opposing party of material evidence relevant to the claims or defenses."[8]

Additionally, there is currently a disturbing trend in electronic discovery involving parties seeking to utilize discovery from unrelated cases and unrelated prior hold directives. Unfortunately, as currently drafted, there are some drafting inconsistencies in Rule 37(e) that could lead to unintended consequences that could pose a serious impediment to reducing the costs and burdens associated with unnecessarily expansive discovery requests.

More specifically, Rule 37(e)(1) and Rule 37(e)(2) and 37(e)(2)(A) contain language referencing "conduct *in* litigation" instead of "conduct in *the* litigation." From my perspective, as written without the insertion of the word "*the*," the proposed Rule could plausibly aid the expansion of this alarming discovery trend. Notably, the Committee appropriately uses the phrase "conduct in *the* litigation" in sections 37(e)(1)(B)(i) and (ii), and in the Committee notes describing these sections, but the term "the" appears to be inadvertently omitted from the other subsections referenced above.

To help clarify any inconsistencies and eliminate any such potentially expansive but hopefully unintended consequences, I respectfully request that the Committee revise this language to insert the word "the," and to properly tailor the Rules' applicability to consequences for conduct affecting the current litigation, as follows:

- Rule 37(e)(1): "If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of *the* litigation, the court may:"
- Rule 37(e)(2): "The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of *the* litigation, and whether…"

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[7] LCJ Supplementary Public Comment to the Advisory Committee on Civil Rules, at 1 (Feb. 3, 2014).

[8] *Id.* at 7.

- Rule 37(e)(2)(A): "the extent to which the party was on notice that *the* litigation was likely and that the information would be discoverable"

Committee's Questions on Rule 37(e)

In its invitation for public comment, the Committee specifically invited comments on five questions regarding the proposed amendments to 37(e). My suggestions for the Committee's consideration follow.

1. **Should the rule be limited to sanctions for loss of electronically stored information?**
   No. I believe that Committee's efforts to put forward a rule that would set a single, national uniform standard for situations in which curative measures or sanctions may issue is a well-reasoned approach that will hopefully help companies and their counsel in efforts to implement company-wide preservation practices.

2. **Should Rule 37(e)(1)(B)(ii) be retained in the rule?**
   No. I believe that the Committee's efforts to address the circumstances that occurred in the *Silvestri* case, while well-intended, could lead to a situation in which a proposed subsection expressly stated as being intended to impose a more demanding standard will have the opposite effect, and become an exception intended to be narrowly construed that instead swallows the rule.

3. **Should the provisions of current Rule 37(e) be retained in the rule?**
   No. If the rule is tightly written and modified to eliminate ambiguity in its application as suggested above such that sanctions and any curative measures would only issue in well-defined circumstances, I do not believe it is necessary to retain current Rule 37(e). I support and am pleased to see in the Committee notes that "[t]he amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with the confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." I am also pleased to see an express statement in the committee notes that "[t]he routine good faith operation of an electronic information system should be respected under the amended rule."

4. **Should there be an additional definition of substantial prejudice under Rule 37(e)(1)(B)(i)?**
   Yes. Adding a definition of "substantial prejudice" would help clarify those focused circumstanced in which sanctions may be issued in connection with the litigation. To be substantial prejudice that rises to the level of invoking sanctions, the party's failure: (1) should be tied to preservation failures in the anticipation or conduct of the litigation, and (2) should focus on discoverable information that was material and relevant to any party's claims and defenses.

5. **Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?**
   As stated above, the term "willful" could be interpreted to mean any degree of action or inaction, and should be addressed. In this regard, I endorse the definition of "willful"

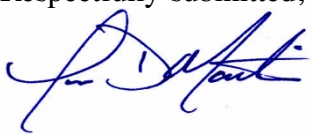
suggested by LCJ in its Supplementary Public Comment: "acting with specific intent to deprive the opposing party of material evidence relevant to the claims or defenses."[9] Moreover, if both "willfulness" and "bad faith" are included, they should be included as "willfulness *and* bad faith" to clearly reinforce that culpability is required in order for sanctions to be issued.

Closing Insights

Thank you again for your leadership in developing Rules that aim to provide a robust and merit-based discovery process which strikes the proper balance between advocacy and procedural fairness. I appreciate the opportunity to provide comments regarding the proposed amendments, and respectfully express support for the proposed amendments with the modifications suggested and referenced herein.

If I can provide you with any additional information or assistance please do not hesitate to contact me.

Respectfully submitted,



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[9] *Id*.