Phillips Lytle LLP

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

January 8, 2014

Re: Proposed Amendments to Rule 26

To the Members of the Committee:

I am a partner at Phillips Lytle LLP and have been a practicing attorney since 1977. All of my practice, and a large portion of my firm's practice, consists of litigation, primarily on behalf of corporate defendants. The views expressed in this letter are, however, my own.

I am writing in support of the proposed amendment to F.R.C.P. Rule 26(b)(1), limiting discovery to matters relevant to the parties' claims and defenses and proportional to the needs of the case. In my experience, the "dual category" approach of the current rule has proven unworkable insofar as it authorizes a court to permit broader discovery – namely, discovery of any matter relevant to the subject matter of the case – upon a showing of good cause. In my view, the courts have largely failed to apply the "good cause" requirement in a manner consistent with the Advisory Committee's statement at the time of the 2000 amendment that the "dual category" approach was not intended to create "entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Additionally, in my experience, defendants are often dissuaded from raising valid arguments why requested discovery is not relevant to the claims or defenses in a case because such arguments have so often – and so easily – been defeated by plaintiffs' contentions that the challenged discovery should nevertheless be allowed under the broader "relevant to the subject matter" standard.

These problems arise because the distinction between information relevant to claims or defenses and information relevant to the broader subject matter of an action is not defined in the Rule. Moreover, as the Advisory Committee acknowledged at the time of the 2000 amendment, this distinction "cannot be defined with precision." Thus, rather than narrowing the scope of discovery as was intended, the "dual category" approach

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of the 2000 amendment has frequently led to broad discovery orders – most often directed to defendants – allowing discovery into matters far beyond the scope of the pleadings and what is reasonably necessary for plaintiffs to prosecute their claims.

I respectfully commend to the Committee's attention the Colorado Supreme Court's discussion of this issue in its June 2013 *en banc* decision in *DCP Midstream v. Anadarko Petroleum Corp.*, 303 P.3d 1187 (Co. 2013). (Although the decision applies Colorado Rule of Civil Procedure 26(b)(1), the Colorado rule is in all relevant respects identical to its federal counterpart.) Recognizing the difficulty of distinguishing between information relevant to the parties' claims and defenses and information relevant to the subject matter of the case, the court wrote:

> Most federal cases construing the corresponding federal rule do not attempt to parse discovery into these categories. Many courts quote or paraphrase the amendments and proceed without considering whether they effected any meaningful change, often deciding cases on broad relevancy principles that appear unchanged from pre-amendment practice. These decisions may be based on an "ingrained mindset of liberal discovery under the old standard," but courts are likely concerned that any attempt to define what is relevant to a party's "claim or defense" and what is relevant to the "subject matter" could provoke additional procedural contention among litigants debating the differences between the two categories. This type of discovery dispute creates delay and increases costs, which is the very problem that the 2002 amendments[1] are intended to address.

Id. at 1196.

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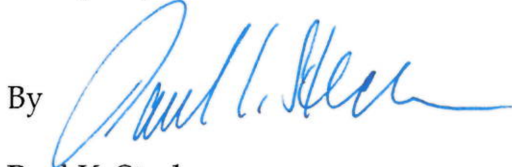
[1] This is a reference to the 2002 amendments to the Colorado rule, which tracked the 2000 amendments to the federal rule.

Finding any "attempt to delineate and define the meaning of a claim or defense as distinguished from the subject matter . . . counterintuitive to the purpose of the amendments," *id.* at 1195, the court adopted the "practical approach" suggested by the Advisory Committee's notes, under which "'[w]hen judicial intervention is invoked, the actual scope of discovery should be determined by the reasonable needs of the action.'" *Id.* at 1196. This standard is substantively similar to the "proportional to the needs of the case" standard the proposed amendment would add in redefining the scope of discovery under Rule 26(b)(1). Thus, in deleting the "subject matter involved in the action" and adding the "proportional to the needs of the case" language, the proposed amendment addresses the same concerns that motivated the Colorado Supreme Court in its "reinterpretation" of the provisions that have proven to be unworkable in practice. For all of these reasons, I respectfully urge the Committee to amend the Rule as proposed.

I thank the Committee for the opportunity to comment on this important issue and note that these comments are not submitted on behalf of any client or organization.

Respectfully submitted,

Phillips Lytle LLP

By 

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