Testimony before the Federal Civil Rules Advisory Committee
Proposed Amendments to the Federal Rules of Civil Procedure
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Mr. Chairman and Members of the Civil Rules Advisory Committee: Good afternoon and thank you for the opportunity to speak about the proposed amendments to the Federal Rules of Civil Procedure.

My name is Steve Twist. I serve as Vice President and General Counsel for Services Group of America, Inc. (SGA). SGA is a privately held corporation with industry-leading companies providing foodservice distribution, transportation management, produce marketing, custom meat production, and real estate management. We provide quality food and service to our customers and good jobs to almost 4,000 associates, who, along with their families, depend on the health of our company for their continued employment.

Prior to joining SGA I served for a decade as counsel to Dial Corporation which became Viad Corp (NYSE:VVI), where among other duties, I supervised litigation. From 1978 to 1991, I served as the Chief Assistant Attorney General for the State of Arizona. During the other years of my legal career I have been in my own law practice, which included civil RICO litigation among other areas of practice.

My current and past roles have provided me significant litigation experience, from which I have concluded that, unfortunately, the civil justice system is dysfunctional in that it is not meeting its fundamental obligation, as established in Rule 1, to "secure the *just*, *speedy*, and *inexpensive* determination of every action and proceeding." The costs and burdens of discovery now drive dispute resolution, rather than the merits of cases. Such a system is neither "just," nor "speedy." And it is most certainly not "inexpensive." Let me explain why I say this.

1. My company spends more money on preservation and discovery than it does to pay claims.

Our IT Department reasonably estimates that just to maintain the preservation and search functions that are required of us costs us more than a quarter million dollars every year.

2. The leading factor in litigation strategy is cost, not the merits of claims or defenses.

In the last two years alone, we have been involved in litigation involving only three matters in which the attorney's fees and costs related to discovery alone have exceeded well over one million dollars. In none of these cases has there been a finding of responsibility against SGA. Admittedly, these cases have been in state courts and not in federal courts, but I dare say had they been in federal courts the costs would have been higher. And I respect the power of changes in the Federal Rules to encourage improvements in state rules around the country.

3. Excessive costs are driven by the *in terrorem* effect of spoliation sanctions.

In addition to the IT costs noted above, the energy put into preserving every conceivable record, every iteration of every e-mail, and every version of every document, places an enormous burden on any party, but especially on companies trying hard to run efficiently and respond to a demanding and ever changing market. Litigation takes unseen tolls beyond simply the costs of attorneys. It robs company employees of time that would be better spent meeting the needs of the market.

The triumph of cost over merit is a direct result of the current Federal Rules of Civil Procedure and how they are interpreted. That's why I strongly support this Committee's efforts to amend the FRCP to achieve meaningful reform.

<u>Rule 26(b)(1) – Scope of Discovery</u>

Specifically, the scope of discovery as defined in Rule 26 (b)(1) promotes a litigation strategy designed to bring opponents to their knees rather than to bring the facts to light.

The Committee's proposal to re-define the scope of discovery to allow discovery of "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." is a much-needed and appropriate reform. Since the explosion of electronically stored information (ESI) began, much of the cost and burden of discovery has been caused by the broad scope of discovery including the concept of the "subject matter involved in the action" and the idea that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." In contrast to these concepts, the proposal to move the proportionality language currently found in a subpart [Rule 26(b)(2)(C)(iii)] into Rule 26(b)(1) would result in parties and judges paying needed attention to what discovery should mean to each individual case.

I am aware that opponents of the Committee's proposed amendments to Rule 26(b)(1) are alleging that moving the proportionality language will somehow result in a "shifting of the burden of proof," and that this alleged shift will impose an inappropriate burden on plaintiffs. I think that argument is incorrect for several reasons:

First, changing the scope of discovery does not change the legal "burden." Whoever bears the burden to show that a particular discovery request is or is not within the scope today will have that burden after the scope is re-defined.

Second, currently the "burden" of ensuring proportionality falls upon both requesting and responding parties because Rule 26(g) states that an attorney's signature on a discovery request or response is a certification that the document is consistent with the FRCP, not interposed for any improper purpose (including cost and delay) and is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case…." The Committee's proposal does not change this.

Third, if what the opponents mean by shifting burden is a possible increase in motions to compel compared to motions for protective orders, this is a minor factor. Reforming the scope of discovery to ensure proportionality is worth it. The current proportionality rule has failed.

Rule 37(e)

The proposed new Rule 37(e) is also a much-needed reform. As I mentioned, the fear of spoliation sanctions is a major driver of litigation cost. That fear is created by the lack of a nationwide standard that prohibits sanctions for loss of information unless that failure was in bad faith.

Although this proposal holds great promise, two parts need fixing before the Rule will have the intended effect. First, the Committee should remove the word "willful," making clear that the test is "bad faith." This is crucial because some courts interpret "willful" to mean simply intentional, and under that definition, it will remain impossible for companies to make reasonable decisions about preservation. Even worse, since several circuits currently have higher thresholds, this proposed Rule could actually lower the standard in those jurisdictions.

The second needed repair is to eliminate the exception contained in subsection (1)(B)(ii), which would provide for sanctions absent any culpability where the loss of information "irreparably deprives" a party of any ability to present or defend the claims in the action. Although the Committee intends for this exception to apply in only in the very rarest of situations, it is likely that courts would use the exception to avoid the primary rule.

Conclusion

Thank you again for the opportunity to present my views of the Committee's proposals today.