Shook, Hardy & Bacon L.L.P.
www.shb.com

October 29, 2013

John F. Murphy

2555 Grand Blvd.
Kansas City
Missouri 64108-2613
816.474.6550
816.559.2205 DD
816.421.5547 Fax
jmurphy@shb.com

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 Shook, Hardy & Bacon L.L.P., we appreciate the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure under consideration by the Committee.[1] Shook, Hardy & Bacon is an international law firm specializing in defending companies in civil litigation in a wide variety of subjects. Many of our firm's cases are putative class actions and federal multi-district litigations in which hundreds or thousands of individuals make claims against defendants. It has been our overall experience that the asymmetrical burden of discovery on defendants, along with the ability for plaintiffs to creatively use their advantages under the current rules, can, and often does, impede a just and proper outcome of a case. We support the proposed amendments because they help fix a civil justice system that, based on our collective experience, is unbalanced and in need of repair.

Full and fair discovery directed toward evidence the parties will present at trial is essential to a just adjudication of a lawsuit. The discovery system in effect today, though, does not perform this function well. As practitioners for plaintiffs and defendants have agreed, discovery "takes too long and costs too much."[2] The reality is that the bulk of these discovery burdens are borne by corporate defendants, who preserve and produce documents far in excess of what is relevant or probative in their litigations. It is not uncommon for us to review millions of pages of documents to produce several hundred thousand documents that we learn are never reviewed by opposing counsel. Their goal is to leverage the high cost of responding to their discovery requests against the value of the case. Indeed, the business distraction and sheer costs associated with excessive discovery can drive the outcome of a dispute, often more than a case's merits.[3]

---

[1] Our firm is proud that John Barkett, a partner in our Miami office, serves on the Federal Civil Rules Advisory Committee. To assure his professional independence, John has been firewalled from this comment.

[2] AM. COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT, at 2 (Mar. 11, 2009) [hereinafter ACTL/IAALS Report].

[3] ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, at 2 (Dec. 11, 2009) (reporting that 83% of its members, which include both plaintiffs' and defense attorneys, believe that the cost of litigation forces settlement in cases that should not be settled on the merits).

Our understanding is that other commenters will share in detail causes and examples of overly broad retention and discovery. We, therefore, will focus our comments on the impact the imbalance of discovery can have when improperly exploited. Litigation is a hard-fought endeavor, and some lawyers have become well-schooled at using discovery to their advantage. Here are a few examples based on our experiences:

- The baldest example of how discovery costs can determine the outcome of a case may be in patent infringement claims, which are being increasingly filed by those seeking to leverage the high costs of discovery to drive settlements. Studies have shown that in patent cases, *average* defense costs are $1.6 million through discovery in cases where $1 million to $25 million is at stake.[4] In some cases, plaintiffs have been "so blunt as to explain" that they will price settlement offers "'well below the pain level'—i.e., below the price where it may be worthwhile…to defend instead of settle."[5] In one of our patent cases, the plaintiff was so primed to hike discovery costs that it demanded a Rule 30(b)(6) deposition on preservation and collection before the first document was even produced.

- In personal injury claims, which represent the bulk of our cases, our clients often face discovery "gamesmanship." It is well-documented that some attorneys will initiate discovery disputes to discolor a defendant in the judge's eyes and, when possible, generate sanctions.[6] Monetary sanctions can help contingency fee attorneys lock in proceeds, regardless of a case's merits.[7] Negative inferences can sway a jury in their favor, and the striking of a defendant's pleadings can win the case for them outright, without ever having to prove their case in court. This type of motion practice has been termed "litigation by sanction." Regardless of how well one complies with discovery requests, there can always be allegations that a page, document, or flash drive has not been produced. This item may not be relevant or may be duplicative, but the diversion of explaining its absence can derail an entire case. Such "outcome-determinative pretrial gamesmanship"[8] should not be allowed to overpower the factual and legal merits of a case.

---

[4] Am. Intellectual Prop. Law Ass'n, *2011 Report of the Economic Survey* (2012).

[5] Public Comment of Lee C. Cheng, Chief Legal Officer of Newegg, Inc., Regarding the FTC and DOJ Investigation of "Patent Assertion Entities" (Dec. 8, 2012), *at* http://www.ftc.gov/os/comments/pae/pae-0004.pdf.

[6] *See* Sherman Joyce, *The Emerging Business Threat of Civil "Death Penalty" Sanctions*, WASH. LEGAL FOUND., Sept. 10, 2009.

[7] Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 Rev. Litig. 267, 270 (1996) ("By racking up enough sanctions during discovery, the merits of the case might never be reached at all.").

[8] Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan. 28, 1991, at 22.

- A recent technique for increasing a defendant's discovery costs and laying the groundwork for sanctions has been to challenge the *process* a defendant uses for responding to discovery requests, rather than the results of that process. For example, some plaintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system's relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions. Under the current rules, courts have allowed such "discovery on discovery" without any allegations that the defendant's discovery procedures were deficient.

The amendments before this Committee help address these concerns in two important ways. First, the rule changes themselves are significant steps toward addressing the high, asymmetrical costs and burdens of excessive discovery. Second, they convey to judges at both the federal and state levels that the imbalance of discovery is a national concern and they need to be stewards of discovery in their courts to counterbalance the improper effect that discovery costs and disputes can have on the outcome of a case.

The proposed revisions to Rule 26(b)(1) will help reduce overly broad discovery requests by requiring parties to tailor their discovery requests to be proportional and relevant to the case.

Commentators from both sides of the courtroom emphasize that "[p]roportionality should be the most important principle applied to all discovery."[9] The proposed changes to Rule 26(b)(1) will encourage parties to hone their discovery requests to take into account the issues of the case and the amount in controversy. Also, by specifying that "discovery of inadmissible evidence should not extend beyond the scope of discovery simply because it is 'reasonably calculated' to lead to the discovery of admissible evidence,"[10] this amendment helps focus discovery on relevant information and can stem the tide of overly broad document production. An important byproduct of this amendment is that it encourages judges to be active in weighing the costs and benefits of discovery requests, which could lead to fewer opportunities for gamesmanship.

---

[9] ACTL/IAALS Report at 7; *see also* Sedona Canada Principles Addressing Electronic Discovery (2008) ("In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: (i) the nature and the scope of the litigation...; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.").

[10] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 297 (2013) (Committee Note to Rule 26(b)).

Allocating costs in Rule 26(c) levels the playing field between parties and helps prevent asymmetrical expenses from driving litigation outcomes.

Amending Rule 26(c) to expressly recognize that courts have the authority to fairly apportion the expenses of document production is a significant step toward addressing the inequities in the allocation of discovery costs. In our experience, when our clients have included cost-shifting provisions within their Rule 26(c) protective orders, opposing parties have asked for fewer documents and focused their requests on materials relevant to the claims they were making.[11] While the proposed change to Rule 26(c) does not go so far as a "requester pays" rule,[12] the amendment explicitly encourages courts to take an active role in shifting the costs of discovery. Accordingly, as with the Rule 26(b)(1) changes, this amendment strengthens judges' authority to step in and referee the discovery process.

The proposed revisions to Rule 37(e) will assist judges in assessing when discovery-related conduct truly deserves sanction.

Currently, disputes over what should be preserved for discovery are roadblocks to efficient judicial process and resolution of cases on the merits.[13] Part of the problem is that preservation and discovery standards vary from court to court, as do when and what types of sanctions parties should be subject to when they fail to abide by their preservation and discovery obligations.[14] The lack of consistent standards causes

---

[11] In Europe, which has a "loser-pays" system, discovery costs are included in the final litigation bill, motivating both parties to minimize broad fishing expeditions and to keep costs down by making specific discovery requests. *See* Umar Bakhsh, *Cost Shifting in e-Discovery: A Comparative Analysis Between America and Europe*, NAT'L L. REV. (Nov. 16, 2011).

[12] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (Apr. 1, 2013).

[13] *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010). The opinion, drafted by Judge Lee Rosenthal, former chair of the Judicial Conference Committee on Rules of Practice and Procedure, highlights the burdens on litigants:

> Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.

[14] *See* Memorandum Order and Recommendation at 38, *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*, No. MJG-06-2662 (D. Md. Sept. 9, 2010) (including various federal opinions on spoliation).

"concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities—and vulnerability to being sued—often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties."[15] Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring "substantial prejudice" and actions that were "willful or in bad faith."

To enhance the proposed revisions, though, the Committee should consider changing the phrase in Rule 37(e)(1)(B)(i) from "willful or in bad faith" to "willful and in bad faith" to prevent the bad faith requirement from fading away or disappearing altogether.[16] Doing so would be a reasonable extension of the Advisory Committee's work on Rule 37(e) "to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."[17]

These and the other rule changes are important, both for the technical fixes they provide and to assure that judges are involved in the discovery process so they can minimize discovery tactics from having an undue influence on the outcome of litigation.

We thank the Committee for the chance to comment and urge the Committee to amend the rules as proposed.

Respectfully submitted,

John F. Murphy
Chairman

---

[15] *Id.* at 51.

[16] The need for the change from "or" to "and" is illustrated by the recent decision of *Sekisui Am. Corp. v. Hart*, -- F. Supp. 2d --, 2013 WL 4116322, *6 (S.D.N.Y. Aug. 15, 2013) (stating "[t]he law does not require a showing of malice to establish intentionality with respect to the spoliation of evidence" and granting defendants' motion for an adverse-inference instruction after emails were deleted).

[17] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 318 (2013) (Committee Note to Rule 37(e)).