SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

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DIRECT DIAL
(202) 371-7410
DIRECT FAX
(202) 661-8301
EMAIL ADDRESS
JOHN.BEISNER@SKADDEN.COM

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SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV

Mr. Jonathan C. Rose
Secretary of the Committee on Rules of
Practice and Procedure of the
Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. Rose:

I am writing to express my support for the discovery-related changes to the Federal Rules of Civil Procedure recently proposed by the federal Advisory Committee on Civil Rules ("the Committee") and to suggest several minor modifications to the published drafts.

The Committee's proposals are responsive to the escalating cost of discovery in U.S. civil litigation, a trend largely attributable to electronic discovery. In a recent survey conducted by the American Bar Association, Litigation Section, 82% of the responding lawyers (including 61% of those identifying themselves as plaintiffs' counsel) agreed that discovery is too expensive. In addition, 66% believed that e-discovery is abused.[1] The Committee's proposals will help ameliorate these problems in two principal ways: (1) by amending Rule 26(b)(1) to redefine the scope of discovery; and (2) by amending Rule 37(e) to establish clearer standards for imposing curative measures and sanctions when electronically stored information is lost. The Committee has also proposed positive changes to Rules 1, 4, 16, 26, 30,

[1] John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell L. Rev. 455, 456 (2010).

31, 33, 34, 36 and 37. Overall, the Committee's proposals are steps in the right direction to come to grips with costly, unnecessary discovery burdens. My thoughts regarding each of the Committee's proposals are set forth in greater detail below.

Rule 26(b)(1) – Scope of Discovery

Rule 26(b)(1) currently permits discovery of any information relevant to the "subject matter involved in the action."[2] The same rule goes on to specify that "[r]elevant information need not be admissible at . . . trial if the discovery appears ***reasonably calculated*** to lead to the discovery of admissible evidence."[3] Under the Committee's proposed amendment to Rule 26(b)(1), the scope of discovery would be limited to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."[4] In other words, instead of encompassing all information within the "subject matter" of the litigation, discovery would be limited to information relevant to the parties' claims and defenses.[5] In addition, the proposed amendment moves the current proportionality language from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1), the rule that governs the general scope of discovery.[6] Finally, the proposed amendment would also strike the phrase "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[7]

Limiting the scope of discovery to matters relevant to a party's claim or defenses is an important step to curtailing abusive discovery. All too often, litigants exploit the current broad standard for discoverable information to pursue information only "tangentially related to the claims or defenses at issue."[8] Frequently, this tactic is employed to coerce a "favorable settlement" irrespective of the merits of the underlying suit.[9]

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2 Fed. R. Civ. P. 26(b)(1).

3 *Id.* (emphasis added).

4 Proposed Rule 26(b)(1).

5 *Id.*

6 *Id.*

7 *Id.*

8 John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 579, 584-85 (2010).

9 *Id.* at 585.

Despite the intended narrow purpose of Rule 26(b)(1), both courts and counsel have interpreted the "reasonably calculated" wording in the rule in a manner that "broaden[s] discovery beyond the benchmark of relevance,"[10] essentially "obliterat[ing] all limits on the scope of discovery."[11] The revised version of Rule 26(b)(1) will curtail patently overbroad discovery requests.[12]

The Committee's published draft amendments also recognize the wisdom of imposing a strong proportionality requirement. The Committee's proposed amendments to Rule 26 would require that all discovery requests be subject to a careful cost-benefit analysis, taking account of the particular circumstances of a given case. This change would be a marked improvement over the "anything goes" approach to discovery that has "encourage[d] plaintiffs to seek broad electronic discovery from sources . . . driv[ing] up the costs of litigation for defendants."[13] The proposed amendment should help winnow overbroad discovery requests and curtail abuse, resulting in less expensive discovery production and affording courts more time to focus on the substance of parties' claims and defenses.

Rule 37(e) – Failure to Preserve Discoverable Information

The other principal proposal is a series of amendments to Rule 37(e), which governs sanctions for failing to preserve electronically stored information. The current rule provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[14] For good reason, the efficacy of the current rule has been questioned, as "electronic discovery has become a prime tool used offensively by litigants, with sanctions motions turning into their own minilitigations."[15] Disputes over electronic discovery are consuming precious judicial resources, with courts imposing sanctions in more than seventy percent of the instances in which they are

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[10] Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, Vol. 26, No. 5 Utah B.J., at 38, 40 (2013).

[11] Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 Fed. Cts. L. Rev. 178, 190-91 (2013) (internal quotation marks, citation and footnote omitted).

[12] *Id.* at 196-97.

[13] Beisner, *supra* note 8, at 583.

[14] Fed. R. Civ. P. 37(e).

[15] Danielle M. Kays, *Reasons to "Friend" Electronic Discovery Law*, 32 Franchise L.J. 35, 36 (2012).

sought.[16] Recognizing this trend, the Committee has proposed an amendment to Rule 37(e) that places greater emphasis on curative measures (such as permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information) and clarifying when sanctions for failure to preserve electronically stored information are appropriate.[17]

I enthusiastically endorse the portion of this proposal that authorizes courts to order curative measures. Under the current rule, the only option for a court faced with a party's loss of information is to sanction that party. Because the goal of Rule 37(e) should be to facilitate a party's access to key information rather than to punish the other side's loss of that information, a rule that gives courts the option of ordering curative measures is logical.

At the same time, however, I have concerns regarding the Committee's move toward expanding the category of cases in which sanctions may be imposed for the loss of information. Proposed Rule 37(e)(1)(B) allows a court to impose sanctions when a party's actions were (i) "willful or in bad faith" and cause "substantial prejudice," or (ii) "irreparably deprived" the opposing party of a "meaningful opportunity to present or defend" against the litigation.[18] Proposed Rule 37(e)(2) also lays out five factors a court should consider when assessing a party's conduct before ordering curative measures and/or sanctions.[19]

The first part of proposed Rule 37(e)(1)(B) permits sanctions when "the party's actions: (i) caused substantial prejudice in the litigation and were willful or in bad faith." I applaud the proposal requiring a party to demonstrate "substantial prejudice." Requiring a showing of prejudice will limit the parties' ability to exploit spoliation traps, such as discovery requests crafted simply to expose perceived imperfections in preservation efforts as a basis for sanctions or other forms of

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16 Alexander B. Hastings, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential To Bring Uniformity to Electronic Spoliation Disputes*, 79 Geo. Wash. L. Rev. 860, 862 (2011).

17 *See* Advisory Committee on Civil Rules, at 143, Apr. 11-12, 2013; Advisory Committee on Civil Rules, at 122-24, Nov. 1-2, 2012.

18 Proposed Rule 37(e)(1)(B)(i)-(ii).

19 These factors are: "(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information." *See* Proposed Rule 37(e)(2).

litigation leverage that have no legitimate connection to the merits of a case."[20] Moreover, sanctions have no compensatory or deterrent purpose if the party cannot articulate any plausible prejudice.[21] The Committee should, however, add a definition of "substantial prejudice" to ensure a national, uniform standard when determining whether sanctions for spoliation should be imposed on a party. Currently, some courts apply weak standards for determining whether the loss of information has prejudiced the other side. For example, under one Southern District of New York precedent, this standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense."[22] In my view, "substantial prejudice" should require something more – i.e., that the loss of information is somehow material to the party's claims or defenses.

Proposed Rule 37(e)(1)(B) would permit sanctions where a party's loss of information was either willful or done in bad faith. I recommend revising this proposal to limit sanctions to cases where a party's conduct was both willful ***and*** in bad faith. Some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind.[23] However, sanctions should only be allowed where a party has engaged in intentionally culpable conduct – i.e., knowingly destroying evidence that the party knows should have been preserved. Because electronic information is "ephemeral" and easily created, transmitted and stored, "it may be virtually impossible" for some companies "to preserve all potentially relevant electronic data."[24] Thus, sanctions for spoliation should be imposed only when a party has intentionally destroyed evidence that it knows it had an obligation to retain. Accordingly, the Committee should substitute the "or" with "and" in proposed Rule 37(e)(1)(B)(i).

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[20] Beisner, *supra* note 8, at 591-92.

[21] *Id.* at 592.

[22] *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 503 (S.D.N.Y. 2013) (Scheindlin, J.) (citation omitted); *see also Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1008 (D. Ariz. 2011) (Campbell, J.) ("[W]hen 'the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both relevance and prejudice to make [sanctions] appropriate.'") (citation omitted).

[23] *Sekisui* , 945 F. Supp. 2d at 503 ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.") (internal quotation marks, citation and footnote omitted).

[24] Beisner, *supra* note 8, at 590.

In my view, the second part of Rule 37(e)(1)(B), which permits sanctions when a party's actions "(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation,"[25] should be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation claims as a litigation tactic and impose significant costs on American companies by encouraging them to store every last byte of information. "[S]avvy plaintiffs' counsel have an incentive to request some electronic documents . . . in hopes of securing a large sanction when the opposing party cannot produce them."[26] As the Committee has recognized, "many litigants and potential litigants fe[el] they ha[ve] to undertake[]" "overbroad preservation" "to ensure they w[ill] not later face sanctions."[27] This problem will only worsen if the Committee's expanded sanctions provision is adopted. And it would also be highly unfair, subjecting litigants to potentially severe sanctions absent sufficiently culpable behavior.

Proposed Rule 37(e)(2) also lays out five factors a court should consider when assessing a party's conduct before ordering curative measures and/or sanctions. While these factors are well-intentioned, I think they should be deleted from the proposed amendment. None of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Reasonableness is a "highly elastic" standard that will only foster greater uncertainty over whether a party may or may not delete information.[28] Moreover, there is a significant risk that some courts will view the satisfaction of any one of these factors as justifying sanctions in cases where a party's loss of discoverable information was ***not*** the result of conduct carried out willfully and in bad faith.

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[25] Proposed Rule 37(e)(1)(B)(i)-(ii).

[26] Beisner, *supra* note 8, at 571.

[27] Advisory Committee Report, at 35, May 8, 2013.

[28] *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) ("Until a more precise definition is created by rule, a party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.'") (citation omitted); *see also* Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. Rev. 537, 553 (2013) (questioning whether parties can rely on reasonableness in making proactive decisions about the scope of discovery if reasonableness becomes the guiding principle for judges in analyzing preservation decisions after the fact).

Rules 30, 31, 33 and 36 – Presumptive Numerical Limits

The Committee has also appropriately proposed to reduce the presumptive numerical limits in several categories of discovery. The proposals include reducing the number of oral depositions from 10 to 5 per party and the duration of a deposition from 7 hours to 6 (Rule 30); the number of written depositions from 10 to 5 (Rule 31); the number of Rule 33 interrogatories from 25 to 15; and adopting a presumptive limit of 25 for Rule 36 requests to admit.[29]

I support these proposed changes to the discovery rules. These changes will streamline civil discovery without denying a party the ability to gather information for its claims or defenses. Under the proposed version of Rule 26(b)(2), like the current one, the court retains discretion to modify or alter these numerical limits.[30]

The Need for Further Reforms

While the Committee's published proposals will result in meaningful improvements, they do not address the impetus for making discovery demands that maximize burden and expense: the discovery respondent almost invariably bears all costs of production.[31] As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."[32] In my experience, discovery costs have become the most significant settlement dynamic in many (if not most) civil cases. Perversely, avoiding overwhelming discovery costs are more likely to prompt a defendant to settle than worry about a significant loss on the merits. Indeed, I believe that the disappearance of civil trials in our federal courts is more attributable to the costs of getting cases to the trial stage (that is, discovery expenditures) than the costs of the actual trials.[33]

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[29] Proposed Rule 30, 31, 33, 36.

[30] *Compare* Proposed Rule 26(b)(2) *with* Fed. R. Civ. P. 26(b)(2).

[31] *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

[32] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

[33] *See, e.g.*, Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 Yale L.J. Pocket Part 167, 191 (Nov. 30, 2006) http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/procedure/ a-few-thoughts-on-electronic-discovery-after-december-1,-2006/ ("Lawyers and judges are collectively wringing their hands over the continuing decline in the number of trials, especially jury trials. The factors that contribute to this are many and varied, but there is a consensus that the costs and delays of civil litigation – largely due to discovery – play a significant

Plaintiffs' ability to use discovery burdens as a tool to force settlement irrespective of the merits under the current producer-pays system arguably implicates a defendant's fundamental due process rights. The due process clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[34] Such property, which includes a defendant's bank accounts, cannot be deprived "except pursuant to constitutionally adequate procedures"[35] – for example, "notice and opportunity for hearing."[36] However, every day, defendants are forced to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability and without adequate procedures.

While our federal courts have not yet addressed the due process implications of the current discovery system, some commentators have urged that "impos[ing] the nonreimbursable costs of a plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process" because it requires payment "without even a preliminary judicial finding of wrongdoing."[37] And the specter of contempt under Rule 37 for failure to comply with a discovery order underscores this principle.[38]

This conclusion is a logical extension of long-standing Supreme Court precedent holding that deprivation of a property interest, based merely on a plaintiff's ability to make out a facially valid complaint, carries too great a risk of erroneous deprivation to satisfy due process. For example, in *Connecticut v. Doehr*, the claimant sought an attachment of the defendant's home to secure payment of a judgment he hoped to obtain on a civil assault complaint against the defendant.[39] The Supreme Court held that the state statute's provision for a prompt post-attachment hearing did not satisfy the requirements of due process because the

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role."); Jason Krause, *In Search of the Perfect Search*, 95 A.B.A.J. 38, (2009) ("Facing the prospect of monumental e-discovery costs, some lawyers may settle important cases, further reducing the number of trials.").

[34] U.S. Const. amend. V.

[35] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

[36] *Bell v. Burson*, 402 U.S. 535, 542 (1971).

[37] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 807 (2011).

[38] *See id.* at 806 (citing Fed. R. Civ. P. 37).

[39] *Connecticut v. Doehr*, 501 U.S. 1, 5 (1991).

statute did not otherwise provide adequate safeguards against an erroneous deprivation. According to the Court, "[p]ermitting a court to [take away a property interest] merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would [impermissibly] permit the deprivation of the defendant's property when the claim would fail to convince a jury [or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute."[40]

Similarly, in *Fuentes v. Shevin*, the Supreme Court struck down laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin.[41] The Florida and Pennsylvania statutes at issue in *Fuentes* permitted any person to file an *ex parte* application for a pre-judgment writ of replevin as long as she posted a security bond. Neither statute required notice to be given to the other side, and neither statute provided the possessor with a pre-seizure opportunity to be heard.[42] The Supreme Court invalidated the laws on due process grounds, reasoning that while "the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ . . . those requirements are hardly a substitute for a prior hearing"; "they test no more than the strength of the applicant's own belief in his rights."[43] Instead, the court must "examine[] the support for the plaintiff's position" and "hear both sides" before depriving the defendant of a property interest.[44]

There are strong arguments that the rationale underpinning this caselaw applies with equal force to civil discovery. After all, a plaintiff's untested allegation of fault is all that is necessary to force a defendant to spend enormous sums on discovery responses. Indeed, the due process concerns are even more pronounced in the civil discovery context because, unlike applications for writs of replevin, there is not even a requirement that a plaintiff place a security bond before proceeding to discovery. While it is true that recent Supreme Court decisions have reinforced the idea that an adequately pleaded complaint is necessary to unlock the doors to

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40 *Id.* at 13-14.

41 *Fuentes v. Shevin*, 407 U.S. 67 (1972).

42 *Id.* at 70.

43 *Id.* at 83.

44 *Id.*

discovery, those safeguards are insufficient to protect the rights of defendants facing vexatious discovery requests.

In light of the due process concerns raised by the current producer-pays discovery regime, the Committee should consider additional amendments to the federal rules. One solution would be to establish a general rule that each party pays the costs of the discovery it requests, subject to adjustments by the court.[45] In deciding whether to make any adjustments, a court might consider whether the party from whom the discovery is sought retained information in a manner that makes retrieval particularly expensive or cumbersome, failed to provide relevant information during initial disclosures, thereby drawing out discovery, or otherwise drove up the price of discovery through its litigation strategies. Such an approach would help ensure that discovery is used to obtain legitimately needed information and that neither side uses discovery as a strategic ploy. In addition, it would protect a defendant's due process rights by ensuring that a defendant is not forced to spend huge amounts of money producing discovery even though no court has ever found that it engaged in improper conduct.

A more modest step would be to expand cost shifting for electronic discovery, which remains a driving force behind abusive and expensive discovery requests. While some courts have imposed cost shifting for electronic discovery in some cases, the Rules currently do not ***require*** consideration of the option.[46] An amendment mandating that courts assess the use of cost shifting when a party seeks electronic discovery would place the onus of burdensome discovery requests on the party making the requests, reducing the prospect for impermissible deprivation of property without due process and encouraging requests that are more narrowly tailored to obtaining relevant evidence. The American Bar Association has articulated sixteen factors a court should apply when considering cost shifting.[47]

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[45] *See* Lawyers for Civil Justice, Comment to the Civil Rules Advisory Committee and the Discovery Subcommittee: *The Un-American Rule: How the Current "Producer Pays" Default Rule Incentivizes Inefficient Discovery, Invites Abusive Litigation Conduct and Impedes Merits-Based Resolutions of Disputes*, at 6, Apr. 1, 2013.

[46] James Pooley & Vicki Huang, *Multi-National Patent Litigation: Management of Discovery and Settlement Issues and the Role of the Judiciary*, 22 Fordham Intell. Prop. Media & Ent. L.J. 45, 55 (2011) (courts have "discretion to shift a portion of the costs onto the requesting party to protect the responder from 'undue burden or expense'") (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

[47] *See* ABA Section of Litig., Civil Discovery Standards (rev. 2004), http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf. These factors include: "A. The burden and expense of the discovery, considering among other factors the total cost of production . . .

Incorporating these factors into the civil discovery rules would mark a significant advancement over prior efforts to curtail abusive and costly discovery.

I offer one final note on cost-shifting. To an increasing degree, third parties (e.g., hedge funds) are investing in U.S. civil litigation.[48] Clearly, a goal of such investors is to find "strong" cases – claims likely to yield a substantial verdict or settlement. But in pursuit of such "big win" cases, the producer-pays discovery system tends to make lawsuits a "no lose" proposition, encouraging investors to place their bets rather indiscriminately on as many opportunities as possible. If claims can be described in a complaint that will survive a motion to dismiss (not a particularly difficult undertaking), investing in such claims probably makes sense. If a case can reach the discovery phase, an investor probably can bank on at least breaking even, since even if prospects on the merits become bleak for the plaintiff, a defendant presumably will be willing to at least cover the plaintiff's expenses in order to escape the further financial burdens of discovery. With the growing number of litigation investment funds amassing more and more cash to deploy, the obvious

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compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product . . . ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; . . . J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; . . . O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reason; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]" *Id.* at 59-61.

[48] *See, e.g.*, Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1658 (2013) ("As common law nations such as . . . the United States . . . loosen restrictions on third-party funding in domestic litigation, third-party funding corporations have become more prevalent, with some even traded on public stock exchanges."); Cassandra Burke Robertson, *International Law in Domestic Courts: The Impact of Third-Party Financing on Transnational Litigation*, 44 Case W. Res. J. Int'l L. 159, 181 (2011) ("Third-party litigation finance is a growing industry. The market for lawsuit investment is already quite large in . . . the U.S., and it is poised for growth[.]").

result is that we are going to see a substantial increase in the number of lawsuits being filed – lawsuits in which the decision to file will turn more on assessments of the ability to inflict discovery burdens on the defendant and much less on the actual merits of the underlying claims. In sum, the inequities created by producer-pays discovery are likely to multiply.

Conclusion

The Committee's proposals represent a balanced, cost-effective effort to reform our nation's civil discovery system. Strengthening the proportionality requirement of Rule 26(b)(1), limiting discovery to information relevant to a party's claims or defenses and reducing the presumptive limit on depositions and other vehicles of discovery will reduce the prospect of overbroad and costly discovery. Incorporating curative measures into Rule 37(e) – as opposed to automatically imposing sanctions – is also a positive step because it will likely diminish some of the gamesmanship that has plagued recent discovery practice. However, the Committee should modify its sanctions proposal to state that such measures are only proper where a party has acted willfully ***and*** in bad faith. Otherwise, litigants will be forced to spend large sums of money solely to avoid being hit with crippling sanctions.

Looking forward, the Committee should also consider whether the current producer-pays system of civil discovery jeopardizes the fundamental due process rights of defendants – and if so – whether additional reforms are in order. One possible reform is an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court. Alternatively, the Committee could expand cost-shifting for electronic discovery, which remains the primary component of excessive discovery costs.

Sincerely,

John H. Beisner