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Commission on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Committee Members:

I send this letter in response to the Committee's Request for Comments on Proposed Rules and Form Amendments (August 2013). Squire Sanders has more than 1,300 attorneys in 39 offices around the world. Our Litigation practice group includes hundreds of trial attorneys representing a wide range of clients – from large corporations to individuals and public entities – in federal courts around the country and in other forums around the world.

I lead the firm's eDiscovery & Data Management practice, which assists our clients and attorneys with electronic discovery and related issues. Our attorneys are active participants in Working Group 1 of The Sedona Conference and other similar organizations and conferences. Squire Sanders serves as primary electronic discovery counsel to many of the nation's largest corporations, including in the manufacturing, chemicals, consumer goods, and health care sectors. We note the foregoing not to be self-laudatory, but rather to highlight our interest in and attention to these issues as context for our comments below.

This letter is not intended to represent the individual position of every Squire Sanders attorney or client. Rather, it sets forth consensus views and themes that have emerged in discussions with clients and attorneys during the course of our practice, at conferences and educational events, and in private communications. In lieu of commenting separately, several of our largest clients have reviewed this letter and provided input through their in-house counsel with responsibility for their organization's litigation and electronic discovery functions.

Agreement with Proposed Rule 26(b)(1)

We strongly support the proposed revision to Rule 26(b)(1) to include proportionality considerations in the definition of the scope of discovery. Too many cases (especially those

involving large volumes of electronically stored information ("ESI")) require discovery efforts that are unnecessarily expensive and disproportionate to the needs of the case. Opponents of this amendment may argue that it will somehow hinder their ability to conduct necessary discovery to support their case. This concern is unfounded.

Current Rule 26(b)(2)(C)(iii) already provides that courts "must" apply proportionality considerations in considering the "frequency or extent of discovery." But this requirement is not regularly or uniformly followed. Moving the proportionality consideration to the definition of the permissible scope of discovery does not fundamentally change the discovery framework. Instead, it ensures that existing requirements under the Rules are appropriately and consistently applied.

Moreover, the more frequent application of proportionality considerations to limit discovery will not frustrate a party's appropriate search for evidence to support its case. In current practice, much time and expense is spent on the collection, review, and production of ESI that, while technically relevant, is of marginal utility and is cumulative of discovery from other sources. Application of proportionality considerations will encourage the use of more specific (and therefore more productive) discovery requests. Such requests could be followed, where appropriate, by a second round of requests directed to sources and issues identified as likely to be relevant and proportional. This is preferable to the common practice now of sweeping initial requests seeking an unnecessarily broad scope of information, including large volumes of ESI that might be marginally relevant but that is not particularly important to any party.

Including proportionality in the scope of discovery will also further the goal – reflected not only in the current proposed amendments but also in the 2006 amendments – of encouraging direct discussions between counsel regarding ESI issues. Under the proposed amended Rule 26(b)(1), discussions of the appropriate scope of discovery will be more productive because they will be more likely to include meaningful proportionality considerations.

As a final comment on Rule 26(b)(1), we applaud the Committee for eliminating the "reasonably calculated to lead to the discovery of admissible evidence" language from proposed Rule 26. This language is frequently misinterpreted as an exception to the requirement that the subject of discovery be relevant. It is often used in an attempt to justify patently overbroad requests and results in a scourge of unnecessary and unproductive discovery disputes. The language in the proposed amended Rule appropriately reflects that information need not be admissible to be discoverable but that it needs to be relevant and proportional in order to fall within the permissible scope of discovery.

Suggestions for Improvements to Proposed Rule 37(e)

Proposed Rule 37(e) is a positive step toward achieving a national standard for spoliation sanctions and confining those sanctions to appropriate circumstances. In the current practice environment, sanctions are too often sought – or threatened – as an attempt to gain leverage in a case rather than to remedy any actual problem. Litigants are deprived of the opportunity to make reasonable and good faith decisions regarding preservation for fear that 1) those decisions will be

second-guessed months or years later under an uncertain standard, and/or 2) they will be threatened with spoliation sanctions by an opposing party as an overly aggressive litigation tactic. As recognized in the Committee Notes to proposed Rule 37(e), this contributes to expensive and unnecessary overpreservation.

The key to reducing costly overpreservation is predictability. If litigants can be assured that their decisions will be judged under a predictable standard that is reasonable, then they will be empowered to make appropriate preservation decisions in good faith. Conversely, actual or perceived "loopholes" in the new Rule will mean that litigants will continue to overpreserve. Accordingly, we suggest the follow revisions to the proposed Rule to achieve predictability.

Eliminate the word "willful" from Rule 37(e)(1)(B)(i)

Inclusion of the word "willful" in the standard for sanctions risks confusion and uncertainty. Some courts may interpret "willful" to be synonymous with "intentional" or "voluntary." If proposed Rule 37(e) were interpreted this way, then reasonable actions – including those that would not, for example, even rise to the level of negligence – could subject a party to sanctions if the action was undertaken purposefully. Analysis of tort law supports the conclusion that use of "willful" risks significant confusion as to whether it refers to the intentionality of an act, an intended result, or to both.

Including the term "willful" is also unnecessary. If the Committee's point is that an actual intent to deprive an opponent of information that should have been preserved is sanctionable, then that concern is already addressed through the standard of "bad faith." Consideration of the factors listed in proposed Rule 37(e)(2) is sufficient to address willfulness as a component of bad faith.

Eliminate the Exception Contained in Rule 37(e)(1)(B)(ii).

The "irreparably deprived a party of any meaningful opportunity" language in Rule 37(e)(1)(B)(ii) risks creating an exception that could swallow the Rule in terms of needed certainty. Every sanctions motion (and every letter threatening a sanctions motion) will argue that the loss of information is so significant that it deprived the party of the "meaningful" ability to prove its case. Parties faced with the uncertain interpretation and application of Rule 37(e)(1)(B)(ii) will continue to overpreserve.

As discussed in the Committee Notes to proposed Rule 37(e), overpreservation is primarily a function of ever-increasing volumes of ESI in modern litigation. The framework proposed in Rule 37(e)(1)(B)(i) and 37(e)(2) is more than capable of addressing the consequences of the loss of ESI in a case. The "irreparably deprived" exception seems geared toward cases like *Silvestri v. General Motors Corp.* where a single piece of physical evidence is so important that it effectively comprises the entire case. The number of cases in this category is so small (some would say functionally non-existent) that it does not justify the risk of confusion and uncertainty imposed on tens of thousands of other cases, including those with significant volumes of ESI.

If the Committee elects to retain the exception in Rule 37(e)(1)(B)(ii), it should be tied to some level of culpability other than bad faith. As currently written, Rule 37(e)(1)(B)(ii) requires no culpability and would allow a court to impose severe sanctions for an entirely innocent and reasonable failure to preserve if it later resulted in the loss of important evidence. Similarly, proposed Rule 37(e)(1)(B)(ii) requires no demonstration that the information lost would have been unfavorable to the party against whom sanctions would be imposed.

Adopting a provision that authorizes sanctions with no showing of culpability and no prejudice will significantly frustrate the intended effect of the proposed Rule. However much the Committee Note may seek to describe the "very rare cases" in which such a provision is meant to apply, the existence of the alternative standard will foster uncertainty and lead to continued overpreservation. Rule 37(e)(1)(B)(ii) and the incredibly rare (or functionally non-existent) category of cases it is meant to address should not be the "tail that wags the dog" and we respectfully suggest it should be eliminated in order to further the important purposes of proposed Rule 37(e)(1)(B)(i) and 37(e)(2).

Other Comments

We suggest that the Committee Notes to Rule 37(e) (as well as those for Rule 26) should state explicitly that preservation obligations are limited by the same proportionality considerations. Additionally, to respond to other specific questions included in the Committee's invitation for public comment:

- We do not believe Rule 37(e) should be limited to sanctions for the loss of ESI. There should not be divergent standards for sanctions based merely on the medium in which information is stored.

- The provisions of current Rule 37(e) need not be retained. The framework of the new proposed rule is sufficient.

- An additional definition of willfulness or bad faith is not necessary. As suggested above, "willful" should be removed from the proposed Rule and the factors in Rule 37(e)(2) are sufficient to guide the inquiry into bad faith. If the Committee does retain the term "willful" it should consider adding language clarifying that it does not encompass actions or decisions that are otherwise non-culpable even if such actions or decisions were volitional.

Suggestions for Improvements to Proposed Rule 34(b)(2)(C)

We understand the purpose of proposed Rule 34(b)(2)(C). Too often in practice, a laundry list of objections is followed by a statement that "notwithstanding" those objections, documents and ESI will be produced. This leaves the requesting party uncertain whether information has been withheld on the basis of the objection. We appreciate the Committee's desire to address that uncertainty.

Our concern is that Rule 34(b)(2)(C) imposes a disproportionate obligation on the responding party with respect to overbroad requests. For example, common requests in practice include things like: "All documents relating to any allegation of the Complaint" and "All documents relating to your claimed damages." In those instances, the producing party would know that it is producing some information that would be responsive to the core of the requests but objections as to vagueness and overbreadth would be appropriate. It would be difficult to state what responsive materials are being "withheld" because it is difficult to conceive exactly what materials are being sought.

A responding party could seek to satisfy Rule 34(b)(2)(C) by affirmatively describing the limits of its search for responsive information, as suggested in the Committee Note. But the result of an unnecessarily broad and undifferentiated request should not be to impose an obligation on the responding party to offer a detailed account of its attempted response. To address this concern, we suggest that the Committee Note to Rule 34(b)(2)(C) include the statement that: "The sufficiency of the identification of materials withheld on the basis of objection should be measured by, among other things, the degree of specificity of the description of materials sought in the request."

Conclusion

In the interests of brevity and emphasis, our specific comments are limited to the matters described above. As a general comment, we believe the case management proposals set forth in the Committee's request for comment are helpful and non-controversial. We thank the Committee for its important work on the proposed Rules and for this opportunity to submit comments.

Sincerely,

Scott A. Kane