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Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
Thurgood Marshall Building
Suite 7-240
Washington, DC 20544

Re: Proposed Amendments to the Rules of Civil Procedure

Dear Members of the Committee:

On behalf of Verizon Communications Inc., we would like to thank the Committee for its work on the proposed revisions to the Federal Rules of Civil Procedure. Verizon strongly supports the proposed amendments as a significant improvement to the Rules dealing with discovery. These changes are consistent with the fundamental premise of Rule 1, namely securing the "just, speedy and inexpensive determination of every action and proceeding." We do, however, have some slight suggested modifications to improve these proposed revisions further.

Verizon is a leading global telecommunications company with over 200,000 employees worldwide. As such, Verizon is party to a variety of litigation, ranging from large business disputes to purported class actions to small claims matters. Unfortunately, the costs associated with litigation are increasing without, we would submit, an improvement in the efficacy of the litigation system.

The costs associated with the preservation, review and production of information – and in particular electronically stored information – as part of the discovery process represents a significant portion of these increased costs. Currently, Verizon has hundreds of employees on legal "hold," meaning that they are required to preserve data in connection with ongoing matters that would otherwise not be preserved in accordance with the company's document retention policies. Of the terabytes of information on legal hold, only a small percentage – less than half of 1 percent – will be used in a typical legal matter. The primary reason for retaining this huge amount of information is to guard against the threat that a litigant may later claim that some piece of "relevant" information may have been destroyed – a tactic that is unfortunately all too common.

The mounting costs of the preservation, review, and production of electronically stored information do not solely affect large scale litigation; in fact, it may have an even greater impact on small to medium size cases. In such cases, the potential discovery costs often approach or exceed the amount at issue. Such discovery costs are often one-sided: while Verizon may incur large expenses to preserve and produce information from a large number of employees or systems, the opposing party may not have much if any relevant information to collect or produce. This results in an incentive for that party to use disproportionate discovery as leverage to increase the costs associated with litigating the case for one party in order to secure a favorable settlement.

The proposed amendments to the Federal Rules represent a good step toward reducing the needless cost of litigation while at the same time preserving parties' ability to obtain the evidence that is relevant and necessary to support or defend claims. We believe the amendments could have a significant impact in helping parties and the courts make real world litigation more efficient.

Rule 26. This is particularly true of the proposed amendment to Rule 26, deleting the phrase that currently authorizes discovery of information "reasonably calculated to lead to the discovery of admissible evidence." This provision originally stood for the simple proposition that discovery need not be strictly limited to admissible evidence. However, it has long become unmoored from its original intent and transformed into a general statement allowing essentially limitless discovery of any information that might be of some, even tenuous, relevance to a litigation.

Similarly, invoking the concept of proportionality in Rule 26(b)(1) should emphasize to parties and courts the central importance that this concept plays in determining to what extent discovery should be allowed – particularly in smaller cases where the costs of electronic discovery, left unchecked, can easily exceed the amount at issue in the case.

We would respectfully suggest one additional change to Rule 26 consistent with this general approach. Currently, the Rule allows discovery into "any nonprivileged matter that is relevant to any party's claim or defense." We would suggest replacing the word "relevant" with "material." Just as with the phrase "reasonably calculated to lead," the word "relevant" could be stretched to include an almost limitless string of information that is only hypothetically relevant to a claim. By contrast, use of the term "material," well-defined in case law, would emphasize that appropriate limits can and should be placed on the scope of discovery without denying parties the ability to obtain information that is necessary for their case.

Rules 30-36. We also support the limits on interrogatories, request to admit and especially depositions reflected in the changes to Rules 30, 31, 33 and 36. These changes reinforce the notion that discovery should be conducted efficiently. In particular, the reduction in the presumptive number and duration of depositions should reduce the incidence of lawyers wasting deponents' time by asking irrelevant or repetitive questions simply to fill up the time or number of allotted depositions.

Rule 37. We believe that the proposed changes to Rule 37 are critical to ensuring that sanctions for discovery violations are only imposed for truly bad faith conduct and not for innocent errors. Although we believe that this rule should extend to all forms of discovery, this change is especially important in the context of electronic discovery, given the ease with which the failure to preserve some piece of data among a terabytes of "potentially relevant" information can be portrayed, with the benefit of 20/20 hindsight, as an example of negligent "spoliation" of "evidence." Furthermore, while the changes do not affect the standard for when and what must be preserved, the changes should help organizations make more rational judgments about what specific data must be preserved, as opposed to taking overly conservative and costly positions solely to avoid potential sanctions based on second guessing about even good faith decision-making.

We would, however, offer the following suggestions for modifying the proposed amendments to Rule 37. First, in proposed Rule 37(e)(1)(B)(i), we believe the phrase "willful or in bad faith" should be changed to "willful *and* in bad faith;" alternatively, the word "willful" should be defined in the Rule to include only actions that involves destruction of information that the party knows is required to be preserved for litigation. Otherwise, the word "willfully" will be mis-interpreted to include an intentional, routine act of destroying information by a person wholly unaware of its relevance to a legal matter.

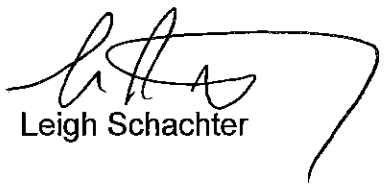
Second, the exception in Rule 37(e)(1)(B)(ii), allowing for sanctions to be imposed under certain circumstances even in the absence of bad faith, should be eliminated. While we understand that the Committee intends this provision to be applicable only in exceptional circumstances, any such exception opens up the possibility of having it swallow up the rule. At best, this exception will engender further litigation over whether a party has been "irreparably deprived" of their "meaningful opportunity" to present their claims or defenses, especially in light of the inherent vagueness of these terms. Moreover, even in truly exceptional circumstances, it is not clear why innocent conduct should be subject to sanctions (as opposed to curative measures) simply because of the effect it may have on the other party to the litigation.

Third, we would suggest removing the proposed Rule 37(e)(2) which spells out a list of factors to be considered in assessing a party's fulfillment of its preservation obligations. While the factors would certainly be appropriate for a court to consider, the list is certainly not exclusive, yet enshrining these factors in the Rule could convert them into their own mandates and thus lessen the Rule's true focus on assessing whether a party's conduct was willful and in bad faith and whether the other party suffered "substantial prejudice." If the Committee is inclined to maintain this list of factors in some form, we would suggest that they be included instead as a non-exclusive list of factors laid out in the committee notes.

Rule 84. Finally, we applaud the Committee for its proposal to abrogate Rule 84 and the Appendix of Forms. As the Advisory Committee on Civil Rules correctly noted in its 2013 memorandum, "some of the forms have come to seem inadequate, particularly the Form 18 complaint for patent infringement."

Once again, we would like to thank the Committee for its hard work on this issue and reiterate our strong support for the proposed amendments.

Very truly yours,



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