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LAWYERS FOR CIVIL JUSTICE

PROPOSED AMENDMENTS TO FRCP 26 AND 37 GOVERNING: SCOPE OF DISCOVERY, COST ALLOCATION, PRESERVATION TRIGGER, AND SANCTIONS

SCOPE OF DISCOVERY

26(b)(1) *Scope in General.* ~~Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).~~

ALTERNATIVE "A":

26(b)(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant **and material** to any party's claim or defense including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter, subject to the limitations **and proportionality assessment** imposed by Rule 26(b)(2)(C). ~~For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

26(b)(2)(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of the following categories of electronically stored information ~~from sources,~~ absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):

- (i) deleted, slack, fragmented, or other data only accessible by forensics;
- (ii) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

- (iii) on-line access data such as temporary internet files, history, cache, cookies, and the like;
- (iv) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (v) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
- (vi) backup data that are substantially duplicative of data that are more accessible elsewhere;
- (vii) physically damaged media;
- (viii) legacy data remaining from obsolete systems that is unintelligible on successor systems; or
- (ix) any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost; and that On motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for discovery.

26(b)(2)(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is ~~unreasonably~~ cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Rule 26(b)(2) *Limitations on Frequency and Extent.*

- (A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests

under Rule 36, or the temporal scope of the requests, or number of custodial sources required to be searched for requests under Rule 34.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things or Entering onto Land, for Inspection and Other Purposes

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(b) Procedure.

(1) *Contents of the Request.* The request:

- (A) must describe with reasonable particularity each item or category of items to be inspected;
- (B) ~~must specify a reasonable time, place, and manner for the inspection, and for performing the related acts; and be limited, unless otherwise stipulated or ordered by the court in a manner consistent with 26(b)(2), to:~~
 - (i) a reasonable number of requests, not to exceed 25, including all discrete subparts;
 - (ii) a reasonable time period of not more than two years prior to the filing date of the complaint;
 - (iii) a reasonable number of custodial or other information sources for production, not to exceed 10;
- (C) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
- ~~(D)~~ (D) may specify the form or forms in which electronically stored information is to be produced.

COST ALLOCATION

In General. A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request.

(1) Such costs include the costs of preserving, collecting, reviewing and producing electronic and paper documents, producing witnesses for deposition and responding to interrogatories.

(2) Each party is responsible for its own costs related to responding to Disclosure Requirements under Rule 26.

(3) Non parties responding to Subpoenas under Rule 45 shall be entitled to recovery of reasonable costs associated with compliance with the subpoena.

(4) The costs described in subsection (1) and (3) above shall be considered Taxable Costs under Rule 54(d).

PRESERVATION TRIGGER AND SANCTIONS PROVISIONS

PRESERVATION:

Rule 26.1. Duty to Preserve Information.

(a) Duty to Preserve Information. Any duty to preserve information subject to discovery pursuant to Rule 26(b)(1) is triggered when a defendant or respondent receives actual notice that a complaint or petition has been duly filed against it, or a formal administrative claim that is a statutory prerequisite to filing a complaint in a U.S. District Court has been duly commenced. Plaintiff's duty is triggered when the complaint is filed.

SANCTIONS:

Existing Rule 37(e) should be replaced with the following:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) Sanctions for failure to preserve information. Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:

- (1)** a willful breach of the duty to preserve information has occurred;
- (2)** as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;
- (3)** the party seeking sanctions has been demonstrably prejudiced;
- (4)** no alternative source exists for the specified information, documents or tangible things;
- (5)** the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions;
- (6)** the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.