October 1, 2012

Sent Via Email

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Sedona WGI Steering Committee

Re: Draft Federal Rules

Dear Sedona Working Group Members:

Thank you for permitting State Farm to comment on Sedona's proposal for meaningful new standards governing discovery, preservation, and sanctions. Now is the time to address these issues, and they should be addressed by revising the Federal Rules of Civil Procedure (FRCP). With the voluminous and exploding electronic information age, the FRCP have not kept pace with such information or the litigation involving electronic discovery. More than small, ad-hoc adjustments are needed to the FRCP specifically in the sanction and scope of discovery sections.

It is time to move to an intentional sanction standard. The FRCP should be amended to add an intentional culpability standard to Rule 37(e). State Farm supports the approach which protects a party under the safe harbor unless the party has intentionally or recklessly failed to preserve the information. The history behind the sanction stems from the fact that courts needed penalties or mechanisms of enforcement to provide incentive for obedience with the laws or the rules or the regulations. *Clear Value Inc. v. Pearl River Polymers Inc.*, 560 F.3d 1291, 1306 (C.A. Fed (TX) 2009). Typically, a level of fault is required for the imposition of sanctions. The FRCP should be no different. They should require a high level of fault before a sanction is imposed. "Sanctions for failing to preserve or produce relevant and material ESI should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step such as failing to issue a written notice, to identify a key custodian, to identify an electronic storage location or to anticipate a specific request for ESI." Lawyers for Civil Justice, et al, "*Now is the Time for Meaningful New Standards Governing Discovery, Preservation, and Cost Alloction: Preliminary summary of View regarding Necessary FRCP Amendments*, Mar. 15, 2012. Rule 37(e) should only permit sanctions to be awarded upon proof of deliberate destruction of material information.

Scope & Preservation of Discovery: A more defined approach is needed. Courts are interpreting FRCP 26(b)(1) "Scope in General" on and ad hoc basis. Such interpretation is turning the law into an affirmative duty to preserve material that may become relevant in litigation to avoid inadvertent disposal of material that could otherwise be properly disposed of per record management policies. Under the current law, companies like State Farm are spending unnecessary money to preserve undefined spoliation risks.

Besides the costs and undue burdens associated with preservation, parties do not know what information in the electronic age should be preserved because there is no standard. The only current guidance is Rule 26(b)(1), which is ambiguous and overly broad. Thus companies are placed in the difficult position of saving everything at great cost or trying to define the preservation boundaries themselves and risking sanctions for failing to preserve.

The scope of discovery should be narrowed by limiting discovery to "any non-privileged matter that would support proof of a claim or defense" subject to a proportionality standard similar to Rule 26(b)(2)(C). The sheer volume of electronic information that could be produced to an overbroad electronic discovery request dictates there be some restriction on what electronic information parties can discover. Additionally, the Rule should specifically define categories of ESI that do not need to be preserved. The Seventh Circuit's E-Discovery Pilot Program has done this. In its E-Discovery Principle 2.04(d), the Seventh Circuit states discovery of some forms of ESI is not allowed unless a party specifically raises the need for it early on: deleted, slack, fragmented or unallocated data, RAM, certain metadata fields, duplicative backup data, etc. Providing this more narrowly tailored guidance in a Federal Rule, would assist parties in defining the boundaries of what ESI should be preserved and what ESI is discoverable. Creating such a Rule permits parties to focus on the subject litigation and not the superfluous, voluminous areas of other ESI simply being maintained out of fear of sanctions.

In determining when preservation obligations commence, a more specific trigger is needed. The trigger described in the Lawyers for Civil Justice proposal articulates a clear and unambiguous trigger for preserving information that State Farm supports: "*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*."

Cost Allocation. It is time for a Rule wherein each party pays the costs of discovery it seeks. Such a Rule provides incentive for parties to tailor their discovery requests to information relevant to the claim or defense. Large companies today face exorbitant costs in searching for "not reasonably accessible" data. Each party paying for its own discovery would help reduce these costs, by limiting overbroad and irrelevant requests. A specific word search of a large company's entire back-up or disaster recovery system could cost millions of dollars.

Furthermore, to complete these types of searches negatively impact normal business operations. If a requesting party seeks such information then the requesting party should be required to pay the costs for searching for and producing the information. Not only would such a rule save costs for the parties but it would lower costs for the entire court system. Judges dockets are already over-crowded. A cost allocation rule would lead to judicial economy.

It is time to make meaningful substantive changes to the FRCP. The revisions recommended here can provide more guidance to parties in the litigation system, save costs, remove undue burden and provide for judicial economy. Thank you for your consideration of these matters.