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EDISCOVERY ALERT

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Call to Clients to Share Data Illustrating Consequences of Discovery Costs: Comment Period Opens for Amendments to the Federal Rules of Civil Procedure

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Introduction

On August 15, 2013, the Civil Rules Advisory Committee (hereinafter "the Committee") began what is expected to be a six-month period of open commentary on the proposed amendments to the Federal Rules of Civil Procedure ("FRCP"). This invitation to comment offers law firms and litigants an opportunity to influence, and provide context regarding, rules that will affect the legal community and our businesses for years to come.

We hope that you will participate in this commentary process and contact us with specific examples of costs, data volumes, or preservation decisions that symbolize the extraordinary cost and disruption to business that can result from uncontrolled discovery. As Orrick evaluates whether to submit comments, we are assembling case studies as we expect commentary with empirical data will be most meaningful and worthwhile. Should we comment, we will speak to the experiences of our broad client base while also highlighting the experience of small and emerging companies, the perspective most underrepresented in the dialogue to date. If you have data points or case studies you are willing to allow Orrick to include in comments to the committee, we invite you to contact us, and we look forward to the opportunity to work with you on shaping these important practice rules.

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KEY PROPOSED AMENDMENTS TO DISCOVERY RULES AND REQUESTED DATA POINTS

Rule 16:

- Amending Rule 16(b)(3) to permit scheduling orders to "direct that before moving for an order relating to discovery the movant must request a conference with the court."
  - Data Point: Examples of early judicial intervention or litigation in courts who already have this as a local rule and the impact of this practice on cost, efficiency and time to trial.

Rule 26:

- Amending Rule 26(d)(1) to allow discovery requests to be made before the parties participate in a Rule 26(f) conference, but without altering the timing for serving a response.
  - Data Point: Experiences, outcomes, and/or costs associated with negotiating ESI protocols before requests for production have been propounded.
- Amending Rule 26(b)(1) to expressly incorporate the cost-benefit analysis contained in the existing Rule 26(b)(2)(C)(iii) as an express limitation on the scope of discovery.
  - Data Point: Examples regarding the impact of proportionality motions or ESI protocols, including and especially when done absent default limitations on custodians, search terms, data sources, etc.

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KEY PROPOSED AMENDMENTS TO DISCOVERY RULES AND REQUESTED DATA POINTS

Rule 26 (cont.):

- Amending Rule 26(b)(1) to strike the sentence allowing court-controlled discovery into "any matter relevant to the subject matter involved in the action, and instead, limiting all discovery to matter "relevant to any party's claims or defenses" as set forth in the pleadings.
    - Data Points: Examples of egregious "any and all" discovery requests, circumstances where email had little probative value but resulted in a majority of collection, processing and review expenses, impact of local court rules or protocols that include presumptive limits.
- Amending Rule 26(c)(1)(B) to make the court's power to enter a protective order that re-allocates the expenses of discovery more explicit.
    - Data Points: Examples of information produced to, but likely never reviewed by, the opposing party; challenges and costs associated with pursuing cost shifting; and, the impact on reasonableness of opposing party requests when faced with either presumptive limits or indication from the bench that cost shifting is likely to be considered.

Rule 37:

- Amending Rule 37(e) to expressly set forth criteria to be used in evaluating the propriety of issuing sanctions for spoliation, including proposed language of "willful **or** bad faith misconduct."
    - Data Points: Examples of opposing party unwillingness to negotiate scope of preservation, challenges to preservation decisions in putative class actions; examples of circumstances where certain data is not preserved (text messages, IM, video surveillance) or other examples of good faith preservation decisions made consciously – or 'willfully' – but not in bad faith; examples of expensive negotiations or litigation over failure to preserve immaterial or cumulative sources; examples in which the court gave thoughtful input or analysis regarding the true impact of information at issue; and, examples of company investment in technology, hardware or vendors for sole purpose of supporting preservation obligations.

Overview of Key Proposed Amendments Impacting Discovery

Rule 16 – Initial Case Management Conference, Scheduling Orders and Case Management

Rule 16(b)(2) currently requires judges to issue a scheduling order within the lesser of 120 days after any defendant has been served or 90 days after any defendant has appeared. Under the proposed changes, judges will be required to issue an order within the lesser of 90 days after any defendant has been served or 60 days after any defendant has appeared. The amended rule would also allow courts to extend these deadlines in appropriate cases. Concerns have been expressed to the Committee that the shorter timeline will reduce the amount of time parties have at the beginning of an action to think about the case and prepare for a meaningful scheduling conference. Indeed, it is foreseeable that the shorter timeline could reduce the ability of parties to assess their case, interview key players/custodians and prepare a well-thought-out discovery plan.

Next, the Committee is proposing adding a new sub-paragraph (v) to Rule 16(b)(3), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court." The Committee has observed that many courts have similar requirements in their local rules and that the requirement for an informal pre-motion conference with the court often resolves a discovery dispute without the need for a formal motion, thereby reducing discovery-related costs and delays. The question remains whether this amendment would go far enough or whether, to achieve the intended impact, pre-motion conferences must be mandatory absent exceptional circumstances.

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Rule 26 – Duty to Disclose and General Provisions Governing Discovery

Rule 26(d)(1) may be amended to allow discovery requests to be made before the parties participate in a Rule 26(f) conference, a practice not currently allowed.[i] The Committee reasons that allowing parties to serve discovery requests early will help facilitate a more substantive, informed and meaningful discussion at the Rule 26(f) conference.

Second, in an effort to promote greater use of the proportionality concept during discovery, the Committee is proposing to amend Rule 26(b)(1) to expressly incorporate the cost-benefit analysis contained in the existing Rule 26(b)(2)(C)(iii) limiting the scope of discovery. Amended Rule 26(b)(1) would read: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[ii] Third, as currently written, Rule 26(b)(1) allows court-controlled discovery into "any matter relevant to the subject matter involved in the action." In an effort to narrow the scope of discovery, the Committee is proposing amending Rule 26(b)(1) to strike this clause, limiting discovery to only information "relevant to any party's claims or defenses" as set forth in the pleadings.[iii]

Finally, the Committee is proposing an amendment to Rule 26(c)(1)(B) to make explicit the power to shift costs. What remains to be determined is whether the commentary to the final rules will give additional context and explanation educating litigants that the courts' power to shift costs applies to the entire discovery life cycle, including preservation, collection, processing and review.

Rule 34 – Limitations on Requests for Production

The Committee considered and rejected a proposal to presumptively limit the number of Rule 34 requests for production to 25—much as Rules 30, 31, and 33 now contain presumptive limitations—thereby leaving request for production as the only form of discovery not subject to an express presumptive limitation.[iv]

This decision is a stark contrast to laudable trends in local rules and protocols. The Federal Circuit's Model E-Discovery Order presumptively limits the number of custodians and search terms and recognizes the potentially limited probative value of email. Likewise, while the Southern District of New York's Joint Electronic Discovery Submission does not provide the parties with specific presumptive limits, the court does require the parties to certify that they have contemplated and discussed limits on, for example, (i) the number of custodians, (ii) document sources, and (iii) files types. The SDNY publication also includes a "Pretrial Conference Checklist" that puts parties on notice that they must be prepared to demonstrate their adherence to the principle of discovery proportionality embodied in Rule 26(b) by agreeing to limit the breadth of document preservation, reduce the scope of discovery and limit or prohibit preservation depositions.

Similarly, although the Committee is proposing several amendments to Rule 34 to facilitate more straightforward responses to document requests and discourage use of boilerplate objections, the Committee has not proposed any amendments that would bar boilerplate requests, such as those for "any and all" documents.[v]

Rule 37 – Sanctions for Spoliation

The most discussed, controversial and anticipated amendment is the change to the safe harbor provisions of Rule 37. In fact, the proposed language is likely to be further revised as evidenced by the specific questions posed by the Committee in the call for commentary. The proposed amendment is an attempt to respond to the increasing frequency and intensity of calls from both the corporate and legal communities for predictability, uniformity and guidance from the Rules on questions of preservation.[vi] The new language is an attempt to provide clarity with respect to what is sanctionable conduct so that litigant behavior is guided by rational analysis instead of fear. The Committee is also seeking to ensure that proportionality is a defensible argument in the context of preservation, just as it is in many other areas of discovery. As amended, Rule 37(e) would explicitly require a finding of "willful **or** bad faith misconduct" and "substantial prejudice" for the imposition of spoliation sanctions. The commentary period will draw out opinions as to whether these changes secure and provide clarity to the protection already available or instead erode existing protections by codifying willful conduct as the standard for sanctions.

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KEY QUESTIONS FROM THE COMMITTEE PRESENTED FOR COMMENT

Question 1: Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

Question 4: Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Question 5: Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Conclusion

In closing, we note that the Committee has proposed other amendments to the FRCP, including some of the federal rules governing discovery, that are not discussed above. Instead, we discuss only those proposed amendments that we believe are most likely to have an impact on the conduct of discovery, and its cost, or be of interest to you, our clients. We encourage you to review the complete Committee Report at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

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[i] A corresponding amendment would also be made to Rule 34(b)(2)(A), setting the time to respond to a request delivered under this new rule to within 30 days after the parties' first Rule 26(f) conference. This would ensure that early service would not advance the deadline for responding to these requests.

[ii] A corresponding change would also be made to Rule 26(b)(2)(C)(iii) to expressly refer to the amended portion of Rule 26(b)(1).

[iii] In the same vein, the Committee proposes striking the penultimate sentence in Rule 26(b)(1), which currently reads: "Relevant information need not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence."

[iv] The Committee has recommended amending Rule 36 to impose a presumptive limit of 25 on requests for admission.

[v] For example, the Committee proposed amending Rule 34(b)(2)(B) to require that grounds for objections to document requests be stated with specificity. Additionally, the Committee proposed amending Rule 34(b)(2)(C) to require that an objection "state whether any responsive materials are being withheld on the basis of that objection."

[vi] Judicial analysis underlying the question of whether to impose a sanction for spoliation, and if so, which sanction, is informed by a colorful assortment of criteria when considered on a national scale. All you have to do is take a look back at Judge Grimm's now-legendary Victor Stanley chart to appreciate the level of uncertainty in the law.