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The Dow Chemical Company
Midland, Michigan 48674

2030 DOW CENTER

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Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATED TO ELECTRONIC DISCOVERY

Dear Mr. McCabe:

I am a Managing Counsel and leader of the Discovery Expertise Center in The Dow Chemical Company's Legal Department. In this function I am responsible for developing and implementing best practices in conducting discovery, whether in paper or electronic form. The comments that follow are based on many years of experience managing and implementing large-scale electronic and conventional paper discovery projects in the context of a large corporation. The comments are respectfully submitted for consideration by the Federal Judicial Conference Advisory Committee on Civil Rules with the hope that the Advisory Committee will find them of value in their efforts to improve the handling of electronic discovery under the Federal Rules.

Review of the proposed amendments, the discovery rules in general and the extensive comments submitted to the Advisory Committee have revealed a substantial breadth of opinion on what should or should not be done to address the current state of electronic discovery in the U. S. Courts. Despite the variety of opinions expressed, one thing is clear: the time for additional clarity and guidance is at hand, not only for the parties, but also for the courts. It is therefore with great appreciation of the obviously substantial efforts of the Advisory Committee to make sense of the realm of electronic discovery that these comments are submitted. Getting to where we need to be can only come with sound amendments to the discovery rules.

Initially skeptical of the need for amendments, I have come to support the need for amendments that ensure fairness, prevent discovery abuse and promote predictability in the discovery process. But the age-old axiom has never been truer: The devil is in the

details. Pursuit of the goals of the amendments can be totally defeated if the implementation does not stay focused on the goals of the Federal Rules: "to secure the just, speedy, and inexpensive determination of every action." FRCP Rule 1. While the concepts embedded in the amendments are sound, I am concerned that certain details of the proposed amendments will leave litigants wanting.

Rule 26(b)(2): Fairness, Discovery Abuse, Cost-Shifting

As Advisory Committee Notes on past amendments to FRCP Rule 26(b) reveal, concerns about discovery abuse have been long-standing. In support of the 1980 amendments to Rule 26(b), the Committee stated, "There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse...." In 1983, in support of further amendments to Rule 26(b), the Committee stated, "Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems." The Committee went on to state, "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses." In adding new language to deal with "over-discovery" the Committee noted, "The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry," further stating that, "The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

Finally, regarding the 2000 amendments to Rule 26(b), the Committee noted, "The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."

Significantly, these concerns arose in the context of paper discovery. Things will not get any better in the context of electronic discovery. Given the experience of the last 20 years, one must assume that the courts, generally speaking, simply do not have the time and resources available to pursue the depth of detail required to address discovery concerns on a case-by-case basis in addition to fulfilling their other duties. With this history of paper-based discovery concerns and the full fledged advent of electronic discovery, it seems appropriate that any amendments to the Federal Rules should follow the same path in addressing both paper and electronic discovery. It is also logical in doing so that deviations from past precedent, concepts and terminology be kept to a minimum.

Under the existing rules, the first step in responding to any request to produce by a responding party is identifying responsive materials. The second step is determining which of the identified materials can be produced without undue burden, which is then followed by their production. If the production is not deemed sufficient by the requesting

party, the requesting party can move for the production of additional materials. This approach should hold true for both paper and electronic discovery. In this manner, the emphasis for all discovery stays first on responsiveness, then on reviews of adequacy and ultimately burden v. benefit.

To the contrary, the proposed amendments to Rule 26(b)(2) make the first step one of looking at what is accessible, not what is responsive. This shift appears to be based on the idea that accessibility is a surrogate for responsiveness. However, the mere existence of accessible information does not make it responsive. Accessibility is an aspect of burden. Burden, as the current rules provide, is a constraint in ultimately determining the scope of responsiveness. Placing accessibility in the fore puts it out of place. Burden should be addressed as a whole, not piecemeal.

In focusing first on accessibility and not responsiveness, the proposed amendments will unnecessarily increase the cost of responding to electronic discovery. The proposed approach will force a responding party to process large volumes of accessible data with no indication of whether the data will prove responsive. The presumption that collecting accessible data is not burdensome is simply wrong. In corporate environments the volume of "accessible" data alone is staggering. Adding backup data simply makes the numbers twice as staggering.

Further, there is no uniform correlation between the accessibility of data and the burden associated with collecting and producing that data. Large corporations typically have tens of terabytes of active, accessible data at any given moment, with a corresponding pool of backup data. The degree of burden and expense associated with collecting and producing any kind of data is a function of numerous factors, including, for example, the nature, kind, location, number, age, features, access limitations, software and hardware requirements of the systems involved. Any number of combinations of these factors can make the burden of retrieving "accessible" data equally as, or perhaps more, burdensome than retrieving data that is considered under the proposed amendments to be "inaccessible."

The proposed amendment to Rule 26(b)(2) is troublesome in two additional respects. First, the language requires the responding party to identify the electronically stored information it deems not reasonably accessible and second, places the affirmative burden of going forward in identifying what is or is not accessible on the responding party.

By requiring the responding party to identify the electronically stored information it deems not reasonably accessible, the proposed amendment will force the responding party to disclose its information infrastructure, thereby providing a potential roadmap to adverse litigants. While perhaps of less consequence in a "one off" matter, in pattern litigation this requirement will have a highly negative impact. The design and structure of information systems is information that a company routinely considers highly confidential and subject to strict access limitations, even within the company itself. Further, in many instances the proposed amendment would force a company to spend considerable effort simply to identify the systems which it has not searched, whether

active, archive, or legacy. Company information systems are still developed and implemented to meet business objectives – not to comply with discovery rules. What is necessary for the former is typically of little use in complying with the latter.

In placing the burden of going forward on the responding party to identify what is or is not accessible information, the proposed amendment takes a position inconsistent with the handling of non-electronic data under existing Rule 26, which states: the burden of challenging the sufficiency of the information produced by a responding party rests with the requesting party.* The proposed amendment turns this line of precedent on its head by requiring the responding party to disclose what it is not producing, instead of having the requesting party challenge the adequacy of the response, as is the case for non-electronic discovery under the existing rule.

Finally, a cost-shifting provision needs to be built in to the rule to prevent abusive use of discovery. The Texas approach to electronic discovery appears to be a fair way to balance the interests of the parties in dealing with electronic discovery by imposing cost-shifting when a responding party cannot retrieve the requested information through reasonable efforts.

Rule 26(b)(5) – Privilege

Inadvertent waiver provisions clearly provide a benefit to parties in certain cases, but a serious concern exists regarding the use of such provisions in pattern litigation involving matters in jurisdictions where the concept of inadvertent waiver is not recognized. In such instances, the inadvertent waiver in the one case will let such privileged information "out of the bag" forever. This reality will do little, if anything, to facilitate privilege review cost savings for parties involved in pattern litigation cases.

Rule 34: Electronically Stored Information, Form of Production

A proposed amendment to Rule 34 would add the new term "electronically stored information" to the rule. The purpose of this additional term is believed to be adequately met by existing and other proposed phrasing expanding on the term "document" to include "other data or data compilations in any medium."

Another proposed amendment to Rule 34 provides the requesting party "may specify the form in which electronically stored information is to be produced," or that if not so specified, that the "responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form." These provisions will impose additional cost and logistical burdens on a company because of the need to make searchable environments available, independent of the company's existing information infrastructure(s). A company will be driven, out of necessity, to do so in order to minimize or avoid disruption to its ongoing business and data handling operations, and to otherwise keep the company's information separate from that made available because of the litigation. Further, the costs of making such independent environments available, to

* This assumes the responding party does not seek a protective order.

the extent it can be done reasonably at all, should be presumptively shifted or shared, with the producing party having to bear the costs alone only upon a showing of good cause.

Rule 37: Safe Harbor

The establishing of a safe harbor is supported. The establishment of a standard higher than negligence to trigger the availability of sanctions against a party is equally supported. As the Advisory Committee well understands, corporate information systems are large, intricate, dynamic, multi-faceted and not designed with litigation needs in mind. In addressing the need to preserve discoverable information in such an environment, it is realistic to assume that somewhere across the various sub-systems which compose a company's information structure that a piece of the system might be overlooked or somehow slip through the preservation effort. It is also realistic to assume that such an omission or failure may allow information to be lost or made unrecoverable as a result of routine operations. Absent bad intent, and in the presence of a good faith effort, the occurrence of such an event should not be punished.

Further, the effort to determine all places in a company's information systems where the routine operation of a system could result in the loss of information will likely pose a not insignificant burden. Figuring out how to then stop such identified systems from performing their designed functions in a timely manner without disrupting company operations is likely to be even more burdensome, if not impossible.

Finally, the unintentional and inadvertent loss of information through the routine operation of an established records management program should also fall within the safe harbor. Inadvertent human error in implementing a records management program when a litigation hold is in effect should not subject a company to sanctions. The standard to trigger availability of sanctions should be higher than a negligence standard.

Thank you for the opportunity to comment on the proposed amendments. The efforts of the Advisory Committee are greatly appreciated and certainly will result in improved guidance for clients, counsel and the courts.

Respectfully,

William H. Herr
Managing Counsel
989-638-2053
whherr@dow.com