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NEW DISCOVERY, PRESERVATION, AND COST ALLOCATION RULES WILL REDUCE COSTS AND IMPROVE CIVIL JUSTICE

by

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INTRODUCTION

The Federal Rules of Civil Procedure must be meaningfully amended in three key areas To substantially improve the quality of justice, reduce costs, burdens and unnecessary risk, and to create the opportunity to actually try more cases: (1) limit the scope of discovery to information relevant, material, and proportional to the claims and defenses, (2) trigger preservation duties on commencement of litigation and sanctioning only willful destruction of information for the purpose of preventing its use in litigation, and (3) reverse current perverse cost allocation economic incentives to require that each party pay the reasonable costs of the discovery it seeks.

Lawyers for Civil Justice and their law reform partners are working together to persuade the rulemaking committees and Congress to enact these amendments. These efforts deserve your strong support and active participation.

Currently, the U.S. Judicial Conference Committee on Rules of Practice and Procedure and its Civil Rules Advisory Committee are being urged by organizations such as Lawyers for Civil Justice to cut through a myriad of pending rule amendment proposals that amount to mere tweaking of the existing Rules and to focus on developing an interrelated package of broad-based and bold amendments in the three areas referenced above. Other significant voices recently joined that chorus. As stated by Congressman Trent Franks, Chair of the Subcommittee on the Constitution of the House Judiciary Committee:

> We appreciate your Committee's current consideration of proposed rule changes to address many of these issues, salute your efforts, and look forward to the recommendations of your Committee. You and your Committee have a monumental effort ahead of you as it is our view that the Rules have become an outdated, confusing and complex patchwork of vague and indeterminate standards that are in need of a major overhaul. Accordingly, we suggest that your Committee consider focusing for now on developing a clean, straightforward rewrite of the Rules governing discovery, preservation, and cost allocation. *Letter,*

[1] Alfred W. Cortese, Jr., of CORTESE PLLC in Washington, D.C., has based this article on his years of scholarship and work in the area of civil justice reform as counsel to Lawyers for Civil Justice and major corporations. See, e.g., *A Once in a Century Opportunity: Meaningfully Amending the Federal Rules Will Improve the Administration of Justice*, DRI In-House Defense Quarterly, Summer 2012.

Hon. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell, March 21, 2012.

The dawn of the twenty-first century brought great promise and hope that advances in technology would make all aspects of the civil litigation system more efficient and cost effective. This great hope, however, has evaporated and instead litigants have been inundated by spiraling costs, excessive and burdensome discovery that has produced the opposite result. The plaintiffs' bar frequently has attempted to use the technology and information explosion to coerce settlements from corporate America by threatening costly discovery battles over millions of gigabytes of information. Faced with skyrocketing costs and unacceptable risks, corporate America often is forced to choose the certainty of settlement.

A far more fundamental shift has occurred, however, as a result of unacceptably burdensome and intrusive discovery. The merits actually determine the outcome of very few cases. Discovery-coerced settlements mean that parties don't resolve disputes through trials. As a result, an entire generation of new lawyers misses out on the opportunity to learn trial skills by actually trying cases. Many experienced defense trial lawyers have sounded the alarm that the days of the trial lawyer are essentially gone.

Something must change if the civil justice system as we know it is to survive. This change can only happen by adopting incentive based rules that recognize the fundamental fairness required by a system of justice—fairness cabined by: predictability, proportionality, consistency, and clarity.

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Indeed, some judges are experimenting with methods to control unnecessary discovery through Discovery Orders issued in individual cases that incorporate some of the above proposals. For example, Hon. Paul W. Grimm, Chief Magistrate Judge, U.S.D.C., MD, recently began to issue Discovery Orders in several of his cases similar to that attached to this article as *Appendix "B"*. Judge Grimm is Chair of the Discovery Subcommittee of the Civil Rules Advisory Committee.

THE NEED FOR MEANINGFUL RULE AMENDMENTS

Failing to adjust the Federal Rules of Civil Procedure to meet the demands of twenty-first century litigation will have significant, negative implications today and for our future. Inefficient and unpredictable litigation is a tax on productive behavior and an inefficient system can have significant adverse impacts, including sanctioning appropriate behavior and providing incentives for inappropriate behavior. *See e.g.*, Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of* Twombly *and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 115 Penn. St. L. Rev. 1 (2010). Such perverse effects weaken our economy and social structure, and the global competitiveness of American companies. *See e.g.*, John Langbein, *Cultural Chauvinism in Comparative Law*, 5 Cardozo J. Int'l. & Comp. L.41, 48 (1997) ("Americans operate a system of justice whose excesses make it a laughing stock to the rest of the civilized world. Our system is truth-defeating, expensive, and capricious – a lawyers' tax on the productive sector."); Daniel Troy, *Seize the Opportunity - Reduce The Costs And Burdens Of Our Current Justice System*, The Metropolitan Corporate Counsel (2010); Francis H. Buckley, *et al.*, *The American Illness: Essays on the Rule of Law*, (forthcoming, The Yale Univ. Press, 2012)

(Essays detailing the adverse impact of the American civil justice system on global competitiveness).

Unfortunately, the Federal Rules have not kept pace with either the information or the litigation explosions and, as a result, federal courts are now failing in key ways to ensure the just, speedy, and cost-effective determination of every action. This is largely because the many well-intentioned earlier rule amendments have tinkered at the edges of necessary change and the sporadic, inconsistent holdings of various courts that have resulted from them, taken together, have failed to achieve the meaningful, systemic changes to interrelated rules that are now more necessary than ever.

The difficult task of crafting procedural rules that would actually help solve some of today's problems, in which the Rules Committee is now engaged, is symptomatic of a deeper underlying problem: the 1938 Rules are simply out of date and the myriad variety of "tweaks" to those rules over the last 30 years have been unable to keep pace with the information explosion and the resulting skyrocketing increase in the costs, burdens, and complexity of modern litigation.

The defense bar has long supported returning to the fundamentals of the Federal Rules of Civil Procedure. Lawyers for Civil Justice—along with DRI, the FDCC, and the IADC—submitted a white paper presenting the consensus of the defense bar that included specific recommendations to a May 2010 Conference on Civil Litigation sponsored by the Committee on Rules of Practice and Procedure. Lawyers for Civil Justice, et al., *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* 7–8, 18–20 (May 2, 2010). The white paper encouraged the Committee on Rules of Practice and Procedure to move forward with meaningful amendments to the rules in four key areas: (1) pleadings, (2) discovery, (3) preservation, and (4) cost allocation. This paper focuses on the latter three interrelated areas.

The rules advocated in the white paper and subsequent comments submitted to the Committee on Rules of Practice and Procedure, if adopted, would help achieve real relief from the costly and inefficient administration of justice that has come to characterize the current civil justice system. Business leaders, the bar, and the judiciary have become more aware of the interplay between the nation's suffering economy and the opportunities that reforming the federal rules might hold for boosting U.S. competitiveness in a global economy. Reducing the extraordinary costs, burdens, and unacceptable risks of modern litigation would also increase in the number of cases that courts try to verdicts.

Moreover, the rule reform proposals have received legal academic attention and support: Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 64 U. Fla. Law Rev. 965 (2012); Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules,* 115 Penn St. L. Rev. 1 (2010); Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure,* 64 U. Fla. L. Rev. 845 (2012). This scholarship has created a significant legal and economic foundation for arguments supporting specific proposals and has highlighted substantial empirical data documenting existing problems that should drive the proposed rule-making solutions.

RULES OF PROCEDURE MUST ADJUST TO MODERN LITIGATION

Federal Rule of Civil Procedure 1 expressly recognizes that the primary goal of the federal procedural system is the fair, efficient, and accurate adjudication of legal actions. This underscores and recognizes the need for procedural rules to vindicate and protect the substantive law. However, debates over rule amendments frequently neglect the law's ultimate goals, more often focusing on a particular area or problem. For example, certain perceptions about the internal norms of the Federal Rules of Civil Procedures and the rule-making process drove much of the ferment over the recent U.S. Supreme Court decisions in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Remarkably absent from the list of objections to *Twombly* and *Iqbal* was whether the Court's decisions were sensible given the objectives of the law. *See* Alfred W. Cortese, Jr., Iqbal & Twombly: *Sensible Interpretations of the Pleading Rules* 19, The Metropolitan Corporate Counsel (July 2010). Similarly, while many commentators have expressed concern that raising the pleading bar may disadvantage some plaintiffs, only rarely has the debate considered the beneficial or perverse effect on primary social behavior. The law and rule makers should attend to optimizing society's objectives. In other words, rule makers must attend to optimizing responsible, productive social and litigation behavior.

The implications of these points became painfully clear in the debate that followed the *Iqbal* and *Twombly* decisions. The debate largely proceeded as if the only issue was whether someone who wished to air a complaint had access to a courtroom to do so. It neglected that litigation also imposes costs on defendants—often astonishing costs.

While the risk of an error suffered by a plaintiff should be addressed, we must not fail to address the harm suffered by innocent individuals, such as employees, shareholders, and other stakeholders, when a party must defend against spurious allegations. Nor can we overlook the harm suffered by the public at large, since many defendants will pass on these legal costs to consumers. Litigation costs do lead to increased prices and limit available goods and services, which in turn hits wage earners. So we need rules that weed out unjustifiable litigation costs partly for economic reasons. Legal procedural rules are instrumental to that task as well as to the tasks of optimizing productive social and litigation behavior.

The original drafters of the Federal Rules of Civil Procedure knew that procedural rules can encourage beneficial primary social behavior. The Federal Rules historically were intended, in part, to address existing systemic disadvantages by removing the barriers to entry to the legal system to permit adequate access to the courts. The original rule makers also assumed that discovery and trials could proceed relatively cheaply and efficiently.

However, things change. The system has become enormously expensive and burdensome, and attorneys have learned to game it. All too frequently a well-organized and well-funded plaintiffs' bar takes strategic advantage of the costs of litigation to obtain unjustifiable settlements. Each time that a defendant settles a case because of the risk of ruinous litigation costs rather than the merits, it undermines the goals of the law, and the public at large suffers the consequences. In light of the way that things have changed since the 1930s, the law and procedural rules can

justifiably take such matters into account, and not doing so qualifies as socially perverse.

DISCOVERY PROBLEMS OBSCURE THE MERITS OF DISPUTES

Excessive discovery and evasion and resistance to reasonable discovery requests pose significant problems. 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. All of this results in excessively costly and time consuming activities that are disproportionate to the nature of the case, the amount involved or the issues or values at stake.

The preceding paragraph paraphrases the opening of the Advisory Committee Note to the 1983 amendments to FRCP 26. These amendments intended to address growing problems that threatened the viability of effective dispute resolution in the federal system by empowering judges to limit overly expansive discovery in accordance with new standards of cost benefit analysis and proportionality in what is now Rule 26(b)(2)(C). Since 1983 one set of additional amendments has followed another at a pace unheard of in preceding years, culminating in 2006 with efforts specifically to address the exploding problems with e-discovery. Four times since the pronouncement in the 1983 advisory note, the Committee on Rules of Practice and Procedure has recommended revising the federal rules to prevent the scope and cost of modern litigation from outstripping the federal system's ability to uphold the fundamental premise of Rule 1: the "just, speedy, and inexpensive determination of every action."

Time has shown that current problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. In fact, due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite "meet and confer" amendments and calls for "cooperation." Better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens, and unintended consequences of unnecessary preservation and discovery.

Some have voiced concern that, in light of how rapidly technology is changing, rule changes at present would be counterproductive. However, what would truly be counterproductive for both the system and the American economy would be to maintain the current discovery system.

Rather than focusing judicial attention on the merits of an action, the lack of clear and specific rules has resulted in an ad hoc patchwork of individual solutions to the complex problems created by large volumes of ESI. Rule-based solutions would provide uniform, real world relief to costly real world problems. The need for national uniformity, consistency, and clarity is urgent and immediate.

THE NEED: CLEAR, CONCISE, AND LIMITED DISCOVERY RULES

For the last several decades, courts and commentators have noted the increasing inability of federal discovery rules to keep pace with technological advances, and the concomitant increase in expense and delay in the litigation process. Numerous studies, case law, and anecdotal evidence show that litigants are being overwhelmed by the volume of data subject to discovery

and the commensurate costs of properly handling such data throughout the litigation process. Absent definitive action by the rule makers to relieve the burdens of electronic discovery, the problems will only continue to grow.

Numerous prior rule amendments have unfortunately failed to achieve meaningful progress in alleviating continuing discovery problems. Further specific, decisive action to amend the discovery rules along the following lines will render the process more efficient.

First, Rule 26 should be amended by limiting the scope of discovery to "any non-privileged matter that would support proof of a claim or defense," subject to a "proportionality assessment" as required by Rule 26(b)(2)(C). The explosion of electronic discovery has dramatically changed litigants' experience of the discovery process, but the fundamental purpose of discovery—namely, "the gathering of material information"—remains unchanged. Thus, one obvious response is to limit the scope of discovery to evidence that is **material** to the claims and defenses in each case. See, *e.g.*, *English Civil Procedure Rules, The White Book Note CPR 31.6.3 (2),* adopted pursuant to the recommendations of the Lord Woolf Committee Report in 1998.[2]

Second, Rule 26(b)(2)(B) should be amended to identify specifically the categories, types, or sources of electronically stored information that are presumptively exempted from preservation and discovery, absent a showing of "substantial need and good cause" along the lines of the Federal Circuit Patent Rules and Seventh Circuit E-Discovery Principles.

Third, the provisions for protective orders, embodying the so called "proportionality rule," Rule 26(b)(2)(C), should be amended to include explicitly its requirements to limit the scope of discovery and to make it clear that it is available to limit and manage excessive demands for unreasonable and burdensome preservation.

Fourth, and finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.

These steps would address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance and materiality, lessening the likelihood of satellite litigation on discovery issues and, consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.

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[2] An alternative revision of the current scope rule would also be effective: **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).~~ See attached Appendix "A", *LCJ Proposed FRCP Amendments.*

THE RULES MUST ADDRESS INFORMATION PRESERVATION STANDARDS

Until recently, the rule for preservation was simply, "do not destroy material relevant to a dispute." However, an *ad-hoc* judge-made framework has turned that rule into an *affirmative* duty to preserve material that may become relevant to a dispute *in futuro* and to prevent the inadvertent disposal of material by otherwise appropriate recycling efforts. This inconsistent creation of new duties converted the system from one of professionalism, in which litigants and attorneys were presumed to have acted in good faith and not to have destroyed material pertinent to a dispute, to one of suspicion, in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen, and policed, will engage in regular spoliation—*without any real evidence* to suggest that such a change is necessary or desirable. Under this system, today's litigants are spending billions of dollars to address an undefined and largely non-existent spoliation risk based on the existence of a few high profile sanctions decisions.

Trigger. Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated—upon "reasonable anticipation of litigation"—it is an almost impossible task to determine confidently the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates a "bright line" standard. What is necessary to give useful guidance is a clear, bright line standard that will meaningfully clarify the time at which a duty to preserve information for purposes of litigation is triggered. As a result we endorse a "commencement of litigation" standard.

A "commencement of litigation" trigger rule would eliminate the current gotcha game of demanding unreasonably expansive pre-litigation preservation and the costs of over-preservation to respond to those demands. That standard will permit each district court to be engaged in the preservation process as necessary (rather than second guessing the propriety of pre-litigation activity) and subject the requesting party to Rule 11 (rather than the current absence of sanctions for overly broad preservation demands); and the preserving party to Rule 37 (rather than the court's inherent power).

Scope. The problems with preservation, most notably its significant costs and burdens, are not merely the product of the post-modern age and evolving technology. The real problem is the lack of identifiable boundaries on which parties may rely when analyzing the scope of their preservation obligations. Faced with the prospect of preserving all information relevant to the subject matter of potential litigation — the ambiguous standard for the scope of discovery of Rule 26(b)(1) — parties are forced to rely on "amorphous" principles and widely divergent court opinions in order to comply with their preservation obligations.

A workable solution to the problems of costly and burdensome preservation must include a narrowed scope governing all discovery — not a separate scope of preservation rule. Narrowing the scope of discovery would provide a simple, straightforward, and easily understood resolution of the problems of preservation, a simplicity that is sorely needed within the Federal Rules. Moreover, a narrowed scope of discovery limited to information that is material to the case would have the immediate and direct effect of reducing the costs and burdens of discovery and preservation of information, precisely the problems the committee has been attempting to

address for many, many years.

Sanctions. The possibility of a sanctions order has highly negative *in terrorem* effects on responsible American corporations and the individual employees who are internally responsible for making preservation decisions. As a result, regardless of the infrequency of sanctions motions and awards, and notwithstanding the financial impact and costs of the sanctions awards themselves, the companies spend billions of dollars to over-preserve material that is merely "potentially" relevant. Hubbard, William H. J. Preliminary Report on the Preservation Costs Survey of Major Companies. 090811.

Sanctions for failing to preserve or produce relevant and material information should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step. Therefore, we have proposed a sanctions rule that permits sanctions to be imposed by a court only if information relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions. See attached *Appendix "A"*.

Rule 37, which currently has limited application to sanctions for failure to preserve, should be amended to include those failures in its scope to reduce the reliance of courts on their undemocratic "inherent powers," which can also be accomplished by amending Rule 37(e), as LCJ has proposed or as Connecticut has done, to give it new scope and life. See Sec. 13-14 *Connecticut Practice Book* (2011) (eff. Jan. 2012) and LCJ New Standards Comment.

THE RULES MUST CONFRONT RUNAWAY DISCOVERY COSTS

How can the judicial system deliver on Rule 1's promise of just, speedy, and inexpensive determination of actions if a litigant may ask for limitless costly, burdensome, and time consuming discovery—and pay for none of it?

The Cost of Discovery Is out of Control

Numerous amendments to the discovery Rules aimed at reining in the ever-increasing costs of discovery have not adequately or effectively controlled these costs. Today, discovery is too often used as a weapon to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes (and/or megabytes) of information that is very expensive to collect and review in an effort to force opposing parties to consider settlement based primarily on the threat of excessive litigation costs. And many parties do in fact decide to settle to avoid expensive and protracted discovery instead of undertaking a fair and practical examination of the merits.

Existing Rules and Practices Do Not and Cannot Control Costs

The current Federal Rules provide no reliable remedy to curb discovery and preservation costs.

Judges are asked to manage the scope of discovery, but are prevented from being effective by institutional limitations. Without effective guidance discovery costs soar. For these reasons, parties need a cost-effective, workable, self-executing solution for access to relevant information. See Redish, *Allocation of Discovery Costs and the Foundations of Modern Procedure*, 2 (forthcoming chapter in The American Illness, The Yale Univ. Press, 2012), available at http://buckleysmix.com/wp-content/uploads/2010/10/Redish.pdf.

The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining truly critical evidence is the best way to achieve that purpose. See Peter B. Rutledge, *The Proportionality Principle and the (Amount in) Controversy*, (forthcoming chapter in The American Illness, The Yale Univ. Press, 2012), available at: http://buckleysmix.com/wp-content/uploads/2010/10/Rutledge.

A much more effective remedy would be—to limit the scope of discovery and to enforce those limits by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it. Recognizing this, we propose that the Federal Rules be amended to require that each party pay the costs of the discovery it seeks. Such an explicit rule is needed because even after numerous rounds of discovery rule amendments, existing rules and the practices of both lawyers and judges have not prevented the current discovery/preservation crisis. If we continue on the same path, cost escalation will never be brought under control.

The Economic Logic of Requiring "Requester Pays"

Numerous scholars have recognized the unfairness and economic perversity of the existing system and have likewise argued persuasively that making the consumer of discovery pay for what he or she consumes will naturally balance the process, largely without need for management by judges.

It is axiomatic that when the consumer does not have to pay for what he or she consumes, the consumer will demand more than is economically rational. Several scholars have noted that the incentive a party already has to consume that which is "free" is multiplied by creating a "free" benefit to the requester on one side of the ledger, and a detriment to the opponent on the other side. See *e.g.*, Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, Northwestern University School of Law, Law and Economics Series, No. 10–16.

A rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party—the party in the best position to control the scope of those demands and, therefore, their cost. It would undoubtedly represent significant savings for the litigation system and the economy. The Rule would also discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. See, Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 U. Fla. L. Rev. 845 (2012), http://www.floridalawreview.com/2012/martin-h-redish-pleading-

discovery-and-the-federal-rules-exploring-the-foundation-of-modern-procedure/

Conventional economic theory on price as a mechanism for efficient allocation of resources is adequate justification for a "requester pays" rule. Professor Bone has described the law-and-economics version of utilitarianism as "The optimal rule from a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs." Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 910 (2009).

The abuses discussed herein are only possible because of the gross disproportionality engendered by the deadly combination of loose pleading rules, unlimited discovery, nebulous duties to preserve information, and the ability of the requester to "free ride" by demanding everything and paying for nothing. See Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 Fla. L. Rev. 885, 893-4 (2012).

Rather than enshrine economically perverse activity, the Federal Rules should encourage parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. As Redish and McNamara state, "Subsidization—through allocation of the total costs to the responding party—renders discovery costs a complete externality, and removes all incentives for litigants to limit the scope of their requests." Redish & McNamara at 33.

A party who benefits by making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage focused requests designed to obtain that information necessary for the just adjudication of the issues without causing the "*de facto* hidden litigation subsidy" that incentivizes excessive discovery. Redish & McNamara at 34.

The perverse cost incentives of the current system are most pronounced in cases of asymmetrical information, those in which the bulk of information resides with one party. Incentives diverge and the burden of responding to discovery is largely borne by one side; there are fewer incentives to self-discipline. See Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 13, 64 U. Fla. Law Rev. 965 (2012) (referencing Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 643 (1989).
http://www.floridalawreview.com/2012/richard-esenberg-a-modest-proposal-for-human-limitations-on-cyberdiscovery/

Requiring Payment for Requested Discovery Will Not Curb Access to Justice

There is no reason to believe that imposing a fair system of cost allocation should curb access to justice. Private, individual litigants rarely bear the expenses of initiating lawsuits under the contingency-fee systems that prevail in the United States. The current system of discovery cost allocation is difficult to explain as anything other than an historical anomaly that—if it ever did—no longer serves a laudable purpose.

The cost allocation rule proposed in *Reshaping the Rules of Civil Procedure for the 21st*

Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure, will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to focus discovery on the merits and to settle meritorious cases before the completion of discovery. See attached *Appendix "A"*. More cases will be tried and will be fairer to both sides and more likely to be resolved on the merits without the perverse incentives created by the current system.

CONCLUSION

The intensive review of the Federal Rules of Civil Procedure currently underway by the Judicial Conference of the United States Committee on Rules of Practice and Procedure represents a once in a century opportunity to achieve real relief from the costly and inefficient administration of justice that has come to characterize the current civil justice system. Adopting clear, concise, and meaningful amendments to the Federal Rules of Civil Procedure in at least three key areas, as shown in the attached *Appendix "A"*, would help reduce the extraordinary costs, burdens, and unacceptable risks of modern litigation and increase the number of cases that actually are tried to verdict. These three areas are (1) discovery, (2) preservation, and (3) cost allocation.

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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;

APPENDIX "A"

(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 ~~O~~on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought ~~must~~ shows ~~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

* * *

(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

~~(C)~~ (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 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.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
CHIEF MAGISTRATE JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-4560
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DISCOVERY ORDER

Fed. R. Civ. P. 26(b)(2)(c) and 26(g)(1)(B)(iii) require that discovery in civil cases be proportional to what is at issue in the case, and require the Court, upon motion or on its own, to limit the frequency or extent of discovery otherwise allowed to ensure that discovery is proportional. This Discovery Order is issued in furtherance of this obligation. Having reviewed the pleadings and other relevant docket entries, the Court enters the following Discovery Order that will govern discovery in this case, absent further order of the Court or stipulation by the parties. This Discovery Order shall be read in conjunction with the Scheduling Order in this case, which provides discovery deadlines.

1. ***Disclosure of Damage Claims and Relief Sought.*** Within fourteen (14) days of this Order, any party asserting a claim against another party shall serve on that party and provide to the Court the information required by Fed. R. Civ. P. 26(a)(1)(A)(iii) regarding calculation of damages. The party also shall include a particularized statement regarding any non-monetary relief sought. Unless otherwise required by the Scheduling Order, the disclosures required by Fed. R. Civ. P. 26(a)(1)(A)(i), (ii), and (iv) need not be made.

2. ***Scope of Discovery – Proportionality.*** Pursuant to Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(ii)–(iii), the discovery in this case shall be proportional to what is at issue in the case. To achieve this goal, and pursuant to Fed. R. Civ. P. 26(b)(1), discovery will be conducted in phases, as follows.

    a. ***Phase 1 Discovery.*** The first phase of discovery should focus on the facts that are most important to resolving the case, whether by trial, settlement or dispositive motion. Accordingly, the parties' Phase 1 Discovery may seek facts that are not privileged or work product protected, and that *are likely to be admissible* under the Federal Rules of Evidence and material to proof of claims and defenses raised in the pleadings. Phase 1 Discovery is intended to be narrower than the general scope of discovery stated in Rule 26(b)(1) ("discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense," even if not admissible, if "reasonably calculated to lead to the discovery of admissible evidence" (emphasis added)). Discovery sought during Phase 1 Discovery may not be withheld on the basis that the producing party contends that it is not admissible under the Federal Rules of Evidence, if it otherwise is within the scope of discovery permitted by Rule 26(b)(1), as modified by this Order. Rather, a party from whom discovery is sought ("Producing Party") by an adverse party ("Requesting Party") must produce requested Phase 1 Discovery subject to any evidentiary objections, which must be stated with particularity.

APPENDIX "B"

b. ***Phase 2 Discovery.*** Unless the parties stipulate otherwise, the Court, upon a showing of good cause, may permit discovery beyond that obtained under Phase 1 Discovery. In Phase 2 Discovery, the parties may seek discovery of facts that are not privileged or work product protected, are *relevant* to the claims and defenses pleaded or more generally to the subject matter of the litigation, and are not necessarily admissible under the Federal Rules of Evidence, but are likely to lead to the discovery of admissible evidence. A showing of good cause must demonstrate that any additional discovery would be proportional to the issues at stake in the litigation, taking into consideration the costs already incurred during Phase 1 Discovery and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If the Court determines that additional discovery is appropriate, the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost of the additional discovery sought.

3. ***Cooperation During Discovery.*** As required by Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), http://www.mdd.uscourts.gov/localrules/LocalRules.pdf, the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2009). The failure of a party or counsel to cooperate will be relevant in resolving any discovery disputes, including whether the Court will permit discovery beyond Phase 1 Discovery and, if so, who shall bear the cost of that discovery. Whether a party or counsel has cooperated during discovery also will be relevant in determining whether the Court should impose sanctions in resolving discovery motions.

4. ***Discovery Motions Prohibited Without Pre-Motion Conference with the Court.***

   a. No discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.

   b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto will be filed in letter format and may not exceed five, single-spaced pages, in twelve-point font. Replies will not be filed unless requested by the Court following review of the motion and response.

5. ***Interrogatories.*** Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 33 interrogatories shall be limited to fifteen (15) in number. Contention interrogatories (in which a party demands to know its adversary's position with respect to claims or defenses asserted by an adversary) may be answered within fourteen (14) days of the discovery cutoff as provided in the Scheduling Order. All other interrogatories will be answered within thirty (30) days of service. Objections to interrogatories will be stated with particularity. Boilerplate

objections (e.g., objections without a particularized basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible evidence"), as well as incomplete or evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4).

6. ***Requests for Production of Documents.***

   a. Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 34 requests for production shall be limited to fifteen (15) in number. An answer to these requests shall be filed within thirty (30) days of service, and any documents shall be produced within thirty (30) days thereafter, absent Court order or stipulation by the parties. Any objections to Rule 34 requests shall be stated with particularity. Boilerplate objections (*see* ¶ 5 above) and evasive or incomplete answers will be deemed to be a refusal to answer pursuant to Rule 37(a)(4).

   b. Requests for production of electronically-stored information (ESI) shall be governed as follows:

      i. Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been requested shall not be required to search for responsive ESI:

         a. from more than ten (10) key custodians;

         b. that was created more than five (5) years before the filing of the lawsuit;

         c. from sources that are not reasonably accessible without undue burden or cost; or

         d. for more than 160 hours, exclusive of time spent reviewing the ESI determined to be responsive for privilege or work product protection, provided that the Producing Party can demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.

      ii. Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology.

7. ***Duty to Preserve Evidence, Including ESI, that is Relevant to the Issues that Have Been Raised by the Pleadings.***

   a. The parties are under a common-law duty to preserve evidence relevant to the issues raised by the pleadings.

   b. In resolving any issue regarding whether a party has complied with its duty to preserve evidence, including ESI, the Court will consider, *inter alia*:

i. whether the party under a duty to preserve ("Preserving Party") took measures to comply with the duty to preserve that were both reasonable and proportional to what was at issue in known or reasonably-anticipated litigation, taking into consideration the factors listed in Fed. R. Civ. P. 26(b)(2)(C);

ii. whether the failure to preserve evidence was the result of culpable conduct, and if so, the degree of such culpability;

iii. the relevance of the information that was not preserved;

iv. the prejudice that the failure to preserve the evidence caused to the Requesting Party;

v. whether the Requesting Party and Producing Party cooperated with each other regarding the scope of the duty to preserve and the manner in which it was to be accomplished; and

vi. whether the Requesting Party and Producing Party sought prompt resolution from the Court regarding any disputes relating to the duty to preserve evidence.

8. ***Depositions.*** Absent further order of the Court upon a showing of good cause or stipulation by the parties, depositions of witnesses other than those deposed pursuant to Fed. R. Civ. P. 30(b)(6) shall not exceed four (4) hours. Rule 30(b)(6) depositions shall not exceed seven (7) hours.

9. ***Non-Waiver of Attorney–Client Privilege or Work Product Protection.*** As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney–client privileged or work product protected.

In accordance with Fed. R. Evid. 502(d), except when a party intentionally waives attorney–client privilege or work product protection by disclosing such information to an adverse party as provided in Fed. R. Evid. 502(a), the disclosure of attorney–client privileged or work product protected information pursuant to a non-waiver agreement entered into under Fed. R. Evid. 502(e) does not constitute a waiver in this proceeding, or in any other federal or state proceeding. Further, the provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of ESI pursuant to an agreement entered into between the parties under Fed. R. Evid. 502(e). However, a party that produces attorney–client privileged or work product protected information to an adverse party under a Rule 502(e) agreement without intending to waive the privilege or protection must promptly notify the adversary that it did not intend a waiver by its disclosure. Any dispute regarding whether the disclosing party has asserted properly the attorney–client privilege or work product protection will be brought promptly to the Court, if the parties are not themselves able to resolve it.

/S/
Paul W. Grimm
United States Magistrate Judge