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February 4, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

RE: Comments of the Washington Attorney General's Office on Proposed Amendments to Federal Rules of Civil Procedure

The Washington State Attorney General's Office (AGO) appreciates this opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure.

The AGO employs over 500 lawyers, 125 paralegals, and 475 professional staff. We provide legal services to more than 230 state agencies and represent state agencies, officers, and the public interest, in both plaintiff and defense roles, across a wide range of litigation and under severe budget constraints. Many of our cases are litigated in federal court. We therefore appreciate the federal courts' initiative to encourage early and effective case management and to consider proportionality in defining the scope of discovery.

The AGO welcomes the changes to Rule 1 emphasizing that parties share with the courts the responsibility to secure the just, speedy, and inexpensive determination of every action. We agree that parties should cooperate to achieve these ends. The state is particularly vulnerable to overreaching discovery demands by opponents due to the state's huge ESI repositories. Private parties often erroneously assume the state has unlimited financial resources to respond to discovery. The proposed changes to other rules, as discussed below, will provide the state with the ability to seek relief from the courts from such excessive demands when the state's efforts toward a cooperative resolution of discovery issues are unsuccessful.

The AGO strongly supports the proposed amendments to Rule 26(b)(1) to expressly limit the scope of discovery to what is proportional to the needs of the case. This amendment will encourage the parties to collaborate and target discovery requests to identify the most crucial information and will require courts to consider how to structure pretrial orders to prevent discovery costs from continuing to skyrocket.

In addition, we enthusiastically agree with the proposed amendments to Rule 37(e), which would delineate factors for courts to consider in assessing whether a party wrongfully failed to preserve discoverable information, including the proportionality of preservation efforts relative to the

litigation or anticipated litigation. The absence of express proportionality limits in the current rules has the effect of significantly inflating the costs, complexities, and burdens of litigation by incentivizing over-preservation and over-broad discovery. We also support the proposed amendments to Rule 37(e) that direct trial courts to decide allegations of discovery lapses with a preference for finding a remedy that solves the discovery problem, rather than punishing the party who is struggling to comply with complex rules and technology involved in electronic discovery.

Finally, we also strongly support the proposed amendment to Rule 26(c)(1)(B) that would expressly authorize courts to include cost allocation as part of a protective order. The possibility that a party may be required to bear the financial burden associated with its disproportionate demands regarding preservation or production hopefully will encourage reasonableness in the discovery process.

In sum, we believe the proposed rules, if enacted, would be a positive step toward managing the costs and burdens of litigation, and thereby improving overall access to justice.

Sincerely,

NOAH G. PURCELL
Washington State Solicitor General

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