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January 14, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7 – 240
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Members of the Advisory Committee on Civil Rules:

DRI - *The Voice of the Defense Bar* ("DRI") respectfully submits this Comment to the Advisory Committee on Civil Rules in response to the Committee's Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure. DRI is grateful for the opportunity to provide feedback regarding this proposal and appreciates the efforts of the Committee.

I. The Interests of DRI

DRI was founded as the Defense Research Institute in 1960 and since then has been at the forefront of changes to the civil justice system. Indeed, in its Articles of Incorporation, DRI's mission statement was defined as follows:

> The purpose or purposes for which said corporation is organized shall be to promote improvements in the administration of justice and enhance the service of the legal profession to the public; to support and work for the improvement of the adversary system of jurisprudence in the operation of the courts; to encourage the prompt, fair and just disposition of tort claims; to enhance the knowledge and improve the skills of defense lawyers; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to work for the elimination of court congestion and delays in civil litigation; to cooperate with programs of public education directed toward highway safety and the reduction of losses and costs resulting from highway and other casualties; and to carry on other related and similar activities in the public interest.

The essence of this initial purpose clause is the same over 50 years later. With more than 22,000 members, DRI is the international membership organization of all

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lawyers involved in the defense of civil litigation. The history of DRI encompasses many years of effort by dedicated lawyers who see the need for a coordinated approach by defense lawyers to the challenges of a civil defense practice. The founders of DRI created the organizational vehicle to drive this effort and subsequent leaders have nurtured the organization to maturity and success. Today, DRI remains committed to anticipating and addressing issues germane to defense lawyers and the civil justice system, improving the civil justice system, and preserving the civil jury trial. As part of its efforts, DRI has published numerous articles and reports over the years on civil justice and discovery-related issues.[1]

DRI has a longstanding interest in the work of the Committee and its central role in shaping federal practice and procedure. However, establishing and enforcing a reasonable scope of discovery has proved a challenge. As an advocate for fundamental changes to the civil discovery rules, DRI has observed:

> While the repeated attempts to address the catastrophic costs, burdens, and abuses of discovery through judicial intervention were commendable, the practical result of such intervention is that the problems have remained unsolved. In fact, the problems have persisted and festered. It is time to change course. Judicial intervention is a method that arguably encourages excessive motions practice by requiring parties to seek out the assistance of the courts. Instead, practitioners should be bound by the rules to narrow the scope of discovery without judicial oversight.[2]

There is a surprising degree of agreement among the qualitative studies that a problem exists. For example, a majority of the respondents to an American Bar Association (ABA) survey[3] as well as a Federal Judicial Center (FJC) survey[4] agreed that at least some amendments to the Rules of Civil Procedure are in order. Fifty-two

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[1] *See, e.g.,* DRI Judicial Task Force Report: *Without Fear or Favor* (2011), available at http://www.dri.org/News/DRIReports; DRI, et al., Reshaping the Rules of Civil Procedure for the 21st Century (2010), available at http://www.dri.org/News/DRIReports; Christopher V. Cotton and Tiffany F. Lim, E-Discovery Reform and Cost Reduction, *For the Defense* at 56 (February 2010) available at http://www.dri.org/odownload.ashx?file=27140.

[2] RESHAPING THE RULES OF CIVIL PROCEDURE at xi.

[3] ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 2, 8 (2009).

[4] Emery G. Lee III & Thomas E. Willging, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3 (2009).

percent of the respondents to the ABA survey did not believe that the current discovery mechanisms work well, while sixty percent of the respondents to a survey by the National Employment Lawyers' Association, a group comprised of lawyers who represent claimants in employment litigation, believed that the "current rules as written are not conducive to securing a 'just, speedy and inexpensive determination of every action.' "[5]

The use of discovery to gain leverage in litigation has intensified in the past two decades, particularly with the proliferation of electronic data. Likewise, the outside costs of litigation for American businesses over the past decade have steadily grown. These costs are disproportionately high in the United States and have the effect of seriously undermining the American jury trial system. Indeed, these costs are hampering access to justice for many litigants.

Some might suggest that civil defense lawyers billing by the hour is a leading cause of increased litigation costs. The facts, however, do not bear out this suggestion. Civil defense lawyers, like their clients, have felt the impacts of this difficult economy. More than ever, our clients demand efficiency and value from their lawyers. Litigation budgets have become the norm in most civil cases. Law firms are more frequently utilizing alternative fee arrangements to handle civil litigation. These arrangements provide for nontraditional billing and sharing of risks and rewards with clients. Civil defense lawyers frequently ask courts to enter scheduling and case management orders, and for additional relief to streamline discovery and control expense. In short, just as with their in-house counterparts and client representatives, civil defense lawyers are being asked to do more with fewer resources.

The largely unfettered scope of discovery under the current Rule 26 is a fundamental cause of the runaway costs in civil litigation. "Despite several amendments to Rule 26 aimed at controlling the increasing costs of discovery, discovery costs in many cases (particularly asymmetrical cases) are not being effectively controlled."[6] Discovery frequently is used as a weapon in the requesting party's arsenal to impact the outcome of a case, rather than as a tool to collect information to aid the fact finder. It is not uncommon for "[p]arties [to] request substantial volumes of information (including information that can be very expensive to collect and to review) in an effort to force opposing parties to consider settlement. Rather than deciding to settle after a fair and practical examination of the merits of a

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[5] SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009: A REPORT BY THE NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION 4 (2010).

[6] RESHAPING THE RULES OF CIVIL PROCEDURE at xiii.

particular case, parties instead opt to settle to avoid expensive and protracted discovery."[7] As noted by a distinguished jurist:

> There is little question but that civil litigation is expensive, beyond the means of most persons.... Yet, an actual trial is not the main cost in a large number of cases. Rather, it is the preparation for a trial that is a virtually non-occurring event.... The most costly feature of federal practice, by most accounts, is the discovery process.... As trials disappear, discovery is only a path to settlement.[8]

If these costs are not controlled, civil litigation will be reduced to a world of endless discovery disputes and rising costs in which many defendants with legitimate defenses—but who cannot afford the costs of e-discovery—are forced to settle frivolous and feeble claims.

Given these costs, it is not surprising that the number of jury trials is steadily waning. "[T]he American jury system is dying out—more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts—but dying nonetheless."[9] The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a blemish on the Constitutional promise of access to civil, as well as criminal, jury trials. Whether this tide can be turned depends on the success of reform efforts. Federal discovery practice, in its current form, is the largest component of the increasing costs and is staggeringly wasteful and inefficient. If the Committee's proposed amendments are effectuated, costs can be contained, civil litigation will be more efficient, there will be more jury trials, and hence litigants will have more access to justice. DRI therefore enthusiastically supports the Committee's efforts to engage in meaningful civil justice reforms in the area of civil discovery.

II. Rule 26(b)(1)

When the Federal Rules were framed, it was intended that the boundaries of discovery would be defined largely by Rule 26, with the help of several rules that describe the specific discovery tools available. Debates over the scope of discovery

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[7] *Id.*

[8] Hon. Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405, 1416, 1417 (2002).

[9] *United States v. Reid*, 214 F. Supp. 2d 84, 99 (D. Mass. 2002).

and concern regarding discovery abuse, misuse and excessive expense posing significant danger to the administration of justice have persisted since the adoption of the Federal Rules in 1938. Seventy-five years later, despite numerous attempts to address these concerns, the problem persists.[10]

Exorbitant e-discovery discovery costs are one of the main culprits. From 1999 through 2002, electronically stored information (ESI) increased 30 percent per year; by 2002, not even one-tenth of one percent of information was stored on paper.[11] A large corporation's data center can contain more than 10,000 tapes, each of which can contain over 1 terabyte of information—the equivalent of a 200-mile-high stack of paper.[12] In one case, restoring 93 tapes cost an astounding $6.2 million—approximately $67,000 per tape.[13] More recently, the Office of Federal Housing Enterprise Oversight was forced to spend over $6 million—reportedly more than nine percent of the agency's entire annual budget—to comply with an e-discovery subpoena.[14]

Given these costs and inequities, it is not surprising that there have been numerous calls for reform. The nonpartisan IAALS[15] and the American College of Trial Lawyers (ACTL) have led the way. The ACTL Task Force on Discovery and Civil Justice works in collaboration with the IAALS to study the Federal Rules of Civil Procedure to determine whether there exists a fair and less-expensive approach to exchanging information. In March 2009, the two organizations issued a final report on a joint project that examined the role of discovery and perceived problems

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[10] Civil Rules Committee Chair Judge Paul Niemeyer acknowledged the problem in his report to the Committee on Rules of Practice and Procedure (The Standing Committee) and prior to the 2000 amendments. He reported the revival of efforts to narrow the scope of discovery (a proposal "repeatedly considered...over the years" and continually rejected) and noted, "Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine." Report of the Advisory Committee on Civil Rules 9 (May 18, 1998), *available at* http://www.uscourts.gov/rules/Reports/CV5-1998.pdf. Unfortunately despite continual acknowledgment of a need for "stronger medicine," numerous amendments to the rules have proven ineffective to solve the problems.

[11] RAND Institute for Civil Justice, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY 1 (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

[12] *Id.*

[13] *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ.A. 99-3564, 2002 WL 246439, at *2 (E.D. La. Feb. 19, 2002).

[14] *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 816–17 (D.C. Cir. 2009).

[15] The IAALS at the University of Denver is a national, nonpartisan organization comprised of former judges, attorneys, academics and journalists, and focuses on core issues such as the reform of the civil justice system.

in the civil justice system.[16] One of their main proposals was the following: "Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens."[17]

DRI welcomes the Committee's attempt to incorporate this proportionality concept in the proposed amendment to Rule 26(b)(1), which would re-define the scope of discovery to be "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case...." This amendment provides a proportionality requirement that has been completely lacking in modern discovery, and DRI strongly supports the Committee's proposal. The modest edits proposed will produce an important reduction in abusive discovery practice, while at the same time preserving a litigant's right to obtain necessary information. Rather than being guided by the amorphous standard of "relevant to the subject matter involved in the action," a litigant instead will be anchored to the claims and defenses pleaded in the case. Moving the current proportionality language from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1), if adopted, will have the critical effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean to each individual case.

The current rule also contains the following, well-known sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language has become a common justification for discovery "fishing expeditions." It also limits what Courts can do to restrict the volume of information sought. However, the use of this language in this fashion is erroneous, because it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery so long as it was relevant (a principle the proposed amendment preserves). Although it was never intended to define the permissible scope of discovery, both practitioners and judges routinely cite the "reasonably calculated" language as though it somehow defines the outer bounds of discoverable material.

As the Committee is well aware, prior efforts to limit the scope of discovery, such as the 2000 amendment to this Rule, have not produced a different mindset among the bench and bar. These historically broad notions of discovery and relevance could prevent the proposed amendment from fulfilling its potential. To

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[16] *See* IAALS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

[17] *Id.* at 14.

avoid that risk, the Advisory Committee should add a materiality requirement to the scope of discovery, defining it as "any non-privileged matter that is relevant and material to any party's claim or defense . . . ." Such a requirement would strengthen Rule 26(b)(1), yet simultaneously ensure that parties can obtain the information they need to bring or defend against any claim. Whereas relevant information tends to prove or disprove some fact related to the action, material information "has a legitimate and effective influence or bearing on the decision of the case."[18] This modest change would further the goal of proportionality in individual cases by ensuring that documents sought are not merely relevant but also material to any claim or defense. DRI urges the Committee to implement this change in the final Rule.

III. Rules 30, 31, 33, and 36

The Committee's proposal reduces the presumptive numerical limits for seven types of discovery, including the number and duration of oral depositions allowed under Rule 30, the number of depositions allowed under Rule 31, the number of interrogatories allowed under Rule 33, and the number of requests to admit allowed under Rule 36. DRI believes that each of these revised limits is a welcome step in helping to reduce the overall costs and burdens of discovery in many cases. While the parties still may expand these limits in individual cases as needed (either by mutual consent or by leave of court), the new presumptive default limits will help to ensure that the burdens of discovery are more proportional to the needs of the average case.

Other presumptive limits on document discovery should be considered. One such proposal is "Susman's Checklist." Stephen Susman is a prominent litigator with Susman Godfrey, LLP and frequently represents both plaintiffs and defendants alike. He proposes that discovery information be limited to five custodians in the first instance, chosen by the requesting party. Following production from those five custodians, an additional five custodians may be selected by the requesting party. However, following production from the second set of five custodians, no further discovery will be allowed absent a showing of good cause. "This proposal is essentially an amalgam of presumptive limits and phased discovery and combines the best attributes of both."[19]

IV. Rule 37(e)

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[18] BLACK'S LAW DICTIONARY 1128 (4th ed. 1968).

[19] *See* Daniel Troy & John O'Tuel, A TOOLKIT FOR CHANGE: HOW THE FEDERAL CIVIL RULES ADVISORY COMMITTEE CAN FIX A CIVIL JUSTICE SYSTEM "IN SERIOUS NEED OF REPAIR," WLF LEGAL BACKGROUNDER, May 21, 2010.

DRI fully embraces the main objective of the proposed new Rule 37(e), which is to replace the disparate treatment of preservation and sanctions issues across the circuits by adopting a single uniform standard. Unlike the current Rule 37(e), the proposed rule would not be limited to electronically stored information. The proposed Rule also clarifies that, in all but excepted cases (i.e., cases where failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation"), sanctions may not be imposed unless the court finds that a party's failure to preserve was willful or in bad faith, causing substantial prejudice in the litigation. In so doing, the proposed rule squarely rejects *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), which held that mere negligence suffices to support discovery sanctions. DRI believes this proposal holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation over allegations of spoliation.

However, there are several potential problems with the proposed amendment to Rule 37(e). First, an exception contained in subsection (1)(B)(ii) could "swallow the rule" by allowing courts to impose sanctions absent any willfulness or bad faith where the loss of information "irreparably deprives" a party of any ability to present or defend the action. Although DRI understands the Advisory Committee intends for the exception to apply in only in the very rarest of situations, it is likely that courts would use the exception to avoid the primary rule. Thus, the exception should be removed before the proposal is adopted.

Second, the proposed Rule 37(e) would authorize sanctions for "willful or in bad faith" conduct. DRI believes that the Committee's use of the disjunctive—"willful or in bad faith"—is highly problematic. Some courts define "willfulness" as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. Even absent a showing of a culpable mind, some courts will not hesitate to impose sanctions where the Rule can plausibly be read to permit it. *See Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, *5 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach the duty to preserve it], or negligently."). For this reason, DRI respectfully recommends that the Advisory Committee substitute the conjunctive "and" for the disjunctive "or" to make clear that sanctions apply only to conduct that is both willful and in bad faith.

Third, DRI believes that the list of "factors to be considered in assessing a party's conduct" in subsection (2) of the proposed rule is not helpful and should be deleted (or, at most, included in the Committee Note rather than the rule text). None of these factors goes to the central point of the proposed rule, which is the

determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts. Even more importantly, there is a high degree of risk that misinterpretation of the various factors could convert them into mandates whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule. Thus, DRI urges the Committee to eliminate these factors from the proposed Rule altogether. A failure to eliminate this list is likely to invite ancillary discovery disputes attempting to establish satisfaction of the Rule's "factors."

Finally, the proposed Rule 37(e) should articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, wasteful over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. "Irrational fear of sanctions and spotty familiarity with information technology have so conditioned lawyers to over-preserve that when advised there's no need to keep something, they reply, 'Let's keep it anyway — just to be safe.'"[20] Many litigants simply do not have the tools in place to target only relevant information when the duty to preserve is triggered. Instead, they play it safe, preserving and often collecting everything even remotely associated with the matter. This approach is problematic. "Grabbing a big slug of data is a gamble because it doesn't eliminate the need to isolate relevant information; it simply defers the effort, perhaps to a time when layoffs or fading memories make it harder to find relevant items."[21] The current, ill-defined boundaries of discovery drive this preservation and production of staggering volumes of documents that frequently have little to do with the merits of the case. Commonly, the overwhelming majority of documents produced in litigation never see the light of day during the trial of the case.[22] The "anticipation of litigation" standard incorporated into the proposed rule requires preservation decisions to be made in the absence of scope-defining pleadings. Prior to litigation, there frequently is no opposing lawyer with whom to negotiate and no judge available to resolve preservation issues. For these reasons, DRI asks the Advisory Committee to adopt a clear-cut "commencement of litigation" standard—triggered by the filing of a complaint—to initiate a party's duty to take affirmative preservation steps,

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[20] Craig Ball, THE SAFE SIDE ISN'T, Law Technology News (January 30, 2012).

[21] *Id.*

[22] A survey of "major" companies revealed that, although the average number of pages produced in discovery in major cases that went to trial was 4,980,441, the average number of exhibit pages totaled just 4,772 (.10% of the total production). LAWYERS FOR CIVIL JUSTICE, ET AL., STATEMENT ON LITIGATION COST SURVEY OF MAJOR COMPANIES, App. 1 at 16 (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary. This would yield vast benefits without materially damaging any party's ability to prove or defend against any claim.

V. Conclusion

The current paradigm is not working in civil discovery practice, and DRI believes meaningful rules reform is essential. The Committee has a chance to effect much-needed change in the way that federal civil litigation is conducted and in the way that American citizens view the administration of justice in federal courts. Currently, onerous litigation costs constitute an unnecessary drain on American businesses. The ill-defined and overly-broad discovery regime that currently exists under the Federal Rules imposes a heavy cost and burden with little corresponding benefit. The net effect is that Americans are being denied access to justice and civil jury trials. Without any sacrifice to the ability of litigants to obtain information they truly need in the pursuit of justice, modest revisions to the Rules will go far towards reducing these costs and improving federal litigation practice in a way that would benefit all parties.

Thank you for your service to our system of justice.

Respectfully submitted,

J. Michael Weston
DRI President