Timothy A. Pratt
Executive Vice President,
Chief Administrative Officer,
General Counsel and Secretary

One Boston Scientific Place
Natick, MA 01760-1537

508.650.8616 Tel
508.650.8956 Fax

timothy.pratt@bsci.com
www.bostonscientific.com

November 14, 2013

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, DC 20544

Dear Committee on Rules of Practice and Procedure:

Re: *Comments to Proposed Amendments to the Federal Rules of Civil Procedure*

Please consider this public comment provided by the Federation of Defense & Corporate Counsel ("FDCC") to the Proposed Amendments to the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 1 defines the scope and purpose of the Federal Rules as to "secure the just, speedy, and inexpensive determination of every action and proceeding." Unfortunately, the current state of discovery in the Federal Courts is often neither speedy nor inexpensive. FDCC members are defense and corporate lawyers and insurance representatives regularly involved in litigation in the Federal Courts. We have seen first-hand the increasing costs and burdens associated with litigation. FDCC appreciates this opportunity to provide its comments on the Proposed Amendments to the Federal Rules of Civil Procedure.

FDCC was formed in 1936. It consists of approximately 1,400 members from around the world, with most being from the United States. FDCC members are experienced attorneys in private practice, as well as general counsel, corporate chief litigation officers and insurance claims executives. Membership is limited, available solely by nomination, and includes only those who have been judged by their peers to have achieved professional distinction and demonstrated leadership in their respective fields.

FDCC members are concerned with what we view as ever-increasing costs and burdens associated with discovery and, in particular, the burdens associated with electronic discovery. Recent years have shown a proliferation of e-discovery demands and sanctions motions for the failure to produce or preserve e-discovery. As practitioners and corporate counsel, we regularly see e-discovery abuses, and the increasing potential that e-discovery costs, burdens and fear of sanctions drive litigation strategy, settlement decisions, and even the decision whether to litigate in the American court system in the first instance. E-discovery has taken on a life of its own that bears little resemblance to speedy and efficient litigation. Many of our member law firms have attorneys dedicated to e-discovery litigation within their organizations. Entire practice groups are focused on advising clients regarding how to locate and produce e-discovery materials,

including the need to preserve e-discovery in order to avoid sanctions. Corporations like mine worry about preserving terabytes of e-discovery that may never be relevant to any of the claims or defenses at issue in any litigation. Many of the preserved documents serve no business purpose and are preserved solely due to fear of sanctions in light of the unsettled legal standard.

Before the proliferation of e-discovery, practitioners were faced with the more simple question of what paper documents needed to be maintained. Paper documents were certainly not maintained in perpetuity. They were kept in boxes and file cabinets. Physical storage limitations dictated the creation of reasonable document retention policies. E-discovery creates a completely different dynamic. The creation of a "document" takes only a few keystrokes. There is no physical dimension to the documents. They become a primary tool of communication, particularly through e-mail, so the volume is exponentially greater. And that volume makes it difficult to ensure that one has preserved and retrieved all of the "documents" requested in litigation. There is a greater risk of inadvertent destruction and, hence, a sanctions motion. The practical, logistical and cost challenges of e-discovery, greater now and growing every year, are daunting. Litigation is increasingly being driven and decided by discovery battles rather than the merits. We need to get back to the point where the law and facts drive litigation outcomes.

Given the current state of e-discovery, one must ask whether the Federal Rules further the cause of "the just, speedy and inexpensive determination of every action," which was adopted as a guiding principle of Rule 1 of the Federal Rules of Civil Procedure in 1938. The Federal Rules should be amended to return the courts and litigants to this laudable goal of just, speedy and inexpensive litigation.

Rule 37(e) – Failure to Preserve Discoverable Information

The FDCC urges the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. FDCC is concerned that the exception contained in Rule 37(e)(1)(B)(ii), which allows sanctions or an adverse-inference jury instruction only if the court finds that the failure irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action and was negligent or grossly negligent, could "swallow the rule." Under this proposal, and specifically the inclusion of the simple negligence option, courts could impose sanctions absent any evidence of willfulness or bad faith. The effect of the (B)(ii) exception would be more over-preservation, the very problem the Committee set out to address. FDCC urges the removal of this exception before the amendments are adopted.

FDCC is also concerned with the use of the word "or" in subsection (1)(B)(i), which would authorize sanctions for conduct that was "willful **or** in bad faith." Willful conduct could include deliberate conduct that was void of any evidence of bad faith. One often cited willful act is the use of a standard auto-delete function. The use of such auto-delete could be willful, but not in bad faith. FDCC recommends that the Committee consider substitution of the word "and" for the word "or" to make clear that the conduct must be for both willful **and** in bad faith.

FDCC also urges the deletion of the "factors to be considered" provisions in subsection (ii) of the proposed Rule 37(e). The factors do not assist in the determination of whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice. If the Committee does not delete the factors, FDCC suggests that they be included in the Committee Notes rather than in the text of the rule itself. Including the factors in the rules suggest that the factors are mandatory considerations. Such factors would be better left in the Committee Notes.

Finally, FDCC suggests that Rule 37(e)(1) adopt a "commencement of the litigation" trigger for determining when preservation obligations are imposed. The current text of the rule would require discovery be preserved "in anticipation" of litigation. This anticipation of litigation trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming. Such a rule is bound to lead to differing standards across the Circuits regarding when and what should be anticipated, and increases the risk of inconsistency and uncertainty for litigants in our Federal Court system. If the purpose of the Federal Rules is to secure the just and speedy determination of actions, the rule should impose bright-line standards. A "commencement of litigation" trigger would provide such a bright-line standard, which is desperately needed.

Rule 26(b)(1) – Scope of Discovery

FDCC supports the proposed revision to Rule 26(b)(1) redefining the scope of discovery to matters that are "relevant to any party's claim or defense and proportional to the needs of the case . . . ." This modification will clarify that the claims or defenses actually in the litigation are properly what drives discovery. The current standard allowing discovery of evidence not necessarily admissible at trial but "reasonably calculated to lead to the discovery of admissible evidence" is vague and overly broad and often leads to fishing expeditions well outside of the actual issues in the case. This well-known standard of "reasonably calculated to lead to the discovery of admissible evidence" has driven up the costs, expense and time spent by the parties in discovery. Limiting discovery to matters actually relevant to the claims or defenses at issue is a welcomed limitation on discovery that should further the goals of the Federal rules in promoting the "just, speedy and inexpensive determination of every action." Adding the words "and material" to the phrase "any non-privileged matter that is relevant **and material** to any party's claim or defense . . ." would strengthen the rule further. This limitation would serve to eliminate wasteful discovery while allowing parties to obtain discovery that is relevant and material and necessary to defend or pursue claims.

Rule 30, 31, 33 and 36 – Presumptive Numerical Limits

Reducing the number of depositions allowed, the deposition time, the number of written depositions and the number of interrogatories and requests to admit are welcome changes to the rules. Certainly in a large case where the parties can establish that they need additional discovery, such discovery can be secured by a motion to the court, if necessary. We fully expect,

however, that parties will routinely agree to additional discovery where necessary and motion practice will not be needed. But imposing presumptive numerical limits on discovery would have the beneficial effect of reducing discovery in the first instance, requiring the parties to focus discovery at the outset of the case and making discovery proportionate to the needs of the case. The FDCC welcomes these changes.

Rule 1 – Cooperation by "Parties"

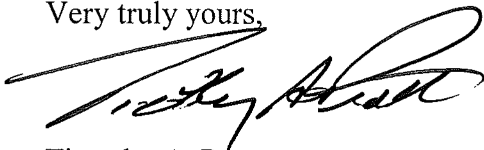
FDCC opposes the amendment to Rule 1, which proposes to state that the rules are to be "employed by the court and . . . the parties" to reach the goals of "just, speedy and inexpensive" resolutions. While certainly cooperation is a valid aspirational goal to which the members of the FDCC subscribe, we do not believe that adding the term "parties" to Rule 1 is appropriate. The possibility of motions brought under Rule 1 for the failure to cooperate will only encourage wasteful motion practice and additional burdens on an already over-burdened federal judiciary. Attorneys are bound by the Rules of Professional Conduct in their respective jurisdictions. Any imposition of additional duties of cooperation on the attorneys should be carefully considered, especially to the extent that it could be considered at conflict with the notions of this country's adversary system. FDCC urges the Committee not to include the term "parties" in Rule 1.

Conclusion

FDCC members have concerns over the vanishing jury trial in this country, and this trend has been perpetuated by a costly, unpredictable and sometimes inefficient civil justice system. Litigation should be, as Rule 1 espouses, "just, speedy and inexpensive." Discovery costs should not drive litigation or settlement decisions. Fear over discovery sanctions resulting from e-discovery demands and inadvertent destruction of electronic documents should not be a driving force in whether and how parties litigate cases. E-discovery is being abused and the costs and burdens associated with e-discovery are simply too high.

FDCC appreciates the Committee's consideration of this written comment. As President of the FDCC and General Counsel of Boston Scientific, I will appear January 9, 2014 in Phoenix, Arizona, to testify before the Committee.

Very truly yours,



Timothy A. Pratt
President, Federation of Defense & Corporate Counsel

TAP/neh