PUBLIC COMMENT

of

THE FLORIDA JUSTICE REFORM INSTITUTE

to the

ADVISORY COMMITTEE ON CIVIL RULES

Concerning

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE

IN RESPONSE TO THE COMMITTEE'S INVITATION
TO SUBMIT FORMAL COMMENTS

WILLIAM W. LARGE
Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 222-0170
Facsimile: (850) 222-1098

MARK K. DELEGAL
MATTHEW H. MEARS
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Counsel for the Florida Justice Reform Institute

February 6, 2014

Dear Members of the Standing Committee on the Rules of Practice and Procedure:

The Florida Justice Reform Institute (the "Institute") respectfully submits these comments in support of the proposed amendments (the "Proposed Amendments") to the Federal Rules of Civil Procedure which have been circulated for public comment by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee").

I. Introduction and summary

The Institute is Florida's leading organization of concerned citizens, small business owners, business leaders, doctors, and lawyers working toward the common goal of restoring predictability and personal responsibility to our civil justice system through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute, which is the first independent organization focused solely on civil justice in Florida, works to restore faith in the judicial system and to protect Floridians from the social and economic toll of nonmeritorious litigation.

Through these public comments the Institute first explains from a conceptual standpoint why the Proposed Amendments are essential to safeguard the integrity of the federal judicial system. Then, three provisions are individually discussed. First, the Institute strongly supports measures to ensure that discovery is proportional to the needs of a case. Disproportionate discovery gives the requesting party improper leverage and results in settlements based on a desire to avoid the burden of excessive discovery rather than on the merits of the case. Second, the Institute also supports measures to adopt a uniform standard for sanctions for the failure to preserve evidence. A single national standard will help to ensure that sanctions are imposed in a manner that is uniform and consistent across the country. That being said, this provision should be strengthened with additional safeguards to ensure that these sanctions are reserved for wrongdoers. Third, the Institute supports the proposed reductions in the presumptive discovery limits. These changes will empower judges to take a more active role in establishing the scope of discovery for each case. Finally, the Institute responds to the five specific questions put forward by the Standing Committee.

II. Why the Proposed Amendments are essential to preserve the integrity of the federal judicial system

The Institute applauds the efforts of the Standing Committee to increase cooperation in the litigation process, to promote proportionality in discovery, and

to facilitate early and active case management by the court. The Proposed Amendments are thoughtful, balanced, and carefully targeted. These changes will improve the fairness and efficiency of the overall system while safeguarding the rights of each individual litigant. As a whole, the package of Proposed Amendments will be a decisive step forward.

To fail to adopt these Proposed Amendments or to allow them to be watered down would be a huge mistake. Already many potential litigants are "voting with their feet" by opting to resolve their disputes through private dispute resolution procedures such as mediation and arbitration.[1] The Proposed Amendments provide a significant starting point in what must be a sustained and focused effort to provide a system of justice that is efficient, cost-effective, and fair.

---

[1] *See e.g.*, Am. College of Trial Lawyers & Inst. for the Advancement of the Am. Legal Syst., *Final Report* at 22 ("*Final Report*") (March 11, 2009) (noting that the rise of ADR "could be a reflection of how slow and inefficient the normal judicial process has become"); Lipsky, D. B. & Seeber, R. L., *Resolving Workplace Disputes in the United States: The growth of Alternative Dispute Resolution in Employment Relations*, 2 J. of Alt. Dispute Resolution in Employment, 44 (2000) ("Between 70 and 80 percent of the major corporations in the U.S. reported using various ADR procedures because they believe such procedures saved them time and money"); U.S. Dep't of Labor, Special Report by the Comm'n on the Future of Worker-Mgmt. Relations ("Special Report"), *available at* http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (visited 2/3/14) (noting that employee claimants in court "must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint" and concluding "that development of private arbitration alternatives for workplace disputes must be encouraged."); Andrew P. Morriss & Jason Korosec, *Private Dispute Resolution in the Card Context: Structure, Reputation, and Incentives* (June 2005), Case Legal Studies Research Paper No. 05-12, *available at* SSRN: http://ssrn.com/abstract=735283 or http://dx.doi.org/10.2139/ssrn.735283 (noting the explosive grown in card payment systems and the parallel growth in private dispute resolution systems).

The current rules do not adequately protect litigants from excessive discovery.[2] The obvious way to fix this problem is to revise the rules in order to close the loopholes that are being exploited to the detriment of our civil justice system. The Proposed Amendments go a long way toward the goal of closing these loopholes.

III. Why discovery must be proportional to the needs of the case

The Institute strongly supports the proposed changes to Rule 26(b)(1). This proposed rule provides that the *scope* of discovery must be proportional to the needs of the case. This change will help to ensure that the dominant driving force behind the resolution of any case will be the merits of the claims asserted and not the burden of excessive discovery.

When discovery is permitted that is *disproportionate* to the needs of the case, it degrades our entire civil justice system in at least three ways. First, it creates an uneven playing field where settlements are based on avoiding discovery rather than on the merits of the claim.[3] Consider a case alleging damages of

---

[2] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547 (2010-11) (addressing the myriad of problems posed by unfettered discovery in the United States and noting that discovery is often used in an abusive and vexatious manner to coerce settlement); *Final Report*, at 9 ("Discovery has become broad to the point of being limitless."); Peggy Bruggman, Public Law Research Institute, *Reducing the Costs of Civil Litigation: Discovery Reform*, (analyzing the problem of discovery abuse), *available at* http://gov.uchastings.edu/public-law/docs/plri/discov.pdf (vistited 2/3/14); *see also Tampa Bay Water v. HDR Engineering, Inc.*, Case No. 8:08-CV-2446-T-27TBM, (M.D. Fla. Nov. 2, 2012) (approving a recovery of $3.1 million in electronic discovery costs, mostly attributable to the cost of storing and hosting ESI); *In re Fannie Mae Securities Litigation*, 552 F. 3d 814, 817 (D.C. Cir. 2009) (discussing $6 million expended to review 600,000 documents in preparation for production).

[3] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of Experienced Litigators Finds Serious Cracks in U.S. Civil Justice System ("Survey of Experienced Litigators")*, 92 JUDICATURE 78 (Sept.-Oct. 2008)

$100,000. Assume that the cost of discovery for the defendant would be $500,000. The obvious result (if the discovery is allowed) is that the primary factor driving the resolution of the case will be the cost of discovery. All too often under the current rules, discovery is used as a weapon for extracting settlements rather that as a tool to move a case toward resolution on the merits.[4] Another result of this uneven playing field is that the cost of settlement for all cases is inflated by these excessive discovery costs. This settlement premium provides an extra incentive to file lawsuits, resulting in more cases being filed. These additional cases, in turn, clog our court system and delay the resolution of all cases. This delay, in turn, increases the costs of each case and undermines the integrity of our judicial system.[5]

Second, when discovery is permitted that is *disproportionate* to the needs of the case, the cost of each case—in time, in energy, and in money—is driven up.[6]

(noting that 83 percent of survey respondents indicated that "litigation costs drive cases to settle").

[4] *Final Report,* at 9 (noting that 71 percent of respondents thought that "discovery is used as a tool to force settlement"); Jane Easter Bahls & Steven C. Bahls, *Suiting Up*, Entrepreneur Mag., May 1999 (concluding that many entrepreneurs would settle frivolous claims to avoid the cost of litigation), *available at* http://www.entrepreneur.com/magazine/entrepreneur/1999/may/17684.html (visited 2/3/14).

[5] *Clinton v. Jones*, 520 U.S. 681, 722 (1997) (J. Breyer, concurring in judgment) ("the time and expense associated with both discovery and trial have increased"); *Final Report,* at 25 ("At present, the system is captive to cost, delay, and in many instances, gamesmanship. As a profession, we must apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworthy civil justice system in America.").

[6] *Survey of Experienced Litigators*, at 78 (noting that "more than 9 out of 10 respondents agreed that the longer a case goes on, the more it costs"); The American Institute of Certified Public Accountants & Institute for the Advancement of the American Legal System, *Another Voice: Financial Experts*

Two prevalent complaints about our civil justice system are that discovery is too slow and too expensive. The proposed changes to Rule 26(b)(1) will help to address both of theses problems. Discovery takes both time and money. When discovery is appropriately limited, it saves time and money and helps the parties to focus on the evidence that is material to the resolution of the dispute.

Third, when discovery is permitted that is *disproportionate* to the needs of the case, it damages the integrity and reputation of our civil justice system.[7] Excessive discovery is inefficient, wasteful, and unfair. It is also unjust because it allows plaintiffs to extract settlements based not on the damages suffered, but instead based on the "weapon" of excessive discovery. If these rules are not modified to address the way that discovery is being abused, the reputation of our federal court system will be diminished.

IV. Why a uniform standard for sanctions is necessary

The Institute strongly supports the basic concept behind the proposed changes to Rule 37(e). This proposed change creates a uniform standard for analyzing an alleged failure to preserve discoverable information. A national standard is beneficial for at least two reasons. First, it will promote the rapid

---

on Reducing Client Costs in Civil Litigation (2012) (noting that federal courts "frequently fail" to meets the goal of an a speedy, inexpensive and just determination and discussing how extending the period of time for pre-trial work drives up costs) *available at* http://www.aicpa.org/interestareas/forensicandvaluation/newsandpublications/advocacy/downloadabledocuments/financial-experts-on-reducing-client-costs%20in-civil-litigation.pdf.

[7] *Final Report*, at 2 (reporting that "the survey revealed widely-held opinions that there are serious problems in the civil justice system generally. . . . From the outside, the system is often perceived as cumbersome and inefficient.") (emphasis added); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 574 (2010-11) (noting that discovery costs are growing at an explosive rate and that the cost of discovery is a chief concern of defendants).

development of a robust body of case law. By having a single standard, case law in one jurisdiction will provide guidance for other jurisdictions. Thus, a single standard will give interested parties clearer guidance when addressing "failure to preserve" allegations.

Second, a national standard will promote certainty and efficiency. Attempting to apply case law across jurisdictions with varying standards is time consuming and tedious. A single standard will provide the certainty that is needed to quickly resolve any alleged failures to preserve discoverable evidence.

While the basic concept in proposed rule 37(e) is good, these proposed changes should be revised in three ways. First, the provision at 37(e)(1)(B)(ii) that authorizes sanctions in the absence of any wrongdoing should be eliminated as it merely invites litigants who have no evidence to support their claims to argue that the proof of their entire case rests upon documents that the defendant failed to preserve. This would place defendants—in the absence of any willfulness or bad faith—in the nearly impossible position of having to prove that all evidence was preserved and that the allegedly "missing" documents never existed. This provision would also put courts in the dangerous position of deciding who should win the case. If the court were to authorize a negative-inference jury instruction, the plaintiff would likely win. In contrast, without a negative-inference jury instruction, the defendant (in a case where the plaintiff has no evidence to support his or her claims) would be likely to prevail. Thus, this provision improperly requires the court to put "its thumb" on the scale of justice.

Second, sanctions under 37(e)(1)(B)(i) should require a showing the party that failed to preserve evidence acted willfully *and* in bad faith. As proposed, this sanction is authorized where a party acts willfully *or* in bad faith. Willful can be defined as merely intentional conduct that is not necessarily malicious.[8] Of course,

[8] *United States v. Murdock*, 290 U.S. 389, 394 (1933) (noting that the term "willful" often denotes "an act which is intentional, or knowing, or voluntary, as distinguished from accidental"), *overruled in part on other grounds, Murphy v. Waterfront Com'n*, 378 U.S. 52 (1964); *Sekisui American Corp. v. Hart*, 945 F. Supp. 2d 494, 503 (S.D.N.Y. 2013); *see also Black's Law Dictionary*, 1593 (7th ed. 1999) (defining the term willful as "[v]oluntary and intentional, but not necessarily malicious.").

electronic data storage systems are not set up "accidentally." Thus, the proposed language will invite arguments that any failure to preserve evidence was willful. Negative inference jury instructions are so powerful that they must be reserved for cases where there was bad faith or at least a culpable state of mind. To accomplish this sanctions must be reserved for cases where the party acted "willfully *and* in bad faith."

Third, the court should be invited to consider one additional factor when assessing a party's conduct under 37(e)(2). Specifically, the court should consider whether the information that was not preserved was material to a specific claim or defense. Just because evidence is discoverable does not mean that it will make a material difference in the case. Negative jury instructions should be reserved for instances where material evidence was not preserved.

V. Why reducing the presumptive discovery authorization will help to reduce the cost of litigation without depriving any litigant of any justifiable discovery

The Institute strongly supports the proposed changes to Rules 30, 31, 33, and 36 to reduce the presumptive limits on discovery. These proposed changes directly confront two problems that plague our federal litigation system today, namely that resolving disputes in federal court takes too long and costs too much.[9] A case where only five depositions could be justified illustrates the savings in time, effort, and energy that will flow from the proposed reduction in depositions from ten down to five. Under the Proposed Amendments, the party would get all five of the depositions that could be reasonably justified. In contrast, under the *current* rules, the party would be presumptively allowed ten depositions. Thus, five additional depositions would be allowed under the current rules, doubling the cost of depositions, doubling the witness preparation time, doubling the disruption for the defendant, and doubling the number of days needed. Similarly, reducing the

[9] *Final Report*, at 2 ("Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much.") (emphasis added); *Survey of Experienced Litigators*, at 79 (noting that under the current rules discovery abuse "apparently is not being punished").

presumptive number of interrogatories from 25 down to 15, will streamline some cases, as will limiting requests for admission to 25.

The beauty of these proposed changes is that parties will still be entitled to all discovery that can be justified by the claims and defenses presented. Setting lower presumptive limits does not limit discovery, is simply requires the parties to justify any discovery that is requested beyond the new presumptive limits. Getting the Judge involved in establishing the scope of discovery early in the litigation process is likely to provide an array of benefits, including lower costs, greater efficiency, narrower and more focused discovery requests, and quicker resolution of the case.[10]

The proposed changes to Rule 34 will help to avoid a lot of confusion. In particular, the new requirement in Rule 34(b)(2)(C), that a producing party must disclose whether any responsive materials are being withheld on the basis of the objection(s) asserted will both thwart gamesmanship and provide clarity and order to the discovery process.

VI. The Institute's position on the questions proposed by the Advisory Committee on Civil Rules

The Institute's responses to the questions proposed by the Advisory Committee on Civil Rules are set forth below.

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored

[10] *Survey of Experienced Litigators*, at 79 ("when asked about the impact of early and regular judicial involvement in a case, 74 percent of respondents stated that it results in a narrower range of issues in dispute, 71 percent agreed that it results in greater client satisfaction, and 67 percent said that it results in lower costs"); The American Institute of Certified Public Accountants & Institute for the Advancement of the American Legal System, *Another Voice: Financial Experts on Reducing Client Costs in Civil Litigation*, at 4-5 (2012) (discussing the need for early, active, and consistent case management by the court).

information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

The Institute believes that a single standard for failing to preserve discoverable information is preferable. Therefore, Rule 37(e) should not be limited to electronically stored information.

2. *Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?*

The Institute understands this question to be directed to proposed rule 37(e)(1)(B)(ii) and believes that (B)(ii) should not be retained for the simple reason that this provision puts forward an exception that is likely to swallow the rule. First, the Institute takes the position that sanctions and adverse jury instructions should be limited to cases where there was wrongdoing. Second, creating a special rule for parties who have no evidence to support their claim(s) creates the wrong incentive. Such a provision essentially invites plaintiffs with no evidence to argue that their entire case rested on some electronic or paper documents that were not preserved. Proving a negative, namely that no relevant documents were destroyed, is virtually impossible. Thus, (B)(ii), although well intended, would give litigants who have no evidence grounds to argue that they are entitled to a negative jury instruction. Any defendant responding to a motion for a negative inference jury instruction under (B)(ii) would face the risk that a borderline frivolous claim might be transformed into a "sure win." Thus, this provision would add uncertainty to the litigation process. This provision would also place the court in the position of putting its thumb on the scale of justice by deciding which side should win the case.

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

No. The proposed rule is intended to cover all the conduct that the current rule covers. Retaining the current safe-harbor provision of Rule 37(e) thus appears to be unnecessary.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Yes. When a party is deciding whether to seek sanctions under Rule 37(e), a detailed definition for "substantial prejudice" would be a helpful measuring stick. A clear standard would help to avoid the wasted time and effort associated claims that fall short. One important component of the definition is that in order for there to be "substantial prejudice," the documents that were not preserved must be material to a specific claim or defense. In addition, the Institute supports the Committee's suggestion that the court should be directed to consider the availability of reliable alternative sources for the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Yes. As drafted, the Proposed Rule authorizes sanctions if the court finds that the party's actions were either willful or in bad faith. The term "willful" can mean *any* intentional action that was taken in good faith. However, in the context presented willful should be defined to include an element of "guilty knowledge" or scienter. The preferable solution would be to limit sanctions to cases where a party's actions were "willful *and* in bad faith."

VII. Conclusion

The Institute strongly supports the Proposed Amendments as an overall package. For the most part, they strike an appropriate balance. In a few instances some additional measures should be adopted to avoid some unintended consequences. In particular, the standard for imposing sanctions for failing to preserve evidence should be elevated.

Under the current rules, federal litigation takes too long and costs too much. The Proposed Amendments squarely address these problems and thus represent a huge step forward in the goal of liberty and justice for all.