Doug Lampe
Office of the General Counsel
Ford Motor Company
One American Road
Dearborn, MI 48126
dlampe@ford.com
313 594 4111

November 22, 2013

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Suite 7-240
Washington, DC 20544

VIA: electronic submission

Re: Ford Motor Company Comment to Report of the Advisory Committee on Civil Rules

Advisory Committee on Civil Rules:

Ford Motor Company ("Ford") appreciates the opportunity to comment on the proposed changes to the Federal Rules of Civil Procedure ("FRCP") currently under consideration by the Advisory Committee on Civil Rules.

INTRODUCTION

Ford, a global automotive industry leader based in Dearborn, Michigan, manufactures or distributes automobiles across six continents. We have been engaged in business in locations across the world – from Britain, to Australia, to Argentina – for more than a century, and international sales far exceed domestic sales. Despite the global nature of our business, the vast majority of litigation faced by Ford is in the United States. Indeed, Ford has more product litigation in each of many states than the rest of the world *combined*. Ford is sued thousands of times every year in the courts of the United States in cases of all types, with product liability personal injury actions alleging a design defect comprising the majority of Ford's litigation

docket. And with vehicle design and development historically focused heavily in the United States, the documents and witnesses sought by plaintiffs are locally available and within the jurisdiction of the courts of the United States. Not so with most of the global leaders in the automotive business, which typically have only a sales and manufacturing subsidiary established in the United States. This puts domestic producers like Ford at a competitive disadvantage because discovery against Ford is nearly unlimited by the current FRCP whereas discovery against foreign automakers in the United States is not usually available, and the local sales and manufacturing companies have few or no design documents or engineers of interest to the litigation.

Because Ford believes in the vehicles designed, manufactured, and sold by the men and women of Ford, in the past 20 years Ford has tried to verdict more than 1,000 product liability cases and dozens of cases of other types. Ford's litigation experience, almost entirely as a defendant, includes trials in virtually every state and federal district. Indeed, very few entities have as much litigation experience to share with this Committee. Discovery in Ford's cases has been commonly used against Ford in ways that are not just, fair, or efficient to the resolution of disputes but instead to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation.

Litigation should be about achieving a just outcome in a manner that is as speedy and inexpensive as possible. Discovery should be about the legitimate search for necessary information—not a tactic to run up costs or gain a tactical advantage. There should be no judicial tolerance for the tactical, satellite, or discovery-on-discovery litigation that is unfortunately too common under the existing Rules.

The great majority of lawsuits against Ford are filed in state court, usually with a local vehicle retailer named to defeat diversity. We recognize, of course, that individual states may or may not choose to adopt any modifications to the federal rules, but as the Committee is aware, most states have adopted the Federal Rules of Civil Procedure in whole or in part and many would be informed by any action taken to amend the FRCP. Accordingly, adoption of the proposed amendments could have significant effects on discovery practices in state as well as in federal courts. Even in those states that have developed unique procedural approaches, adoption of the proposed amendments would carry considerable influence. With that in mind, Ford's Comment describes examples of discovery abuses from state courts that could – and do – easily occur in federal courts and that would be redressed indirectly by the effect the proposed FRCP amendments will likely have on state court proceedings. Ford will also briefly respond to the specific questions posed by the Committee in its August 15, 2013 report.

I. AMENDMENTS TO RULE 26(B): SCOPE AND PROPORTIONALITY

Ford supports the proposed revisions to Rule 26(b)(1). These revisions would advance the interests of justice and align with the principle set forth in the Committee Note to Rule 1: "effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."[1] Elimination of the reference to information that is "reasonably calculated to lead to the discovery of admissible evidence" from Rule 26(b)(1) and requiring that discovery be "proportional to the needs of the case" would recognize and make clear to judges and litigants the reality that discovery necessarily involves a balancing of interests. Further, using the

[1] Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure and Request for Comment at 281(August 2013).

proportionality considerations from Rule 26(b)(2)(C)(iii) would give both federal and, indirectly, state judges a set of familiar guideposts for evaluating the discovery needs of a particular case.

Ford also anticipates that adoption of the proposed revisions to Rule 26(b)(1) would deter parties from engaging in overly broad, unduly burdensome, and vexatious discovery practices that do not advance the interests of justice. Too frequently, litigants recognize that the current Rules can be used to drive up the opposing party's costs and expose the opposing party to sanctions. Under current practice, parties justify their discovery requests by stating that such requests may "lead to the discovery of admissible evidence" – all but ignoring the rule's express invocation of a relevance standard – and by identifying a policy expressed nowhere in the rules themselves – that discovery should be "liberal and broad." By removing the "reasonably calculated" language and requiring that discovery be proportional to the needs of the case, parties would be required to focus on that discovery necessary to assert a claim or present a defense – that is, to contemplate the discovery necessary *before* propounding discovery.

The amendments represent a substantial step toward providing judges with well-defined and applicable guidance, and in reversing the far-too-prevalent misconception that "liberal discovery" that is "reasonably calculated to lead to the discovery of admissible evidence" effectively means discovery unlimited by anything but well-grounded privilege claims.

II. AMENDMENTS TO RULE 26(C): COST-SHIFTING MECHANISMS

Ford also supports the additional language in the proposed amendments to Rule 26(c) that would make explicit the judicial authority to allocate discovery costs. In Ford's experience, judges are almost uniformly unwilling to consider meaningful cost-allocation proposals even in cases of clear discovery abuse. As a result, the current rules sometimes cause defendants to

settle cases they believe to be meritless--cases that should be tried or dismissed--to avoid the huge expense of compliance with onerous discovery demands. Such a decision does not further the interests of justice and invites ever more meritless litigation that clogs the courts and diminishes public appreciation for, and access to, the justice system.

Especially for large enterprises like Ford, the tradeoff is a very real because of the sheer amount of information that might be responsive to a broad discovery request. Many courts, however, seem to think just the opposite – that large enterprises can readily and efficiently pull information no matter how much is requested. The Florida District Court of Appeals identified just such a misimpression in reviewing, and reversing, a trial court's order imposing discovery sanctions against Ford:

> The trial court's sanctions order seems predicated on an unproven assumption – that Ford's attorneys can access [a] database, make a few key strokes on a computer, and [the responsive documents] would spit out onto a laser printer, readily available for disclosure to the plaintiff in this case.[2]

In Ford's experience, this unrealistic perception is shared by too many courts and frequently motivates judges to require expansive production out of proportion to the needs of the case.

The reality is that, although defendants may attempt to predict what materials will be sought in future litigation, lawsuits by their very nature involve unforeseen issues and disagreements. Consequently, identifying, collecting, and processing documents to comply with discovery requirements often occurs many years after the events at issue in the case, and surveying old information systems utilizing outdated, prior technology can be an enormous burden.

Making explicit the provision for protective orders that allocate the costs of discovery would deter parties from engaging in abusive discovery tactics. And more closely connecting

[2] *Ford Motor Co. v. Hall-Edwards*, 997 So.2d 1148, 1152 (Fla. Dist. Ct. App. 2008).

the cost of discovery to the party seeking to benefit from the discovery will cause parties to consider more closely whether the discovery is truly necessary to the case.

III. CASE STUDY: *STOKES V. FORD MOTOR CO.*

Although Ford could provide many examples for the positions advanced in this comment letter, we highlight an action litigated in 2011 in state court in a jurisdiction that adopted the Federal Rules of Civil Procedure. In *Stokes v. Ford Motor Co.*,[3] the plaintiff sued Ford in a products liability action relating to a fatality arising from a single-vehicle crash. The plaintiff propounded requests for discovery seeking litigation materials from other personal injury cases, including cases involving other vehicle models. Ford responded with uncontroverted evidence demonstrating that these other vehicle models had entirely distinct designs and *did not share any of the components at issue*. Rejecting Ford's arguments, the court invoked Rule 26(b)(1) and its understood policy that "discovery shall be liberally granted," and ordered Ford to produce the requested material.[4]

Compliance with the court's order imposed an enormous burden. Ford identified more than 1,300 lawsuits and 1,200 witness transcripts meeting the parameters specified in the requests. The vast majority of these 1,300 cases had been closed years earlier, and most of the specific documents covered by the court's order were maintained only within the archived or off-site files of the outside counsel who had represented Ford. Culling through these 1,300 other cases—by hand on a document-by-document basis to identify responsive items, separate out materials not requested, and log and remove privileged documents from this enormous number of cases—required the work of 60 law firms and numerous individuals from Ford's in-house

[3] No. 05-1236 (Mont. 13th Jud. Dist. Ct. 2011).
[4] Order at 9, *Stokes v. Ford Motor Co.*, No. 05-1236 (Mont. 13th Jud. Dist. Ct. Apr. 18, 2011).

legal team. Ford estimated that complying with the court's discovery order would consume more than 800 hours from Ford's legal staff and cost $2 million in outside counsel legal fees.

All told, Ford produced to the *Stokes* plaintiff nine computer hard drives containing more than 360 GB of documents and 1,200 witness transcripts.[5] The court eventually did grant Ford some modest relief from the extreme reach of its discovery order, but only after Ford had already incurred these staggering costs.

The true purpose of the *Stokes* plaintiff's discovery requests was to drive settlement value that was not warranted by the case facts. Plaintiff's purpose became apparent shortly before trial when the *Stokes* plaintiff filed a motion to impose default sanctions against Ford for purported gaps in the $2 million "other lawsuit" production. When that motion for sanctions failed and the case proceeded to trial on the merits, the evidence actually presented at trial demonstrated just how insignificant the onerous discovery was to the plaintiff's case: he attempted to introduce exactly *one* document drawn from the court-ordered other lawsuit production and he initially offered only *six* transcripts. After the court ruled on admissibility from the "other lawsuit" production, *none* of the testimony transcripts were actually presented to the jury and *none* of the documents gleaned from the court-ordered production were admitted into evidence. Thus, the court's order, which stemmed from its expansive view of discovery occasioned by the "reasonably calculated" language of Rule 26(b)(1), resulted in the utter waste of hundreds of hours of internal legal staff time and millions of dollars. The interests of justice were not served at all. And one does not need the benefit of hindsight to know that the discovery process wasted resources—it was clearly predictable given the scope of the court's order requiring production of

[5] The *Stokes* plaintiff also served a Rule 30(b)(6) deposition notice raising dozens of distinct topics including several addressing vehicle components and systems admittedly not implicated by their defect allegations. Although the court acknowledged the irrelevance of discovery on these issues, it nonetheless ordered Ford to produce corporate representatives to testify citing to Rule 26(b)(1) and "the liberal nature of discovery and the potential for admissible evidence arising out of discovery." *Id.* at 4.

other incident litigation documents from other unrelated cases involving unrelated vehicles, particularly given that the documents were not engineering documents and were not even in Ford's possession. Ultimately Ford won the battle with a 12-0 defense jury verdict, but lost the war in the sense that Ford cannot recover the wasted expenditures required by the sweeping court order inspired by the language of Rule 26(b)(1).

The *Stokes* case provides a real-world example of an abuse that would be addressed by the Committee's proposed revisions to Rule 26(b)(1) and also supports making explicit a mechanism by which cost allocation can be ordered pursuant to Rule 26(c). First, under the existing language of Rule 26(b)(1), the *Stokes* plaintiff was free to pursue his strategy of overwhelming Ford with document and deposition requests because, at least at the outset, the court was unwilling to set any meaningful scope limitations. If instead the court were required to ensure that the discovery sought was "proportional to the needs of the case," then certainly the interests of justice would have been enhanced because little or none of the satellite litigation involving other cases would have occurred. Ford does not suggest that the loss for which the plaintiff sought recovery in the *Stokes* case was inconsequential, but rather that the disputed facts of the case demanded only a targeted discovery plan, proportional to the needs of that case.

Secondly, establishing that cost allocation is a real possibility makes using abusive discovery to overwhelm the opposing party less attractive as a litigation strategy. In *Stokes*, the court accepted Ford's evidence that compliance with ordered discovery would cost $2 million in outside counsel fees and hundreds of hours of in-house counsel time, but balked at the notion that the plaintiff should pay any portion of the fees associated with the discovery. Instead, the court only required the plaintiff to pay Ford's "reasonable copying costs," which amounted to

only a few thousand dollars—a tiny portion of the total bill.[6] With no real threat of reallocation of discovery costs, there was nothing to dissuade the plaintiff from overwhelming Ford with overly broad and burdensome discovery—the onerous discovery was sure to drive up defense costs and potentially Ford's settlement offer and may even allow for argument that a gap in the enormous production occurred so as to launch a motion for sanctions.

IV. AMENDMENTS TO RULE 37 (E): FAILURE TO PRESERVE DISCOVERABLE INFORMATION, SANCTIONS

Ford supports a revision to Rule 37 that would establish uniform preservation and sanctions guidelines across courts, and agrees that the proposed revisions would at least directionally reduce the burden of over-preservation. Ford is concerned, however, that the proposed revision permits sanctions upon a finding of "irreparable deprivation" even in the absence of bad intent. The omission of an intent element would eviscerate much of the clarity sought by the Committee.

Although Ford believes the Committee intends this standard to apply only to truly exceptional circumstances, Ford is concerned that "irreparable deprivation" will be used to maintain the status quo because advocates for sanctions will argue that "irreparable" simply means that the information sought is gone while "deprivation" just means that the unavailability of the lost information is regrettable and unfortunate. If advocates for sanctions are successful in convincing courts that "irreparable deprivation" is such a modest standard, then the only remaining obstacle to sanctions is that the information deprives a party of "any meaningful opportunity to present or defend against the claims in the litigation." But advocates for sanctions will then argue that the "any meaningful opportunity" provision cannot refer to discovery that is

[6] *Id.* at 4.

actually necessary to present or defend a claim because otherwise the court would have to dismiss the claim or defense rather than sanction the opposing party.

Ford urges the Committee to include a bad intent component to any rule governing the imposition of sanctions. If such a component is not added, Ford urges the Committee to modify Rule 37(e)(1)(B)(ii) to make clear that the claim or defense must be so restricted by the absence of information that the court would have been required to dismiss the claim or defense but for the sanction relief provided by Rule 37(e)(1)(B)(ii). This suggested modification would also deter unwarranted motions for sanctions because of the inference created about the viability of the claim or defense if the motion for sanctions is not granted.

V. CASE STUDY: *STIMPSON V. FORD MOTOR CO.*

Another product liability case litigated in 2011 demonstrates the basis for Ford's concern that the proposed "irreparable deprivation" standard will invite motions for sanctions, receive inconsistent treatment (especially in state courts), and not be reserved for application only in unusual and extreme cases. *Stimpson v. Ford Motor Co.*[7] shows just how easily some courts will be persuaded that the absence of evidence *even of unknown value* means that a litigant's opportunity to present her case has been irretrievably undermined. In *Stimpson*, Ford successfully defended its product against allegations arising from a crash that occurred in 2003 involving a vehicle produced in 1991. The jury returned a complete defense verdict for Ford following a four-week trial.

In post-trial motions, the plaintiffs cited language similar to the proposed "irreparable deprivation" standard in arguing that their ability to present their case against Ford had been

[7] No. 2004-CA-000013 (Fla. Cir. Ct. Sumter Cnty. 2011).

"unfairly hamper[ed]."[8] According to the plaintiffs, this disruption occurred because Ford had discarded (pursuant to its records retention policy) certain engineering reports dating back two decades before the subject accident. Even though the contents of these documents were not known, the trial court concluded that the unavailable documents would have contradicted Ford's position regarding the absence of alleged defects and that Ford had "unlawfully disposed of those documents."[9] Disregarding the jury's verdict, the court struck Ford's answer and affirmative defenses, entered judgment on liability in favor of the plaintiffs, and scheduled a new trial to address the amount of damages.

Florida's Third District Court of Appeals, however, recognized that strident argument about the potential effect of unavailable evidence is not the same as depriving a litigant of an opportunity to present her case. Reversing the trial court, the court of appeals observed that "there was no evidence presented, either at trial or during post-judgment proceedings, showing that the [discarded documents] contained engineering reports identifying a defect."[10] Further, as to whether Ford had wrongfully discarded the items, the court noted that when Ford disposed of the documents "the Stimpsons' accident had not yet taken place, this lawsuit had not yet been filed, there was no matter pending between the parties, and there was no evidence showing that the instant action was foreseeable by Ford."[11] Thus, only after extensive motion and appellate

[8] Findings of Fact, Conclusions of Law, and Memorandum Decision at 38, *Stimpson v. Ford Motor Co*., Case No. 2004-CA-000013, (Fla. Cir. Ct. Sumter Cnty. July 20, 2011). Notably, the Florida Rules of Civil Procedure generally track the Federal Rules. Of course, because the proposed revision to Rule 37(e) has not yet been adopted even for use in the federal courts, the Florida state court did not apply the "irreparable deprivation" standard. However, the "unfairly hampered" test employed by the *Stimpson* trial court is conceptually consistent with the Rule 37(e) proposal. The *Stimpson* court's comfort in concluding that discarded documents with unknown contents deprived the plaintiffs of their ability to present their case and warranted striking Ford's defenses demonstrates the potential for a standard such as the Rule 37(e) proposal to be misunderstood and broadly utilized.
[9] *Id*. at 39–40.
[10] *Stimpson v. Ford Motor Co*., 115 So.3d 401, 406 (Fla. Dist. Ct. App. 2013).
[11] *Id*.

practice and adverse publicity was Ford able to regain the just outcome as determined by the jury. Such results convince Ford that an intent element is critical.

VI. FORD'S RESPONSES TO RULE 37(E) QUESTIONS

Ford appreciates the opportunity to respond to the specific questions the Committee has raised pertaining to Rule 37(e) and provides its perspective regarding each question below. Ford also references the more extensive comments submitted by Lawyers for Civil Justice in its response to the specific questions posed by the Committee.

1. Should the rule be limited to sanctions for loss of electronically stored information?

FORD'S ANSWER: Ford does not see a principled basis for distinguishing among different types of discoverable evidence based on the manner in which it is stored. A single standard applicable to all evidence would encourage consistency from courts in addressing motions for sanctions and provide better guidance to parties.

2. Should Rule 37(e)(1)(B)(ii) be retained in the rule?

FORD'S ANSWER: As noted above at pp. 9 – 10, Ford believes that proposed Rule 37(e)(1)(B)(ii) should be eliminated. This provision will invite sanctions motions and allows for a wide range of interpretations that will prevent consistency and predictability. Extreme cases, such as the Committee seems to envision for application of (B)(ii), are better addressed through application of the Court's inherent powers or other available remedies such as spoliation claims or adverse inference. If Rule 37(e)(1)(B)(ii) is retained, it should receive substantial modification to ensure that it is invoked only in those exceedingly rare cases in which the lost evidence is so central to the claim or defense that further litigation on the issue is impossible.

3. Should the provisions of current Rule 37(e) be retained in the rule?

FORD'S ANSWER: Ford sees no reason to retain the current provisions of Rule 37(e).

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)?

FORD'S ANSWER: Courts would benefit from additional guidance regarding the term "substantial prejudice," and providing a definition will enhance consistency and remind the courts that meeting this factor requires demonstration of a direct and meaningful impairment of a party's ability to advance a claim or defense.

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?

FORD'S ANSWER: Willfulness, standing alone, should not be a sufficient basis for imposing sanctions. If the Committee chooses to retain willfulness in the disjunctive within the rule, an additional definition clarifying that purposeful intent to preclude the availability *for use in litigation* should be added; millions of documents are destroyed "willfully" every day but it is only pertinent to the discovery process if the documents are willfully destroyed in apprehension of litigation.

VIII. CONCLUSION

Ford applauds the Committee's efforts to reform the FRCP and supports the Committee's aim to create procedures that require litigants to focus on the merits of a case rather than on unduly burdensome and costly discovery practices. Especially because there is a far greater number of actions commenced in state courts in states that have adopted the federal rules than in federal court, Ford encourages the Committee to consider the impact that these proposed amendments would have on state-level systems. As discussed above:

- The Amendment to Rule 26(b)(1), which would limit the scope of discovery to that which is proportional to the needs of the case, would go far in achieving the Committee's goal of consistency in application. The amendment to Rule 26(b)(1) would give state courts following the FRCP direction regarding the scope of proper discovery and, thereby, would minimize inconsistent or otherwise problematic rules interpretation.
- The Amendment to Rule 26(c), which would make explicit the power to allocate the costs of meeting production demands to the requesting party, would be of great utility. By making explicit the power to reallocate discovery costs, abusive litigants would have far less interest in overwhelming defendants with costly and burdensome discovery demands.
- A revision to Rule 37 with the purpose of creating a uniform and easy-to-apply standard across the judicial system would allow for more consistency in the application of sanctions and adverse inferences. Nevertheless, the proposed "irreparable deprivation" basis for sanctions would invite superfluous motions and inconsistent analysis. Ford recommends that the Committee modify the language of Rule 37 to add a bad intent element.

Ford thanks the Committee for the opportunity to provide comments on the proposed changes to the Federal Rules of Civil Procedure. Please do not hesitate to contact Ford should the Committee have any questions regarding our comment letter or should Ford be able to further assist in this process.

Respectfully submitted,
Doug Lampe
Counsel
Ford Motor Company