



February 14, 2014

Honorable Jeffrey S. Sutton, Chair  
Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Administrative Office of the United States Courts; Suite 7-240  
Washington, D.C. 20544

**Re: Comments on Proposed Rules and Forms Amendments**

Dear Chairman Sutton:

Intellectual Property Owners Association (IPO) welcomes this opportunity to comment on the Proposed Rules and Forms Amendments on which the Committee has solicited public comments.

IPO is a trade association representing companies and individuals in all industries and fields of technology that own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,500 individuals who are involved in the association either through their companies or in other member classes. Founded in 1972, IPO represents the interests of all owners of intellectual property covering all areas of technology. Many of our members are involved in patent litigation in U.S. Federal Courts.

In addition to the Proposed Rules and Forms Amendments, IPO has reviewed legislation pending in Congress relating to patent litigation and the November 6, 2013, letter from you and Chairman Campbell to Congress regarding H.R. 3309. IPO is pleased to provide the following comments for your consideration.

**I. Rules of Civil Procedure in Patent Cases**

Certain entities are attempting to exploit the judicial system for financial gain through the unjustified assertion of patent rights in expensive litigation. The courts should maintain flexibility in developing policies and procedures addressing such improper activities. We agree with the letter of November 6, 2013, that federal civil procedure should be developed by the Judicial Conference of the United States consistent with longstanding practice and the Rules Enabling Act, 28 U.S.C. §§ 2017-2077. The IPO Board of Directors adopted the following resolution on December 10, 2013:

*RESOLVED*, IPO opposes Congress dictating the outcome of deliberations of the Judicial Conference of the United States, or bypassing the Judicial Conference and its rulemaking entirely, relative to the rules of civil procedure such as (a) the scope and sequencing of discovery in patent

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cases including claim construction, (b) the setting of pleading standards for patent infringement, and (c) the initial disclosure and joinder of interested parties.

Further, rules addressing the unique procedural issues presented by patent litigation should be developed by the Judicial Conference. Several jurisdictions across the United States have developed Local Patent Rules to increase the efficiency and predictability of patent litigation. Congressional legislation regarding civil procedure may be inefficient and may lead to unintended consequences. The IPO Board of Directors adopted the following resolution on December 10, 2013:

*RESOLVED*, IPO believes that the Judicial Conference should develop and adopt rules to address issues of case management and discovery in patent cases in a timely manner.

We welcome the opportunity to work with the Judicial Conference in developing such rules. We are pleased to offer comments on the proposed amended rules presented by the Judicial Conference.

## **II. Discovery Limitations and Cost Shifting**

We support in principle the proposed amendments to Rule 26(b)(1), which reinforce and make more concrete the importance of proportionality in setting boundaries on the scope of discovery. Discovery in patent infringement matters is often prohibitively expensive. Some parties (including both patent holders and accused infringers) use the threat of this expense to extract settlements in cases for reasons other than the merits of the case. The requirement that discovery be “proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit” should allow the parties to narrowly tailor discovery in a given case, substantially reducing the cost of litigation.

IPO generally supports the other limitations on discovery and discovery abuse, such as those set forth in Rules 26, 31, and 34, as well as the specific reference to “the allocation of expenses” in Rule 26(c)(1)(b). The addition of this language should empower judges to require cost shifting when one party seeks unduly burdensome and disproportionate discovery, as may happen when a non-practicing entity seeks discovery from an operating company.

## **III. Preservation of Evidence and Sanctions for Missing Evidence**

In this era of electronically stored information, IPO supports the proposed addition to Rule 37(e), as well as the other changes to Rule 37, to address preserving electronically stored information and sanctions for the failure to do so. Proposed Rule 37(e) will help address

problems that result from costly and inconsistent obligations to preserve, process, and produce vast amounts of data for discovery, much of which has no real relevance to the issues in dispute and is never used at trial. The changes are largely a codification of the most thoughtful and well-reasoned of the existing case law.

#### **IV. Proposed Abrogation of Form 18 Pertaining to Patent Infringement**

We support retention of Form 18. Litigating the sufficiency of pleadings at the beginning of each patent lawsuit would be expensive and wasteful of judicial resources. We believe, however, that Form 18 should be modified to require the identification of at least one patent claim that is infringed, a statement explaining such infringement, and a statement addressing indirect infringement, if alleged.

IPO believes that complaints should fairly place defendants on notice of the nature of the claim against them, and should otherwise comply with the general pleading requirements of the Federal Rules, including Rules 8-11. In particular, patent complaints should comply with Rule 8 requiring every complaint to (1) contain a short and plain statement of the grounds for the court's jurisdiction, (2) contain a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) contain a demand for the relief sought. Pursuant to Rule 9, patent complaints should also specify the party's capacity to sue, the party's authority to sue, or the legal existence of an organized association of persons in all cases where such information is needed to show jurisdiction.

Patent complaints should further comply with the requirements of Rule 10 as to form, and Rule 11(b), which specifies that each complaint signed by an attorney of record constitutes a certification that to the best of the person's knowledge, information and belief, that (1) it is not being presented for any improper purpose, (2) the claims and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law, and (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Patent complaints that fail to meet these requirements should be dismissed pursuant to Rule 12(b)(6), or at least be made subject to a successful motion for a more definite statement under Rule 12(e). IPO believes that non-informing complaints – those that do not fairly place defendants on notice of the claim in sufficient detail to allow the defendant to prepare a proper answer – should not be favored, although it should not be necessary for plaintiffs to plead the evidence that supports their claim, or detailed contentions, as these are typically developed through discovery as verified factual information is obtained. The minimum pleading standard should be sufficient to evidence a legitimate claim and grant access to the judicial system, but not so high that it requires initial discovery or becomes a barrier to the courts and further discovery. Accordingly, IPO's Board of Directors adopted the following resolution on September 15, 2013:

## INTELLECTUAL PROPERTY OWNERS ASSOCIATION

*RESOLVED*, IPO supports modification of Form 18 to include: (1) an identification of at least one claim that is infringed, (2) a statement explaining such infringement, and (3) a statement addressing indirect infringement, if alleged.

### **V. Conclusion**

IPO appreciates the opportunity to present these comments. We would be happy to clarify or elaborate on any of the points discussed in this letter.

Respectfully submitted,

A handwritten signature in black ink that reads "Herbert C. Wamsley". The signature is written in a cursive style with a large initial 'H'.

Herbert C. Wamsley  
Executive Director