Comment to the Advisory Committee on Civil Rules
Proposed Amendments to Rule 26 Federal Rules of Civil Procedure
USC-RULES-CV-2013-0002-0001

By Hon. Jon Kyl and Prof. E. Donald Elliott

As colleagues at the law firm of Covington & Burling LLP, we submit these comments as concerned individuals and not on behalf of any organization or client.

As a member of the Senate Judiciary Committee for 18 years, Jon Kyl heard the complaints of many business and other litigants that the costs of civil discovery force them to settle even when they feel they are in the right. As an academic teaching advanced civil procedure for over 30 years, as well as a practicing lawyer, Professor Elliott shares Senator Kyl's concerns. We decided to submit this joint comment to provide the Advisory Committee with our shared perspective, approaching the problem as we do from two very different backgrounds but sharing common conclusions.

We believe the proposed changes to Rule 26 are a useful step in the right direction and we support their adoption. However, we also believe that the proposed changes do not go far enough to address the underlying incentives that cause litigants to use the costs of discovery to bludgeon their adversaries into settlements regardless of the merits of the dispute and that, therefore, the Committee needs to take further actions to address the economic incentives that are at the root of the problem.

I. The Problem.

The function of civil discovery has shifted since it was incorporated into the rules in 1938. Originally intended to prevent "trial by surprise," it worked well and without undue expense in the typical case of the time (automobile accidents) because the facts were self-limiting: one could discover everything there was to know by taking a few depositions of witnesses and getting the police report. One couldn't even get documents except by special leave of court until 1970.

Today discovery costs are still relatively reasonable in a majority of federal cases,[1] but there is a significant percentage in which discovery costs are out of control. The Lawyers for Civil Justice study showed that for the years 2006–2008, the average discovery cost per case for companies ranged from a low of $621,880 to a high of $2,993,567 in complex cases.[2] Costs of this magnitude are not, however,

[1] Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010).

[2] Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies App. 1 at 15 fig. 11 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf

typical of all cases.[3] The high-discovery cost cases tend to be those in which "the facts" involve patterns and practices of institutional behavior: antitrust cases, civil rights cases, mass torts. In these so-called "complex cases," discovery does not have obvious limitations, particularly not when every email in a company over a 10-20 years period can be retrieved and examined.

Very little of the information exchanged in civil discovery is actually used at trial.[4] According to the 2010 LCJ study, only 0.1% - one tenth of one percent - of material produced in discovery is actually used at trial.[5] Rather than prepare for trial, in this important fraction of cases, the costs of discovery have become an instrument to bludgeon the other side into settlement. A University of Virginia law professor, John Setear gave this function of discovery a quaint name a few years ago: "the "impositional function" of discovery – the ability to impose costs on the other side.[6]

Today civil trial has virtually disappeared[7] and the economic aspects of discovery as a bludgeon for settlement frequently outweigh its contributions to the discovery of truth. At the Dallas mini-conference in October 2012, Alex Demetrief of GE stated that 90 percent of its settlement decisions are driven by the costs of discovery, not the merits of the case. This accords with our experience since joining Covington: one of us recently had to advise a client to settle a case even though it was in the right because the case only involved $1 million and the costs of discovery would make it impractical to litigate. Many important disputes are leaving the

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[3] Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to The Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998) ("The recent studies of civil discovery . . . establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity . . . . The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems and involve much higher stakes.").

[4] Written Testimony of Thomas H. Hill Associate General Counsel Environmental Litigation & Legal Policy, General Electric Company, House Committee on The Judiciary Subcommittee on The Constitution Hearing: The Costs and Burdens of Civil Discovery (December 13, 2011), judiciary.house.gov/hearings/pdf/12132011Hill.pdf

[5] LCJ, *Litigation Cost Survey of Major Companies*, *supra* note 2, at p. 3 ("The ratio of pages discovered to pages entered as exhibits is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages actually were marked.")

[6] John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

[7] John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

federal system for arbitration or other forums because extensive discovery is just too expensive.

Other systems including our criminal law, arbitration and administrative litigation, as well as systems in other countries, manage to decide cases on their merits without extensive discovery like we have today in federal civil litigation. Furthermore, civil discovery hurts our economy. Many foreign companies are reluctant to invest in the U.S. because of what they see as free-wheeling investigations into business by parties with a financial interest and little or no actual judicial supervision. This is ironic in a country that is solicitous of privacy in many other contexts.

II. **The Proposed Rules Changes.**

We strongly support the committee's efforts to address these problems and support the proposed changes to the discovery rules as important and helpful steps in the right direction. We would go further, particularly regarding "requester pays," and we understand a subcommittee will be examining that reform in greater depth. We support that effort and we look forward to working with the subcommittee. We believe that changing the wording of the rules without affecting the underlying incentives of the litigants has only limited utility and, ultimately, we will have to attack the root of the problem, which is incentives to impose costs on the other side to force it to settle.[8]

Our focus here will be limited to Rule 26. The change to eliminate the language about leading to evidence admissible at trial is particularly helpful. Many have misunderstood this language as the standard for discovery. Even leading treatises misstate possibly leading to admissible evidence as the standard for the scope of discovery.[9] This is not a workable standard because it is impossible to know in advance whether any inquiry about the general subject might lead to something that bears on some issue.

Likewise, we support moving the existing proportionality language from an obscure section of the Rule [26(b)(2)(C)] to a more prominent one. In reality, it

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[8] E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U.CHI. L. REV. 306, 308 (1986)("[W]e should think about civil procedure less from the perspective of powers granted to judges, and more from the perspective of incentives created for lawyers and clients. Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.")

[9] KEVIN M. CLERMONT, CIVIL PROCEDURE 79 (West Black Letter Series, 5th ed., 1999)(stating that a party may seek "matter … that … might reasonably lead to other matter that bears on some issue that will or may be decided in the case.")

changes nothing; but the protest from opponents reveals its value: parties and judges just might begin to take it more seriously.

We are particularly supportive of the Committee's recommendation to clarify that judges have the power under Rule 26(c) relating to protective orders to allocate the costs of discovery to the party requesting discovery rather than the party responding to the request – the so-called "requester pays" system. This gets the incentives right and lets the party who is in the best position to decide whether it really needs something get it *if* it is willing to pay for it. It is easy to create discretionary exceptions for the poor and special cases. But the reality is that the lawyers who bring class-actions or other cases with extensive discovery are rarely really poor! The point is that it is very hard and time consuming for judges to manage discovery disputes between parties. Rules that create incentives to encourage a degree of self-policing would help, as proposed by E. Donald Elliott, in 1986.[10]

It would be particularly helpful if the Committee would provide some examples in the Advisory Committee Note of when judges should use this authority to allocate the costs of discovery to the requester rather than the responder. The original draftsman of the civil rules, Dean (later Judge) Charles Clark, drew as one of the main lessons from his experience that to be effective, rules should not merely grant power, but also "explain" how that power is to be used by giving illustrations:

> "[W]ithout a tradition for the exercise of discretion, a general grant of power is likely to accomplish little. … If left to their own devices, without any precise guide beyond a general authorization, [courts] will stick to what they have known in the past. … A basic reason for the effectiveness of the federal rule authorizing pre-trial procedure is its careful statement of possible issues to be pre-tried, at the same time that it grants broad discretion to the court."[11]

The Committee should not merely reaffirm the authority of judges to allocate discovery costs to the requester in general terms, but should provide concrete illustrations of when it is appropriate to do so. We provide three examples below, but there are probably several others that experts such as Judge Grimm who has been using a modified requester pays system, could provide.

1. **Second-Guessing an Administrative Agency.** After an administrative agency such as the Food and Drug Administration or the Environmental Protection Agency has already conducted an extensive administrative investigation into the safety or a drug or chemical substance, it is anomalous

[10] Elliott, *supra* note 8, at 308 and *passim*. *See also* Robert D. Cooter & Daniel L. Rubenfeld, *An Economic Model of Legal Discovery,* 23 J. LEGAL STUD. 435 (1994).
[11] Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 501 (1950).

indeed that anyone who has passed the bar exam is empowered to conduct his own investigation to second-guess the experts at the expense of the company. We understand that administrative determinations are often not pre-emptive of the right to sue, but that does not address who should pay for the costs of investigating something for the second or third time after an agency has already done so. The long-standing presumption of regularity for administrative proceedings[12] should be sufficient to allocate discovery costs to the requester in these circumstances. We believe that there should be a rebuttable presumption that the requester pays where an agency has already concluded that a drug or other substance is safe.

2. **If the Need for Information is in Doubt.** The academic literature points out that judges are not well-situated to determine whether litigants actually need particular information to prove their cases or defenses.[13] Judges know little about the facts of a case other than what is alleged in the complaint until trial begins; they have not sat through the depositions nor culled the documents. As a result, they find it hard to know whether particular information is or is not really necessary. Today they generally make a stark decision: either require production of the information at the expense of the party producing it or grant a protective order denying production of the information all together. More frequent use of a "requester pays" approach opens up a third, intermediate option: a litigant may get the information if that litigant is willing to pay for the costs of producing the information. Far from harming litigants trying to prove the case, as some defenders of the *status quo* have contended, a "requester pays" system, after a modicum of free discovery, is a safety valve against judicial error. There would only rarely be a legitimate interest in denying discovery outright (such as privilege or privacy concerns) if the party seeking discovery were willing to pay for the costs of production. But allocating the costs to the party requesting discovery removes the incentive for either plaintiffs or defendants to request information not because they really need it, but to impose costs on the other side and coerce them into settling.[14]

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[12] *Citizens to Preserve Overton Park v. Volpe*, 332 U.S. 402, 415 (1971); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *United States v. Chemical Foundation*, 272 U.S. 1, 14 -15 (1926).

[13] ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 218 (NY: Foundation Press, 2003)("It is hard to imagine how judges would go about estimating the social benefits from additional [discovery[in the context of a specific case."); Elliott, *supra* note 8, at 331 ("It is possible that sometimes judges may indeed have a perspective on a case that enables them to see which preparations lawyers legitimately need to undertake and which they should pass by, but judges may also think that they understand more about a case than they actually do.")

[14] Jon Kyl, *A Rare Chance to Lower Litigation Costs*, THE WALL STREET JOURNAL Jan. 20, 2014 ("A "requester-pays" system lets a party decide to pay and get certain information if it really needs it. It also eliminates the temptation to make overly broad requests to impose costs on the other side to coerce a settlement.")

3. **Implausible Claims or Defenses.** Another situation in which judges should presumptively allocate the costs of discovery to the requester is if the judge believes the claims or defenses are implausible and very unlikely to be substantiated. Judges are understandably reluctant to deny litigants their day in court, even when they make highly implausible claims (such as, for example, that the makers of baking soda are liable for failing to warn a convicted drug dealer that it is illegal to use their product to cut crack cocaine[15]). But it adds insult to injury to require the opposing party to pay the costs of discovery when claims or defenses just barely meet the Rule 11 standard as not frivolous, but fall far short of being likely to prevail on the merits. In granting or denying preliminary injunctions, judges frequently assess whether claims are likely to prevail on the merits. Where claims or defenses on their face are unlikely to prevail, but are not so implausible as to warrant dismissal under *Twombly*[16] or sanctions under Rule 11, the opposing party should not be required to pay for discovery, but a litigant should presumptively proceed at its own expense. As Professor Redish has pointed out, the lawyer will reap profits if such speculative claims are successful; requiring others to subsidize this form of economic speculation amounts to unjust enrichment.[17]

The Committee should encourage judges to actually use the power to allocate costs of discovery to the requester after a limited amount of free discovery by

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[15] *Ward v. Arm & Hammer*, 341 F.Supp.2d 499 (D.N.J. 2004).

[16] *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 550 (2007).

[17] Martin H. Redish and Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO.WASH. L. REV. 773 (2011). *See also* E. Donald Elliott, Twombly *In Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895 951-2 (2012)(emphasis supplied):

> "[P]laintiffs' lawyers are empowered by the state to bring cases that do not currently have a reasonable basis in law or in fact. … It does not follow automatically, however, that the person sued should subsidize the investigation into whether a wrong has been committed. *In such reasonable but speculative cases, it should be routine for the plaintiff's lawyer to pay the costs that his or her speculation in litigation futures imposes on the persons sued.* Normally in a market economy those who make the decision to invest in an economic opportunity are required to pay the costs of the social resources consumed by their endeavor. This is thought to create a self-policing system in which those who are in the best position to determine whether an opportunity is worth pursuing can balance both the costs and benefits of the activity in which they choose to engage. The litigation business is unusual, however, in that a plaintiff's lawyer may externalize a substantial portion of the costs of the economic venture that he or she initiates onto the defendant, but the attorney and his client obtain all of the benefits if the venture is successful."

specifying examples in the Advisory Committee Note for when it is presumptively appropriate to allocate the costs of discovery to the requester.

III. <u>The Role of Courts as Opposed to Congress.</u>

For those of us who support both the substance of the proposed rule changes and the process for doing so a final point is in order. The process needs to move to conclusion. Frustrated parties and interests have other options, such as the Congressional action being pursued on patent litigation reform. Many were surprised at how quickly that legislation cleared the House of Representatives, and by a wide bi-partisan margin.

Judge Lee Rosenthal, a former chair of the Judicial Conference Committee on Rules of Practice and Procedure, sometimes referred to the Rules Enabling Act as a "treaty" between Congress and the courts. Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in, with results that are not always easy to predict.

Therefore, to argue that the committee should gather more evidence, hold more meetings and take more time is not without risk. The Committee had plenty of evidence when it drafted its proposals, but also has been provided with a great deal more during the public comment process. The further work of this Committee, the Standing Committee, the Judicial Conference, the U.S. Supreme Court and the 6 month layover in Congress mean that the new rules will not actually take effect before 2015 or 2016. This Committee will have been working on the problem of excessive discovery for at least five years, since the 2010 Duke conference. And its predecessors have been working on the problem of excessive discovery since 1981. No one can deny that the process has been thoughtful, deliberative (even exhaustive) and fair. It's time to finalize the committee's work.

Respectfully Submitted,

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E. Donald Elliott