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Committee on Rules of Practice and Procedure
Administrative Office of the Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

To Whom It May Concern:

I am a member of the law firm of Munger, Tolles & Olson LLP in Los Angeles, California. I write to comment on the proposed amendments to the Federal Rules of Civil Procedure currently under consideration by the Committee. I appreciate the opportunity to submit these comments, which express only my own views, not those of my firm or any of its clients.

In my thirty-five years as a litigator, I have tried numerous patent, antitrust, and class action lawsuits in federal court, representing companies from a broad array of industries. I am a member of the American College of Trial Lawyers, and I have been recognized by leading legal publications for my work on behalf of both plaintiffs and defendants. For example, the California *Daily Journal* has recognized both my work obtaining the largest plaintiffs' verdict in California, in 2006, and my work obtaining one of the top ten defense verdicts in California, in 2008. I hope that my extensive experience as a trial lawyer representing both plaintiffs and defendants allows me to offer a useful perspective to the Committee as it considers the proposed amendments to the federal discovery rules.

Full and fair discovery is an indispensable part of the American justice system, but lengthy and repetitive discovery bogs down cases and engenders disputes, increasing costs to litigants and burdens on the courts. The proposed amendments to the Federal Rules represent a useful first step in streamlining discovery, allowing all parties to reach trial more efficiently while still allowing plaintiffs ample opportunity to obtain necessary evidence. I therefore support the adoption of the proposed changes to Rules 26, 30, and 33.

If adopted, the new Rules 30 and 33 would reduce presumptive limits on the volume of discovery (*i.e.*, the length and number of depositions and number of interrogatories) to a level reasonable for the majority of cases. Based on my experience in both federal and state courts, I believe that enlargement of the presumptive limits will be readily agreed to by the parties (or ordered by the courts) in cases where additional discovery is appropriate. The new presumptions should therefore be adopted by the Committee. The Committee should also adopt the proposed change to Rule 26(b)(1), which emphasizes the existing requirement that discovery be proportional to the needs of the case. This proposal appropriately entrusts resolution of disputes related to the scope of discovery to the federal bench.

I. The Proposed Addition of a More Explicit Proportionality Requirement to Rule 26(b) Appropriately Responds to Increasing Discovery Burdens

The Committee's proposal to add a more explicit proportionality requirement to Rule 26(b) is sound. By modestly emphasizing the courts' existing power to tailor discovery according to the needs of each case, the proposed change will assist the courts in combating the deleterious effects of spiraling discovery costs.

In 1980, even before the advent of electronic discovery, Justice Powell remarked that without significant reform, the discovery rules would "deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs."[1] In the intervening decades, with the rise of electronic discovery and no significant reform of the discovery rules, the burdens Justice Powell bemoaned have worsened, and costs have spiraled.[2] According to a 2010 industry survey, average annual litigation costs as a percent of revenues increased 78% between 2000 and

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[1] *In re Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting from the adoption of certain Federal Rule amendments because of the failure to curb discovery costs in the amended rules).

[2] Emery G. Lee, III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 766-67 (2010) (describing attempts, beginning in the 1980s, to curb discovery abuse and other problems, and stating that the complaints from the bar are nonetheless "louder than ever"); Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies 2 (2010) [hereinafter "Litigation Cost Survey"] ("Litigation costs continue to rise and are consuming an increasing percentage of corporate revenues."), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf. The Litigation Cost Survey collected data from about 20 companies.

2008, due in part to increasing discovery costs.[3] The costs of discovery alone have increased to approximately $3.5 million for a typical mid-size lawsuit.[4]

Unfortunately, the increase in discovery costs has not enhanced the pursuit of justice. The 2010 survey showed that the ratio of pages discovered to pages used as part of trial exhibits is as high as 1000 to 1.[5] Thus, contrary to the contentions of numerous commenters from the employment bar and other plaintiffs' groups, extensive discovery does not meaningfully assist parties in preparing their cases. Rising costs *do*, however, encourage defendants to settle unmeritorious cases and discourage plaintiffs from bringing meritorious lawsuits in the first place.

The logical reaction to this uncoupling of legal merits from discovery burdens is to emphasize to the courts their inherent power to realign the scope of discovery with the scope of the issues in each case. The proposed amendment to Rule 26(b)(1) does just that. It requires that discovery be "proportional to the needs of the case," given the amount in controversy, the importance of the issues at stake in the action, the importance of discovery in resolving the issues, and other factors.

Numerous commenters have protested that the proposed amendment places unwarranted emphasis on the amount in controversy, disadvantaging plaintiffs in civil rights cases and other actions involving important rights but little monetary damage. These commenters may be misreading or misinterpreting the proposal. The proposed amendment merely recognizes that the amount in controversy is in *some* cases a key factor in determining the importance of the case to the parties and the public. It leaves plenty of room for the court to determine "the importance of the issues at stake" irrespective of the monetary sums involved. In my experience, federal judges and magistrates are well positioned to divine the true stakes in each case – whether important public rights or potential settlement value.

Moreover, the sensible proportionality principle included in the proposed Rule 26(b)(1) is not some wild innovation – the proposed amendment merely reorganizes a proportionality standard already reflected in Rule 26. In its present form, Rule 26(b)(2)(C)(iii) requires judges to limit discovery as needed on motion or *sua sponte*, based on "the needs of the case, the amount in controversy, . . . the importance of the issues at stake," and the other factors mentioned in the proposed amendment. Thus the only change effected by the proposed rules is to move the new requirements into Rule 26(b)(1), modestly increasing the emphasis placed on the proportionality rule. This change in emphasis is more than justified by the heavy discovery burdens that currently bog down the justice system.

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[3] Litigation Cost Survey, *supra* n. 2, at 3.

[4] *See id.* at 4 n.4 (citing Inst. for the Advancement of the Am. Legal System, *Electronic Discovery: A View from the Front Lines* 3-4, 25 (2008)); Emily Madavo et al., *Recent Key Developments in Shifting E-Discovery Costs*, EDDE Journal vol. 4, issue 2 (spring 2013), at 2, *available at* http://www.americanbar.org/content/dam/aba/administrative/science_technology/eddejournal_volume4_issue2.authcheckdam.pdf.

[5] Litigation Cost Survey, *supra* n. 2, at 3.

II. The Proposed Rules Appropriately Revise Presumptive Limits on Depositions and Interrogatories

I support the proposed changes to Rules 30 and 33, which will modestly reduce the presumptive limits on the number of depositions and interrogatories and the length of depositions. The reductions will appropriately adjust litigant expectations with respect to the volume of discovery that is appropriate in most cases, in line with the renewed emphasis on proportionality in the proposed amendment to Rule 26(b). The changes will not, however, restrict parties' ability to negotiate increases in the presumptive limits or to request such increases from the courts.

A. Limits on Number of Depositions and Interrogatories

The proposed amendments would trim the presumptive limits on the number of depositions and interrogatories to levels that are appropriate for the majority of cases.[6] The adjustments will prompt the parties to narrow the issues covered in both depositions and interrogatories, focusing all litigants on the most important issues and decreasing the burdens on all involved.[7] This adjustment reduces the likelihood that litigants will default to the wasteful but risk-averse tactic of over-using depositions and interrogatories simply because they are available.

Commenters opposing the reduction in the presumptive number of depositions argue that five depositions will not be enough in certain large or complex cases. These commenters overlook the instruction in the proposed amendments to Rule 30 that the court *must* grant leave to take more depositions "to the extent consistent with Rule 26(b)(1) and (2)." Where more depositions are needed for reasonable fact discovery, they will be available by agreement between the parties or, when necessary, by recourse to the court. Moreover, my experience aligns with the observations in the Committee's Preliminary Draft proposing the changes: parties will be able to agree on their own, without recourse to the courts, if the new presumptive limits are inadequate.[8] Opposing commenters' fears that disputes over increases will burden the courts are unfounded. Simply put, there is no reason to believe that litigants' general ability to reach agreement on the appropriate number of discovery requests will dissolve in the event that the Committee adjusts the presumptive number of interrogatories.

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[6] The proposed adjustment of the permitted number of depositions from ten to five, for example, is supported by research from the Federal Judicial Center. The Center's research suggests that fewer than one-quarter of federal cases result in more than five depositions, but that each additional deposition increases the cost of an action by several percent. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure* 267-68 (Aug. 2013).

[7] *Id.* at 269 ("Hopefully, the change will result in *an adjustment of expectations* concerning the appropriate amount of civil discovery.") (emphasis added).

[8] *Id.* at 268.

In summary, the proposed amendments are unlikely to create additional disputes over the permitted number of depositions and interrogatories. Sophisticated parties in complex disputes are generally able to handle reasonable requests for increased discovery between themselves. Moreover, whereas it is relatively easy to reach agreement on an upward adjustment in the permitted number of interrogatories, it is in my experience uncommon for parties to agree to a downward adjustment. It is therefore appropriate for the Committee modestly to decrease the presumptive limits, relying on the parties to agree on increases in appropriate cases. Courts will, of course, retain the ability to resolve disputes should they arise.

B. Limits on Length of Depositions

Reducing the presumptive length of a deposition from seven to six hours – a modest fifteen percent – offers all parties a significant practical benefit with no obvious drawback. A six-hour deposition, including time for standard breaks, could be completed in a single day, thus eliminating unnecessary and wasteful travel costs and saving time for all litigants and their attorneys.

Commenters opposing this change speculate that the change would allow corporate defendants to withhold information. In my experience, sixty extra minutes is not the critical element for uncovering material information. Adequate preparation and skillful questioning by the deposing attorney is far more effective than simply wearing a witness down, particularly in the types of complex, document-intensive cases that the plaintiffs' bar is most concerned about. Opponents also argue that depositions, particularly 30(b)(6) depositions, already take the full time allowed. But the status quo does not prove that the full seven hours is always necessary. Six hours will almost always be sufficient to cover the critical substance of a deposition. Where more time is truly needed, the parties themselves may agree to extended time, with recourse to the court to resolve any true dispute.

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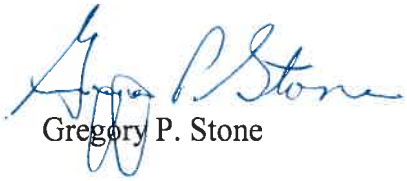
In conclusion, I urge the Committee to adopt the proposed amendments to Rules 26, 30, and 33. The amended Rules will allow courts to tailor discovery to the facts of each individual case and will, in most cases, allow parties to reach trial faster, advancing the interests of all litigants, their attorneys, and the courts in the efficient administration of justice.

I appreciate the opportunity to comment.

Respectfully submitted,



Gregory P. Stone

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