COMMENT

The Need for Meaningful Rule Amendments: Preliminary Views on the Duke Subcommittee Proposals

Submitted To
The Standing Committee on Rules of Practice & Procedure
The Advisory Committee on Civil Rules

On Behalf Of
Lawyers for Civil Justice
DRI – The Voice of the Defense Bar
Federation of Defense & Corporate Counsel
International Association of Defense Counsel

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I. Overview: The Litigation and Information Explosions Require Meaningful Rule Amendments

This comment is respectfully submitted to supplement previous comments from LCJ, DRI, FDCC, and IADC such as the *New Standards* Comment, Tab A-5, pg. 85. These comments outline urgently needed reforms that are essential to solving the problems of excessive and unnecessary discovery and over-preservation of information currently plaguing civil litigation. The focus of this paper is on LCJ's preliminary views on the "Duke Subcommittee's" proposals for amendment of the Rules, which are contained in the materials for the Advisory Committee meeting, Tab 9, pg. 371 (Ann Arbor, MI March 22-23, 2012) and addendum, Tab A-1, pg. 7; and in the Advisory Committee's Report to the Standing Committee, Tab 2-A, pg.79.

A. "Tinkering" with the discovery rules will not work.

In considering amendments to the Rules that will actually help solve today's excessively burdensome and costly discovery and preservation problems, the most crucial task of the Advisory Committee is to cut through the myriad of complex proposals that amount to mere tweaking of the existing Rules. For example, Congressman Trent Franks, Chairman of the House Judiciary Committee's Subcommittee on the Constitution, recently urged:

> You and your Committee have a monumental effort ahead of you as it is our view that the Rules have become an outdated, confusing and complex patchwork of vague and indeterminate standards that are in need of a major overhaul. Accordingly, we suggest that your Committee consider focusing for now on developing a clean, straightforward rewrite of the Rules governing discovery, preservation, and cost allocation. *Letter, Hon. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell*, March 21, 2012.

Chairman Franks' words truly outline the problem facing the Advisory Committee in considering appropriate solutions to discovery and preservation problems. Therefore, in our view, the focus must be on developing an interrelated package of bold, broad-based amendments that accomplish the following:

(1) reevaluate the premise and focus of discovery, especially e-discovery;

(2) develop clear preservation standards without creating new pre-litigation preservation duties that are inconsistent with federal authority and state common law; and

(3) deter runaway litigation costs with reasonable cost allocation rules premised on economic incentives.

Citations of authority in this comment are minimal. The original comments advocating the above amendments are fully documented and reference may be made to those papers for sources and citations.[1]

B. There is an urgent need for meaningful amendments

Failing to overhaul the Federal Civil Rules to meet the demands of 21st century litigation will have significant, negative implications today and in the future. Inefficient and unpredictable litigation is a tax on productive behavior and an inefficient system can have significant adverse impacts, including imposing sanctions for appropriate behavior and providing incentives for inappropriate behavior. These perverse effects weaken our economy and social structure, and the global competitiveness of American companies.

The Rules are simply out of date and the myriad variety of "tweaks" to those rules over the last thirty years have been unable to keep pace with the skyrocketing increase in the costs, burdens, and complexity of modern litigation, as pointed out in Section III below. The 2006 amendments to the Federal Rules of Civil Procedure are a case in point. Any hope or expectation that these amendments would curb the discovery "explosion" has been proven sadly unrealized over the last several years. Contrary to the expressed intent of the amendments, discovery burdens have increased exponentially - fueled by court decisions based upon indistinct, inadequate, guidelines and, in some instances in direct contravention of existing Rules. Broad-based rule reform has thus been shown to be essential to achieving the consistency, uniformity, and predictability that will reduce the costs and burdens of modern litigation.

A number of the proposals in the "Rules Sketches" submitted by the Duke Subcommittee seem to have the potential for some amount of incremental positive change. However, as we have said, the time for "tinkering" with the rules is over. Fundamental, meaningful reforms must be enacted now. The fundamental rule revisions we suggest will help curb systemic excesses, increase cost efficiency and generally improve the administration of justice under the Federal Rules – continued tinkering will not.

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[1] See, *e.g.,* LCJ, DRI, FDCC and IADC. White Paper: Reshaping the Rules of Civil Procedure for the 21st Century. 050210. ; LCJ Comment to Standing Committee Supplementing the Duke White Paper, 060810. ; LCJ Comment, A Prescription for Stronger Medicine, 090110. ; LCJ Comment, Preservation: Moving the Paradigm, 111010. ; LCJ Comment, Preservation – Moving the Paradigm to Rule Text, 040111. ; LCJ Comment, A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action, 081811. ; LCJ Comment, The Time is Now: The Urgent Need for E-Discovery Rule Reforms, 103111. ; LCJ Comment, Now is the Time for Meaningful New Standards Governing Discovery, Preservation and Cost Allocation, 022912.

II. The Duke Subcommittee Proposals

A. The Duke Subcommittee's "Other Discovery Issues Sketches"

Turning specifically to the Duke Conference Subcommittee Sketches, and in particular those discussed in Section II, Other Discovery Issues, it is encouraging to see serious consideration of many of the changes proposed by LCJ, including the explicit incorporation of proportionality in the rules and the imposition of presumptive limitations on the number of discovery requests. Such limitations should result in some much needed reduction in the volume of discovery in modern litigation and discourage the abusive overuse of discovery requests intended to trip up opposing parties, but not likely to result in the discovery of useful information. Self-executing rules, such as limitations on the number of requests for production, for example, will also reduce the need for costly and time-consuming judicial intervention. Adoption of these amendments is therefore strongly encouraged. But we should not stop there. To engage in limited reform would be counterproductive because it would effectively reinforce the failures in our current system. While such changes are no doubt vital components of meaningful change, they cannot, by themselves, repair the broken system.

Unfortunately and despite the potential contribution to a larger discovery schema of many of the proposed rules (or "sketches) laid out in Section II, there is reason for concern that the Committee will once again accept the placebo of apparent change in lieu of any meaningful shift in the discovery paradigm. This danger is well illustrated by the Subcommittee's continued consideration of the proposals set forth by Daniel Girard and Todd Espinosa in their submission to the Duke Conference.[2] LCJ has previously commented at length on the problems with the proposals of Girard and Espinosa[3], discussed by the Subcommittee in Subsection II under the heading "Discovery Objections and Responses." While that prior comment makes clear that the proposals have the potential to create a myriad of additional discovery difficulties—not the least of which is the creation of "new" standards that may encourage the continuation of litigation by sanction[4]—one of the most problematic results may be the continued delay of meaningful reform of discovery. Indeed, the proponents have themselves described their proposals as "admittedly modest"[5] and have argued in favor of "small adjustments"[6]—hardly the antidote to the very serious problems currently ailing the civil justice system, and in particular discovery. Despite this, the proposals have received significant attention and the Subcommittee has indicated that they deserve "serious consideration going forward."

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[2] Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473 (2010).

[3] *See*, Lawyers for Civil Justice, *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action* (Aug. 18, 2011) *available here*: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-D-Comment-Bauman.pdf.

[4] *Id.* at 5 (citing Charles F. Herring, *The Rise of the Sanctions Tort*, TEXAS LAWYER, Jan 28, 1991, at 3-4.) (describing the "sanctions tort" or "litigation by sanction" in its "most dramatic" form as "discovery gamesmanship in which one party purposefully seeks impossibly broad discovery or, alternatively, discovery of the same information from multiple sources, and when mistakes are inevitably uncovered, moves for terminating sanctions.").

[5] Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473, 475 (2010).

[6] Letter from Daniel C. Girard and Todd I. Espinoza to Honorable John G. Koetl, Chair, Duke Conference Subcommittee (October 4, 2011).

In short, concern remains great that significant and meaningful amendments will once again be sidelined and supplanted by "small adjustments" unlikely to affect the nature of discovery to any significant degree. Major reform is needed: the scope of discovery must be narrowed, preservation standards must be tightened and clarified, and the paradigm of producer-pays discovery must be seriously re-considered. Stated simply, bold action is necessary; and time is short.

Absent meaningful amendments to the rules of discovery, the problems of abuse and misuse will inevitably continue. More problematic, though, are the difficulties of volume and cost created by the rise of electronic discovery. The staggering statistics regarding the proliferation of information in the modern age illustrate the need for action[7] and foreshadow the profound consequences of the failure to act. As the "problem" of the proliferation of data continues to grow, inaction will have greater and greater consequences. Already it is being reported that the costs of discovery are discouraging full participation in the legal process and driving cases to settle for reasons unrelated to the merits[8] or, worse, that parties willing to nonetheless forge ahead despite the difficulties anticipated may be unable to find representation because of costs related to their case.[9] Such consequences are in danger of becoming commonplace absent action to meaningfully address the problems that have been known to the Committee for years and which now have grown worse with the rise of electronic discovery.

B. Concerns Regarding Addition of "Cooperation" to Rule 1

1. Unintended Consequences Beg Many Questions.

Our civil justice system is plagued by a fundamental problem that is directly traceable to the intersection of (i) the 20th Century philosophy of full pretrial disclosure and (ii) the 21st Century reality that even ordinary litigation files can comprise millions of pages (and almost always come sprinkled randomly with privileged documents). "Full disclosure" – once an easy task and a laudable goal – has become onerous and expensive. In many cases, the cost of marshaling and producing material discoverable under the current version of the Rules extends well into the millions of dollars. Our current reality was certainly not in anyone's contemplation when the Rules were first adopted in 1938.

Some think this unforeseen collision is manageable and propose that Rule 1 of the Federal Rules be amended to add a new *affirmative* requirement that the parties "cooperate" with each other. But adding an affirmative and subjective requirement of "cooperation," as used in this context is a new and untested concept in our adversary system and what is meant exactly by this new requirement of "cooperation" is entirely unclear. It is one more point on which parties can disagree and blame the other when it is to their advantage.

The LCJ believes in professionalism and the need for lawyers to uphold their professional responsibilities. Unfortunately, the idea of mandating "cooperation" in Rule 1 is not as easy as accepting its potential desirability. As set forth below, our concern rests with the likely consequences of this laudable goal.

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[7] *See, e.g.*, John Gantz & David Reinsel, Extracting Value From Chaos 1 (IDC June 2011) ("In 2011, the amount of information created and replicated will surpass 1.8 zettabytes (1.8 trillion gigabytes) - growing by a factor of 9 in just five years."); John Gantz & David Reinsel, The Digital Universe Decade – Are You Ready? 1 (IDC May 2010) ("This explosive growth means that by 2020, our Digital Universe will be 44 TIMES AS BIG as it was in 2009.").

[8] *Hearing on Costs and Burdens of Civil Discovery Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (written statement of Rebecca Love Kourlis, Executive Director of Institute for the Advancement of the American Legal System at the University of Denver at 2).

[9] *Id.* at 3.

. While the Federal Rules do not proclaim a separate, affirmative requirement of "cooperation," they do already provide specific rules that effectively require cooperation.[10] Examples of implicit cooperation in the Federal Rules include:

- Rule 16, which authorizes the court to order attorneys to appear for pretrial conferences for several purposes, including "discouraging wasteful pretrial activities."[11]

- Rule 26, which provides limitations on discovery, including where the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient."[12]

- Rule 26(f), which requires parties to meet in conference and "attempt[..] in good faith to agree on the proposed discovery plan."[13]

- Rule 37 – titled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions" – which sets forth specific rules and remedies where parties provide incomplete disclosure, fail to comply with a court's orders, fail to disclose or supplement a response, fail to attend a deposition, fail to provide electronically stored information or fail to participate in framing a discovery plan.[14]

These rules and many others form the basis of the traditional check on the adversary system. As some have noted, the goal of Rule 1 – the "just, speedy and inexpensive determination" of a judicial matter – can be reached when attorneys obey and courts actively enforce these rules.[15] Any departure from our adversary tradition, however well-intentioned and however much seen to be needed at this moment in the history of our judicial system is an open-ended invitation to mischief, unless accompanied by specific guidance in the form of specific rules.

The questions ask themselves: What does it mean to cooperate? Federal Rule 37 was created to prevent persons from "unjustifiably resisting discovery,"[16] and to authorize the court to issue sanctions on parties "who fail to participate in good faith in the discovery process."[17] What would the "cooperation" standard be? Would it require parties simply not to act in bad faith? Or would the new rule require a level of behavior greater than what is already implicitly required? Where is the line between proper advantage-seeking within the bounds of the adversary system and an improper failure to cooperate? What specific affirmative duties would "cooperation" require? Could a court punish a failure to cooperate without abridging or modifying substantive rights, which would violate the Rules Enabling Act's proscription in 28 U.S.C. § 2072(b)? Would a failure to alert an adversary party to an error in its argument be seen as a failure to cooperate? Would any fact finding that was a predicate to such a

[10] See David J. Waxse, *Cooperation – What Is It and Why Do It?*, XVIII RICH. J. & TECH. 8 (2012), http://jolt.richmond.edu/v18i3/article8.pdf
[11] Fed. R. Civ. P. 16(a)(3).
[12] Fed. R. Civ. P. 26(b)(2)(C).
[13] Fed. R. Civ. P. 26(f)(2).
[14] Fed. R. Civ. P. 37.
[15] Waxse, *supra* note 10, at ¶ 19.
[16] Adv. Cmte. Notes (1970)
[17] Adv. Cmte. Notes (1980).

finding have to be done only after a hearing in open court? Would a requirement to cooperate be used to change the operation of any of the other rules of procedure? One can imagine many more.

Good faith cooperation may be an important element of our judicial system. However, adding a new requirement of "cooperation" to the rules could have myriad unintended and unforeseen consequences that might undermine this very goal. This rule change should not be done without the most thorough consideration. Moreover, it is almost certain to increase, not diminish, the workload of the courts and the number of disputes over which they will have to preside. Strict adherence to ethical standards has always been required of trial counsel. A vague concept of "cooperation" has not.

2. Any Exhortation to "Cooperation" Must be Carefully Cabined.

Rule 1 at present reads as follows: "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." As written, the rule is plainly addressed to the court since only the court, and not counsel, can "construe" or "administer" the Federal Rules of Civil Procedure.[18] Adding a requirement of cooperation among adverse parties would newly expand the reach of Rule 1 to every participant in the federal civil justice system.

Moreover, as written, the rule currently is aspirational, and is not intended to lay out hard requirements of certain action in particular circumstances. The Duke Conference Subcommittee itself acknowledges that the current rule is not a set of commands, but is properly regarded as "aspirational."[19] The proposed change, if adopted without some conditions, would radically change an "aspirational" rule into a rule with hard, albeit vague, requirements.

The Duke Subcommittee's Sketches suggest two proposals for amended Rule 1. The first reads as follows:

> "[These rules] should be construed, and administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding [, and the parties should cooperate to achieve these ends]."

The second reads slightly differently:

[18] The Committee notes confirm that it is *the courts* that have an "affirmative duty" to achieve the "just, speedy and inexpensive" mandate of Rule 1. The 1993 comment to Rule 1 adds in passing that counsel "share" this responsibility:

> "The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."

Notes to 1993 Amendment to Rule 1.

[19] Duke Conference Subcommittee Rules Sketches at 2 (page 8 of 156 in Tab A-1 of the Materials distributed in connection with the March 22-23 Ann Arbor Conference). The subcommittee's comment in full reads:

> "The last proposal is really one item — a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1."

> "[These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends."

Both versions propose an entirely new requirement that would be imposed on parties: "The parties should cooperate to achieve these ends." No definition is added that gives any kind of guidance to the parties who would be grappling with questions of the kind sampled in the fourth paragraph of subsection (A). In effect, yet another sanctionable event would be created by the Rules, but no "safe harbor." The new proposed rule would constitute an enormous, unstructured delegation of authority to the federal courts, and a new opportunity for the federal courts to create another body of federal common law (alongside the current case law developing – inconsistently -- concerning preservation). In order to be just in its application, the law must be clear to those whose conduct it regulates. The proposed rule, as written, is anything but.

Any change of this kind will certainly be the subject of very careful consideration, hearings and input in a process we are only beginning. The Duke Subcommittee's own notes echo this sentiment:

> "There is something to be said for a purely aspirational rule. But extending it to the parties — and thus to counsel — may be an invitation to sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution."[20]

The reporter for the Committee, writing in the third person, added his own "skepticism" to his write-up of the Committee's discussions of the topic:

> "RLM [Richard L. Marcus] adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms — that is, terms considered reasonable by the court?"[21]

Clearly, this proposal is not ready for adoption in its current form. As one commentator (and United States Magistrate Judge) has noted, the Federal Rules of Civil Procedure already "provide a clear path to cooperation."[22] Instead of creating a rule that raises more questions than provides guidance, the goal of Rule 1 is better achieved by providing counsel and the court with clear, unambiguous, bright line rules that clearly set forth the parties responsibilities – those rules we propose herein.

C. Preliminary Conferences

1. Discovery before Rule 26(f) conference

One of the sketches in Tab 9-B of the materials concerns a proposal to allow discovery to commence at an earlier point than now provided by the rules. Under this proposal, discovery could be propounded

[20] Duke Conference Subcommittee Rules Sketches at 31-32 (pages 37-38 of 156 in Tab A-1 of the Materials distributed in connection with the March 22-23 Ann Arbor Conference).
[21] Duke Conference Subcommittee Rules Sketches at 32 (pages 38 of 156 in Tab A-1 of the Materials distributed in connection with the March 22-23 Ann Arbor Conference).
[22] Waxse, *supra* note 10, at ¶23.

prior to the Rule 26(f) scheduling conference, although answers and responses would not be due until after the conference had taken place. Specific language is provided for changes to Rule 26(d), 30, 31, 33 and 34.

The objective of this proposal, to attempt to shorten the length of time taken by the discovery process, is certainly laudable. However, it must be pointed out that the current structure of discovery timing seldom causes significant delays in the progress of lawsuits. The foundations of delay in the discovery process lie in the overbroad and burdensome discovery which occurs all too often under the rules, even in light of restrictions imposed by past amendments. Excessive discovery requests, including e-discovery which requires the preservation, and possible production of untold terabytes of material, unreasonable preservation requirements, and the protracted discovery controversies thus engendered, are seen to be the real culprits.

The enactment of this proposal would not result in a significant improvement in the orderly administration of justice. The thought behind the proposal is good. However, it simply is not the type of fundamental change in the discovery provisions of the rules which can make a real difference in the efficiency of the federal court system.

2. Enhancing Rule 16(b) requirements

As set forth in Tab 9-B, this proposal would require an actual conference, even if telephonic, before issuing a scheduling order; accelerate the time for issuing the order; and add deadlines for abandoning claims or defenses. The proposed changes appear to have the potential of having a positive effect.

Having said this, it must be pointed out that substantial challenges stand in the way of making this a truly effective instrument of beneficial reform. A number of these challenges are discussed in the Sketch itself. The timing of a Rule 16(b) conference will necessarily affect the schedule of any Rule 26(f) conference; any decision as to timing must be carefully analyzed. Also, the question has been raised as to the necessity of an actual conference if all parties agree on the provisions of a scheduling order. This could lead to additional delay and concomitant costs.

Again, the prospects for the proposal appear positive. However, in rule drafting, the "devil is always in the details," and the implementation of such a rule must be carefully thought through.

The provision for the establishment of a deadline for abandoning "obsolete" claims or defenses is troubling. Most trial lawyers can, in hindsight, identify claims or defenses which were useless in a particular litigation, some of which were innocuous and others potentially more significant. No competent trial counsel will be prepared to abandon, well in advance of trial, a claim or defense that she or he is not utterly convinced has been rendered entirely superfluous by developments. The difficulty lies in determining by which standard such decisions will be judged. The Sketch discusses the application of Rule 11 to such a situation, and points out some issues involved in the utilization of this Rule. The concern of a trial lawyer would involve being caught between doing a disservice to the client by abandoning a claim or defense which could, under some circumstances following the discovery period, be of benefit, and facing Rule 11 sanctions for failure to do so. If such a provision is to be adopted, it must be made clear in the rule the criteria governing the retention or abandonment of claims or defenses.

3. Requiring conferences with the court before discovery motions

Also mentioned in Tab 9-B is the proposal to add to Rule 16(b) the provision that the scheduling order could include a requirement that before any discovery motion is filed, an informal conference with opposing counsel and the court must be requested. The thought behind this proposal is, of course, that at least some motions can be rendered unnecessary if opposing counsel, with guidance from the court, can reach agreement in advance of any motion being filed. This also appears to have, on the whole, potential for positive results.

"Meet-and-confer" conferences can be effective in avoiding discovery disputes. In many cases, of course, they will not be, and constitute more of a waste of time than anything else. The efficacy of such conferences always depends upon the particular circumstances of the case, and the predilections of the lawyers involved. Probably no rule ever written can guarantee good results in every case.

LCJ, while finding this proposal unobjectionable, would point out that it is unlikely to have a major effect on the overall goal of reducing the time and expense involved in discovery under the federal rules. While this proposal does have good potential, it is no substitute for fundamental reform of the rules.

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The proposals discussed above all contain some merit. However, consideration of these items by the Advisory Committee must not distract it from its main task of putting together rules amendments which do address the heart of the discovery problems today. These have been discussed in prior submissions to the Committee by LCJ, DRI, FDCC, and IADC and are addressed in the next section.[23]

III. The Need for Meaningful Limits on Discovery, Preservation, and Costs – Not Tweaks to the Rules

As has been discussed in prior comments from LCJ and others, the history of amendments to the Rules of Civil Procedure, and in particular the rules of discovery, is a long one, filled with repeated attempts to reign in the problems of abuse, misuse, and, more recently, to address the changing realities of preservation of information and litigation cost allocation in our modern world. Each round of amendments was the result of tough choices and close calls meant, with the best intentions, to better serve the legal system and uphold the mandate of Rule 1 to secure the "just, speedy and inexpensive determination of every action and proceeding." Unfortunately, in many cases, the amendments did not bring about the intended result or serve to minimize the discovery abuse and misuse at which they were aimed. Moreover, with the rise of electronic discovery, the long-standing problems of discovery, preservation, and costs seem only to have worsened and the Advisory Committee is once again faced with calls for reform.

A. Now Is the Time for Meaningful Discovery Amendments

A close look at the history of the discovery rules amendments in the last 40 years reveals some tension between those who advocate major change and those who do not. One example in particular, the scope

[23] See comments *supra* note 1.

of discovery, illustrates this tension quite well, and has been discussed at length in previous comments.[24] Stated simply, despite repeated calls to narrow the scope of all discovery from a myriad of highly respected organizations and individuals, the Committee has opted instead for more modest "solutions" which, thus far, have failed adequately to address the problems and have been insufficient to handle the new realities of electronic discovery. As a result, the problems of discovery have been repeatedly engaged, but never solved, and the civil justice system now sags beneath their weight.

Unfortunately, such a result is not surprising, and, in fact, might properly be characterized as inevitable. Indeed, this result was predicted by Justice Powell in his dissent to the adoption of the then-proposed civil rule amendments in 1980.[25] There, Justice Powell lamented the lack of meaningful change and expressed his opinion that while the modest amendments proposed were not "inherently objectionable,"[26] their adoption would nonetheless "delay for years the adoption of genuinely effective reforms."[27] Thirty two years later—and arguably no closer to the goal of meaningful change—the prediction of Justice Powell is eerily prescient, save one small detail: Justice Powell predicted a delay of only a decade[28], now, as we once again take up the task of amending the civil rules, it has been more than three.

Presently, amendments to the discovery rules are again being considered. However, as illustrated by the "Rules Sketches" outlined by the Duke Conference Subcommittee, it appears that the Committee is once again in danger of sacrificing meaningful change for the relative comfort of incremental tinkering. In fact, somewhat alarmingly, the opening paragraph of the Duke Subcommittee's rules discussion opines that "[t]here was little call for drastic revision"—a point that is vigorously disputed by LCJ, DRI, FDCC, and IADC and in direct contravention to other, somewhat prominent, calls for meaningful reform, not the least of which has most recently come from Congressman Trent Franks, Chairman of the House Judiciary Committee's Constitution Subcommittee.[29] The American College of Trial Lawyers, and The Institute for Advancement of the American Legal System earlier made strong recommendations for fundamental reform along the lines proposed here, as well.[30]

Initially (and following the lead of Justice Powell), it should be noted that many of the proposed discovery rules are not "inherently objectionable"—indeed some of those currently under consideration were proposed by LCJ in its first submission for the Duke Conference.[31] Rather, it is the lack of any *meaningful* shift in the discovery paradigm to address the problems of discovery misuse and abuse, or the dramatic effects of electronic discovery (in particular volume and cost) that render the "proposals/sketches" insufficient.

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[24] *See, e.g.*, Lawyers for Civil Justice, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (Sept. 2010), *available here* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-D-Comment-Bauman.pdf.

[25] 85 F.R.D. 521.

[26] *Id.* at 521.

[27] *Id.* at 523.

[28] *Id.* at 522 (The Court's adoption of these inadequate changes could postpone effective reform for another decade.").

[29] In fairness, Congressman Franks' letter is dated March 21, 2012 and was therefore not likely considered by the Duke Subcommittee prior to submission of their meeting materials. Nonetheless, it stands in stark contrast to the Subcommittee's statements regarding the nature of necessary rules' revisions. *Letter, Hon. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell*, March 21, 2012, *supra* at 1.

[30] See, ACTL-IAALS Report

[31] Specifically, LCJ favors the explicit incorporation of "proportionality" in Rule 26(b)(2)(C), limits to the number of discovery requests, and, as is discussed elsewhere in this comment, appropriate proposals that incorporate cost shifting or changes to the "producer pays" paradigm.

Therefore, we reiterate our call to rewrite the discovery Rules as follows:

First, Rule 26 should be amended by limiting the scope of discovery to "any non-privileged, material matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C). See, *e.g.*, URCP Rule 26(b) (Utah 2011). The explosion of electronic discovery has dramatically changed litigants' experience of the discovery process, but the fundamental purpose of discovery – namely, "the gathering of material information" – remains unchanged. Thus, one obvious response is to limit the scope of discovery to evidence that is most material to the claims and defenses in each case. See, *e.g.*, English Civil Procedure Rules, The White Book Note CPR 31.6.3 (2), adopted pursuant to the recommendations of the Lord Woolf Committee Report in 1998.

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are presumptively exempted from preservation and discovery absent a showing of "substantial need and good cause" along the lines of the Federal Circuit Patent Rules and Seventh Circuit E-Discovery Principles.

Third, the provisions for protective orders, embodying the so called "proportionality rule," Rule 26(b)(2)(C), should be amended to *explicitly* include its requirements to limit the scope of discovery and to make it clear that it is available to limit and manage excessive demands for unreasonable and burdensome preservation.

Fourth, and finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.

B. Now Is the Time to Address Preservation Triggers and Sanctions

Until recently, the rule for preservation was simply: "do not destroy material relevant to a dispute." However, an *ad-hoc* judge-made framework has turned that rule – implicitly rewriting Rule 37 – into an *affirmative* duty to preserve material that may become relevant to a dispute and to prevent the inadvertent disposal of material by otherwise appropriate recycling efforts. This inconsistent creation of new duties converted the system – from one of professionalism – in which litigants and attorneys were presumed to have acted in good faith and not to have destroyed material pertinent to a dispute – to one of suspicion – in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen and policed, will engage in regular spoliation – *without any real evidence* to suggest that such a change is necessary or desirable.

Under this system, litigants are today spending billions of dollars to address an undefined and largely non-existent spoliation risk based on the existence of a few high profile, un-tethered sanctions decisions. Allowing individual inherent power cases to define corporate conduct and determine corporate budgets in every corner of America is a misuse of that power, and is antithetical to the American system of justice. It is entirely appropriate to require that sanctions, if awarded at all, be awarded only pursuant to clear and consistent rules that subject only deliberate and willful acts to sanctions. And, that the duty to preserve information for litigation purposes be codified in a "bright line" Rule that triggers the duty upon commencement of litigation.

Of course, a successful solution to the problems of costly and burdensome preservation must include a Rule governing the scope of **all discovery** as we suggest above – not a separate scope of preservation rule. Narrowing the scope of discovery limited to that information which is material and proportional to

the claims and defenses in the case would provide a simple, straightforward, and easily understood solution to the problems of preservation—a simplicity that is sorely needed within the Federal Rules. Moreover, a narrowed scope of discovery would have the immediate and direct effect of reducing the costs and burdens of discovery and preservation of information — precisely the problems the Committee has been attempting to address for many, many years.

1. Trigger: Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated – upon "reasonable anticipation of litigation" – it is an almost impossible task to determine confidently the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates a "bright line" standard. What is necessary to give useful guidance is a clear, bright line standard that will meaningfully clarify the time at which a duty to preserve information for purposes of litigation is triggered. As a result we endorse a "commencement of litigation" standard. A "commencement of litigation" trigger rule would eliminate the current "gotcha" game of demanding unreasonably expansive pre-litigation preservation and the costs of over-preservation to respond to those demands. See *New Standards* Comment,Tab A-5, Pg. 85 at -16.

2. Sanctions: The possibility of a sanctions order has highly negative *in terrorem* effects on responsible American corporations and the individual employees who are internally responsible for making preservation decisions. As a result, regardless of the infrequency of sanctions motions and awards, and notwithstanding the financial impact and costs of the sanctions awards themselves, the companies spend billions of dollars to over-preserve material that is merely "potentially" relevant. See, Hubbard, William H. J. Preliminary Report on the Preservation Costs Survey of Major Companies. 090811.

Sanctions for failing to preserve or produce relevant and material ESI should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step created in contravention of even existing Rules. Therefore, sanctions should be imposed by a court only if information relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions.

Rule 37, which currently has been construed to have limited application to sanctions for failure to preserve, should be amended to include those failures in its scope to reduce the reliance of courts on their undemocratic "inherent powers," which can also be accomplished by amending Rule 37(e), as LCJ has proposed or as Connecticut has done, to give it new scope and life. See Sec. 13-14 *CONNECTICUT PRACTICE BOOK* (2011) (eff. Jan. 2012) and *New Standards* Comment,Tab A-5, Pg. 85 at 9-16.

C. Now Is the Time to Reverse The Perverse Incentives Of Current Cost Allocation Rules.

1. Existing Rules and Practices Do Not and Cannot Control Costs

The current Rules provide no reliable remedy to curb discovery and preservation costs. Judges are asked to manage the scope of discovery, but are prevented from being effective by institutional limitations. Without effective guidance discovery costs soar. For these reasons, parties need a cost-effective, workable, self-executing solution for access to relevant information. See Redish, *Allocation of Discovery Costs and the Foundations of Modern Procedure*, 2 (forthcoming chapter in THE AMERICAN

ILLNESS, The Yale Univ. Press, 2012), available at: http://buckleysmix.com/wp-content/uploads/2010/10/Redish.pdf.

The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining truly critical evidence is the best way to achieve that purpose. See Peter B. Rutledge, *The Proportionality Principle and the (Amount in) Controversy*, (forthcoming chapter in THE AMERICAN ILLNESS, The Yale Univ. Press, 2012), available at: http://buckleysmix.com/wp-content/uploads/2010/10/Rutledge.

Therefore, we suggest that limits on the scope of discovery should be enforced by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it. We propose that the Rules be amended to require that each party pay the costs of the discovery it seeks. Such an explicit rule is needed because even after numerous rounds of discovery Rule amendments, existing rules and the practices of both lawyers and judges have not prevented the current discovery/preservation crisis. If we continue on the same path, cost escalation will never be brought under control.

2. The Economic Logic of Requiring "Requester Pays"

Numerous scholars have recognized the unfairness and economic perversity of the existing system and have likewise argued persuasively that making the consumer of discovery pay for what he consumes will naturally balance the process, largely without need for management by judges.

It is axiomatic that when the consumer does not have to pay for what he consumes, the consumer will demand more than is economically rational. Several scholars have noted that the incentive a party already has to consume that which is "free" is multiplied by creating a "free" benefit to the requester on one side of the ledger, and a detriment to the opponent on the other side. See *e.g.*, Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory* (forthcoming, U. FLA. L. REV. 2012).

A Rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party, who is after all the party in the best position to control the scope of those demands and, therefore, their cost. It would undoubtedly represent significant savings for the litigation system and the economy. The Rule would also discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. See, Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure, 37* (forthcoming, U. FLA. L. REV. (2012)

Conventional economic theory on prices as a mechanism for efficient allocation of resources is adequate justification for a "requester pays" rule. Professor Bone has described the law-and-economics version of utilitarianism as: "The optimal rule from a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs." Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 910 (2009).

The abuses discussed herein are only possible because of the gross disproportionality engendered by the deadly combination of loose pleading rules, unlimited discovery, nebulous duties to preserve information, and the ability of the requester to "free ride" by demanding everything and paying for nothing. See Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation* at 12.

Rather than enshrine economically perverse activity, the Rules should encourage parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. As Redish and McNamara state: "Subsidization—through allocation of the total costs to the responding party—renders discovery costs a complete externality, and removes all incentives for litigants to limit the scope of their requests." Redish & McNamara at 33.

A party who benefits by making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage focused requests designed to obtain that information necessary for the just adjudication of the issues without causing the "*de facto* hidden litigation subsidy" that incentivizes excessive discovery. Redish & McNamara at 34.

The perverse cost incentives of the current system are most pronounced in cases of asymmetrical information, those in which the bulk of information resides with one party. Incentives diverge and the burden of responding to discovery is largely borne by one side; there are fewer incentives to self-discipline. See Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 13, (2011), forthcoming, U. FLA. LAW REV. (2012) (referencing, Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 643 (1989).

3. Requiring Payment for Requested Discovery Will Not Curb Access to Justice

There is no reason to believe that imposing a fair system of cost allocation should curb access to justice. Private, individual litigants rarely bear the expenses of initiating lawsuits under the contingency-fee systems that prevail in the U.S. The current system of discovery cost allocation is difficult to explain as anything other than an historical anomaly that – if it ever served a laudable purpose -- no longer does. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure, 34-38* (forthcoming, U. FLA. L. REV. (2012)

The cost allocation rule proposed by LCJ will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to focus discovery on the merits and to settle meritorious cases before the completion of discovery. More cases will be tried and will be fairer to both sides and more likely to be resolved on the merits without the perverse incentives created by the current system.

IV. Conclusion

The Rules Committee long has recognized the danger the information explosion poses to our civil justice system. In that time, the problems of discovery and preservation have worsened dramatically and, left unchecked, they will only continue to grow. We applaud the Committee's reexamination of these Rules and agree that the Duke Subcommittee proposals contain some merit. However, consideration of these items by the Advisory Committee must not distract it from its main task of putting together rules amendments that do address the heart of the discovery problems today. In the final analysis, the Rules Committee cannot solve the problems civil litigation faces today without integrating into its current

work the interrelated rule amendments governing discovery, preservation, and cost allocation that we have proposed.

Respectfully submitted,

Lawyers for Civil Justice

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