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1140 Connecticut Avenue, N.W. • Suite 503 • Washington, D.C. 20036
Phone: (202) 429-0045 • Fax: (202) 429-6982

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December 27, 2012

Honorable Jeffrey S. Sutton
Chair, Committee on Rules of Practice and Procedure
United States Court of Appeals
260 Joseph P. Kinneary U.S. Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Dear Judge Sutton:

We write in support of the proposal by the Advisory Committee on Federal Rules of Civil Procedure to publish proposed Rule 37(e) for comment in August, to share a few reservations about that proposal, and to offer our perspective on other proposals including the Duke Subcommittee draft.

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), the International Association of Defense Counsel (IADC) and DRI – The Voice of the Defense Bar (DRI) believe the current discovery paradigm encourages broad, expensive and often unnecessary discovery, severely limiting the availability of a just, speedy and inexpensive determination of legal disputes. The most effective pathway for improvement is publication for public comment of an integrated package of rule amendments addressing sanctions, costs, proportionality and scope of discovery.

The proposals before the Standing Committee reflect significant progress on issues LCJ has advocated for years. The proposed revised Rule 37(e) addresses a profound cost-driver in modern discovery: the lack of clarity and uniformity in the standards for imposition of sanctions for failing to preserve information. The Civil Rules Committee and its Discovery Subcommittee have devoted extensive time and effort to this proposal. Although we have serious concerns about some aspects of the proposed rule, we strongly support its publication in August in order not to squander the progress that has been achieved and to allow our concerns and others to be aired as contemplated by the rules process. Approving the proposed Rule 37(e) for publication will also assure its consideration together with what is expected to be a package of integrated proposals governing discovery. We also strongly urge the Committee to continue its work on

the Duke Subcommittee draft so its proposals may be joined with proposed Rule 37(e) in that integrated package.

The Department of Justice (DOJ) requests the Standing Committee to delay its vote to approve publication of the proposed Rule 37(e), having previously taken the position that any sanctions rule was premature throughout the Committee's consideration of the issue. The DOJ was the only Civil Rules Committee representative to withhold support from approval of the proposed rule and the stated reason was that insufficient input had been gathered from within the Department as of November 2012. The Discovery Subcommittee's work on proposed rule 37(e) began shortly after the Duke Conference in May 2010, and has included a major day-long conference, a panel discussion during the January 2011 Standing Committee meeting, many discussions with the Advisory Committee, eight Subcommittee conference calls, and untold hours of consideration of comments from observers and careful drafting.

No one could fault the care and deliberation of the process, which has taken into account many different points of view from a wide variety of participants. We urge the Standing Committee to further open this process by voting to approve proposed Rule 37(e) for publication by commencing the public comment period, during which the DOJ and anyone else who chooses to participate can add comments and criticisms for the Advisory Committee's full consideration. The DOJs own concerns will receive the broadest possible vetting along with the views of all other interested parties during the public comment process. Indeed, a vote now approving the proposed Rule for publication would not prevent further adjustments being made at the spring, 2013 meetings and it would free the Discovery Subcommittee to focus on other important issues in the interim.

Although we support publication of the proposed rule, we recommend that the Committee consider the following points in its evaluation of the proposed Rule 37(e) and its discussion of the Duke proposals:

1. **Proposed Rule 37(e)**:

   (a) Draft Rule 37(e)(2)(A) includes the disjunctive 'or' in referencing "willfulness **or** bad faith." This language could have the effect of penalizing a litigant who acts in good faith in situations when information is not retained, such as standard programs that automatically delete data. The use of the conjunctive, "willfulness and bad faith" would be preferable.

   (b) Vague standard for notice. The first factor for determining reasonableness in draft Rule 37(e)(3)(A) is an examination of "the extent to which the party was on notice that litigation was likely and that the information would be discoverable." The reference to notice is not defined and could open up the potential of ancillary discovery activity and proceedings on the issue of anticipation of litigation as well as state of mind regarding the potential claim and the scope of materials subject to preservation. A better approach would be to define a preservation trigger that provides clarity to parties and judges, such as the commencement of litigation, as discussed further in paragraph 2 below.

(c) The uncertainty of reasonable efforts. Draft Rule 37(e)(3)(B) creates uncertainty by suggesting an evaluation of the reasonableness of preservation efforts—a concept that could create a whole new area of discovery into parties' efforts to preserve information. This provision should be removed from the proposed rule.

(d) Draft Rule 37(e)(3)(C), as part of determining the *producing* party's reasonableness, willfulness and bad faith, indicates the court should assess *"whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation."* This is an odd judicial standard to assess the *producing* party's reasonableness and good faith on the basis of the *requesting* party's request and consultations.

(e) Draft Rule 37(e)(3)(D) requires an examination of "the party's resources and sophistication in litigation." Importantly, the Civil Rules Committee voted to delete this provision, but it has been included in the draft Note. Although well-intended, this language is virtually certain to produce unfair results because it invites a different standard for parties with similar intent. The question of (e)(3) is whether a party acted willfully or in bad faith, and there is simply no basis for establishing a different standard based on the litigants' profile.

(f) Too many "factors" in the Rule. One way to minimize the adverse impact of the "factors" and state them more helpfully would be to put them in the Note, rather than in the Rule, which has been Committee practice with "factors" – put them in the Note, not the Rule.

2. **Preservation Trigger:** We urge the adoption of a "commencement of litigation" trigger standard for preservation because it would eliminate the "gotcha" game of demanding unreasonably expansive pre-litigation preservation. 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. It is far easier for parties to pattern their conduct around a clear rule than to pattern their conduct around the uncertainty caused by myriad interpretations of the reasonable anticipation of litigation trigger. The commencement trigger is a fair line that creates a framework for both plaintiffs and defendants to control preservation decisions and reduce gamesmanship.

3. **Proportionality and Scope of Discovery**: Importing the proportionality factors from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1) and limiting the scope of 26(b)(1) discovery to include only information that is relevant to a party's claim or defense and proportional to the needs of the case should be a significant step forward in reducing the costs and burdens of discovery generally. However, the current draft of the Rule would benefit considerably by inserting the word "material" to require discovery of information that is "relevant *and material* to the claims and defenses," because the proper purpose of discovery should be "the gathering of material information." This could solve many long-identified problems with discovery abuse

and misuse while simultaneously addressing the relatively new "problem" of electronic discovery and its attendant high volumes and costs. At the same time, a focus on information that is relevant *and material* to the claims and defenses of the parties serves to better align the rules of discovery with the realities of litigation.[1]

4. **Presumptive Limitations:** The Federal Rules of Civil Procedure should set presumptive limitations on discovery by, for example, identifying categories of information presumptively exempted from discovery and by placing specific limitations on the number of requests for production or the number of custodians allowed. Such bright-line limitations would serve the dual purpose of both objectively limiting the amount of data subject to discovery—a necessary component of any successful package—and reducing the need for judicial intervention. Moreover, and perhaps more importantly, such presumptive limitations on discovery would further support the overarching efforts to affect the necessary shift away from needlessly broad discovery and better focus the efforts of parties and counsel on what is truly at issue in the case.

5. **Duke Subcommittee Draft:** We applaud the Duke Subcommittee for developing a number of proposals that address many of the chronic problems presented by the lack of clarity and guidance in the Civil Rules. The recent revisions to the "Duke Sketches" reflect substantial progress toward improving the Rules. However, we respectfully submit the following comments to assist in furthering that progress as we remain very concerned with several of these proposals:

   (a) **Cooperation.** The Duke Subcommittee draft suggests making Rule 1 applicable to parties and spelling out the concept of cooperation in the Committee Note. Applying Rule 1 to the parties would introduce a new, untested, and vague concept into our adversary system – an approach that is fraught with unintended consequences. Addressing cooperation among the parties in a Committee Note would be only slightly less problematic than putting it in rule text. We oppose such an amendment and strongly support the alternative formulation: "*** * *** [These rules] [**must**] be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding." Indeed, we recommend changing back the "should" to "must" to recapture the original purpose of the Rule. The courts construe and administer the Rules. The parties comply with them. Amending Rule 1 to apply it to parties to subject them to an affirmative and subjective requirement of "cooperation," as spelled out in the draft Note, is not proper rule making – or Note writing.

   (b) **Numerical Limits.** The Duke Subcommittee draft includes the proposals to reduce to 15 the presumptive number of Rule 33 interrogatories and to adopt a presumptive limit of 25 for Rule 36 requests to admit. It also includes a proposal to reduce the presumptive limits on depositions to 5 per side and to reduce the presumptive duration of a deposition to 4 hours. Placing numerical limits on depositions, interrogatories, document requests, and requests to admit is a reasonable and appropriate step towards curbing discovery abuse.

[1] Honorable Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit, Remarks at the E.D. Texas Judicial Conference: The State of Patent Litigation (2011).

The presumptive limits proposed by the Duke Subcommittee are reasonable and we support them.

(c) **Sanctions Torts Proposals.** The new Duke Sketches continue the requirements that Rule 34 objections be stated specifically and state whether anything is being withheld on the basis of an objection, but wisely withdrew the proposal to add "not evasive" to the certifications under Rule 26(g)(1). We strongly support the decision to withdraw "not evasive" as such language would likely serve to increase litigation over discovery practices. LCJ opposes the Duke Subcommittee's proposed changes to Rules 34, and 37, which, allegedly, are intended to avoid delay in the production of documents and to modernize the way in which document requests are answered in light of actual production practices. These proposals would be counterproductive to the goal of improving the discovery process by giving rise to "sanctions torts" and the flurry of ancillary proceedings around these sanctions proceedings.

(i) The proposal to amend Rule 34(b)(2)(B) should also be rejected. Requiring parties choosing to produce electronically stored information (rather than allowing inspection) to state that production must be completed "no later than the date for inspection stated in the request" will only serve to encourage the sort of discovery motions that result in additional cost and delay. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities. Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage further disputes requiring court review. Moreover, despite the express acknowledgement in the Advisory Committee's earlier notes that the amendments to Rule 34 were "not meant to create a routine right of access to a party's electronic information system," the language of the proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection. This "choice" fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production (thus rendering the choice a fiction) or requires the acceptance of the incredible risk and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time-consuming satellite litigation to resolve disagreement surrounding production.

(ii) Finally, the proposed amendment to Rule 34(b)(2)(C) requiring specification of whether any responsive material is being withheld would create yet another discovery obligation that would only serve to add to the burden of discovery and would result in additional delays and inevitable disagreements regarding compliance.

In conclusion, LCJ, DRI, FDCC, and IADC believe that the proposals before the Standing Committee reflect significant progress. Although we have serious concerns about some aspects of these proposals, we strongly support moving forward with approval for publication in August in order to continue the progress that the Advisory Committee has achieved. We urge the

Standing Committee to support that progress by approving Rule 37(e) for publication and directing that the Advisory Committee make every effort to complete its work on an interrelated package of rule amendments governing preservation sanctions and discovery that also can be published in August so that LCJ's concerns and the inevitable concerns of other parties can be addressed formally and publicly.

Respectfully submitted,

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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