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Summary Views of

LAWYERS FOR CIVIL JUSTICE

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FEDERATION OF DEFENSE & CORPORATE COUNSEL

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

NOW IS THE TIME FOR MEANINGFUL NEW STANDARDS GOVERNING DISCOVERY, PRESERVATION, AND COST ALLOCATION

I. The Litigation and Information Explosions Require Amended Rules.

These Summary Views highlight the Rule Amendments proposed by LCJ, DRI, FDCC, and IADC in the *"New Standards"* Comment, *Now is the Time for Meaningful New Standards Governing Discovery, Preservation and Cost Allocation*, to the Civil Rules Advisory Committee on March 15, 2012 that are essential to help solve the problems of excessive and unnecessary discovery and over-preservation of information currently plaguing civil litigation. Citations of authority are minimal as the original Comment is fully documented.

The Advisory Committee is presently considering numerous proposals for amending the Rules, but must cut through a myriad of complex proposals that amount to mere tweaking of the existing Rules and focus on developing an interrelated package of broad-based and bold amendments that: (1) reevaluate the premise and focus of discovery, especially e-discovery; (2) develop clear preservation standards without creating new pre-litigation preservation duties inconsistent with federal authority and state common law; and (3) deter runaway litigation costs by reasonable cost allocation rules premised on economic incentives.

As stated by Trent Franks, Chairman of the Subcommittee on the Constitution of the House Judiciary Committee:

> You and your Committee have a monumental effort ahead of you as it is our view that the Rules have become an outdated, confusing and complex patchwork of vague and indeterminate standards that are in need of a major overhaul.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.

Failing to adjust the Federal Rules to meet the demands of 21st century litigation will have significant, negative implications today and for our future. Inefficient and unpredictable litigation is a tax on productive behavior and an inefficient system can have significant adverse impacts, including sanctioning 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. Broad-based rule reform is essential to help achieve the consistency, uniformity, and predictability that is necessary to reduce the costs and burdens of modern litigation.

It is essential to go back to basic principles and comprehensively reconsider the interrelationship of preservation, discovery, and cost allocation as well as amendments to the Rules governing each of those areas. Such amendments will help curb systemic excesses, increase cost-efficiency and generally improve the administration of justice under the Federal Rules.

II. Now Is the Time for Reform of the Discovery Rules.

A. Runaway Discovery Costs Must Be Brought Under Control. Substantial real world information has been presented to the Rules Committee that the lack of clear, concise preservation and discovery rules is harming businesses – even businesses at the pinnacle of the high technology community.[1]

Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. In fact, due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite "meet and confer" amendments and calls for "cooperation". Better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences of unnecessary preservation and discovery.

Some have voiced concern that, in light of how rapidly technology is changing, rule changes at present would be counterproductive. However, what would truly be counterproductive for both the system and the economy would be to maintain the current discovery system.

Rather than focusing judicial attention on the merits of an action, the lack of clear and specific rules has resulted in an *ad hoc* patchwork of individual solutions to the complex problems created by large volumes of ESI. Rule based solutions would provide uniform, real world relief to costly real world problems. The need for national uniformity, consistency, and clarity is urgent and immediate.

B. Now Is the Time for Meaningful Discovery Amendments. For the last several decades, courts and commentators have noted the increasing inability of federal discovery rules to keep pace with technological advances, and the concomitant increase in expense and delay in the litigation process. Numerous studies, case law, and anecdotal evidence show that litigants are being overwhelmed by the volume of data subject to discovery and the commensurate costs of properly handling such data throughout the litigation process. Absent definitive action by the Rules Committee to relieve the burdens of electronic discovery, the problems will only continue to grow.

Numerous prior rule amendments have unfortunately failed to achieve meaningful progress in alleviating continuing discovery problems. Further specific, decisive action to amend the discovery Rules along the following lines will render the process more efficient:

First, Rule 26 should be amended by limiting the scope of discovery to "any non-privileged matter that

[1] A recent survey of Fortune 200 companies found that in 2008, the 36 companies responding spent an aggregate $4.1 billion on U.S. litigation – not including judgments and settlements or internal costs such as information technology to store and retrieve information for litigation and employee time spent attending depositions and responding to discovery requests. Litigation Cost Survey of Major Companies App. 1 at 8 fig.4 (2010). *On average, that year, for each dollar of global profit earned, companies spent 16-24 cents on U.S. litigation.* Letter from Prof. Henry Butler to the Honorable Lee H. Rosenthal, *et al.*, June 2, 2010, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Discussion/0DEC29D460FD45DA85277190060E48DB/?OpenDocument. And, Professor William Hubbard has estimated that over preservation costs companies "billions of dollars": William H. J. Hubbard, *Written Statement*, U.S. House, Judiciary Comm., Constitution Subcomm. Hearing "The Costs and Burdens of Discovery" (2011).

would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C). 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. [Cite Lord Woolf Committee Report and "materiality" amendments in English Civil Procedural Rules 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.

These steps would address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance and materiality, lessening the likelihood of satellite litigation on discovery issues and, consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.

III. Now Is the Time to Address Preservation Issues

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 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 sanctions decisions.

A. 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. That standard will permit each district court to be engaged in the preservation process as necessary (rather than second guessing the propriety of pre-litigation activity) and subject the requesting party to Rule 11 (rather than the current absence of sanctions for overly broad preservation demands); and the preserving party to Rule 37 (rather than the court's inherent power).

B. Scope. The problems with preservation, most notably its significant costs and burdens, are not merely the product of the post-modern age and evolving technology. The real problem is the lack of identifiable boundaries on which parties may rely when analyzing the scope of their preservation obligations. . Faced with the prospect of preserving all information relevant to the subject matter of potential litigation, the ambiguous standard for the scope of discovery of Rule 26(b)(1), parties are forced to rely on "amorphous" principles and widely divergent court opinions in order to comply with their preservation obligations.

A successful solution to the problems of costly and burdensome preservation must include a narrowed scope governing all discovery – not a separate scope of preservation rule. Narrowing the scope of discovery 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 limited to that information which is material to the case 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.

C. 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 note 1.]

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. Therefore, we have proposed a sanctions rule that permits sanctions to 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 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 at .

IV. Now Is the Time to Reverse Current Cost Allocation Perverse Incentives.

How can the judicial system deliver on Rule 1's promise of just, speedy and inexpensive determination of actions, if a litigant may ask for limitless costly, burdensome, and time consuming discovery – and pay for none of it?

A. The Cost Of Discovery Is Out Of Control. Numerous amendments to the discovery Rules aimed at reining in the ever-increasing costs of discovery have not adequately or effectively controlled these costs. Today, discovery is too often used as a weapon to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes of information that is very expensive to collect and review in an effort to force opposing parties to consider settlement based primarily on the threat of excessive litigation costs. And many parties do in fact decide to settle to avoid expensive and protracted discovery instead of undertaking a fair and practical examination of the merits.

B. 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.

A much more effective remedy would be – to limit the scope of discovery and to enforce those limits by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it. Recognizing this, 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.

C. 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 – 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).

D. 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 at__.

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.

V. *Conclusion*

For almost 20 years, the Rules Committee has recognized the danger the information explosion poses to our civil justice system. In that time, the problems of discovery have worsened dramatically and, left unchecked, they will only continue to grow. The Rules Committee should give intense consideration to developing a package of interrelated rule amendments governing discovery, preservation, and cost allocation such as those proposed in this paper.

Respectfully submitted,

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