COMMENT

SUPPLEMENTING THE WHITE PAPER SUBMITTED TO THE 2010 LITIGATION CONFERENCE

Submitted to the Judicial Conference Standing Committee on Rules of Practice and Procedure

On behalf of

Lawyers for Civil Justice
DRI – The Voice of the Defense Bar
Federation of Defense & Corporate Counsel
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LCJ, DRI, FDCC, AND IADC COMMENT TO STANDING COMMITTEE SUPPLEMENTING THE WHITE PAPER SUBMITTED TO THE 2010 LITIGATION CONFERENCE

I. Introduction

This Comment is respectfully submitted to briefly summarize for the Standing Committee the proposals for amendment of the Rules of Civil Procedure in the attached White Paper[1] and the policy rationale for those proposals. We congratulate the Standing Committee and the Civil Rules Advisory Committee on the very successful 2010 Litigation Conference - the first step in a renewed effort to right the balance of the Federal Rules in order to optimize socially responsible, productive behavior and to improve the accuracy and efficiency of litigation in the Federal Courts. Our members appreciate the opportunity to have participated in the Litigation Conference and to submit this Comment. The Committee's further exploration of these very important issues will continue to have our strong support and involvement.

II. The Substantive-Procedural Intersection: Refocusing the Debate

Rule 1 expressly recognizes that the primary goal of the federal procedural system is the fair, efficient and accurate adjudication of claims. This commitment underscores the drafters' recognition of the essential intersection between the procedures that are adopted in the Federal Rules and the vindication and protection of the underlying substantive law being enforced. Procedural rules do not exist in a vacuum. If structured improperly, they will inevitably have a distorting impact on the implementation of substantive social and economic policies well beyond the four walls of the courtroom. Yet the indisputable fact that procedural law is inherently concerned with advancement of the goals of the substantive law being enforced has all too often been neglected in recent controversies about the structure of the Federal Rules. At times, it seems as if the primary objectives of the Rules are internal consistency for its own sake or compatibility with a certain set of internally generated and insufficiently explored procedural norms.

Modern practice, moreover, has undermined the promise of accurate, efficient, and inexpensive litigation, casting doubt on the ability of the procedural system to further the substantive goals of the law. Maintaining rules or interpretations of the rules that were developed under assumptions that are no longer correct can lead to perverse results, such as inhibiting productive behavior rather than encouraging it. When that happens, either the rule or its interpretation should change.

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[1] Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise and Meaningful Amendments to Key Rules of Civil Procedure* (May 2, 2010) at 7-8, 18-20, available at http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement [hereinafter "White Paper"].

In contributing to the renewed debate over the scope and structure of the Federal Rules, we hope to refocus the inquiry on the issue with which any system of procedural rules must be primarily concerned: the extent to which that system either effectively implements and enforces, or distorts and undermines, the underlying substantive law.

A. The Purpose and Function of the Judicial System

The law's concern with advancing substantive goals is frequently neglected in debates over rule amendments that more often focus on a particular area or problem. It is as if the primary objectives are internal consistency or compatibility with a certain set of discrete or indigenous norms. For example, much of the ferment over the recent U.S. Supreme Court decisions in *Iqbal*[2] and *Twombly*[3] is driven entirely by certain perceptions of the internal norms of the Federal Rules of Civil Procedure and the rule making process. The criticisms of these cases largely are that the cases:

> "have changed the meaning of FRCP 8 outside of the Rules Enabling Act process; undercut the trans-substantive aspirations of the procedural system; breached the procedure-evidence divide inappropriately; will result in idiosyncratic trial court judgments based on bias and caprice; and have imposed an unworkable if not incomprehensible standard of plausibility on pleadings."[4]

What is remarkably absent from this list of objections is whether the Court's cases are sensible, given the substantive objectives of the law. Similarly, much concern has been expressed that raising the pleading bar may disadvantage some plaintiffs, but only rarely has the debate considered the beneficial or perverse effect on primary behavior.[5] Obviously, legal regulation of litigation behavior is important, but the analysis must not ignore the fact that litigation behavior must serve the substantive objectives of the law. The issue for the law and rule maker is how to optimize the substantive objectives of society – in other words, how to optimize socially responsible productive behavior.

The implications of these points are painfully clear in the debate that has followed the *Iqbal* and *Twombly* decisions. The debate has largely proceeded as if the only issue is whether someone who wishes to air a complaint has access to a courtroom to do so. It neglects that litigation also imposes costs on defendants -- often astonishing costs. Every time an undeserving plaintiff imposes such costs a wrong is done through depriving a deserving defendant of its assets by having to defend against unjustified allegations. Yet the current debate neglects the fact that defendants routinely are wrongly forced to defend and, too frequently, even to settle non-meritorious cases. To drive proper behavior, both issues need to be considered.

While we need to address the risk of an error against a plaintiff, we must likewise address the harm done to innocent individuals, such as shareholders and other stakeholders, when defendants are

[2] *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937 (2009).
[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[4] *See*, *e.g.*, Ronald J. Allen & Alan E. Guy, Conley *as a Special Case of* Twombly *and* Iqbal: *Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, -- Penn St. L. Rev. – (forthcoming 2010), available at SSRN: http://ssrn.com/abstract=1589732. *See also* White Paper at 7-8, 18-20.
[5] See White Paper at 3-5

forced to defend against spurious allegations. Nor can we overlook the harm done to the public at large as these costs are passed on to consumers. Indeed, wage earners are especially hard hit by increased prices and limited availability of goods and services caused by unjustifiable litigation costs.

In sum, the legal system's primary task is to optimize productive behavior. This requires a clear recognition that there are several decisions in litigation that matter. Mistakes against deserving plaintiffs are a cost, but so too are mistakes against defendants; and just as there can be correct decisions for plaintiffs, there can be correct decisions for defendants. Most importantly, that complex mix of decisions should be constructed to set optimal incentives for what really matters—which is responsible, productive primary behavior. Procedural rules, like all other forms of regulation, are instrumental to that task.

B. Rules of Procedure Must Adjust to the Dynamics of Modern Litigation

The original drafters of the Federal Rules knew that procedural rules can encourage socially beneficial primary activity. Indeed, perhaps the single most important motivation for the development of the 1938 Rules was the recognition that plaintiffs were systematically being disadvantaged. This meant that defendants were not bearing the true cost of their behavior. Harms could be imposed on individuals who had no effective recourse, which allowed costs to be externalized to the public at large, giving rise to socially perverse incentives. The Federal Rules were designed in part to address this problem by removing the barriers to entry so that deserving plaintiffs had access to the courts. Another assumption underlying the original Rules was that discovery and trial could be relatively cheap and efficient. If a pleading regime imposed unnecessary costs, it was perfectly sensible to change the pleading regime to reduce costs and facilitate the cheap and efficient resolution of disputes through discovery and trial.[6] This increases the probability that people will bear the true cost of their behavior, and thus optimizes the incentives for socially responsible primary behavior.

However, things change. The system has become enormously expensive and burdensome, and individuals have learned to game it. One of the primary issues today is the ability of a well-organized and well-funded plaintiff's bar able to take strategic advantage of the costs of litigation to obtain unjustified payouts to it and its clients. Each time a deserving defendant wrongfully loses a case or settles because of the risk of ruinous litigation costs, the public at large suffers and the substantive goals of the law are undermined. In light of the way that things have changed from the 1930s, it is not only justifiable for the law and rules to take such matters into account, it is socially perverse not to do so.

III. Empirical Data Shows the Litigation System is Costly and Inefficient

A. Data from Various Studies

U.S. litigation transaction costs are a significant cost of doing business. 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

[6] *See* White Paper at 6-8.

attending depositions and responding to discovery requests.[7] On average, **for each dollar of global profit earned, companies spent 16 cents to 24 cents on U.S. litigation in 2008**, according to a subsequent analysis of the survey data.[8] Moreover, outside U.S. litigation costs have increased rapidly, at an average rate of 9 percent each year between 2000 and 2008.[9] In-house costs have remained constant over this period.[10]

Despite its high price tag, the U.S. legal system is extremely inefficient. Various studies have found that roughly 60 percent of U.S. tort costs are consumed in transaction costs, with only 40 percent benefiting the actual claimant.[11] These studies suggest that for each dollar awarded in settlement or judgment, "it is reasonable to assume that a dollar of legal and administrative expenses is incurred. In other words, for society to use the tort system to transfer money to claimants is analogous to a person using an ATM at which a withdrawal of $100 results in a service fee of $100."[12]

Overbroad and expensive discovery procedures appear to contribute significantly to the problem. For example, the survey of Fortune 200 companies found that resources spent on extensive discovery do little to aid the fact finder, as the ratio of pages discovered to pages entered as exhibits at trial is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages were actually marked.[13] Whatever marginal utility may exist in undertaking such broad discovery is overwhelmed by its costs. For the years 2006-2008, the average company paid an **average per case discovery cost of $621,880 to $2,993,567**.[14] Companies at the high ends during the same years reported **average**

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[7] Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies 8 fig.4 (2010), *available at* http://tinyurl.com/LitCostSurvey-Major-Companies [hereinafter "Litigation Cost Survey"].

[8] Letter from 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/0DEC29D460FD45DA85257737004648DB/?OpenDocument [hereinafter "Butler letter"]. The information in the Butler letter was developed by the Northwestern University Law School Searle Center on Law, Regulation & Economic Growth in response to questions raised by participants at the May 2010 Conference on Civil Litigation at Duke Law School.

[9] Litigation Cost Survey at 8. Annual outside litigation costs averaged $115 million per survey respondent in 2008, up from $66 million in 2000. *Id.* at 7 & 8 fig.4. For the 20 companies providing data on this question for the full survey period, average outside litigation costs were $140 million in 2008, up from $66 million in 2008.

[10] *Id.* at 8.

[11] *See* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1470 (2010), *citing* Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003), *available at* http://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (tort claimants receive 46 cents of every dollar paid by defendants); James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation ix tbl.S.3 (1986) (tort claimants generally receive 46 cents to 47 cents per dollar of tort system expenditures); James S. Kakalik et al., Costs of Asbestos Litigation vii tbl.S.2 (1983) (finding that asbestos claimants obtain 37 cents of every dollar paid by defendants); Stephen J. Carroll et al., Asbestos Litigation 104 (2005) (asbestos claimants obtain 42 cents of every dollar paid by defendants); Patricia M. Danzon, *Liability for Medical Malpractice*, *in* 1 Handbook of Health Economics 1339, 1369 (A.J. Culyer & J.P. Newhouse eds., 2000) (medical malpractice claimants receive 40 cents for every dollar of defendants' liability insurance payments); Peter Huber, Liability: The Legal Revolution and Its Consequence 151 (1988) (medical malpractice claimants and product liability claimants receive 40 cents for every dollar paid by defendants for liability insurance); Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 Am. L. & Econ. Rev. 330, 359 tbl.5 (2007) (plaintiffs in Texas tort litigation receive 57 cents for every dollar paid by defendants).

[12] *Id.*

[13] Litigation Cost Survey, at 16.

[14] *Id.* at 15 fig.11.

discovery costs ranging from $2,354,868 to $9,759,900 per case.[15] Despite these costs and the limited marginal utility of the amounts of information recovered, courts almost never allocate costs to equalize the burden of discovery or as an incentive for seeking only discovery that is anticipated to yield value.[16]

B. Impact on the Economy

Large companies are frequently assumed to be deep pocket defendants that can readily absorb litigation expenses (and the corollary assumption is often that since corporate defendants can supposedly "afford it," there is no reason to change the system). With U.S. litigation expenses representing an average 16 cents to 24 cents of each dollar of profit earned,[17] it is perverse public policy to waste that money by allowing systemic inefficiencies to go unaddressed. Fixing the problems to truly facilitate the "just, speedy and inexpensive" resolution of actions would free up a significant amount of corporate revenues that could be used productively to create jobs, to lower prices of products and services, to invest in research and development of new products and services, to contribute to partnerships with local communities, and to increase shareholder returns, among other uses.

More importantly, corporate defendants are not the only ones on which these excessive litigation costs fall; inevitably, many of these costs will be passed on to consumers and taxpayers in the form of higher prices and decisions to forego promising areas of research, to withdraw products and services from the market, and to relocate jobs and other corporate investments to jurisdictions with more efficient and cost-effective civil justice systems.[18]

This is of particular concern in the 21st century global economy. As a percent of revenue, multi-national company respondents to the Fortune 200 survey spend a disproportionate amount on litigation in the United States compared with their expenditures in foreign jurisdictions. Depending on the year, relative U.S. costs were between four and nine times higher than non-U.S. costs. This disparity will inevitably influence decisions by corporations about where to invest their resources. Global competition for foreign investment is increasing, and the changing dynamics of the global economy are affecting the United States' ability to remain a leader in this area.[19] The International Trade Administration at the U.S. Department of Commerce has found that "many foreign investors view the U.S. legal environment as a liability when investing in the United States."[20]

Such an outcome contributes to the growing recognition that "rather than being just an incremental part of doing business, the mere threat of legal action can seriously — and sometimes irrevocably —

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[15] *Id.*
[16] *Id.* at 16.
[17] *See* Butler letter.
[18] *See, e.g., The Uneasy Case for Product Liability,* 123 Harv. L. Rev. 1437, 1471-72 & 1489 n.16 (2010) (discussing impact of litigation costs on prices and innovation and collecting articles discussing issue); George Hohmann, *Chesapeake Nixes New Building,* Charleston (W.Va.) Daily Mail, 1A May 29, 2008 (lack of automatic appeal in West Virginia contributes to energy company's reversal of its earlier decision to build $35 million facility in the state).
[19] While the U.S. is still a leader in attracting foreign direct investment, its global share of FDI declined from 31 percent in 1980 to 13 percent in 2006. International Trade Administration, U.S. Department of Commerce, Assessing Trends and Policies of Foreign Direct Investment in the United States 6 (2008), *available at* http://www.trade.gov/publications/abstracts/trends-policies-fdi-2008.asp (accessed June 5, 2010).
[20] *Id.* at 7.

damage a company," thereby "making it harder to manage legal risk in the US than in other jurisdictions."[21] This perception has had significant consequences with regard to America's competitiveness in the global market. As a report by the Committee on Capital Markets noted, "[f]oreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. [securities] market."[22] Similarly, the President's Export Council has recently observed that American courts "have gained the reputation around the world as venues for abusive, lengthy, and excessively costly litigation."[23]

If U.S. litigation costs are significantly higher than other countries, and the situation is left unchecked as economic differences between countries narrow, the United States will be unable to compete effectively in the global marketplace.[24]

IV. Prior Attempts to Solve Systemic Federal Litigation Problems Have Not Succeeded

A. Discovery Problems Continue to Overwhelm the Merits of Disputes in the Federal System

> "Excessive discovery and evasion and resistance to reasonable discovery requests pose significant problems. … [T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time consuming activities that are disproportionate to the nature of the case, the amount involved or the issues or values at stake."[25]

This quotation is not from some recent submission to this Committee on the state of federal civil litigation in 2010. It is the opening paragraph of the Advisory Committee Note to the 1983 Amendments to Rule 26. These amendments were adopted more than a quarter of a century ago to address growing problems that threatened the viability of effective dispute resolution in the federal system. Since the 1983 amendments, one set of additional amendments has followed another at a pace unheard of in preceding years. In 1993, there was a set of further substantive amendments, another set in 2000, then still more amendments in 2006 specifically to address the exploding problems surrounding e-discovery. Four times since the pronouncement in the 1983 Advisory Note, this Committee has recommended substantial revisions to the Federal Rules to prevent the scope and cost of modern litigation from outstripping the federal system's ability to deliver on the

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[21] Michael R. Bloomberg & Charles E. Schumer, Sustaining New York's and the U.S.' Global Financial Services Leadership 76-77 (2007).
[22] Interim Report of the Committee on Capital Markets Regulation 11 (2007).
[23] Letter from President's Export Council to President George W. Bush (Aug. 23, 2007), *available at* http://www.ita.doc.gov/td/pec/ (accessed June 5, 2010).
[24] *See* Robert E. Litan, In Their Eyes: How Foreign Investors View and React to the U.S. Legal System 4 (2007), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docid=1059 (accessed June 5, 2010); *see also* International Trade Administration, U.S. Department of Commerce, The U.S. Litigation Environment and Foreign Direct Investment (2008), *available at* http://www.locationusa.com/USDepartmentOfCommerce/pdf/litigationFDI.pdf (accessed June 5, 2010) (considering concerns about the impact of the U.S. legal system on foreign investment and recommending steps to address them).
[25] Fed. R. Civ. P. 26 Advisory Committee Note (1983).

fundamental premise of the Federal Rules – the "just, speedy, and inexpensive determination of every action."[26]

One of the common themes through nearly thirty years of Rule revisions has been increased judicial management of discovery by the federal courts. This Committee has relied on judicial management to address the growing inability of courts and litigants to reach and resolve cases on their merits. Rule 16, for example, was amended in 1983, 1993 and 2006 to increase judicial supervision and control discovery. The 1983 amendments included express references to proportionality to focus the federal courts' efforts. Both this change and the 2000 amendment changing the scope of attorney-managed discovery from "relevant to the subject matter involved in the pending action" to "relevant to the claim or defense of any party" were seen as controversial and revolutionary.

Notwithstanding these frequent and, at the time, supposedly dramatic changes, the opening paragraph of the Advisory Note to the 1983 Amendment to Rule 26 still describes the problems that confront civil litigation in 2010 as accurately as it did 27 years ago.

B. Judicial Management Alone Cannot Solve the Problems Facing the Federal Civil Justice System

Despite the many rounds of Rules amendments recounted above, the U.S. Supreme Court declared recently that it is a "common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[27] Past amendments and increasing reliance upon judicial management have not resulted in the fundamental improvements to the federal judicial system that are necessary to allow the courts to once again decide cases on their merits. This is so for a number of compelling and inter-related reasons.

- The Rules as they currently exist permit an unnecessarily broad scope of discovery. Rule 26 (b)(1) provides that the "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense…."[28] That standard is further broadened by providing that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[29] The breadth of discovery is underscored by allowing, "for good cause," the discovery of "any matter relevant to the subject matter involved in the action."[30]

- Equally important, judicial management is problematic because it is difficult for the trial judge to know at the outset that requested discovery is abusive, harassing, irrelevant, or too burdensome and expensive. When the court balances these concerns against the policy set forth in Rule 26, more often than not, the balance is deemed to weigh in favor of broad discovery.

- The problems created by the broad scope of discovery are accentuated by Rule 8, which has been interpreted as permitting a litigant to proceed with only the barest of allegations. Absent some

[26] Fed. R. Civ. P. 1.
[27] *Twombly,* 550 U.S. at 559.
[28] Fed. R. Civ. P. 26(b)(1).
[29] *Id.*
[30] *Id.*

factual allegations to set the context of the case, the trial judge may struggle to understand the limits of relevant discovery. Indeed, without a clear sense of what the litigation is about at an early stage, the trial judge is not well-situated to manage the litigation in an efficient and inexpensive way. Instead, the trial judge's efforts to manage discovery are typically directed to effectuating the breadth of Rule 26. This is not surprising because that is the outcome that the current language appears to require. Although trial judges are empowered to manage litigation, and to limit discovery, the Rules do not offer clear, workable standards for doing so. As a result, judicial efforts to employ the tools that exist to manage the litigation have been inadequate to stem the current crisis, despite the best efforts of a very competent bench.

- Practical and institutional limitations impede the federal courts' ability to effectively manage discovery at the trial court level. Judicial resources are spread thin and getting thinner. Meanwhile, litigation is growing more and more complex. E-discovery has added a whole new level of complexity, to large as well as run-of-the-mill cases. The pace of technological advancement promises to make complexity a constant issue going forward.

- Decisions regarding discovery are interlocutory rulings and rarely subject to appellate review. When they are reviewed, the standard of review is highly discretionary.[31] Appellate review of a trial judge's supervisory rulings, those that involve supervision of the docket, the timing and extent of discovery, and related issues, receive the highest deference. Many appellate advocates would characterize the trial court's discovery rulings as virtually unreviewable unless coupled with draconian sanctions for failure to comply. Such aberrant cases are often the only ones in which discovery rulings form the basis for an appeal. Routine decisions regarding the timing and limits of discovery typically do not make their way through the appellate courts for decision. As a result, the appellate decisions that are issued do not give trial courts guidance regarding the parameters and correct interpretation of the Discovery Rules, or the use of available judicial management tools.

- Appellate decisions involving a challenge to the trial court's discovery rulings frequently invoke the language in the Rules embodying a "broad spirit" of discovery to overturn a trial judge's efforts to limit discovery.[32] Thus, absent a change in the Rules, the available judicial management tools may continue to be invoked far less often than necessary to achieve the goal of Rule 1.

- Ad hoc judicial management via case-by-case resolution inexorably forces litigants to approach cases from the "lowest common denominator" perspective. Private litigants, unable to predict which decisional rule might apply to their case, must conform their discovery responses to the broadest rule. As just one example, legal publications are littered with declarations that litigation holds are automatic and mandatory in every case following the recent *Pension Committee* opinion.[33] This is so despite the fact that this Committee amended the Rules with respect to electronic discovery only four years ago and did not choose to put such an express obligation in the Rules.

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[31] *See generally* Stephen Alan Childress & Martha S. Davis, 1 Federal Standards of Review § 4.01, 4-2 (3rd ed. 1993).

[32] *See, e.g., Burns v. Thiokol Chem. Corp.*, 483 F.2d 300 (5th Cir. 1973); *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007); *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991).

[33] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs.,* No. 05-9016, 2010 U. S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 15, 2010).

- Litigants' incentives are fundamentally misaligned in a system where all of the costs of discovery are borne by the responding party. Requesting parties gain tactical advantage from broad requests. This is especially true in the era of electronic discovery, where even facially reasonable requests threaten litigation costs that force resolution of disputes on bases other than the merits. Similarly, requesting parties need not make a reasoned decision respecting the marginal utility of their requests. The "respondent pays system" begets the broadest possible discovery demands which result in substantial costs but pose limited prospects of uncovering useful information. Indeed, as studies presented at the Duke Conference show, as many as 1000 pages of documents are produced for every page that gets marked as a potential trial exhibit.[34]

C. The Need for Reevaluation of Key Federal Civil Procedural Rules

The Rules Committee has wrestled with the systemic problems posed by the explosion in the amount and complexity of civil litigation for almost thirty years. It has amended the Rules repeatedly and attempted to finely balance the scales. It has looked to judges to get more involved and for litigants to shoulder more of the burdens of making the system work. But the concerns of the Advisory Committee from 27 years ago remain and, indeed, are more pronounced and compelling than ever. It is time to recognize the limitations of judicial management, cooperation and good intentions. The incentives of the federal civil justice process should be realigned, through Rules that impose realistic and definite requirements on pleadings, limits on discovery, guidelines for preservation of information, and standards for allocating costs. Nothing short of such systemic change will fulfill the promise and premise of the just, speedy and inexpensive resolution of civil disputes.

V. Solving Systemic Problems Codified by the Current Federal Civil Rules

A. The Rules Should Implement the Pleading Standard of *Twombly* and *Iqbal*

Pleading should not allow litigants to defer identification of issues and even claims until after discovery, allowing frivolous cases to impose unwarranted and costly burdens on the courts and litigants. Currently, Rule 8 imposes no meaningful hurdle to instigation of a civil action that automatically imposes tremendous burdens on a defendant to preserve extensive information potentially relevant to a claim sketched out only in broad allegations. Discovery often proceeds without any judicial determination as to the facial sufficiency of the claims asserted, and thus without any tether to constrain the substantial consumption of time and resources discovery entails.

In complex litigation, the consensus has been to require more particular pleading standards so that cases do not proceed to discovery unless the allegations meet a certain manageable threshold of particularity and plausibility. Examples include: Rule 9(b), the Ninth Circuit Judicial Conference's 1955 proposal, Admiralty Rule E(2)(a), *Leatherman and Swierkiewicz*, the Private Securities Litigation Reform Act, the "Y2K" Act, and Local Patent Rules.[35] In each of these instances, the perception that litigation became too costly, complicated, burdensome, and underutilized was met with proposals to require greater specificity in pleading as a cure. Applying that same discipline to the full range of civil cases filed would achieve efficiencies while imposing only slight (and justifiable,

[34] Litigation Cost Survey of Major Companies at 3.
[35] *See* White Paper at 10-18.

reasonable) burdens on legitimate litigants.

We propose amendments primarily to Rule 8 – but also to Rules 9, 12 and 65.[36] These amendments implement the pleading standards currently in successful and non-controversial use in many categories of cases and apply them to all civil actions. Our proposal also includes a stay of discovery, a procedure that has proved successful under the Private Securities Litigation Reform Act, pending resolution of a challenge to the sufficiency of a pleading through a motion to dismiss, for more definite statement, or for judgment on the pleadings. The essence of our proposed amendment would implement the *Twombly-Iqbal* standard as follows: ". . . a short and plain statement, **made with particularity,** of **all material facts known to the pleading party that support** the claim**,** ~~showing~~ **creating a reasonable inference** that the pleader is **plausibly** entitled to relief . . . ." and would define "material fact" as **". . .one that is necessary to the claim and without which it could not be supported."**[37]

B. Clear, Concise and Limited Discovery Rule Amendments are Required

With the expansion of the scope of discovery and elimination of good cause for document requests in 1970, discovery has expanded exponentially. The discovery rules alone have been amended at least seven times since 1970, but these amendments have not kept pace with the explosion of information sources and litigation. Abuse, misuse, costs, and burdens of discovery have reached new heights.[38] The reasons for these excesses are myriad but include the breadth of permitted discovery coupled with the lack of specific guidance on discovery limits in the Rules themselves; unrealistic reliance on judicial intervention to control discovery; and a failure to recognize and enforce the principle of proportionality in discovery.[39]

Judicial intervention, a long-favored mechanism for limiting discovery, has proved insufficient under the current rules, as discussed above. No matter how well intentioned, competent, and hard working judges may be, judicial management alone cannot fix the problem. The Rules and, in particular, the Discovery Rules, are designed to be self-executing – to be applied by the parties to guide their actions and avoid disputes. When that framework fails to resolve disputes, the Rules do not provide judges enough concrete tools to manage and to limit discovery effectively. Moreover, reliance on judicial intervention arguably contributes to the rising costs of discovery, as parties are forced into court to resolve disputes rather than resolving the issues themselves in accordance with a self-executing framework provided by the Civil Rules.[40]

[36] *See* White Paper at 6-10.
[37] *See* White Paper at 8-10.
[38] *See* White Paper at 20-23.
[39] Moreover, plaintiffs' ability to externalize costs to defendants results in perversely incentivizing and subsidizing counterproductive behavior. See, *supra* 4-5; Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory* (May 10, 2010), available at http://ssrn.com/abstract=1621944.
[40] *See* White Paper at 20-25.

The existing Rules lack sufficient clarity, thereby failing to define adequately the reasonable borders of discovery in general and electronic discovery in particular. A major contributor to this lack of clarity is the all-too-frequent incorporation of unduly broad and ambiguous standards to govern and limit discovery. Indeed, on occasion, the Rules fail to include any standards at all. Rule 26(b)(2) provides a particularly salient example of ambiguous standards, as explained by the ACTL/IAALS Report: "The Rule, in conjunction with the potential for sanctions under rule 37(e), exposes litigants to a series of legal tests that are not self-explanatory and are difficult to execute in the world of modern information technology."[41] What is required is to limit the scope of discovery to non-privileged, proportional information that would support proof of a claim or defense.[42]

Rule 34, on the other hand, is a rule without limits, at least those necessary to adequately control increasingly severe discovery problems. Despite this rule's major role in the expansion of e-discovery, specific and concrete limitations as to the number of requests or custodians allowed have not been established. Instead, parties make all manner (and number) of broad and disproportionately burdensome requests, leaving the producing party with limited recourse, namely seeking expensive and often delayed judicial intervention subject to the interpretation and application of ambiguous and unhelpful standards. Concrete, self-executing standards and limitations must be incorporated in the Rules to require parties to efficiently (and inexpensively) resolve common issues amongst themselves.[43] Proposed limits include: limiting document requests to 25 in number, to 10 custodial or information sources, and to two years prior to the complaint in time.[44]

The Rules fail to highlight the value of proportionality and its purpose, namely to "guard against redundant or disproportionate discovery"[45] and accordingly parties and courts have been slow to embrace the concept. Although proportionality traditionally has been honored more in the breach than in the observance, recently it has experienced something of a renaissance – at least in concept. Proportionality, for example, was a major pillar of the ACTL/IAALS proposed principals for addressing discovery.[46] Moreover, Judge Rosenthal recently recognized the integral nature of proportionality and its tie to the proper scope of discovery in *Rimkus Consulting Group, Inc. v. Cammarata.*[47] With this recent rejuvenation of proportionality in mind, the Committee must seriously consider its specific incorporation into the Civil Rules.[48]

C. The Rules Must Address Preservation of Information

The failure of the Rules (and particularly the 2006 e-discovery amendments) to define a litigant's duty to preserve electronically stored information (ESI) creates uncertainty for litigants that often

[41] Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 14 (2009)
[42] *See* White Paper at 23-30, where we propose that the scope of discovery be "limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C)." *Id.* at 23.
[43] *See* White Paper at 30-31.
[44] *See* White Paper at 31-32. We also propose specific presumptive limits on certain categories of electronically stored information. *Id* at 25.
[45] Note, Fed. R. Civ. P. 26(b) (1980).
[46] ACTL/IAALS Final Report at 7.
[47] 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).
[48] *See* White Paper at 30-31.

results in satellite litigation unrelated to the merits of the underlying case. Courts decide disputes about a party's compliance with preservation obligations on a case-by-case basis rather than according to a standard clearly specified in the Rules. A litigant that missteps as to a "litigation hold" or some other aspect of the complex process of information retention can easily find itself defending allegations of obfuscation and misconduct unrelated to the merits of the underlying dispute.[49]

Absent a clear Rules-based standard, a risk averse litigant may incur extraordinary expenses in an attempt to meet the most stringent requirements articulated by the handful of federal judges who take admirable care to articulate their view of the proper scope of a litigant's preservation obligations. The perceived alternative is to face costly sanctions for failing to preserve ESI. Indeed, the mere allegation that a litigant has failed to comply with *ad hoc* preservation obligations imposes substantial burdens – including reputational harm. There is no logical reason to continue to impose this burden on American companies that, by the very nature of their business, can expect to litigate frequently in federal courts. This is an area that cries out for a uniform national standard.

Providing rules directly addressing preservation will permit courts to approach the effects of any willful failure to preserve information in a more structured and uniform procedural environment. We propose amendments to Rule 37(c) to permit spoliation sanctions only where willful conduct for the purpose of depriving another party of the use of the destroyed evidence results in actual prejudice to the other party.[50] A clear rule is needed to counteract the inconsistency of requirements established by various courts, some of which even have imposed sanctions for negligent preservation.

Preservation should also be directly addressed in Rule 26.[51] Ultimately the ancillary litigation related to "litigation holds" is a product of an alleged failure to preserve ESI that would have been subject to disclosure in litigation. Proposed Rule 26(h) and related amendments will restore uniform national procedures that are designed to introduce certainty into preservation decisions by parties and consistency in analyses and decisions by courts.

D. The Rules Must Confront Runaway Discovery Costs

Discovery costs continue to spiral upward because past amendments to Rule 26 have not tackled a core design flaw of the Federal Discovery Rules: unless the parties share discovery burdens (including costs), incentives to conduct targeted and efficient discovery are absent. In litigation involving two similarly situated litigants with equal resources, incentives to conduct reasonable discovery exist to avoid so-called "mutually assured destruction" by discovery. In many other cases, however, (particularly asymmetrical cases), no such incentives exist and the Rules provide none. Instead, the current Rules allow discovery to be used as a weapon in the requesting party's arsenal to impact the outcome of a case irrespective of the merits. The party with a limited risk of having to produce large volumes of data requests substantial volumes of information (including information that can be very expensive to collect and to review) in an effort to force opposing parties to consider settlement. Rather than deciding to settle after a fair and practical examination of the merits of a particular case, the responding parties instead opt to settle to avoid expensive and protracted

[49] *See generally* White Paper at 38-45.
[50] *See* White Paper at 38-39.
[51] *See* White Paper at 36-37.

discovery. Early settlement demands often reference the high cost of discovery as a basis to encourage settlement and to avoid the expenditure of hundreds of thousands or millions of dollars in discovery costs.[52]

For that reason, we propose an amendment to Rule 26 that would require that each party pay the costs of the discovery it seeks.[53] A requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to provide relevant information from the most cost-effective source. Such an amendment would eliminate the illegitimate use of discovery requests to force settlements without regard to the merits of a case, as a party that pays for discovery will have greatly reduced incentives to make overly broad requests. A requester-pays rule would force litigants to analyze the merits of their claims and defenses at an earlier stage of litigation, rather than waiting until after months of unfocused discovery to "figure it all out." Such a rule would also encourage cooperation between parties to focus discovery to obtain only that information necessary for the just and full adjudication of the issues.[54] More importantly, as discussed above, requiring parties to bear the true cost of their behavior is the best general solution to optimizing behavior.[55]

VI. CONCLUSION

LCJ, DRI, FDCC, and IADC respectfully submit this Comment in the hope that it will assist the Committee in sorting through the many issues and ideas presented at the 2010 Litigation Conference for improving the Rules and practice in the Federal Courts. We commend the Committee for undertaking the present review of the Federal Civil Rules and for inviting our participation in this important work. We look forward to continued participation in the Committee's efforts.

Respectfully submitted,

Lawyers for Civil Justice

DRI - The Voice of the Defense Bar

Federation of Defense and Corporate Counsel

International Association of Defense Counsel

[52] *See* White Paper at 55-56.
[53] *See* White Paper at 56-57.
[54] *See* White Paper at 58-60.
[55] This proposal will of course be met with the objection that impecunious individuals will be unable to bring law suits. The reality of litigation today includes an enormously well financed and entrepreneurial plaintiff's bar and any plaintiff with a reasonably plausible claim of liability can find competent counsel who is more than willing to take the case. Requiring parties to bear the costs of their discovery requests is a more just result as it will offset the changes in litigation practice that have led to socially perverse consequences. See, Redish, *supra* note 39 at 6-7.