STATEMENT OF LAWYERS FOR CIVIL JUSTICE

SUBMITTED TO THE

US HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
HEARING: THE COSTS AND BURDENS OF CIVIL DISCOVERY

DECEMBER 13, 2011

Overview

Lawyers for Civil Justice respectfully submits this statement on behalf of its membership to the U.S. House Judiciary Subcommittee on the Constitution for inclusion in the record of the December 13, 2011 hearing on "The Costs and Burdens of Civil Discovery." LCJ is a national coalition of counsel for major American corporations; associate member law firms; and the leadership of DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel, which collectively represent more than 20,000 civil defense attorneys nationwide. Our mission is to promote excellence and fairness in the civil justice system and to ensure the just, speedy, and inexpensive determination of civil cases.

We commend Chairman Trent Franks, the members of the Constitution Subcommittee and the full Judiciary Committee for holding this hearing. The important issues raised by this hearing are currently being debated by the U.S. Judicial Conference Committee on Rules of Practice and Procedure, and we trust that this Committee will meaningfully address the adverse impact that the costs, burdens and inefficiencies of the current federal legal system have on our economy. We respectfully submit that the Rules Committee should take bold action to address the many problems that currently plague the civil justice system and to broadly reexamine the system of justice that the American College of Trial Lawyers (ACTL) and the University of Denver Institute for the Advancement of the American Legal System (IAALS) have characterized as fundamentally flawed and "in serious need of repair." We know from these studies and many others that society's goals and objectives are not being served by the current civil justice system. In fact, the system's perverse effects are weakening our economy, our social structure and the global competitiveness of American companies.

From our perspective, quite simply, the current litigation paradigm of imprecise pleadings; overbroad and inefficient discovery; unclear and inconsistent preservation requirements; and unbalanced allocation of costs undermines the "just, speedy and inexpensive" determination of actions. As we have explained in a series of formal comments submitted to the Advisory Committee on Civil Rules, which are incorporated throughout this statement as hyperlinks, cases are being settled, discontinued, or not brought at all because of inadequate pleading standards, an almost unlimited scope of discovery, catastrophically high costs and burdens of discovery and preservation of information, and inappropriate cost allocation rules.

The Need for the Rules Committee to Reexamine Key Provisions of the Federal Rules of Civil Procedure

The costs, burdens, and inefficiencies of the federal civil litigation system are varied, complex and far reaching. In May 2010, LCJ submitted its White Paper: Reshaping the Rules of Civil Procedure for the 21st Century, Submitted to the 2010 Conference on Civil Litigation, Duke Law School on behalf of Lawyers for Civil Justice, FRI – The Voice of the Defense Bar, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, 050210 to the 2010 Duke Law School Litigation Review Conference sponsored by the Judicial Conference Rules Committee.

The White Paper summarizes the consensus of LCJ's corporate members, the defense bar, and its more than 35 drafters (all experienced trial lawyers) regarding the systemic problems presented by litigation in the federal courts and proposes meaningful Rule amendments to help solve these problems. The White Paper calls for a comprehensive reevaluation of the existing Rules governing litigation in the 21st century to include: (1) the redefinition and rebalancing of the interrelationship between pleading and discovery, (2) reevaluation of the premises and focus of all discovery and further refinement of the treatment of e-discovery, (3) development of clear document preservation and spoliation standards, and (4), deterrence of runaway litigation costs with reasonable cost allocation rules.

More specifically, The *White Paper* is bold in its recommendations in four areas:

- **Pleadings** - It recommends implementation of the *Twombly* and *Iqbal* pleading standard, demonstrating from a historical perspective the need for pleading standards appropriate to modern litigation in the information age. See Martin H. Redish, Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure, Northwestern University School of Law, Working Paper (2010) (The "plausibility standard" of *Iqbal* and *Twombly* is fully consistent with the text and intent of Rule 8(a)'s pleading standard and an amendment expressly adopting the language of the plausibility standard should be adopted, in order to put an end to the doctrinal confusion that has often plagued lower court decisions interpreting the rule.)

- **Limited Discovery** - The White Paper proposes a rule that refocuses the scope of discovery on the claims and defenses in the action. It also requires that discovery requests be in proportion to the stakes and needs of the litigation and that specific categories of electronically stored information should be presumed non-discoverable in most cases. By emphasizing proportionality in discovery and placing limits on the extent of E-discovery, the paper strikes at the heart of current practices, which fuel runaway discovery costs. See Martin H. Redish & Colleen McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, George Washington Law Review, Forthcoming (2011) (The Federal Rules' strategies to control discovery abuse are inadequate because of their inability to put an end to the problems of abusive and excessive discovery. The most effective means to do so would be to recognize that the costs of discovery are, in the first instance, appropriately to be attributed to the requesting party, rather than to the responding party. The current practice concerning discovery cost allocation should be rejected as it finds no grounding in the text of the Federal Rules.); Richard Esenberg, A Modest Proposal for Human Limitations on Cyberdiscovery, (Florida Law Review, Forthcoming, 2011), (As ESI multiplies, organizations will have to find ways to retain and have access to that information which is necessary to conduct business, i.e., to sell and design things, to hire and fire people and to do all the other things that happen in the real world and become the subject of litigation. There ought to be, at minimum, a strong presumption that the retention and retrieval policies created to manage this information outside the litigation process are likely to catch almost all the information that is relevant within it.)

- **Preservation/Spoliation** – Rules should be amended to permit spoliation sanctions only when willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence and when the destruction results in actual prejudice to the other party. The Rules should also be amended to include clear standards for spoliation of information prior to commencement of litigation, and preservation of information thereafter, in order to alleviate the enormous costs and burdens of unnecessary over preservation. See William H. J. Hubbard, "Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero." Unpublished working paper (Dec. 2, 2011) (Attached as Appendix C to Prof. Hubbard's Written Statement), (Rules amendments defining reasonable preservation obligations are needed in light of the unique place that preservation occupies in the discovery process. Because preservation occurs at the earliest stages of litigation, often before a lawsuit is even filed, parties must make preservation decisions in an environment of great uncertainty and sparse information. It identifies how the Federal Rules can better address trigger, scope, and sanctions taking into account the fog of litigation. Reliance on evolving case law will not fully address the problems facing parties.)

- **Cost Allocation -** 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 the truly critical evidence is the best way to achieve that purpose. The Rules should, therefore, be amended to require that each party pay the costs of the discovery it seeks. This will shift the cost-benefit decision onto the requesting party and therein encourage each party to manage its own discovery expenses responsibly. See Ronald Allen, How to Think About Judicial System Errors, Costs and their Allocation, 071211 (Florida Law Rev, Forthcoming (2011), ("Asymmetric costs, by contrast, cause skewed cost allocation and provide the opportunity for strategic exploitation. By contrast, placing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."); Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L.J. 561 (2001), ("[F]ashioning procedures without any serious concern for the avoidance of economic waste and the attainment of economic efficiency inexcusably drains society's resources and violates the dignity of the litigants whose personal resources are unduly affected." *** "…the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger expense to be borne by the opponent, the bigger the incentive to make the request."); **Martin H. Redish & Colleen McNamara, *op. cit. supra*** (When discovery costs are imposed on the producing party, an externality is created for the requesting party, who lacks any incentive to make economically efficient discovery choices. Principles of constitutional due process dictate that the discovering party, rather than the responding party, pay for discovery costs, at least where the defendant is the responding party. Otherwise, a defendant will be required to pay a benefit to the plaintiff on the basis of nothing more than plaintiff's unilateral, unproven allegations of liability.)

Adverse Economic Impact of Civil Litigation

The adverse impact of civil litigation costs on the nation's economy is acute. Some of these costs are highlighted and explained in LCJ's Comment to Standing Committee Supplementing the Duke White Paper 060810. U.S. Companies, seen by many as "deep pocket defendants," cannot absorb litigation expenses as readily as some would assume without placing themselves at a severe economic disadvantage. More importantly, corporate defendants are not the only ones on which the burden of these excessive litigation costs falls; inevitably, many of these costs will be passed on to consumers and taxpayers in the form of higher prices, decisions to forego promising areas of research, the withdrawal of products and services from the market, and the relocation of jobs and other corporate investments to jurisdictions with more efficient, cost-effective civil justice systems.

This important finding of the White Paper is supported by findings later submitted to the 2010 Duke Conference on Civil Litigation by LCJ, CJRG and the Chamber ILR in the FRCP Litigation Cost Survey of Major Companies as well as other studies such as the Letter from Professor Henry Butler to The Honorable Lee H. Rosenthal, *et al*., (June 2, 2010), ("…for each $1 of profit earned, on average survey respondents spent between $0.18 and $0.31 on litigation costs."), and Professor William H. J. Hubbard: *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group Sept. 8, 2011); and Professor William H. J. Hubbard: Letter to the Hon. David G. Campbell (Nov. 3, 2011) ("Given the thousands of large companies that face significant preservation costs, one can extrapolate from this number to estimate that the savings for all companies would be in the billions of dollars.")

The Need for Fundamental Revision of the Discovery Rules

LCJ's White Paper demonstrates that, notwithstanding the history of many amendments to the Rules of Civil Procedure, the current patchwork of rules is simply not working. As history has shown, numerous modest amendments to the Rules governing discovery have achieved little in addressing the problems that have long plagued the discovery process. The system needs fundamental reforms, more than just "tinkering at the edges," in order to improve the administration of justice in the federal courts.

There has been ongoing debate surrounding the discovery rules for more than a generation. Federal Rule of Civil Procedure 26 has been amended no less than four times. Although each amendment attempted to address the ongoing problems of discovery costs, burdens, misuse and abuse, these remain major culprits in the dissatisfaction with our nation's civil justice system. Accordingly, bold action is required to address this problem that has long-haunted rule makers, litigants, practitioners and judges. LCJ submits that now is the time for the Rules Committee to prescribe stronger medicine – meaning primarily the narrowing of the scope of discovery to the claims and defenses in the case.

On September 2, 2010, LCJ reinforced its position that the current extremely broad discovery rules undermine the system's ability to bring about the just, speedy and inexpensive resolution of

cases by submitting to the Civil Rules Advisory Committee the Comment A Prescription for Stronger Medicine: Narrow the Scope of Discovery (September 1, 2010).

That Comment was followed by another titled A Prescription for Stronger Discovery Medicine:The Danger of Tinkering Change and the Need for Meaningful Action (August 18, 2011), in which we pointed out that the problems of discovery will continue to grow and expand until they are addressed head on and once more urged the Rules Committee to adopt meaningful Rule Amendments such as the following:

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to "any non-privileged matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C).

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 discovery absent a showing of "substantial need and good cause" which, in turn, could be used to inform determinations of what constitutes "not reasonably accessible data" where the rule does not specifically address a particular type or category of electronically stored information.

Third, 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 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 serve to address a myriad of discovery problems by reducing the volume of information subject to discovery (a major contributor to cost), providing a clearer standard of relevance, and lessening the likelihood of satellite litigation on discovery issues.

The need for revision of the discovery provisions of the rules is urgent and immediate. In particular, parties need clear rule-based guidance to responsibly comply with unnecessarily broad and inconsistent preservation, collection, and production obligations. In the LCJ Comment The Time is Now: The Urgent Need for Discovery Rule Reforms (October 31, 2011), we explain how the premier legal system for the administration of civil justice has witnessed the complete erosion of Rule 1. Hundreds of millions of dollars are being spent by corporate litigants in America on unnecessary discovery and preservation because that is the only rational response to the uncertainty created by unnecessarily broad and inconsistent discovery, preservation, and spoliation standards that provide sparse guidance.

Preservation, Spoliation, and Other Challenges in the Changing Information Age

LCJ submitted the LCJ Comment Preservation: Moving the Paradigm, (November 10, 2010) to the Civil Rules Advisory Committee to reemphasize the ways in which the proliferation of data in the 21st Century has forced litigants to spend millions of dollars to address an unquantifiable

risk in computing systems that were not designed for litigation holds. It is clear that the costs and burdens of unnecessary over preservation of information for potential litigation are much too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating. High profile sanctions decisions continue to force litigants to spend millions of dollars to address an unquantifiable risk in computing systems that are designed for a myriad of business purposes, but not for litigation holds.

Furthermore, LCJ's members recognize that technology has dramatically changed the way individual litigants and companies create, store and dispose of business and personal records. Unfortunately, in this new information age, complying with the preservation standards that are developing piecemeal around the country is extremely difficult for most and impossible for others. Meaningful rule amendments would, however, supply the guidance necessary to help solve the increasingly serious and costly preservation problems that our members encounter in everyday litigation.

These increasingly costly and serious problems exist not only for defendants, but for plaintiffs and third parties. There are, however, meaningful rule amendments that can supply the guidance necessary to help solve these problems consistent with the Rules Enabling Act.

Realistic Elements of a Preservation Rule

Currently, the duty to preserve is extremely broad and extends to all potentially relevant documents. As a result, the expense and burden to preserve are enormous. On April 1, 2011 LCJ offered consensus views on suggested rule language that incorporates the necessary elements of a preservation rule and spoliation standards in the LCJ Comment Preservation – Moving the Paradigm to Rule Text, to Civil Rules Advisory Committee, (April 1, 2011). We believe it is necessary to consider developing rules and standards that more clearly and pragmatically articulate the events and time at which the duty to preserve information is triggered. A rule that addresses the scope of preservation while acknowledging the overarching considerations of reasonableness and proportionality should provide clear and specific guidelines to parties regarding the types and sources of information subject to preservation. Finally, sanctions placed on a party for failing to preserve or produce relevant and material information (spoliation) should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step.

There are many recent examples that demonstrate the near impossibility of fully complying with inconsistent, common law preservation duties to which multinational businesses in particular are subjected and which adversely impact the competitiveness of American companies; the pressure that excessive costs and burdens exert on businesses to settle, rather than take their cases to court; and the ways in which the legal system's costs and burdens are restricting justice for all.

Meaningful Rule Reform is Needed Now!

We, therefore, submit that the Federal Judicial Conference Rules Committee should exercise its appropriate authority and responsibility under the Rules Enabling Act to enact straightforward

procedural rules that enable cost-efficient civil justice – clear, direct rules that will help curb systemic excesses and that will reduce costs and eliminate unnecessary litigation burdens.

Respectfully submitted,

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