PUBLIC JUSTICE
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Via Electronic Mail to rules_comments@ao.uscourts.gov

COMMENTS OF PUBLIC JUSTICE, P.C. AND THE PUBLIC JUSTICE FOUNDATION

TO THE ADVISORY COMMITTEE ON THE CIVIL RULES

ON THE DRAFT PROPOSALS TO AMEND DISCOVERY RULES

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I. PUBLIC JUSTICE AND OUR INTEREST IN THE DISCOVERY RULES

Public Justice, P.C. is a national public interest law firm dedicated to using litigation to advance the public good. Through lawyers and staff in our Washington, D.C. and Oakland, California offices, we participate in litigation involving public interest issues across the country. The Public Justice Foundation is a not-for-profit 501(c)(3) charitable membership organization that supports the work of Public Justice, P.C. and educates the public about the role of the civil justice system in the public interest. Most of our approximately 2,000 members are experienced litigators who represent individuals in a wide variety of cases against corporations. We have members in every state. Public Justice, P.C., and the Public Justice foundation are dedicated to assuring that the justice system remains available to protect of individuals from wrongs, regardless of their financial stature.

Because we believe courts must be available to individuals to redress wrongs, we are dedicated to the sound development of discovery law. Our system demands that parties provide the whole truth to help assure litigation produces fair outcomes based on facts, thus engendering confidence in the system. This approach replaced a system the Supreme Court compared to "blind man's buff," a game in which blindfolded children grasp in the dark.[1] Under the former system of "trial by surprise," the party which controlled the evidence (which is typically the corporation in a dispute between an individual and a corporation) had an enormous built-in advantage, which led both to unfair results and gamesmanship.

Discovery allows individuals to get a fair trial against powerful institutions that have wronged them. Without a system that assures full and fair access to evidence,

[1] Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

certain kinds of cases simply could not exist. This includes any case where an individual sues an entity that controls the key relevant information. Examples include employment and other discrimination, civil rights, product safety, securities/banking/mortgage fraud, and toxic tort litigation.

In this 75th anniversary year of the federal discovery rules, we hope all will share our commitment to the discovery system and assuring it works as intended. We appreciate your consideration of these comments on the draft proposed changes to rules 1, 4, 26, and 30-36 reflected in the Advisory Committee's December 5, 2012 report. These comments do not address other proposals, including potential amendments to Rule 37. We may address other such potential amendments in future comments.

II. SUMMARY OF COMMENTS

These comments first discuss principles that should be taken into account when considering rule changes and then address specific draft rule changes. We have two overriding concerns. First, the far-reaching changes proposed to Rule 26, including deletion of key language in the definition of the scope of discovery, and cost-shifting language proposed for Rule 26(c) are not only unneeded, but will also undermine the guidance provided by decades of judicial experience and will thus increase motions practice. Second, further reducing the numeric limits on depositions and written discovery will also be counterproductive. The changes to Rules 26 and the numeric limits will predictably jeopardize the effectiveness of discovery in assuring fact-based decision-making in far too many cases, with little benefit in efficiency. Available data does not support making such substantial changes in the rules. The more prudent course would allow rules and systems already in place including changes made in the last decade

to continue to develop. As the Advisory Committee has recognized, rule changes are only one way to effect changes and improve efficiency in the justice system. The rules discussed here are neither the problem nor the solution.

Your efforts, and your consideration of these comments, are greatly appreciated.

III. SOME PRINCIPLES TO BE CONSIDERED IN EVALUATING THE PROPOSED RULE AMENDMENTS

Some basic principles should be considered when evaluating rule change proposals, including the following.

1. **Full and fair access to evidence through discovery leads to a civil justice system that is based on truth, to fact-based conflict resolution, *and* to efficiency.** These were the reasons for adopting the discovery rules 75 years ago, and they remain true today.[2] Indeed, pre-trial development of facts is the reason parties are able to settle the vast majority of cases, justly, without the need for trial. Costs of discovery to the system and the litigants must be measured against these benefits and savings.

2. **Electronic storage of data makes information *cheaper* to find, search, access, and produce, not more expensive.** After all, that is why we use ESI. The premise that electronic data storage makes discovery more burdensome and expensive is unfounded. One needs to remember the days of paper discovery, when lawyers responding to discovery had to go through file cabinets and boxes, sometimes in far-flung locations, and read documents page by page. Documents were hand bates stamped, multiple copy

[2] Edson R. Sunderland, *Scope and Method Of Discovery Before Trial*, 42 YALE L.J. 863, 864-65(1933). *See also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978) ("[T]he liberalization of discovery beginning in 1938 with the adoption of the Federal Rules was designed to promote the resolution of disputes . . . based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely, or at least far too late in the process to serve the fair and efficient administration of justice"); Richard A. Posner, *Economic Analysis of Law* 571 (6th ed. 2003) ("A full exchange of the information . . . enabl[es] each party to form a more accurate, and generally therefore a more convergent, estimate of the likely [case] outcome.")

sets were made, and they were boxed, and either shipped to the recipient or made available for inspection, often in a “reading room.” Requesting counsel might spend days or weeks in the reading room, skimming and reading documents one page at a time. Now, even a large corporation’s worldwide data are typically accessible remotely, searching can be done electronically, and 3 terabytes of information - enough to hold millions of documents – fit on a $130 hard drive. The recipient can often sort through the materials on the disk by reading or electronic searching. Metadata may show who generated, sent, and received a document, and when, without the need for depositions.

There are issues that must be addressed with E-discovery, and there are expenses involved in adjusting to new data storage methods. More “documents” and data are generated and stored since it is so cheap and easy to do so. Also, the transition to systems for efficiently accessing data has a cost. However, businesses need to work through such issues not just of the sake of the civil justice system, but because they need to access stored data for business purposes. These transitional costs should not be seen as costs of discovery, but as transitional costs of the move to electronic storage of data for all business purposes, a system that will be cheaper in the long run.[3]

Similarly, while the shift to discovery of electronic evidence has generated a certain amount of motions practice, as courts and lawyers become more familiar with these issues and technologies they are increasingly able to develop more efficient

[3] See the discussion of this issue, and of the fact that as companies gain experience with their electronic data systems for both business and litigation purposes, costs come down substantially, in Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 Fed Courts L. Rev. 2, 39-47 (2011).

approaches to apply discovery principles to new data formats. As issues are settled through case law, such litigation will decrease.[4]

3. **Discovery is working, and working efficiently, in the vast majority of cases.** As recognized by the Advisory Committee in its December 5, 2012 report to the Standing Committee, even at the Duke University conference that apparently gave rise to these proposed rule changes, "[m]ost participants felt that these goals [cooperation, proportionality, and early hands on case management] can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available." Advisory Committee on Civil Rules Report to the Standing Committee at p. 128 (Dec. 5, 2012). The report then cites the empirical work of the Federal Judicial Center, which in fact supports the conclusion that the rules are working. Indeed in its presentation at the Standing Committee's January 2013 meeting, the Federal Judicial Center Research slide presentation showed that the large majority of practitioners believed discovery costs were in fact proportional to the stakes in the litigation. This presentation mirrors the more detailed findings of Federal Judicial Center ("FJC") researchers that "the stakes in litigation are, empirically, the best predictor of costs" and that "in most federal civil cases, the costs appear to be proportionate to the monetary stakes."[5] Indeed, the FJC researchers found scant evidence in the empirical data that alternative discovery rules

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[4] See *Id.* at 23-25, citing a 2009 Gibson, Dunn & Crutcher review of e-discovery case law and concluding that "[a] notable decrease in the number of cases involving disputes over the format of e-discovery productions suggests that standards and uniformity are developing and becoming commonly understood and utilized."

[5] Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke Law J. 765, 768.

would result in lower costs or shorter cases, leading them to question whether the rules are the cause of the perceived problem of costs.[6]

The FJC researchers also discussed the apparent basis of the conclusion that litigation costs are increasing, citing reported increased litigation costs for large companies.[7] However, the data presented apparently does not show what portion of those costs relate to discovery, and of discovery costs, represents efforts aimed at *providing* discovery and what portion represents work aimed at *fighting to avoid* disclosure of evidence. In the experience of many of the Public Justice Foundation's members, many corporations devote an astonishing amount of resources to attempts to hide key facts and documents in cases. The fact that many corporations are willing to pay their lawyers huge sums to try to keep evidence from coming out is *not* a basis for changing the rules to further restrict discovery.

4. **Discovery rules are meant to be procedural and not to tip the scales in favor of one class of litigants or another in terms of ability to vindicate substantive rights.** Substantive changes in the law should be left to legislatures and to courts through case decisions. Rule changes should not be made for the purpose or with the effect of helping corporations and hindering individuals in cases such as those discussed in the introduction to these comments, in which an individual sues an entity that controls most of the liability evidence.

There are two types of discovery abuse: overuse in requests, and evasion in responses. Most of the discovery rule changes that have been adopted since the early 1980's address only perceived discovery overuse. The one major reform to counter

[6] *Id.*
[7] *Id.* at 770-71.

discovery evasion was the 1993 automatic disclosure requirement, but that was watered down in subsequent amendments to make it ineffective as a tool to counter discovery evasion. Thus, caution must be exercised where most of the proposed amendments ratchet back the ability to discover relevant evidence, particularly since this ratchet has operated almost entirely in one direction, that favoring corporate defendants.

5. **Rule changes should not be made without very good reasons, as changes create new legal controversies and thus waste resources and undermine developing case law.** The importance of this point cannot be over-stated. The experience of our members, like the legal community generally, is that each change in the Federal Rules triggers an enormous amount of ancillary litigation as zealous advocates test the exact application and parameters of every new word and punctuation mark.

IV. COMMENTS ON SPECIFIC PROPOSED RULE CHANGES

A. Rule 26(b) should not be changed to substantially rewrite the definition of discovery relevance. The most far-reaching proposed change is the wholesale re-write of Rule 26(b)(1) relatively soon after the very significant amendment to the rule in 2000. The draft amendment deletes critical language that has been in the rule for a half century, and replaces it with a duplication of language already in Rule 26(b)(2). Such a change is wholly unwarranted, and eliminates one of the most important and well-understood phrases in the discovery rules. It will be used to promote discovery evasion, and will result in a new wave of motions practice even as the law is being settled on the previous Rule 26(b) language changes.

The proposed amendment would delete the sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the

discovery of admissible evidence."[8] This language embodies the concept at the heart of discovery relevance, and recognizes what we all know from practice to be true: finding trial evidence often requires following a trail through other evidence. It is not hyperbole to suggest that deleting this cornerstone phrase will likely harm a substantial number of individuals who have valid legal claims. Moreover, Public Justice respectfully suggests that this fairly radical proposal – eliminating language that has been cited many thousands of times and is a cornerstone of the current Federal Rules scheme – will so dramatically aid one type of litigant (corporate defendants) and harm another type of litigants (individuals who have valid claims under the tort, civil rights, environmental and consumer protection laws), that it will undermine confidence in the rules themselves and the process of how they are amended.

We also do not see any reason to copy a provision already in Rule 26(b)(2), and duplicate it in 26(b)(1). It is unclear what the effect of repeating this language in adjacent paragraphs will be, so it is predictable that a substantial amount of time and money will be spent on motions seeking to answer that question. And should district courts reach answers that are not absolutely the same in every nuance, those divisions will surely spur further rounds of litigation. Some have suggested the move could be seen to switch the burden of proof on issues of proportionality to the requesting party. Public Justice strongly believes that burden should not be shifted, and for support for this point we urge that close attention be paid to the thoughtful comments on this point submitted by John Vail of the Center for Constitutional Litigation.

[8] We strongly disagree with the language of the Committee's December 2012 report that states a concern that "[t]oo many lawyers, and perhaps judges, understand the rule to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit or relevant information may be uncovered." Our large membership has enormous experience in litigating discovery issues in every federal district court in the U.S., and we have not encountered the extreme attitude described in this passage.

In practice, if this change is adopted, objections based on proportionality will be added to the boilerplate objections routinely used. A new layer of expense and battle will be added to a great many routine requests for information that has heretofore largely been produced without excessive cost or controversy.

B. The Change to Rule 26(c), encouraging deviation from the longstanding general rule that the party that controls the evidence bears the cost of bringing it forward, is unnecessary and unwarranted, and raises serious access to justice issues. The longstanding understanding that underlies the rules has been that the party in control of documents and information is in the best position to produce them. Shifting the expense to the requesting party, which has no control over the way the responding party chooses to maintain its information, facilitates discovery evasion and encourages producing parties to generate inflated estimates of the cost of making evidence available. If the rules create incentives for parties to have systems that make it far more expensive to locate and produce evidence, the effect will be perverse and counterproductive. One author of these comments has faced multiple situations in which parties responding to either discovery requests or subpoenas have presented wildly inflated cost estimates in seeking a protective order, and many other attorneys report the same thing. The emphasis on cost shifting, which should be the rare exception and not the rule, also creates incentives for an entity to make it more expensive and difficult to access its own archived information, rather than using technology and practices that make such retrieval quick and easy. This increases the cost of discovery while decreasing its effectiveness in uncovering relevant information.

As discussed, the actual empirical evidence – the data as opposed to the statements made by attorneys who have a general practice of commenting to and lobbying the members of the rules committee – establishes that discovery in the vast majority of cases is not disproportionately expensive, and the courts already have tools for controlling costs in the very small percentage of cases in which there are problems requiring limitations or cost shifting.

C. New numeric limits on written requests and depositions are unwarranted. As discussed, the data do not show the need for changing the numeric limits on discovery requests. Indeed, changing the limits in a way that makes them too low in most federal cases seems counter-productive. Experienced judges and litigators know one cannot judge discovery requests based on numbers alone. *The quality of requests and responses is much more important in terms of controlling discovery abuses than the quantity.* As recognized by the Advisory Committee and others, judicial involvement in discovery planning and disputes is the key to curtailing abuses. Arbitrarily low presumptive limits will not aid this goal. To the extent they leave important questions unanswered pre-trial, artificially low numerical limits will harm the truth-finding function of discovery and create inefficiencies. Where facts are not fleshed out pre-trial, issues will not be narrowed and cases will not be settled, or settled fairly on the merits, and trials will be extended. Unrealistically low numeric limits on written discovery will encourage broad, compound, less specific requests, *sacrificing quality to get a small reduction in quantity.* Limits set too low for most cases will also lead to motions as parties are forced to seek leave just to engage in typical, fair, non-burdensome discovery in typical cases.

Anyone who has taken or defended depositions knows both the questioner and the deponent control the length. A hide-the-ball deponent can easily use a four-hour limit to thwart full disclosure. Economic incentives, the current presumptive limits, and the availability of court intervention are adequate under the current rules to prevent deposition overuse in the vast majority of cases.

Similarly, decreasing the number of interrogatories from 25 to 15 is unwarranted and not an effective way to curtail abuses. Is there any meaningful empirical evidence, going beyond the realm of anecdote and assertion, that establishes that the already limited 25 interrogatories leading to significant excess costs in a substantial number of cases? Our canvas of the relevant literature has failed to identify such evidence.

Moreover, we respectfully suggest that the focus on a quantitative approach will create incentives that lead to poorer (and therefore less efficient) legal practice. Twenty-five clear and discrete interrogatories are far preferable to 15 broad, less specific requests. Limiting interrogatories to 15 will likely result in a first set of, for example, 10 extremely broad requests, with only 5 interrogatories held in reserve for follow-up. Experienced practitioners would rather reply to 25 clear and precise interrogatories than 15 general ones. While interrogatories may not be as effective as production requests and depositions in uncovering evidence and facts, a small number of interrogatories – and 25 is a small number based on practice experience – can sometimes provide a cheap and reliable way to quickly establishing basic facts. Depositions, by comparison, are expensive and require a witness to answer questions off the top of their heads. For instance, an early round of interrogatories on noncontroversial basic facts can help define,

constrict, and guide discovery. Later in the case, contention interrogatories can clarify and narrow the issues for trial.

The current rules do not place presumptive numeric limits on production requests precisely because they are generally agreed to be the most effective way of getting to relevant evidence and establishing facts. The experience of the members of the Public Justice Foundation is consistent with the best empirical evidence, which concludes that written discovery is fair and proportional in the vast majority of cases. Potentially expensive overreaching is reported in only a small portion of cases, and can best be addressed through judicial examination of requests, focusing on quality more than quantity. The way to effectively police production requests, as recognized by the committee, is through judicial involvement at conferences and hearings. Such judicial involvement creates norms as litigants come to understand what judges do and do not consider proper discovery.

Numeric limits on requests for admissions have been rejected in the past because high quality requests are an efficient and effective way to narrow the issues for trial. If 50 relevant facts can be agreed as undisputed, there is no reason to waste time having witnesses testify to these facts in discovery or at trial. Admission requests can also be the least costly and most effective way to authenticate documents and thus avoid wasted trial time. Limiting admission requests will force authentication depositions, which are expensive and require a deponent to attempt to verify the veracity and business records status of a document on the spot in a deposition room, rather than at his office over the course of 30 days.

D. We support clarification of the response obligation under Rule 34. One proposed rule amendment would clearly promote efficiency and reduce motions practice. The changes to rule 34 requiring an objecting party to state the ground for an objection with specificity reflects longstanding case law and addresses the pervasive problem of indiscriminate boilerplate objections. The further requirement that the response state whether documents or information have been withheld based on objections will save untold hours of litigant and court time. If no information or documents have been withheld, there is no reason to litigate an objection.

We suggest a change in the language of the proposed amendment, so that it would require that responses must specify the scope or categories of documents and information produced and withheld. For example, if a plaintiff's request in a product liability case seeks all prior accident information for 10 years, covering 5 vehicle models, worldwide, and the responding party objects that the request is overbroad but that documents will be produced, the response should state that the production will be limited to X years, Y models, and Z countries. That way, any dispute over the proper scope of discovery will be clearly framed. A motion to compel may be avoided altogether if the limitation is reasonable. If the limitation is unknown, a motion to compel is all but inevitable. Unfortunately, in the experience of our members, it is quite common for defendants not to specify the limitations on their responses, which can mask discovery evasion and generates a great deal of needless motions practice.

E. Notes on other rule changes. Consistent with our view that rules should only be changed when there is a clearly demonstrated need that the language change is expected

to effectively address, we question the benefit of the proposed changes to rules 1 and 16, and oppose the changes to Rule 4.

With respect to rule 1, while the sentiment of the amendment is valid, this is a longstanding rule that has served us all well. We suggest that rather than amending the rule, that a better approach might be to add a “comment” to the rule that would remind litigants that we all have a duty to comply with the spirit of the rule.

The proposed amendment to Rule 4 would halve the time for service of a complaint, from 120 days to 60. We oppose that change as both unwarranted and likely to create inefficiencies. Currently, the plaintiff who is ready to serve the complaint when the case is filed has incentives to do so. When delay occurs, it is often for good reasons that serve the cause of efficiency. For instance, if a plaintiff does not retain counsel until shortly before a statute of limitations deadline, the initial complaint may be overly inclusive of claims and parties, and the time allowed for service can be used to further investigate and amend the complaint by narrowing those claims. Delay also occurs when foreign defendants are involved that need to be either served through the Hague Convention, a time-consuming process requiring translation of the complaint, or through negotiations with a domestic entity that may arrange for service by a less expensive means. Shortening the deadline for service in these circumstances will add costs and reduce efficiency. Moreover, while delay that causes a case to be at issue longer may cause excess expense, we are not aware of data showing that delay in the commencement of the case by service increases costs to litigants or the courts. If the Committee is still

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inclined to change the rule, some reduction of less than 50% should be considered.

Thank you for your consideration of our views on these important issues.

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