ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

November 4, 2013

U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Proposed amendments to Federal Rules of Civil Procedure 26, 30, 31, 33 & 36

Dear Chairman and Subcommittee members:

Alliance Defending Freedom writes to oppose some of the proposed changes to Federal Rules of Civil Procedure 26, 30, 31, 33 & 36. Specifically, Alliance Defending Freedom opposes the changes limiting discovery because they will greatly hinder the ability of litigants to hold governmental entities and officials accountable for infringements of civil liberties.

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for freedom – primarily regarding First Amendment rights. Thus, Alliance Defending Freedom regularly represents individuals and organizations in complex, federal civil rights lawsuits against local, state, and federal government entities that violate their constitutional and statutory rights. *See, e.g., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) (challenging Affordable Care Act requirement that employers provide insurance coverage for contraceptives and abortifacients); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013) (enjoining school district policy restricting elementary student's religious expression). In light of its unique experience, Alliance Defending Freedom wishes to offer its expertise to explain how the proposed rule changes will impede litigants' ability to hold governmental actors accountable for violations of civil liberties.

Alliance Defending Freedom is opposed to the following proposed changes to the Federal Rules of Civil Procedure:

- Limiting discovery to be "proportional to the needs of the case";
- Limiting the number of requests for admission to 25;
- Lowering the presumptive number of interrogatories from 25 to 15;
- Lowering the presumptive number of depositions from 10 to 5;
- Lowering the presumptive deposition time from 7 hours to 6.

These proposed changes threaten the ability of litigants to protect civil liberties in two ways. First, making discovery "proportional" to "the needs of the case" is an extremely vague standard. Seizing on this vagueness, governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake in these cases. Indeed, governmental defendants regularly downplay the significance of

plaintiffs' freedoms to justify censorship of them. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (rejecting argument of EEOC that religious organizations had no basis for a special rule grounded in the Religion Clauses to seek a ministerial exemption from Title VII). And defendants may also use this same logic to try to limit discovery and make it more "proportional" to their mistaken valuation of constitutional freedoms. Moreover, civil liberty litigants usually cannot point to large damage awards to prove the importance of their case since they usually can obtain only nominal damages for stand-alone constitutional violations. *See Carey v. Piphus,* 435 U.S. 247, 266-67 (1978) (noting that plaintiffs are entitled to recover "nominal damages not to exceed one dollar…" for the violation of constitutional rights without other injury). Government defendants often point to this small damage award to argue that civil liberty cases are insignificant. *See, e.g., Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 764 (8th Cir. 2008) (rejecting school district's argument that student's nominal damage award on First Amendment claim was "merely technical or de minimis."). So in light of this general mindset downplaying the significance of civil liberties and civil liberty litigation, Alliance Defending Freedom is concerned that the "proportionality" limitation will be disproportionately applied to civil liberty litigants and harm their efforts to conduct discovery about important, albeit nonmonetizable, freedoms.

Second, the changes limiting the amount of discovery will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations. In civil liberty cases, the burden usually rests on plaintiffs to identify a government policy that caused the alleged violation and to prove that a particular government official was personally involved in and, in some instances, acted with a requisite level of intent to commit the alleged violation. But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork. *See, e.g., OSU Student Alliance v. Ray*, 699 F.3d 1053, 1063-79 (9th Cir. 2012) (holding university officials accountable for enforcing unwritten policy despite officials' argument that they never enforced this policy). Thus, more so than most other litigants, civil liberty litigants need extensive discovery to cut through this large governmental bureaucracy so that they can find that key piece of evidence revealing the government's improper purpose and improper policy. In this respect, by uniformly limiting discovery across the board, the proposed discovery limits stack the deck against litigants attempting to hold large governmental entities accountable. As a result, the proposed discovery limits disproportionally hinder civil liberty litigants in their efforts to uncover wrongdoing and to incentivize government entities to respect every citizen's civil liberties.

These are just some of the reasons Alliance Defending Freedom encourages the subcommittee to reject the discovery limits proposed for Federal Rules of Civil Procedure 26, 30, 31, 33 & 36. These rules as presently written strike the proper balance between efficiency and truth-seeking and still allow courts to curtail unnecessary discovery in appropriate cases. Changing this balance will only threaten the ability of litigants to protect civil liberties and to hold governmental actors accountable for wrongdoing on a systematic scale.

Sincerely,

Jonathan Scruggs
Legal Counsel

ALLIANCE FOR JUSTICE

Eleven Dupont Circle NW
Second Floor
Washington, DC 20036

www.afj.org

t: 202-822-6070
f: 202-822-6068

PRESIDENT
NAN ARON

CHAIR
ANNE HELEN HESS

November 4, 2013

The Honorable Christopher A. Coons, Chairman
The Honorable Jeff Sessions, Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Sessions:

Alliance for Justice ("AFJ") respectfully submits these comments in advance of the hearing scheduled November 5, 2013, titled "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"[1]

AFJ is a national association of over 100 advocacy organizations, representing a wide array of groups dedicated to the creation of an equitable, just, and free society. At AFJ, we support the advancement of core constitutional values, as well as the fair administration of justice through unfettered access to the courts. A number of our member organizations engage in litigation, representing the interests of those lacking the resources to represent themselves. Additionally, many of our member organizations rely on the availability of information in order to protect the public interest. AFJ member organizations, including the National Employment Lawyers Association, the Legal Aid Society, and the National Lawyers Guild, have submitted comments expressing concern with many of the proposed rule amendments.

We are worried that a number of the proposed changes to the Federal Rules of Civil Procedure will make it more difficult not only for individuals who are victims of discrimination, unfair business practices, and physical injuries to stand up for their rights in court, but also for the public to learn of corporate wrongdoing and threats to their health and safety. These proposed changes present these concerns in their own right, and especially when viewed in the broader context of existing threats to Americans' access to the courts. Our comments focus on this broader context first, and then turn to the specific proposed rules themselves.

Broader Threats to Access to the Courts

The proposed changes to the Federal Rules of Civil Procedure should not be considered in isolation; rather, they must be viewed in conjunction with other factors that are having a negative impact on access to justice. These factors include understaffed and overburdened courts; Supreme Court decisions that have limited the use of the class action device, as set forth in Rule 23; more victims being pushed into arbitration; and the heightening of pleading standards.

[1] That AFJ has limited these comments to the changes proposed to Rules 26(b), 30, 31, 33, and 36 should not be read to imply support for the remaining proposed changes to the Federal Rules of Civil Procedure.

For more than 30 years, Alliance for Justice has tracked judicial vacancies and nominations. Our goal is to ensure that our federal judiciary that is fully staffed with highly qualified judges who are committed to the rule of law. Yet today, our federal judiciary is being forced to operate at well below full strength.

As of October 24, there are approximately 91 federal judicial vacancies, fully one in ten federal judgeships, many of which do not even have nominees.[2] Consequently, many judges are faced with growing caseloads—lengthening the amount of time individuals must wait for justice. Presently, it takes an average of 25 months for a civil case brought in federal district court to reach trial.[3] In some districts, the wait is far longer; for example, in the Eastern District of North Carolina, it takes upwards of 45 months on average for a civil case to reach trial, according to the most recent data.[4] These delays pose a threat to many people's access to justice, as memories may fade, witnesses may die or disappear, and the costs become too cumbersome while victims wait for trial.

The budget sequester has only made matters worse. The funding shortfalls have forced courts around the country to downsize personnel, which in turn has led to delays in civil and bankruptcy cases. As Judge John D. Bates, the Judicial Conference secretary, wrote to President Obama in September, "Several years of flat funding, followed by the sequestration cuts that took effect March 1, 2013, have had a devastating impact on court operations nationwide."[5] The 17-day government shutdown further added to the judiciary's woes.[6]

The potential impact of these proposed rules changes is exacerbated by recent Supreme Court decisions that have threatened individuals' and small businesses' ability to have their day in court. Two recent decisions have sanctioned large corporations' increasing practice of inserting forced arbitration clauses into the fine print of employment and consumer contracts. In *AT&T Mobility v. Concepción*, the Supreme Court upheld a forced arbitration clause that barred AT&T's customers from filing a class action suit. Consequently, many litigants are now being forced into arbitration proceedings that take place in private, conducted by an arbitrator of the company's choosing, with no pre-trial discovery to unearth necessary evidence. The Supreme

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[2] Alliance for Justice, The State of the Judiciary: Judicial Selection During the 113th Congress, Oct. 24, 2013, http://www.afj.org/wp-content/uploads/2013/10/Judicial-Selection-During-President-Obamas-Second-Term.pdf.

[3] United States Courts, U.S. District Courts—Median Time Intervals from Filing to Trial for Civil Cases in Which Trials Were Completed, by District, During the 12-Month Period Ending September 30, 2012 (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/T03Sep12.pdf.

[4] Id.

[5] Letter from Judge John D. Bates, Secretary, Judicial Conference of the United States, to the President (Sept. 10, 2013), http://news.uscourts.gov/sites/default/files/Letter-President-FY14-Funding-enclosure.pdf; see also Letter from Chief Judges of 87 federal district courts to Vice President Joseph R. Biden, Jr. (Aug. 13, 2013) (noting that budget cuts "have forced us to slash our operations to the bone").

[6] Press Release, Judicial Conference of the United States, For Federal Courts, Shutdown Caused Broad Disruptions (Oct. 25, 2013), http://news.uscourts.gov/federal-courts-shutdown-caused-broad-disruptions. Although the budget deal ending the shutdown restored $51 million in the cuts to the judiciary and the Federal Defenders program, that hardly makes up for the $350 million in cuts imposed by the sequester. See Todd Ruger, Federal Judiciary Budget Increases in Last-Minute Budget Deal, The Blog of LegalTimes, Oct. 16, 2013, http://legaltimes.typepad.com/blt/2013/10/federal-judiciary-budget-increases-in-last-minute-budget-deal.html.

Court further expanded the power of corporations with its decision earlier this year in American Express v. Italian Colors Restaurant. In Amex, a case brought by small businesses alleging antitrust violations, the Court held that the Federal Arbitration Act precludes courts from invalidating arbitration agreements—even in cases where the cost of individual arbitration would prevent the vindication of rights under federal law. In this decision, the Court invalidated the longstanding "effective vindication" doctrine that allowed courts to nullify agreements that would frustrate the ability of parties to protect their rights under federal law. As a result, it has become increasingly difficult to hold corporations accountable for their violations of the law, and corporations are able to use the fine print of contracts to opt out of federal laws.

Even where workers and consumers who have been wronged are able to enter the courthouse, they face great obstacles once they arrive because of Supreme Court decisions making it increasingly more difficult for victims to band together to seek justice. For example, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court significantly limited individuals' ability to join together as a group to fight wrongdoing by large corporations. In *Wal-Mart*, the Supreme Court raised the threshold requirements under Rule 23 for class action certification.[7] In cases where individual recoveries will not be worth the costs of litigation, wrongdoers now have a better chance of escaping liability. As a result of these decisions, the scale is further tipped in favor of powerful interests, at the expense of everyday people seeking justice.

Access to justice was also dealt a severe blow as a result of two Supreme Court decisions regarding pleading standards. In *Bell Atlantic Corp. v. Twombly*[8] and later in *Ashcroft v. Iqbal*,[9] the Court heightened the pleading requirements for a complaint, imposing a new "plausibility" standard. As a result, fewer cases are able to survive the initial pleading stage.[10] Many of the proposed changes to the rules only worsen the potential impact of these decisions. If plaintiffs are somehow successful in making it to discovery, they will still be faced with the arduous task of proving their case under new, more restrictive discovery rules. Victims of egregious wrongs will be dissuaded from speaking out against these bad acts because they will fear that the courts will not provide them the justice they deserve. Additionally, attorneys working under private attorney general statutes and often on a contingency fee basis will be less likely to take these cases from the outset, further limiting the average person's access to justice. Consequently, fewer cases will be filed, and those that are brought will likely be dismissed on technicalities, resulting in even fewer victims having their cases heard than before.

Private enforcement of public policy has long been an effective way to help ensure compliance with the law in a number of important areas, such as civil rights, employment discrimination, and securities regulation.[11] In cases with limited official oversight, private enforcement can supplement, or even replace, government efforts, and serve as an effective deterrent to law-

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[7] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
[8] 550 U.S. 544 (2007).
[9] 556 U.S. 662 (2009).
[10] Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 331-332 (2013) (discussing the impact of *Twombly* and *Iqbal* on the early disposition of cases).
[11] See id. at 1.

breaking. However, this method of enforcement has weakened over time, due to a wave of anti-litigation sentiment.[12] Subsequently, the burden is now placed more heavily on the shoulders of federal agencies to ensure compliance with federal laws, resulting in an increase in rule breaking.[13]

Proposed Changes to the Discovery Rules

For those victims who are able to avoid forced arbitration, survive the gauntlet of onerous class certification standards, and overcome heightened pleading standards, the proposed changes to the Federal Rules of Civil Procedure threaten to erect new stumbling blocks for those seeking their day in court. These proposed rule changes will create an upsurge in motions and hearings to determine their proper application.[14] Such increased motions practice, in addition to burdening the court, will multiply, rather than reduce, the costs of litigation, heightening the hurdles faced by plaintiffs who already often lack sufficient resources. Moreover, plaintiffs of modest means will find it even more difficult to find lawyers to represent them, as lawyers working on a contingency basis will be hesitant to expend the additional, significant resources necessary to conduct this new motions practice. Combined with the previously mentioned state of the federal judiciary, these proposed rule changes pose an even greater danger to the fair administration of justice.

Specifically, AFJ is concerned that the proposed changes to Rules 26(b), 30, 31, 33, and 36 will impede victims' access to justice:

- **Rule 26(b):** This rule change would require judges to perform a five-factor proportionality test to determine the scope of discovery allowed in each case. Such a test will require a substantial showing on the part of the plaintiff, who, in many cases, is operating with limited resources. Furthermore, by altering longstanding language in this rule, the change will upset decades of precedent and invite disputes and uncertainty regarding the meaning of the new language. In addition, this new test creates the risk of an overreliance on monetary stakes in determining the importance of evidence during discovery. An overemphasis on the monetary recovery sought may severely impact cases where large monetary sums are not at issue, including cases where injunctive relief is sought.

- **Rule 36:** The proposal to impose a new, numerical limit on requests for admission also poses a threat to plaintiffs with limited resources. High-quality requests for admission serve to reduce the number of issues that must be decided at trial, promoting efficiency. By reducing the number of requests, plaintiffs will be forced to allocate some of those limited resources to establishing facts that could have been established prior to trial.

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[12] See, e.g., Paul D. Carrington, Politics and Civil Procedure Rulemaking: Reflections on Experience, 60 Duke L.J. 597, 607-609 (2010) (detailing how private enforcement has been progressively weakened).
[13] See Miller, supra note10, at 304.
[14] Id. at 309-12.

Furthermore, requests for admission are a low-cost method of discovery, and limiting them could affect disproportionately those parties with fewer resources.

- **Rules 30, 31, and 33:** The proposed changes limiting the number of oral depositions, written depositions, and interrogatories, respectively, will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants. Frequently in such circumstances, much of the evidence needed to prove the plaintiff's case is in the hands of the wrongdoer. By limiting discovery in such a restrictive manner, it is likely that more cases will be dismissed in the preliminary stages of litigation due to plaintiffs' inability to procure that necessary evidence to proceed to trial. Such limitations in obtaining the necessary evidence for trial will have a profound chilling effect on whether potential plaintiffs decide to bring these suits in the first instance because it is not economically practical to pursue a case with a high probability of being dismissed.[15]

When first enacted, the Federal Rules of Civil Procedure were intended to encourage the resolution of cases on the merits—in direct contrast to previous procedural systems.[16] These proposed rule changes severely threaten that original intent, with significant risks to access to justice.

Thank you for your consideration and for the opportunity to comment on these proposed changes.

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[15] Id. at 322.
[16] Id. at 1.

TO THE ADVISORY COMMITTEE ON CIVIL RULES

RE: Amendments Published for Comment in 2013

Paul D. Carrington
Draft of October 8, 2013, to be presented November 7, 2013

Our Federal Rules of Civil Procedure, for which you are the honored custodians, were established in 1938 in reaction to late 19th century politics protecting the extraction of wealth by an emerging upper class engaged in new and very profitable interstate commerce. Wealth was then extracted with little or no regard for the rights or interests of individual citizens across the continent, such as employees, franchisees, patients, passengers, tenants, or consumers. The underlying premise of the 1938 Rules was first wisely expressed at the 1906 meeting of the American Bar Association in St. Paul by Roscoe Pound in his famous remarks on *The Causes of Popular Dissatisfaction with the Administration of Justice.* The ABA took Pound's point and persuaded Congress in 1934 to enact the Rules Enabling Act creating a rulemaking process more likely to achieve popular satisfaction with civil justice. As the original Rule 1 states, the aim is to assure that everyone's legal rights are enforced. I beg the Advisory Committee not to forsake that inclusive aim and thus serve the regressive political aims of enterprises seeking to weaken the ability of citizens and firms to enforce their claims or defenses in disputes with larger adversaries.

The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the right of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses. The right to compel the disclosure of pertinent information was not a wholly new idea, but its extension to the enforcement of all civil claims was central to the aim stated in Rule 1 to assure that every litigant's rights would be enforced. The extension of the right to discover information was well received by our growing urban law firms representing large business firms. They soon learned to charge astoundingly high fees for hours spent fetching pertinent documents from vast corporate files and sitting as teams to conduct depositions of prospective witnesses. And it appears to be this development of big firms' hourly fees that has led to the 21st century outcry against the allegedly excessive cost of discovery, especially of document discovery in the age of vast electronic files and prolonged depositions. But I do not think we need a law limiting the hourly fee of lawyers responding to subpoenas of documents resting in vast corporate files or limiting the number of lawyers in the room in which a prolonged deposition is conducted. Attorneys' fees are declining and Richard Susskind's 2013 book makes a persuasive forecast that modern technology will accelerate that trend as business clients are learning to control excessive expenditures on legal services.

Moreover, the generalized claim that the cost of discovery pursuant to the 1938 Rules is excessive is not valid, as the report of the Federal Judicial Center clearly

demonstrates. Yes, there are occasional excesses in cases in which the stakes are very large, but abuse of discovery is otherwise not evident in the official data.

Meanwhile, some citizen-litigants would surely be disserved by the proposed amendment of Rule 26(b)(2)(C)(iii) that would impose a duty on the court, perhaps even on its own motion, to limit discovery when it appears that the burden or expense of the proposed discovery would outweigh its likely benefit to the party seeking the information. Such a disparity can sometimes occur when an entity bears the big cost in defending citizens' claims for relatively modest compensation. Indeed, the monetary cost of discovery is most likely to be perceived to be possibly disproportionate to its monetary benefits to citizen-plaintiffs in civil rights and employment rights cases because the citizen-plaintiffs advancing those relatively small claims often need to search a lot of a defendant-employer's documents and interrogate their superiors and fellow employees in order to find and assemble the evidence needed to make their cases. Similar obstacles may be faced by franchisees or minor competitors seeking to enforce their rights against big-business. This proposed amendment will thus weaken the private enforcement of laws governing the conduct of employers, franchisors and big marketing firms and may reward some defendants for extravagance in spending on legal services that could be supplied more economically. And it would further diminish the transparency of the judicial process and thus our trust in law, as Judge Patrick Higginbotham observed over a decade ago.

A justification for such a concealing amendment is said to lie in the vast electronic files increasing greatly the sizes of files on hand to be searched in some cases. But taking note of the utility of the word search, other electronic technologies, and the availability of low-cost clerical assistants around the world, the cost of document searches can generally be contained. And the transparency of business practices is essential to the deterrent effect of the law on many abusive practices of employers, franchisors, or competitors that might be exposed through costly discovery. The proposed amendment to Rule 26(b)(2)(C)(iii) takes no account of the resultant weakening of law enforcement that depends on the document search. Some, and perhaps many, workplaces would become more tyrannical, and many small businesses may be placed at disadvantage.

The acquisitive politics of the proposed amendment to Rule 26(b)(2) are also reflected in the proposed amendment to Rule 1 that would impose a duty on parties and their lawyers to cooperate in securing the "just, speedy, and inexpensive determination of every action and proceeding". That proposal brings to mind the controversy over the 1993 amendment to Rule 26 that imposes a duty on the parties (and thus their lawyers) to disclose basic information without awaiting formal discovery requests. That amendment evoked an outcry from the American Bar Association that viewed the provision as an impairment of the duty of lawyers to be loyal to their clients' interests. The House of Representatives voted unanimously to reject that amendment, but the matter did not get to the Senate in time to be considered. The 2013 proposal to amend Rule 1 goes a bit further in constraining lawyers from performing their duties as advocates by obligating them more generally to help the court to secure a "just, speedy and inexpensive" disposition of the a

case. There are, of course, numerous other more specific provisions in the Rules and in the proposed amendments that invite the imposition of sanctions on lawyers causing needless costs and delays. Do we need to empower judges to make a more generalized disapproval of the role of an advocate in failing to maintain a cooperative spirit in the conduct of adversary litigation? I question the need for this generalized extension of the power and responsibility of the federal judge to punish parties and counsel for excessive zeal in contesting their cases.

I thank the Advisory Committee for its attention.

DTLA
Delaware Trial Lawyers Association

913 Market Street, Suite 315
Wilmington, DE 19801
(302) 421-2801 Fax (302) 421-2803
cd@dtla.org, www.dtla.org

October 30, 2013

The Honorable Christopher A. Coons
Chairman
Subcommittee on Bankruptcy and the Courts
Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Chairman Coons:

I am writing on behalf of the Delaware Trial Lawyers Association (DTLA) in opposition to certain proposed changes to the Federal Rules of Civil Procedure being considered by the Judicial Conference of the United States. DTLA is an association of attorneys dedicated to preserving the constitutional right to trial by jury, furthering the rule of law and the civil justice system, and leading the cause of those who deserve remedy for injury to person or property. DTLA's members practice in a wide variety of disciplines, including complex litigation, medical negligence, products liability, insurance law, employment and civil rights law, and toxic torts.

The proposed changes to the Federal Rules of Civil Procedure, meant to control discovery costs, would actually increase costs, create inefficiencies, impose delay and expense, and encourage gamesmanship. They do not take into account the difficulties that plaintiffs, who bear the burden of proof, face when trying to obtain facts necessary to substantiate their claims. These changes would not only impede access to justice at the federal level but also impact states as well, as states tend to implement similar rules of civil procedure. DTLA is concerned primarily with the following proposed changes:

Proposed Change to Rule 26(b)

The proposed change to Rule 26(b) would alter the scope of discovery from a relevancy standard to a proportionality standard, taking into account five factors: (1) the amount in controversy; (2) the importance of the issues; (3) the parties' resources; (4) the importance of the discovery in resolving the issue; and, most importantly, (5) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The fundamental problem with the proposed change is that a primary assessment of "proportionality" would shift the discovery process from one that

is intended to give injured parties access to justice to one that would allow defendants to avoid producing critical, relevant, information that plaintiffs need to develop their case. It would fundamentally alter the rules of discovery in a way that would only benefit defendants seeking to evade accountability for wrongdoing.

As a result, plaintiffs would be less able to get the information needed to meet the burden of proof. This could be especially detrimental in civil rights and discrimination cases in which information is asymmetrical, meaning that one side—the defendant or defendants—has all the information. Parties would litigate each of the five factors for every piece of information they seek to discover. These cases are highly fact-specific, so courts would be required to weigh in on every factor to determine what is proportionate. Because plaintiffs would be less able to meet their burden, they would use limited time and resources on unnecessary motions and appeals. This would not only tax the overburdened court system but also undermine the goals of discovery.

As cases become increasingly complex, parties must be able to conduct accurate, reliable discovery. This proposed change would only make it harder for an injured party to discover the facts necessary to prove his or her case, thereby denying access to the justice system.

Proposed Changes to Rules 30 and 31

The proposed change to Rule 30 would reduce the presumptive limit of oral depositions from ten to five and limit the presumptive number of hours for those depositions from seven to six. The proposed change to Rule 31 would reduce the presumptive limit of written depositions from ten to five. Plainly stated, these changes would harm the ability of plaintiffs to get critical information to meet their burden of proof. The presumptive limit of five is completely inadequate to develop the requisite burden of proof, the limits apply regardless of the number of parties in the case. Many cases involve five or more defendants, so a plaintiff would need to depose more than five witnesses to develop his or her case. In asbestos cases, for example, plaintiffs must often depose many individuals, from current and former corporate officers to subject matter experts on toxicology and cancer. In one Delaware case[1], for instance, the plaintiff needed additional discovery to even identify the supplier of the product that made people sick. Only after deposing more than five fact witnesses was the plaintiff able to depose a fact witness who could identify one particular supplier. In order to develop their cases, these plaintiffs would undoubtedly require more than five depositions. Under the proposed change, courts would spend more resources hearing plaintiffs' requests for leave to conduct additional depositions under Rule 30(a)(2).

[1] *In re: Asbestos Litig. (Hartgrave)*, C.A. No. 09C–07–303 ASB (Del. Super. Ct., Jul. 30, 2009).

A 2012 Delaware case illustrates this problem. The plaintiff, a high school student and officer of the local 4-H Chapter, was sexually abused by her high school principal and brought suit against the school district for gross negligence in hiring.[2] Her attorney took 20 depositions in order from most to least likely to be helpful. Of the 20 depositions, only the seventh witness admitted a critical fact that the student needed to bring the case to trial. If she had been limited to five depositions she would not have been able to get past summary judgment.

In a 2006 Delaware employment discrimination and retaliation case, the plaintiff, a French teacher who had been with the employer for 20 years, had to show that the employer had a "pretextual" reason for taking an adverse action against an employee, who claimed discrimination based on National Origin and Age, as well as retaliation. This case required eight depositions to find a witness with sufficient evidence of pretext.[3] Had the plaintiff been limited to five depositions, his case would not have had a chance to survive summary judgment and would have been prohibited from getting justice.

In one particularly egregious Delaware case, a woman sought justice for repeated sexual assaults over several years when she was a teenager by a teacher, who was also entrusted to care for her in his home.[4] Due to limited discovery, she was forced to guess which witnesses – most long-retired former school employees – would have evidence or be forthcoming with information that would help her case. Judges have discretion now to limit discovery to address specific cases; additional limitations would not result in justice for those injured by heinous crimes seeking justice under the Child Victim's Act, which provides a civil remedy for sexual abuse of a minor that had previously been barred by the statute of limitations.[5] This case and others like it would be made even more difficult by the proposed rules changes.

Proposed Changes to Rules 33 and 36

The proposed changes to Rules 33 and 36 would also result in increased judicial intervention in basic discovery disputes, tying up limited court resources with issues that can currently be resolved without judicial intervention in most cases. The proposed Rule 33 change would reduce interrogatories from 25 to 15. Interrogatories allow parties to identify critical evidence, so if they were limited to so few interrogatories they would be forced to write their questions as broadly as possible in order to obtain the critical evidence. The parties would engage in additional litigation to determine whether the interrogatories were proper.

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[2] *Jane Doe No. 7 v. Indian River School Dist.*, A.3d 2012 WL 2044347 (2012).
[3] *Termonia v. Brandywine School District*, Case No. 1:06-cv-00294-SLR (2006).
[4] *Hecksher v. Fairwinds*, 09C-06-236 FSS (Del. Super. Ct., Feb. 28, 2013).
[5] 10 Del. C. § 8145 (2009).

The proposed Rule 36 change would impose, for the first time, a presumptive limit on requests for admission to 25. Imposing a narrow limit of 25 requests for admission would encourage parties to make requests broader to fit the requests for needed information into a mere 25 requests, leading to unintended collateral fights over what counts towards the new limit. The ability to request that the defendant admit basic facts is vital to smaller plaintiffs who must establish certain critical information. Currently, when plaintiffs request admissions, defendants simply deny the request. If plaintiffs were forced to make their requests for admissions broader, defendants would more successfully deny the requests due to their broad nature. The proposed Rule 36 will also increase litigation costs for plaintiffs who would have to spend time and resources establishing information that could have been easily resolved by a request for admission.

Proposed Change to Rule 4

Under the proposed Rule 4 change, the Time Limit for Service would be reduced from 120 days to 60 days. This would effectively eliminate the ability to serve via mail and unnecessarily increase litigation costs. Defendants are often adept at eluding service, and may be difficult to locate. While Admiralty litigation is often cited as a type of case where 60 days for service of process may be insufficient, especially for larger vessels traveling on the high seas, the type of case that is more relevant in Delaware is trucking. In the heavily traveled I-95 corridor, trucks traveling through the state cause accidents that injure Delaware residents. When these trucks are owned and operated by independent contractors, the Delaware residents must track down the truck's driver to serve process. In admiralty litigation, for example, plaintiffs often must reach a ship to effectuate service, in which case 60 days would likely be inadequate. Parties would clog the courts and use limited judicial resources to seek extensions of time to effect service. Plaintiffs, who already have the burden of proof, would then have to meet yet another burden by going to court to argue that there was good cause for failure to serve within the newly restricted time frame. This would increase the cost to the plaintiff while rewarding the defendant for evading service. The current 120 day time period usually allows enough time for service so that plaintiffs do not have to use judicial resources to argue for an extension of time.

Thank you for holding this important hearing today. DTLA looks forward to working with you to ensure all Americans have access to justice.

Sincerely,

Lawrance Spiller Kimmel
President
Delaware Trial Lawyers Association

BARRY H. DYLLER, ESQ., Partner
Also admitted in New York
barry.dyller@dyllerlawfirm.com

SHELLEY L. CENTINI, ESQ., Partner
centini.s@dyllerlawfirm.com

KELLY A. BRAY, ESQ., Associate
kelly.bray@dyllerlawfirm.com

DYLLER LAW FIRM
GETTYSBURG HOUSE
88 NORTH FRANKLIN STREET
WILKES-BARRE, PA 18701

Telephone: (570) 829-4860
Facsimile: (570) 825-6675
www.dyllerlawfirm.com

October 31, 2013

The Honorable Christopher A. Coons
Chairman
Subcommittee on Bankruptcy and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Coons:

I understand that you are holding a hearing on "Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?," and I wanted to follow up on a conversation we had about this topic back in July. My practice focuses on federal civil rights litigation. I spoke to you about some of my concerns about the changes to the Rules, and mentioned a specific case I had litigated.

The case we discussed was one in which I represented a young boy who had been repeatedly raped by a foster child who was placed in his home. The case concerned the child protective services agency's decision to put the foster child in to my client's home. The child protective services agency and its personnel were aware for approximately a year that this boy was sexually molesting other children, but decided that they should place the boy in my client's home anyway. The agency personnel specifically instructed the prior foster parents not to disclose the boy's history to my client's parents, because it would "sabotage his chances for adoption." After the boy was placed, the inevitable happened and he raped my male client approximately 10 to 15 times. In order to uncover the details of what happened and to successfully obtain compensation for my client (who was devastated by what had happened to him), 27 depositions were taken in this case. Also, thousands of pages of documents were produced. The depositions were necessary because there were quite a few defendants, caseworkers and their supervisors who were involved in the underlying matter. Further, this was an interstate placement. Therefore, we had to trace all communications from the local child protective services agency to the agency in the state

capitol involved with interstate placements, to the receiving state capitol's agency, and then to the local child protective services agency. I also should note that many of the depositions were taken by the defendants as well, so that they could have a full opportunity to defend themselves. The case was successful only because I was able to take all of the depositions I needed and because the defendants were able to take all of the depositions they needed. With regard to the depositions the defendants took, the case eventually settled because the defendants knew what they were facing. Had I not been able to engage in full discovery, I could not have proved what I needed in order to prevail. Similarly, had the defendants not been able to obtain discovery they believed they needed, they could not have made an assessment of what would happen at trial. We discussed this case, and how civil rights cases frequently require significant numbers of depositions in order to prove the underlying events, and also to prove the policy or custom of a municipality which must be proved in order to reveal unconstitutional policies, customs and actions of the municipality.

I thought I might discuss with you in this letter some other cases that might be of interest. In 2008, in a neighboring county which is governed by three county commissioners, two from one party and one from another party, two Democrats took control of the county from two Republicans. The Democrats then undertook to terminate huge numbers of Republican employees and a handful of Democratic employees who had politically supported the prior Republican county commissioners. These people were terminated and replaced by Democrats who were typically political supporters of the new county commissioners. This type of action violates the First Amendment, as case law is clear that in non-policy making or confidential positions government cannot terminate employees for their political beliefs, support or non-support. I represented 17 of these plaintiffs in one suit. (I also represented several others in individual suits.) In the main lawsuit, the defendants had the need to depose all 17 plaintiffs. Under the proposed limitations of depositions, the defendants never could have taken that number of depositions. I took approximately 10 depositions. We would not have been able to prove our case as well had we not taken that number of depositions. The case recently settled after an extensive opinion by U.S. District Judge Christopher Conner, and after two days of an intense settlement conference conducted by Judge Thomas Vanaskie of the U.S. Court of Appeals for the Third Circuit, who agreed to help the parties resolve the case. The facts of the case could not have been properly discovered, on both sides, had they not had the freedom to take the appropriate number of depositions and otherwise conduct complete discovery. Incidentally, there were discovery disputes, and the district judge was able to control the litigation and resolve such disputes. I note that such disputes are the exception and not the rule.

Under the proposed rule changes, a district judge would be required in almost every case to be involved in mundane discovery matters in order to determine on a case by case basis whether to permit additional discovery beyond the presumed limits of the proposed rules. This would create a significant undue burden for every district judge in every district. In civil rights litigation, the individual plaintiff is often taking on a government entity. This frequently requires a complex process to sort out the facts and determine the responsible agencies, supervisors and employees, and to discover the government entity's official policies and its unwritten customs which actually reflect how it operates. Judges today have the necessary discretion to handle issues involved in these inquiries, and to prevent overreaching by either side in a lawsuit. Judges' jobs should not be made more difficult by creating presumed limits on discovery, which will then make judges decide on each additional discovery device and whether it is or is not warranted. Instead, the lawyers are

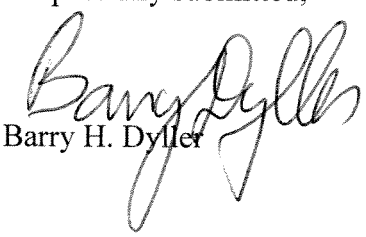
in the best position to know if discovery is warranted, and they can always seek judicial intervention if they believe an opposing lawyer is somehow abusing the discovery process.

Another case which might be of interest was one I litigated concerning a lieutenant in our local prison. An accused murderer had escaped from the prison. My client, a lieutenant in the prison, believed that the prison was extremely poorly run. He and one other lieutenant came forward to the newspapers to discuss a variety of management issues within the prison. Those issues included the reasons that the accused murderer was able to escape, issues concerning drugs and other illegal activity, and various other matters. The county suspended these two lieutenants for a long period of time. The county then constructively discharged my client by demoting him from a lieutenant to a correctional officer trainee. Unable to support himself in that trainee position, my client resigned to seek other work, despite a long and successful career in corrections. The other lieutenant opted to retire instead. The speech that these two lieutenants engaged in was not only protected by the First Amendment, but was extremely important in terms of proper governance and security within the local jail. It was extremely important to the public interest, but the county's action in suspending and terminating these two brave lieutenants sent a chilling message to all county employees to keep their mouths shut in the face of corruption and incompetence. We were able to successfully litigate these cases only because we were permitted to take all of the depositions that were necessary. We took approximately ten depositions in the case in which I represented one lieutenant. I believe there were a similar number of depositions in the companion case which was litigated by a different attorney. (The other case was with a different attorney because in the pre-termination matters, I represented the second lieutenant, and ultimately determined that I might be a witness concerning the threat to her pension; because I was a potential witness, I referred the case to a different attorney.) These cases are just a few examples of the many bad things that happen in government that can be brought to light through appropriate litigation, litigation that can only be successful if the attorneys are permitted ample discovery of the facts.

Incidentally, this particular case in which our brave clients exposed wrongdoing within county government and suffered severe retaliation, could have a profound effect on other governmental matters. I note that the famous "kids for cash" judicial corruption matter occurred in this same county. The kids for cash case was one in which two local judges obtained approximately $2.6 million in bribes in exchange for closing down a county owned juvenile detention center and placing children in a privately owned juvenile detention center. Things like this could not have happened if government employees had confidence that they would not be retaliated against for blowing the whistle on such egregious matters. It is imperative to our society that corruption be exposed. That will only happen if whistleblowers have a full and fair opportunity to protect themselves if they are retaliated against. The proposed changes to the Federal Rules of Civil Procedure will assure that such protections are not afforded to such brave persons who do so much for our society.

I can provide further information on these cases or on anything else that you think might prove helpful. Thank you for your consideration.

Respectfully submitted,



Barry H. Dyller

BHD/nr

RELMAN, DANE & COLFAX PLLC
1225 19TH STREET NW SUITE 600
WASHINGTON, DC 20036-2456

TEL 202-728-1888
FAX 202-728-0848
WEBSITE WWW.RELMANLAW.COM

Written Statement of

Jennifer Klar

Partner at Relman, Dane & Colfax, PLLC

Submitted to the
Subcommittee on Bankruptcy and the Courts of the United States Senate

Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans without Access to Justice?

Submitted November 12, 2013

Introduction

Mr. Chairman and Members of the Subcommittee, thank you for accepting my written comments concerning the proposed amendments to the Federal Rules of Civil Procedure. I am grateful for the Subcommittee's careful attention to the dramatic amendments now under consideration.

Relman, Dane & Colfax, PLLC is a civil rights firm that litigates fair housing, fair lending, and employment discrimination cases around the country. In many of the cases handled by our firm, we represent individual plaintiffs who have suffered discrimination by a corporate or government employer, a housing provider, or a lender. In many of these cases the great majority of the evidence on which our clients' claims depend is within the control of the defendant. The rules governing discovery are thus crucially important to our ability to vindicate the civil rights of our clients. For this reason, my firm and our colleagues throughout the civil rights community are deeply concerned about the dramatic restrictions on discovery contemplated in the current proposed amendments.

Our reservations about many of these amendments are well expressed by the thoughtful testimony and written comments submitted by Sherrilyn Ifill on behalf of the NAACP Legal Defense Fund. The comments below focus on the proposed Rule 37(e), which would dramatically restrict a court's power to issue sanctions or remedial evidentiary remedies when a party spoliates evidence—that is, when a party destroys documents or other evidence that the party was under a duty to preserve.

I have four principal concerns about the proposed rule: first, that it will impede the search for truth; second, that it goes beyond the proper scope of the Federal Rules of Civil Procedure to change the substantive law of multiple circuits; third, that it will disproportionately hurt civil rights plaintiffs; and fourth, that it appears to extend beyond the context of electronically stored information ("ESI"), the costs of which are provided as the primary justification for the change.

1. The proposed rule wrongly focuses on protecting parties who destroy evidence rather than safeguarding the integrity of the judicial search for truth

The value and purpose of the discovery process is to bring to light the evidence and arguments that will assist the factfinder in the search for truth and the just resolution of the case. In civil rights cases, the truth-seeking function of litigation also serves a broader social purpose of uncovering discriminatory behavior and vindicating society's interest in securing equal treatment on the basis of race, religion, gender, disability, and other protected classes. Spoliation sanctions are an important tool courts use to safeguard their truth-seeking mandate. The threat of sanctions deters the destruction of documents a party knows to be relevant to pending or likely litigation. If the party unreasonably allows the documents to be destroyed, spoliation sanctions allow courts to remedy the damage done to the requesting party's case.

The proposed rule fails to account for a court's need for effective tools to safeguard the search for truth, and focuses instead on protecting parties whose conduct, while negligent or even reckless, does not rise to the level of willful or in bad faith. These are the wrong priorities, and, I fear, will have the effect of impeding the search for truth.

This is not only my perspective as a civil rights attorney. The D.C. Circuit has repeatedly held—as have at least three other Circuits—that the evidentiary harm from spoliation requires that a court be able to remedy that harm upon a showing of negligence.[1] As the D.C. Circuit explained earlier this year, where the evidence that has been destroyed "is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim whether or not the spoliator acted in bad faith." *Grosdidier v. Broadcasting Bd. of Governors*, 709 F.3d 19, 28 (D.C. Cir. 2013).

For a related reason, I believe that the proposed rule improperly includes adverse inference instructions within the definition of "sanctions." The D.C. Circuit has held that issue-related remedial

[1] *Buckley v. Mukasey*, 538 F.3d 306, 322-23 (5th Cir. 2008); *Byrnie v. Town of Cromwell, B.d of Educ.*, 243 F.3d 93, 109 (2nd Cir. 2001); *Adkins v. Wolever*, 692 F.3d 499 (6th Cir. 2012).

measures, like adverse inference instructions, are "fundamentally remedial rather than punitive," and are properly imposed when the destruction of evidence has "tainted the evidentiary resolution of the issue." *Shepherd v. American Broadcasting Companies*, 62 F.3d 1469, 1478 (D.C. Cir. 1995). The proposed amendment loses sight of the remedial purpose of sanctions and lesser remedial measures like adverse inferences, focusing only on "protecting" spoliating parties, rather than safeguarding the ability of the requesting party to prove his or her claim or defense.

The Advisory Committee's comments to the proposed amendment state that it is intended to protect "potential litigants who make reasonable efforts to satisfy their preservation responsibilities." A negligence standard, or gross negligence standard, is a more appropriate means of accomplishing this goal.

A willfulness or bad faith standard is not necessary to protect those "who make reasonable efforts." Parties "who make reasonable efforts" are, of course, not negligent or grossly negligent. Under a negligence standard, the destruction of evidence will only lead to a sanction or an adverse inference if it is unreasonable—and only if the party was on notice that the documents may be relevant to litigation. Additionally, the current version of Rule 37(e) already accounts for concerns particular to ESI evidence by preventing sanctions where evidence is lost "as a result of the routine, good-faith operation of an electronic information system." All that is required of a party under current law—in any Circuit—is to take reasonable steps to preserve relevant documents once the party is on notice that the documents may be needed in litigation.

The proposed amendment, however, would tie courts' hands to remedy unreasonable and even reckless conduct that has led to the destruction of evidence needed to determine the truth of a matter in issue. Because the bad faith and willfulness standards are so difficult to prove, the proposed amendment will ensure that the destruction of evidence will often go unchecked. With the threat of sanctions removed, negligence will become perversely advantageous. Additionally, it is necessary to recognize that there are some unscrupulous litigants who intentionally destroy evidence. Where the opposing party is

unable to prove, to the satisfaction of a court, that the destruction was intentional and for the purpose of hiding adverse evidence, those unscrupulous litigants will be rewarded for their misconduct.

The Federal Rules of Civil Procedure should be a vehicle for protecting the integrity of civil litigation and advancing the search for truth. The proposed amendment to Rule 37(e), unfortunately, runs contrary to that purpose.

2. The proposed amendment exceeds the proper scope of the federal rules by effecting a substantive rather than procedural change in the law

Proposed Rule 37(e) is not a modest change to the Federal Rules of Civil Procedure. The Advisory Committee itself recognizes in its comments that the duty to preserve evidence relevant to anticipated or pending litigation was not created by the Federal Rules. Yet the amendment nonetheless takes on the task of regulating how that duty is to be enforced – overturning in its wake the settled and considered precedent of multiple federal circuits. Further, the comments to the amendment expressly stated that the amendment "forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B)." This should not be the role of the Federal Rules of Civil Procedure.

The restriction improperly intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to manage the litigation before them. As the D.C. Circuit has explained, "the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process." *Shepherd*, 62 F.3d at 1472. Rule 37(e) would dramatically restrict courts' discretion to use address spoliation, foreclosing reliance on inherent authority altogether. Such dramatic intrusion on the trial court's role in protecting the integrity of the process should not be undertaken lightly.

Additionally, proposed Rule 37(e) would undermine substantive federal regulations. The EEOC has promulgated regulations requiring employers to preserve certain personnel documents that are routinely used in employment discrimination cases. *See, e.g.*, 29 C.F.R. § 1602.14. Numerous circuits have recognized that violation of such a regulation can support an inference of spoliation and

corresponding remedial measures by a court.[2] Rule 37(e) would prevent courts from enforcing employers' regulatory obligations where willfulness or bad faith could not be proven. A proposed rule of procedure should not be enacted if it would so directly limit the enforcement of federal regulation.

3. The proposed rule raises grave fairness concerns, especially for civil rights plaintiffs

In civil rights cases, the documents that can substantiate discrimination are largely in the control of the defendant rather than the plaintiff. In an employment discrimination case, for example, hiring and personnel documents, or the files containing information about comparable candidates, are controlled by the employer. If the employer destroys that evidence, the plaintiff, court, and jury will be unable to determine the truth of what Congress has recognized to be a vitally important social issue: does the employer treat employees and applicants equally on the basis of race, gender, religion, and disability? In the words of Judge Lamberth, former Chief Judge of the D.C. District Court, "plaintiffs alleging discrimination should not be forced to prove their cases based on the defendants' choice of files and records" due to spoliation. *Webb v. District of Columbia*, 189 F.R.D. 180, 187 (D.D.C. 1999).

Fairness requires that the party who has been injured by the destruction of evidence should not also bear a heavy burden of proof to demonstrate that content of the destroyed documents and that the documents were destroyed in bad faith. The proposed rule sets a standard that will be hard for civil rights plaintiffs—or any requesting party—to meet.

The proposed rule appears to place the burden on the requesting party to show both (1) substantial prejudice to the case and (2) the bad faith or willfulness of the spoliating party. As to the first, it is difficult to demonstrate prejudice, much less substantial prejudice, without evidence of what information or comments the destroyed records contained. For this reason, many courts require a less onerous showing that the documents would have been relevant to a contested issue. Even then, courts have warned against requiring "too specific a level of proof" of relevance, because "in the absence of the

[2] *Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108-09 (2nd Cir. 2001); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hick v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987).

destroyed evidence, a court can only venture guesses with varying degrees of confidence as to what the missing evidence would have revealed." *Gerlich v. U.S. Dept. of Justice*, 711 F.3d 161 (D.C. Cir. 2013). *See also Kronisch v. United States*, 150 F.3d 112, 127-28) (2nd Cir. 1998); *Ritchie v. United States*, 451 F.3d 1019, 1025 (9th Cir. 2006). Similarly, showing the *mens rea* of the spoliating party is difficult because the party who requested documents has no direct knowledge of what was or was not done to preserve documents, and any evidence of the reasons for the destruction is likewise in the hands of the spoliating party.

Although the proposed rule provides an exception to the bad faith or willfulness requirement where the spoliation has "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation," this exception is too narrow to be of any comfort. *See* Proposed Rule 37(e)(1)(B)(ii). It is almost impossible to prove that a party would have had a successful case but for the destruction of documents. The Advisory Committee comments, moreover, acknowledge that this exception will apply only in "narrowly limited circumstances" and suggest application where tangible evidence, like an allegedly damaged vehicle, is lost. *See* Advisory Committee note, *discussing Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). If the provision is applied in that manner, it will reach only a tiny portion of cases in which spoliation has dramatically prejudiced the requesting party.

4. The proposed rule should not apply to paper documents

While I oppose the rule change altogether, I strongly suggest that if adopted, it should apply only to ESI. The concerns about the burden of preservation expressed by the committee relate only to the cost of storing ESI. *See* Advisory Committee note to Proposed Rule 37(e). Similarly, the testimony of Andrew Pincus before this Subcommittee rationalized this rule as a means of addressing the increasing costs associated with data storage. These concerns do not apply equally to the preservation of hard copy documents.

The Advisory Committee further argues "[b]ecause digital data often duplicate other data, substitute evidence is often available" to replace any evidence that may be destroyed. *See* Advisory

Committee note to Proposed Rule 37(e). Paper documents, however, are often both irreplaceable and important to proving discrimination. For example handwritten interview notes, meeting notes, application forms, or comments on applications can be crucial to proving a host of issues that arise in employment discrimination cases, such as the employer's assessment of the plaintiff and other candidates, the decision points in hiring and promotions, and – ultimately – discriminatory intent. *See*, *e.g.*, *Talavera*, 638 F.3d at 312 (a strong spoliation inference was warranted because the destroyed interview notes "represented Talavera's best chance to present direct evidence that Streufert's proffered reason for the selection was pretextual").

Where the destroyed documents are irreplaceable, allowing more discovery or shifting attorneys' fees is simply not a solution. Once the documents have been destroyed, additional discovery many times over will not be able to recreate evidence which no longer exists. Likewise, shifting fees cannot undo the harm to the requesting party's ability to prove its case.

* * *

In sum, I strongly believe that the proposed Rule 37(e) should not be adopted and spoliation law should be left as it has been decided by our able federal courts. If some version of the amendment is adopted, it should reflect a negligence standard or a gross negligence standard rather than bad faith or willfulness, and the rule should be restricted to ESI.

The Leadership Conference
on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

STATEMENT OF WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

HEARING BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

ON

"CHANGING THE RULES: WILL LIMITING THE SCOPE OF CIVIL DISCOVERY DIMINISH ACCOUNTABILITY AND LEAVE AMERICANS WITHOUT ACCESS TO JUSTICE?"

TUESDAY, NOVEMBER 5, 2013

Chairman Coons, Ranking Member Sessions, and Members of the Subcommittee:

Thank you for holding today's hearing on the proposed amendments to the Federal Rules of Civil Procedure. On behalf of The Leadership Conference on Civil and Human Rights, I am pleased to provide this written statement for inclusion in the record.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works to support policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's member organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the lesbian, gay, bisexual, and transgender (LGBT) community, and faith-based organizations.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, fairness in the workplace, economic opportunity and financial security. We understand the vitally important role federal protections play in ensuring equality of opportunity and fair treatment under the law. It is with that understanding and history that we express our concerns about the proposed changes to the federal rules, which we believe would place unequal burdens on plaintiffs seeking to have their rights redressed in federal courts. The cumulative impact of the proposed changes to the discovery rules, and specifically the proposed changes to Rules 26(b), 30, 31, 33, 36, and 37(e), will have serious adverse impact on civil rights litigants.

The Leadership Conference

As others have testified, there is no empirical basis for the proposed changes, and the burden that they would impose is heavy. Simply put, the upending of reliable and settled rules will create a continually moving goal post, resulting in additional burdens and barriers for civil rights plaintiffs and their attorneys, often keeping plaintiffs from having their rights protected and enforced.

The Importance of the Private Attorney

For decades, the federal judiciary has served as the place where individuals facing unfair and illegal treatment—in many cases represented by Leadership Conference member organizations—have turned for protection and enforcement of their rights. Virtually all modern civil rights statutes rely heavily on private attorneys general. Thus, if those private litigants are restricted in their ability to bring cases, the system breaks down.

In *Newman v. Piggie Park Enterprises*, one of the earliest cases considering the Civil Rights Act of 1964, the Supreme Court explained the importance of private litigants in the enforcement of civil rights.

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. [1]

As Professor Pam Karlan of Stanford Law School has observed: "The idea behind the 'private attorney general' can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. …[T]he current reliance on private attorneys general … consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney's fees for a prevailing plaintiff."[2]

Congress has repeatedly recognized the important social benefits that plaintiffs are able to obtain through private rights of action.[3] As Sen. John Tunney stated on the Senate floor, "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers."[4]

Beyond these social benefits, there are pragmatic reasons to promote this structure: "This private enforcement system decentralizes enforcement decisions, allows disenfranchised interests access to

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[1] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (U.S. 1968).
[2] 2003 U. Ill. L. Rev. 183, 186.
[3] 2003 U. Ill. L. Rev. 183, 186-187.
[4] 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney) cited in *Riverside v. Rivera*, 477 U.S. 561 (U.S. 1986).

policymaking, and helps insulate enforcement from capture by established interests. It is also less expensive for taxpayers because it does not place the cost of enforcement solely upon government actors."[5]

More than 150 important statutory policies, including civil rights and environmental protections, provide statutory fees to encourage private litigants to mobilize a private right of action. Private parties bring more than 90 percent of actions under these statutes. In 2005, out of 36,096 civil rights cases brought, the U.S. was the plaintiff in only 534 cases, or 1.5 percent of all civil rights cases brought that year.[6] The rest were brought by private plaintiffs.

The Impact of Recent Supreme Court Decisions

Recent Supreme Court rulings have limited access to the courts for vulnerable Americans, narrowing both procedural and substantive rights for civil rights litigants. The civil pleading standard, which had been well-established, reliable, clear and well understood for more than 50 years,[7] was upended with the Court's *Ashcroft v. Iqbal*[8] and *Bell Atlantic Corp.* v. *Twombly*[9] decisions. In setting up a new, heightened, judicially created standard that pleadings must meet in order to survive a motion to dismiss, the Court created a new practice -- the *de rigeur* immediate filing of a motion to dismiss in many civil rights cases, wasting the court and the parties' time and resources on additional motions practice, often before any information is available to the court.

In the last few terms, the Court has also narrowed substantive protections for older workers,[10] victims of retaliation,[11] and those facing harassment in the workplace.[12] It has expanded the reach of arbitration agreements far beyond their intended purpose,[13] limiting the ability of litigants to vindicate their rights in court, and has caused confusion regarding class action standards.[14]

The danger of these decisions goes far beyond the Supreme Court itself, of course. As these decisions make their way into the lower courts, the impact and damage done is enormous.

The Unintended Consequences of the Proposed Rules

In this context, where the courthouse door has now been shut on so many, a move by this body to further restrict access to justice is ill-advised and antithetical to the pursuit of justice.

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[5] 54 UCLA L. Rev. 1087, 1089-1090.
[6] Admin. Office of the U.S. Courts, 2005 Annual Report of the Director, Judicial Business of the United States Courts 2005, at tbl.C-2, available at http://www.uscourts.gov/judbus2005/ appendices/c2.pdf, cited in 54 UCLA L. Rev. 1087, n14.
[7] *Conley v. Gibson*, 355 U.S. 41, 45-46 ((1957) (a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.")
[8] 556 U.S. 662 (2009).
[9] 550 U. S. 544 (2007).
[10] *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009).
[11] *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).
[12] *Vance v. Ball State University et al*, 133 S. Ct. 2434 (2013).
[13] See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
[14] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Although the goals of the proposed changes to the Federal Rules, such as improving efficiency and decreasing costs in an overburdened system, are laudatory, many of the proposed changes will fail to accomplish those objectives, and will in fact have unintended consequences that are far more damaging than the potential good contemplated by the proposals.

Civil rights litigants will be the ones most burdened by these changes. Specifically, the rules limiting discovery, and in particular, creating the "proportionality" standard under Rule 26(b), will impact plaintiffs such as victims of employment discrimination who already bear the burden of proving their claims in the face of severe imbalances in access to relevant information. Employment discrimination plaintiffs fare particularly poorly in the pretrial motion stage in the current system and would be further injured by these proposed rules. From 1979-2006, employment discrimination plaintiffs won 3.59 percent of their pretrial adjudications, compared to 21.05 percent for other plaintiffs.[15] "[T]he difference in win rates between jobs cases and nonjobs cases shows that pretrial adjudication particularly disfavors employment discrimination plaintiffs."[16]

The information asymmetry faced by employment discrimination litigants requires discovery rules that rectify these imbalances, not exacerbate them. Limiting discovery and creating a proportionality standard will only widen the gap between those who control the information, and those who need access to it to vindicate their rights.

Placing additional procedural barriers in the path of those trying to protect, vindicate, and enforce their rights and the rights of the public, is not only bad policy, it is bad precedent and bad for efficiency. Changes in procedural rules, under the guise of streamlining or limiting costs, operate to impact civil rights litigants by slamming the courthouse door in their faces. As we know, if procedural rules close the courthouse door, victims are deprived of the ability to vindicate their substantive rights. Although the rules may be intended as a solution targeted to one set of litigants, the impact on others, particularly those least able to bear the additional costs and hurdles, must be taken into account.

In short, the proposed rules are a blunt, overbroad sword for circumstances in which a surgeon's scalpel is more appropriate.

The Crisis in the Federal Judiciary

One additional point needs to be underscored: The federal judiciary is in crisis. Addressing this issue will do more to resolve many of the issues this Committee is attempting to resolve than making changes to the discovery rules. We know that judicial resources are limited, and that judges have limited time. Yet that problem should be dealt with through the confirmation of pending judicial nominees, not by changes in the rules that will place additional barriers in the way of the most vulnerable plaintiffs. It is not justifiable to create new Federal Rules simply to get around a limit on judicial resources, when a direct solution to increase judicial resources is available.

For more than two decades, there has been little congressional action to address judicial staffing deficits despite a steadily increasing workload. In its most recent report, the Administrative Office of the United States Courts (AO), the primary source of non-partisan analysis of resource allocation within federal

[15] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 Harv.L. & Pol'y Rev 1., 2009 at 31.
[16] *Id*.

courts, which is entrusted to make recommendations on needed federal court resources, acknowledged the increasing work of the courts across the country, and made specific observations and recommendations targeted to areas where there was considerable backlog or high caseloads per active judge.

Most of these circuit and district courts have judicial emergencies. For example, with respect to the second most important court in the nation, the AO reported that "the caseload per active judge on the D.C. Circuit has risen more than 50 percent since 2005." As of December 31, 2012, there were 1,419 pending cases, meaning a caseload of 177.5 cases per active judge. Today, there are three fewer active judges on the D.C. Circuit than there were in 2005 when the case load was just 119 cases per active judge. The growing disparity between the number of judges on the bench and the caseloads that they face is staggering. This is an issue that warrants immediate action.

Conclusion

Although I am confident it was not the intent of the Judicial Conference's Advisory Committee on Civil Rules, the result of many of the proposed changes will be to impose the greatest cost on those least able to bear that burden. Those most vulnerable, with fewest resources and least access to information should be protected, rather than harmed. Thank you for giving me the opportunity to share our views.