PUBLIC COMMENT

of

THE WASHINGTON LEGAL FOUNDATION

to the

ADVISORY COMMITTEE ON CIVIL RULES

Concerning

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE

IN RESPONSE TO THE COMMITTEE'S
INVITATION TO SUBMIT FORMAL COMMENTS

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October 7, 2013

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Re: Proposed Amendments to the Federal Rules of Civil Procedure

Members of the Advisory Committee on Civil Rules:

The Washington Legal Foundation (WLF) respectfully submits this Comment to the Advisory Committee on Civil Rules in response to the Committee's Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure. WLF is grateful to the Committee for its hard work and appreciates the opportunity to provide meaningful feedback regarding the Committee's proposal. WLF enthusiastically supports the Committee's efforts to bring much needed reforms to federal practice and procedure, especially in the area of civil discovery.

I. Interests of WLF

Founded in 1977, WLF is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF regularly appears before federal and state courts and administrative agencies to promote individual liberty, free enterprise, and a limited and accountable government. As a part of that mission, WLF often litigates to ensure that the ever increasing threat of exorbitant discovery costs is not permitted to distort the substantive rights of parties in litigation. *See, e.g., Pippins v. KPMG LLP*, No. 11-cv-0377(CM)(JLC) (S.D.N.Y. decision pending); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

In addition, WLF's Legal Studies Division has published numerous studies, reports, and analyses over the years on discovery-related issues. *See, e.g.,* Kirsten V. Mayer, Thomas Sutcliffe, & Zachary Golden, *Court Affirms Judicial Authority to Limit Discovery In False Claims Suits*, WLF COUNSEL'S ADVISORY, August 23, 2013; Alfred W. Cortese, Jr., *Federal "E-Discovery" Rules Proposal Requires Scrutiny and Comment,* WLF LEGAL BACKGROUNDER, December 17, 2004; David

E. Dukes, James K. Lehman, Michael W. Hogue, & Jason Sprenkle, *A Corporate Counsel's Guide To Discovery In The Information Age*, WLF MONOGRAPH, November 2001.

WLF has a longstanding interest in the work of the Committee and its central role in shaping federal practice and procedure. WLF strongly believes that this Committee cannot achieve its objective "absent a paradigm shift that requires every litigant to consider the potential benefits of discovery in light of its cost." Rebecca A. Womeldorf, *A Requester-Pay Default: Common-Sense Discovery Reform Can Reduce Undesirable Litigation Incentives*, WLF LEGAL BACKGROUNDER, June 7, 2013. The potency of discovery as a leverage weapon has intensified in the past two decades with the explosion of electronic data. The nature of such data, which can be easily and unintentionally deleted, has also given rise to so-called spoliation claims, where one litigant accuses the other of document destruction and urges courts to sanction the alleged offender. The outside costs of litigation for American businesses over the past decade have steadily grown. These costs are disproportionately high in the United States versus the rest of the world. Federal discovery practice, in its current form, is staggeringly wasteful and inefficient. Requiring litigants to retain and produce vast amounts of discovery without regard to cost skews the outcome of civil litigation by (for all practical purposes) forcing defendants to enter into settlements as a less-expensive alternative to complying with overly broad preservation and production orders. Those concerns are particularly pronounced in the context of mass and class action litigation, where the sheer volume of "potentially relevant" documents can be enormous.

II. Rule 37(e)

WLF fully embraces the overarching objective of the proposed new Rule 37(e), which is to replace the disparate treatment of preservation and sanctions issues across the circuits by adopting a single uniform standard. The proposed Rule clarifies that, in all but excepted cases (*i.e.*, cases where failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation"), sanctions may not be imposed unless the court finds that a party's failure to preserve was willful or in bad faith, causing substantial prejudice in the litigation. In so doing, the proposed rule squarely rejects *Residential Funding Corp. v.*

DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002), which held that mere negligence sufficies to support discovery sanctions. WLF believes that these proposed changes have the potential to significantly curtail the amount of satellite litigation that occurs over spoliation allegations and should reduce the high costs of over-preservation.

WLF is concerned, however, that the aforementioned exception contained in subsection (1)(B)(ii) will essentially "swallow the rule" by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. While the Committee evidently intends for the "irreparably deprived" exception to be applied narrowly, litigants claim "irreparable harm" as a matter of course in sanctions battles, and experience suggests that judges and litigants alike will soon come to view the exception as a convenient way to circumvent primary operation of the Rule. The entire purpose of sanctions is to punish bad actors and deter "willful" and "bad faith" conduct. Absent such intentional misconduct, there should be no authority for the imposition of harsh sanctions on an otherwise innocent or merely negligent party. Sanctions should issue based on the severity of the underlying misconduct, not on a Judge's highly individualized interpretation of "irreparably deprived." Accordingly, the "irreparably deprived" exception should be eliminated before the Rule is adopted. This will also best ensure that the Rule accomplishes a uniform and consistent national standard.

Most notably, proposed Rule 37(e) establishes "willful or in bad faith" conduct, along with "substantial prejudice," as prerequisites for the imposition of sanctions. WLF believes that the Committee's use of the disjunctive—"willful *or* in bad faith"—is highly problematic. Because conduct that is merely willful does not necessarily spring from a desire to suppress the truth, a "willfulness" standard, standing alone, should not suffice to establish the requisite scienter for the imposition of sanctions. Even absent a showing of a culpable mind, some Judges will not hesitate to impose sanctions if the Rule can plausibly be read to permit it. *See Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, *5 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach the duty to preserve it], or negligently."). Finding culpability under such circumstances would undermine, rather than bolster, the proposed Rule's goal of deterring intentional wrongdoing. Therefore, WLF respectfully recommends that the

Committee substitute the conjunctive "and" for the disjunctive "or" to clarify that intentional acts exercised in good faith are an insufficient basis for the imposition of sanctions.

The Committee's list of "factors to be considered in assessing a party's conduct" contained in subsection (2) of the proposed Rule is not particularly helpful. None of these "reasonableness" factors sheds any relevant light on the central question of the Rule: whether the failure to preserve discovery material was "willful" or in "bad faith," resulting in "substantial prejudice." Because this incomplete catalog of considerations risks being misinterpreted as mandates whose violation would justify the imposition of sanctions (irrespective of the culpability and prejudice requirements), WLF urges the Committee to eliminate these factors from the proposed Rule altogether. At the very least, these factors should be included in the Committee Note rather than the text of the Rule itself. Failure to eliminate this list invites ancillary discovery disputes attempting to establish satisfaction of the Rule's "factors."

As to preservation obligations, the proposed Rule should articulate a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information. Much of the wasteful cost of discovery stems directly from the ever-increasing burden of over-preservation—largely a function of guesswork undertaken out of fear of sanctions. The Rule's current "anticipation of litigation" standard is largely unworkable and impractical, as it requires weighty preservation decisions to be made without the benefit of the scope of discovery provided by the pleadings. Likewise, prior to litigation, no judge is able to resolve discovery disputes about preservation, nor is an opposing counsel available for negotiation. While courts always retain the authority to sanction the willful and bad faith destruction of discovery material that substantially prejudices even a potential adversary, the Rule should adopt a decisive and clear-cut "commencement of litigation" standard, which is triggered by the filing of a complaint, before imposing an affirmative duty of preservation on a party. Such a bright-line Rule will help to set uniform expectations while preserving a party's ability to prove or defend any claim.

Finally, the Committee's proposed Rule authorizes a court to impose a "curative measure" if it concludes that a "party failed to

preserve discoverable information that should have been preserved." But unlike the imposition of sanctions, nothing in the Rule requires any showing of willfulness, bad faith, or substantial prejudice before imposing a curative measure. Presumably, a party needs only to establish that lost information was relevant. Because curative measures may sometimes have consequences every bit as severe as sanctions, at least some meaningful threshold should be satisfied before curative measures are authorized. Although a party should not be required to make a showing of willful bad faith in connection with the loss of discoverable information, a minimal showing of substantial prejudice should be required in the Rule for the imposition of curative measures. If substantial prejudice cannot be shown to result from a failure to preserve the information, no curative measures should be necessary.

III. Rule 26(b)(1)

The overly broad scope of discovery that courts have routinely allowed under current Rule 26(b)(1) has long been a source of mischief and inefficiency in litigation. Among the many welcome changes the Committee proposes is the striking of 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." Of course, this provision dates back to 1946, when it was added to overcome early decisions that denied discovery solely on the ground that the requested information would not be admissible as evidence. Although it was never intended to define the permissible scope of discovery, both practitioners and judges routinely cite the "reasonably calculated" language as though it somehow defines the outer bounds of discoverable material. The sooner this potentially misleading language is removed from the Rules, the better.

WLF strongly supports the Committee's proposal to redefine the scope of discovery to include "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." By eliminating any reference to the "subject matter involved in the action," the amendment clarifies that the scope of discovery is delimited by the claims and defenses found in the pleadings themselves. This balanced approach represents a meaningful improvement that should reduce the potential for discovery abuse while preserving the right to obtain necessary information. If obtained

information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings can be allowed when appropriate.

Likewise, transplanting the proportionality language now found in Rule 26(b)(2)(C)(iii) directly into Rule 26(b)(1) will help to emphasize such considerations more prominently in the rule. All discovery should be "proportional to the needs of the case" in light of the amount in controversy, the importance of the issues at stake in the action, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. WLF believes strongly that proportionality considerations are crucial in helping the court and the litigants to maintain a grounded, pragmatic perspective on the practical limits of discovery. These laudable objectives are furthered by the proposed change in location, and thus emphasis, of the proportionality language contained in Rule 26, which all too often is ignored or marginalized by overly broad notions of discovery and relevance.

While the current proportionality factors also include the "parties' resources" as a consideration, deep-pocketed litigants should not be denied the benefit of otherwise sensible discovery limits. The fact that an injustice is chiefly visited on litigants with a high net worth is no more reason to ignore it than if an injustice were chiefly visited on low-net worth litigants. Indeed, no litigant should be essentially forced to settle substantive claims that are false simply because the discovery costs of defending the action on the merits are much too high and far too lopsided to permit a just resolution of the dispute.

As the Committee is well aware, earlier efforts to rein in the scope of discovery, such as the 2000 amendment to this Rule, have been largely unable to produce a new mindset among the bench and bar. To mitigate the very real risk that deeply entrenched customs and practices will continue to trump the actual scope of discovery carefully spelled out by the new Rule, the Committee should add a materiality requirement to the Rule. This could be accomplished by simply defining the scope of discovery as "any non-privileged matter that is relevant ***and material*** to any party's claim or defense." Whereas relevant information tends to prove or disprove some fact related to the action, material information "has a legitimate and effective influence or bearing on the decision of the case." BLACK'S LAW DICTIONARY 1128 (4th

ed. 1968). This modest change would also further the goal of proportionality in individual cases by ensuring that documents sought are not merely relevant but also material to any claim or defense. WLF urges the Committee to implement this change in the final Rule.

IV. Rules 30, 31, 33, and 36

The Committee's proposal reduces the presumptive numerical limits for seven types of discovery, including the number and duration of oral depositions allowed under Rule 30, the number of depositions allowed under Rule 31, the number of interrogatories allowed under Rule 33, and the number of requests to admit allowed under Rule 36. WLF believes that each of these revised limits is a welcome step in helping to reduce the overall costs and burdens of discovery in many cases. While the parties may still expand these limits in individual cases as needed (either by mutual consent or by leave of court), the new presumptive default limits will help to ensure that the burdens of discovery are more proportional to the needs of the average case.

Other presumptive limits on document discovery should be considered. One such proposal is "Susman's Checklist." Stephen Susman is a prominent litigator with Susman Godfrey, LLP and frequently represents both plaintiffs and defendants alike. He proposes that discovery information be limited to five custodians in the first instance, chosen by the requesting party. Following production from those five custodians, an additional five custodians may be selected by the requesting party. But following production from the second set of five custodians, no further discovery will be allowed absent a showing of good cause. "This proposal is essentially an amalgam of presumptive limits and phased discovery and combines the best attributes of both." *See* Daniel Troy & John O'Tuel, *A Toolkit for Change: How the Federal Civil Rules Advisory Committee Can Fix a Civil Justice System "In Serious Need of Repair,"* WLF LEGAL BACKGROUNDER, May 21, 2010.

V. Rule 8

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the U.S. Supreme Court rejected the longstanding pleading standard that automatically upheld the sufficiency of a complaint unless a court found that the plaintiff could prove "no set of facts" to warrant relief. The "no set of facts" standard

developed primarily from earlier interpretations of Rule 8, which requires that a pleading include "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). First in *Twombly*, then in *Iqbal*, the Court strengthened the minimal pleading standard to require that a plaintiff plead facts with enough specificity to show not merely that some relief is "possible," but that the plaintiff's version of events is "plausible." *Twombly*, 550 U.S. at 561 (acknowledging that the "main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8"); *Iqbal*, 556 U.S. at 678 ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.").

Twombly and *Iqbal's* heightened pleading standard recognizes and reaffirms the crucial gatekeeping role performed by the district courts. The Court's "plausibility" requirement emphasizes the importance of district courts applying their "judicial experience"—along with their "common sense"—in disposing of baseless complaints at the proper time: *before* a plaintiff launches intrusive and burdensome discovery. In this context, the Court has noted that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal,* 556 U.S. at 678-69. Rather, requiring a plaintiff to furnish "more than a sheer possibility that a defendant has acted unlawfully," *id.* at 678, makes sense as a matter of public policy especially in light of the often immense burdens of discovery.

Although four years have passed since the Court issued its decision in *Iqbal*, which itself clarified that the standard announced six years ago in *Twombly*, applies across all areas of litigation, WLF notes that the Committee's latest proposal includes no revisions to Rule 8 that would reflect the Supreme Court's new tightened pleading standard. In the wake of *Twombly* and *Iqbal*, differences of opinion among the lower courts persist, especially in the context of patent litigation. For example, in *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012), the Federal Circuit held that the heightened pleading standard announced in *Twombly* and *Iqbal* does not apply to claims of direct patent infringement because that standard cannot be found in Rule 8, Rule 84, or Form 18 of the Federal Rules of Civil Procedure. *See also* J High,

Patent Suit Pleading Standards Must Be Conformed to Supreme Court Precedents, WLF LEGAL BACKGROUNDER, October 5, 2012.

While the Committee's proposal to completely abrogate all Forms, including Form 18, from the Rules will certainly help to mitigate the specific problem identified in *Bill of Lading*, the pleading standard articulated by Rule 8 should reflect the Supreme Court's "plausibility" threshold. At the very least, a Committee Note both acknowledging *Twombly* and *Iqbal* and explaining their relationship to Rule 8 should be added to the Rule to provide valuable guidance and context for the Rule's requirement that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief."

VI. Conclusion

This is a time of great opportunity for meaningful reform. The Committee has a chance to effect much needed change in the way that federal litigation is conducted and in the way that American citizens come to view the administration of justice in federal courts. Burdensome litigation costs constitute an unnecessary drain on American businesses already impacted by economic hardship. The broad discovery regime that currently exists under the Federal Rules imposes a heavy cost and burden with little corresponding benefit. Without any sacrifice to the pursuit of justice, modest revisions to the Rules will go a long way towards reducing these costs and improving federal litigation practice in a way that would benefit all parties.

Respectfully submitted,

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