MEHRI & SKALET PLLC

1250 CONNECTICUT AVENUE NW, SUITE 300 • WASHINGTON, DC 20036
TEL 202.822.5100 • FAX 202.822.4997 • WWW.FINDJUSTICE.COM

CYRUS MEHRI (DC, CT)
STEVEN A. SKALET (DC, MD)
JAY ANGOFF (DC, MO, NJ)
CRAIG L. BRISKIN (DC, NY, MA)
JANELL M. BYRD (DC, MD)
HEIDI R. BURAKIEWICZ (DC, MD, VA)
ELLEN L. EARDLEY (DC, IL)
KARLA A. GILBRIDE (DC, CA, NY)
TARYN WILGUS NULL (DC, CA)
STEPHANIE J. BRYANT (DC, PA)
PIA WINSTON (DC, MD)
TERESA YEH (DC)

N. JEREMI DURU (DC, MD)
MICHAEL D. LIEDER (DC)
OF COUNSEL

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VIA Electronic Mail

Committee on Rules and Practice
Administrative Office of the United States Courts
One Columbus Circle N.E.
Washington, DC 20544

Re: Comments on Proposed Revisions to Federal Rules of Civil Procedure

Dear Committee Members:

I write on behalf of the law firm of Mehri & Skalet PLLC in Washington, DC. We primarily represent plaintiffs in complex litigation in federal courts. Our clients generally claim that defendants have violated civil rights, employee protection, consumer, antitrust or other federal statutes. Our clients cannot afford to pay hourly attorneys' fees and the costs of litigation. As a result, we almost always work on a completely contingent basis.

Most information relevant to the claims and defenses in our cases is in the control of the defendants. As a result, the discovery process is critical to our clients. Proposals to further restrict discovery while at the same time penalizing plaintiffs because they lack a piece of information at the start of a case tilts the scales of justice too far in favor of defendants. In our practice, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), dramatically increased the showing required of plaintiffs to obtain class certification and therefore the plaintiffs' need for discovery at an early stage in the litigation. But the proposed Rules revisions are clearly designed to restrict that discovery.

Civil rights and other fee shifting statutes are designed to encourage lawyers and law firms to pursue public policy claims to ensure that the affected classes have access to

justice. Unlike defense counsel, we advance our time and pay the expenses for the discovery that we obtain on behalf of our clients. Accordingly, we have no interest in engaging in irrelevant and expensive fishing expeditions. Indeed, in our experience plaintiffs are generally pushing to expedite cases and the defense prefers to draw them out. We are confident that any horror stories of out-of-control discovery arise primarily in cases in which both sides have the resources to pay expenses and hourly attorneys' fees and huge amounts are at stake. These conditions arise in a very small percentage (we believe less than 1%) of all civil cases. The Rules should not be revised in a manner that will harm plaintiffs in our cases and in many other civil cases because of possible excesses that may occur in a very small percentage of civil disputes, and that can more appropriately be addressed on a case by case basis.

I. Rule 26(b)(1): Scope of Discovery.

A. *Proportionality Assessment.*

In theory, discovery should be proportional to the case's needs in many civil cases. Where Congress has mandated fee shifting for the benefit of prevailing plaintiffs, such as in employment discrimination and antitrust cases, however, the courts have consistently held that attorneys' fees do not need to be proportional to the amounts at stake. The proposed Rule is at odds with the Congressional purpose, as interpreted by the courts, in those types of cases.

Even if the purposes of Congress and the proposed Rule were consistent, the Rule attempts to achieve its aim through misguided means. The proposed rule invites a party to object to discovery as not proportional to the needs of the case considering "the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." This proposal requires a highly subjective determination and will result in expensive and time-consuming motion practice that a trial judge will be ill-positioned to resolve early in a case. This also ultimately will lead unpredictable decisions and appeals that will unnecessarily consume a great deal of scarce judicial resources and clog up court dockets.

Before discovery has occurred a court will have difficulty assessing "the amount in controversy" in a complex case. For example, if plaintiffs seek to proceed on behalf of a class, the amount in controversy may be a hundred or thousand times greater if the class is ultimately certified than if it is not. Will the court try to assess the likelihood of certification at this early stage of the case? A court will also be unable to judge in advance how important the discovery will be to resolving the issues. One of the more expensive forms of discovery can be production of electronically stored information ("ESI"). But ESI is also one of the most productive sources of admissions for plaintiffs

because it generally contains the least guarded expressions of defendants. Consider, for example, the crucial role robust discovery has played in finally achieving a just result in cases against tobacco companies, unintended automobile acceleration, auto and other product safety hazards, financial fraud, discrimination, privacy violations and the like.

A court, just like the parties, cannot know in advance how important ESI – or any other form of discovery – will be in resolving the issues. Because a court cannot know before significant discovery occurs either the amount in controversy or the likely value of the discovery, it cannot know "whether the burden or expense of the proposed discovery outweighs its likely benefit." Early in a lawsuit, courts will basically be shooting in the dark on these issues. Therefore, allocation of the burden of proof on the proportionality issue will be critical. But the proposed rule is silent, and we have no idea on which party courts will place the burden.

Making matters worse, the proposed rule invites anti-plaintiff decisions. In their terms and conditions, merchants generally purport to eliminate incidental and consequential damages and sometimes try to place a cap on direct damages. Defendants will invite judges to determine that the amount in controversy is small based on those limitations and thereby restrict rights to discovery. In employment cases, low wage earners generally have much lower potential recoveries than professionals and executives, and hence may be allowed less discovery. (Of course, the inclusion of "the parties' resources" as a factor may cut the opposite way, at least in employment cases, leaving judges to wonder how to balance these factors.) Finally, asking judges to decide "the importance of the issues at stake in the action" is to invite them to make decisions based on their own biases. One judge may believe that alleged wage-and-hour violations are an epidemic in this country and allow significant discovery based on this factor, while another judge may believe that the issues FLSA and state wage-and-hour laws were meant to address are no longer important in this country and that employees who bring these suits are taking advantage of a statute that should be removed from the books.

Finally, to force plaintiffs to litigate these issues before substantial discovery has occurred gives defendants a huge unwarranted advantage. Defendants generally have substantially more information in their possession and control than plaintiffs (some of which they may want to keep out of discovery) and hence are in a superior position to argue about the proportionality of discovery. For example, our firm and co-counsel recently settled a case, originally filed as a gender discrimination class action lawsuit, on a non-class basis in large part because early discovery rulings denied us access to critical data. As discovery proceeded in the case, we could have made better arguments than we initially did about why the information was critical, but because we never had access to the data, we could not prove what it would have shown and hence could not prove prejudice. In short, this Rule will become a vehicle for defendants to resist producing damaging evidence.

The only certainty for plaintiffs is that fights over whether their requested discovery is proportional to the needs of the case will be protracted and expensive. It is likely that from the time the moving party starts drafting its papers to the court's decision will take at least six months (even longer if objections are taken to a magistrate's decision). During that time litigation will be at a standstill with little if any discovery occurring. The likely result is that plaintiffs will unfairly be pushed to acquiesce to limitations on discovery to that they would not have agreed to absent the proportionality requirement.

Finally, the best means of ensuring proportional discovery on a case by case basis already exists under Rule 26(b), which allows courts to issue orders limiting discovery, permits local rules to limit requests for admissions, has reasonable rules regarding ESI discovery and already allows for limits on the frequency and extent of discovery on motion or the court's own initiative.

B. *Elimination of Subject Matter Discovery*

The allowable scope of discovery currently is defined as matters relevant to a claim or defense or, upon a showing of good cause, relevant to the subject matter of the action. The proposed rule eliminates the possibility of engaging in discovery relevant to the subject of the lawsuit but not necessarily immediately relevant to the claims or defenses.

We have never had a fight over whether discovery is relevant to a claim or defense or only to the subject matter of the action, but suspect that defendants, believing that the proposed change in the rule has meaning, will raise the issue. For example, suppose that we bring a class action challenging promotion decisions as illegally discriminatory. The employer can fill open slots through promotions, lateral moves, or outside hires. If we seek discovery concerning the outside hires and lateral transfer processes will defendants now contend that the discovery goes to the subject matter and not the claim?

C. *Discovery Concerning Documents and Witnesses*

The proposed rule, without explanation, eliminates the provision allowing discovery into "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Hopefully the Committee deemed the propriety of discovery into these matters so obvious that the provision was unnecessary. But if so, there is no value in eliminating the provision, and plaintiffs inevitably will face arguments that the deletion had meaning and such discovery is no longer proper or is, at least, more limited than under the former rules. Defendants will support this argument by citing the

elimination of the phrase allowing discovery into information "reasonably calculated to lead to the discovery of admissible evidence" and its replacement with a provision that information need not be admissible in evidence to be discoverable. Whereas the former phrase affirmatively brings qualifying information, which may include "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter," within the scope of discovery, the latter merely says such information may not be beyond the scope of discovery.

II. Rule 26(c)(1)(B): Protective Orders

Currently the Rules permit cost-shifting of discovery under Rule 26(b)(2)(B) only as to information that is not reasonably accessible. The proposed rules expand the possibility of cost-shifting dramatically, to whenever a protective order limiting discovery is appropriate. As a result, defendants that argue that discovery should be barred as non-proportional to the needs of the case probably will advance as their fallback that some or all of the costs should be shifted to the plaintiffs to save the defendants from "undue burden or expense." Judges seeking to be "fair" to both parties may seize on this argument. For plaintiffs who are not financially well-off, however, this may have the same effect as barring the discovery entirely. In addition, this will chill plaintiffs' attorneys from pursuing otherwise viable cases.

III. Rule 30(a)(2)(A)(i): Presumptive Number of Depositions

The proposed Rules would cut the presumed number of depositions from ten to five. A basic problem here, and in Rule 33 and 36, is the one-rule-fits-all approach. The Rules should recognize that different standards should apply in complex, multi-party cases. In the complex, multi-party litigation in which our firm typically engages, ten depositions are not adequate and both sides typically agree to exceed that number. However, the existence of the limit in the Rule can place pressure on us in negotiations with defendants, and the reduction of the presumed number to five will create additional pressures.

Instead of reducing the number of presumed depositions, the Rules should recognize that case needs differ by providing that a party without leave of Court or agreement of opposing counsel may not take more than ten depositions plus two depositions for each party in any case with more than two parties. Again, if that number of depositions is unnecessary, neither party will have an economic incentive to take additional depositions.

But even in relatively straightforward cases, such as single plaintiff discrimination cases, the proposed Rule change will place plaintiffs at a greater disadvantage than they

already are by limiting their discovery when more than five depositions are needed, and is ill-advised for that reason as well.

IV. Rule 36(a)(2): Requests for Admission

Requests for admission are one of the most efficient forms of discovery. They can eliminate entire issues from a case, facilitating summary judgment motions and trial. In our experience, they are seldom abused because of the care it takes to draft requests that are likely to elicit admissions. In addition, the number of these requests may already be limited by local rules. But now, for unknown reasons, the proposed Rules for the first time would impose uniform presumptive limits on requests for admission. While this change may reduce costs of discovery, it will increase overall litigation costs.

V. Rule 37(e)(1)(B)(i): Sanctions for Spoliation of Evidence

The proposed Rule makes sanctions for spoliation available when a party's failure to preserve caused "substantial prejudice" and was "willful or in bad faith." We don not think the language requiring the destruction to be "willful or in bad faith" is clearly defined. If a person who files a case had innocently discarded some information before litigation was contemplated that information later turns out to be relevant, as is often the case, is that willful and enough to warrant sanctions? We think bad faith not willfulness is the correct standard. We believe, however, that it is appropriate to give the court greater latitude with respect to spoliation jury instructions, depending upon the facts in each case.

VI. Rule 4(m): Deadline for Service of Complaint

The only non-discovery Rule change on which we wish to comment is the proposal to cut in half – from 120 to 60 days – the deadline for serving a complaint without an extension being granted by a judge. Plaintiffs generally want litigation to proceed quickly. It is undoubtedly the rare case in which there is any substantial delay in service of the complaint.

There are several reasons plaintiffs may need more than 60 days to serve, and the Rule change would make that more difficult. First, many defendants have devised convoluted corporate structures, and it sometimes takes more than 60 days to identify, locate and successfully serve each of the appropriate defendants. Second, some defendants resist or hide from service attempts. In that case a special process server or private investigator may be required to complete service. We perceive no reason to burden plaintiffs and the courts with additional attempts at obtaining extensions. If extensions are not granted, claims against defendants who have not been served may be

dismissed and the statute of limitations may run resulting in some instances in the loss of otherwise meritorious claims on limitations grounds.

CONCLUSION

Rule 1 of the Federal Rules of Civil Procedure states that the goal is the "just, speedy, and inexpensive determination of every action." As described above, the proposed rules concerning discovery will result in more protracted and expensive proceedings. More importantly, the proposed rules are in conflict with the goal of just determinations. The provisions that limit discovery and penalize parties for not being in a position to argue for discovery before discovery has occurred may seem neutral on their face, but will have the effect of inhibiting plaintiffs' ability to sustain legitimate cases. Accordingly, these proposed rules should not be adopted.

Very truly yours,

Steven Skalet