A Once in a Century Opportunity

By Alfred W. Cortese, Jr. and Lewis F. Collins, Jr.

Meaningfully Amending the Federal Rules Will Improve the Administration of Justice

Failing to adjust the Federal Rules of Civil Procedure to meet the demands of twenty-first century litigation will have significant, negative implications today and for our future. Inefficient and unpredictable litigation is a tax on productive behavior and an inefficient system can have significant adverse impacts, including sanctioning appropriate behavior and providing incentives for inappropriate behavior. *See*, *e.g.*, Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of* Twombly *and* Iqbal*: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 115 Penn. St. L. Rev. 1 (2010). Such perverse effects weaken our economy and social structure, and the global competitiveness of American companies. *See*, *e.g.*, John Langbein, *Cultural Chauvinism in Comparative Law*, 5 Cardozo J. Int'l & Comp. L. 41, 48 (1997) ("Americans operate a system of justice whose excesses make it a laughing stock to the rest of the civilized world. Our system is truth-defeating, expensive, and capricious—a lawyers' tax on the productive sector."); Daniel Troy, *Seize the Opportunity—Reduce The Costs And Burdens Of Our Current Justice System*, The Metropolitan Corporate Counsel (2010); Francis H. Buckley, *et al.*, *The American Illness: Essays on the Rule of Law*, (forthcoming, The Yale Univ. Press, 2012) (Essays detailing the adverse impact of the American civil justice system on global competitiveness).

Unfortunately, the Federal Rules have not kept pace with either the information or the litigation explosions and, as a result, federal courts are now failing in key ways to ensure the just, speedy, and cost-effective determination of every action. This is largely because the many well-intentioned earlier rule amendments have tinkered at the edges of necessary change and the sporadic, inconsistent holdings of various courts that have resulted from them, taken together, have failed to achieve the meaningful, systemic changes to interrelated rules that are now more necessary than ever.

The difficult task of crafting procedural rules that would actually help solve some of today's problems, in which the Rules Committee is now engaged, is symptomatic of a deeper underlying problem: the 1938 Rules are simply out of date and the myriad variety of "tweaks" to those rules over the last 30 years have been unable to keep pace with the skyrocketing increase in the costs, burdens, and complexity of modern litigation.

The defense bar has long supported returning to the fundamentals of the Federal Rules of Civil Procedure. Lawyers for Civil Justice—along with DRI, the FDCC, and the IADC—submitted a white paper presenting the consensus of the defense bar that included specific recommendations to a May 2010 Conference on Civil Litigation sponsored by the Committee on Rules of Practice and Procedure. Lawyers for Civil Justice, *et al.*, *Reshaping the Rules*

This article makes the case for change to substantially improve the quality of justice of our courts and the opportunity for trial lawyers to try more cases by meaningfully amending the Federal Rules of Civil Procedure in four key areas: (1) heightened "plausibility" pleading standards, (2) limiting the scope of discovery to the claims and defenses, (3) triggering preservation duties on commencement of litigation and sanctioning only willful destruction of information for the purpose of preventing its use in litigation, and (4) reversing current perverse cost allocation economic incentives by requiring that each party pay the reasonable costs of the discovery it seeks. Such Rules would substantially improve the quality of justice of our courts and the opportunity for trial lawyers to try more cases.

Currently, the U.S. Judicial Conference Committee on Rules of Practice and Procedure and its Civil Rules Advisory Committee are considering numerous proposals for amending the Rules, and are being urged by organizations such as DRI and Lawyers for Civil Justice to cut through the myriad, complex proposals that amount to mere tweaking of the existing Rules and to focus on developing an interrelated package of broad-based and bold amendments such as the above.

Other significant voices recently joined the chorus. As stated by Congressman Trent Franks, Chair of the Subcommittee on the Constitution of the House Judiciary Committee:

> We appreciate your Committee's current consideration of proposed rule changes to address many of these issues, salute your efforts, and look forward to the recommendations of your Committee. You and your Committee have a monumental effort ahead of you as it is our view that the Rules have become an

■ Alfred W. Cortese, Jr., is a member of Cortese PLLC in Washington, D.C. This article is based on his years of scholarship and work in the area of civil justice reform as counsel to Lawyers for Civil Justice and major corporations. Lewis F. Collins, Jr., is a partner of Butler Pappas Weihmuller Katz Craig in Tampa. He is past president of the Federation of Defense & Corporate Counsel and Lawyers for Civil Justice. The authors express great appreciation for the contributions of the many corporate and defense lawyers, too numerous to name, who volunteer countless hours in support of civil justice reform.

of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure 7–8, 18–20 (May 2, 2010), http://www.dri.org/News/DRIReports (then follow "Reshaping the Rules of Civil Procedure for the 21st Century" hyperlink) (last visited Feb. 15, 2011). The white paper encouraged the Committee on Rules of Practice and Procedure to move forward with meaningful amendments to the rules in four key areas: (1) pleadings, (2) discovery, (3) preservation, and (4) cost allocation.

The rules advocated in the white paper and subsequent comments submitted to the Committee on Rules of Practice and Procedure, if adopted, would help achieve real relief from the costly and inefficient administration of justice that has come to characterize the current civil justice system. Business leaders, the bar, and the judiciary have become more aware of the interplay between the nation's suffering economy and the opportunities that reforming the federal rules might hold for boosting U.S. competitiveness in a global economy. Reducing the extraordinary costs, burdens, and unacceptable risks of modern litigation would also increase the number of cases that courts try to verdicts.

Moreover, the rule reform proposals have received legal academic attention and support: Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, (Jan. 4, 2011); Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, (Apr. 14, 2010); Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure*, (Nov. 3, 2010). This scholarship has created a significant legal and economic foundation for arguments supporting specific proposals and highlighted substantial empirical data documenting existing problems that should drive the proposed rule-making solutions.

The Substantive-Procedural Intersection

Federal Rule of Civil Procedure 1 expressly recognizes that the primary goal of the federal procedural system is the fair, efficient, and accurate adjudication of legal actions. This underscores and recognizes the essential intersection between adopted procedures as reflected in the federal rules and vindicating and protecting the substantive law.

Debates over Amending Procedural Rules Ignore the Purpose and Function of the Law

Debates over rule amendments frequently neglect the law's ultimate goals, more often focusing on a particular area or problem. For example, certain perceptions about the internal norms of the Federal Rules of Civil Procedure and the rule-making process drove much of the ferment over the recent U.S. Supreme Court decisions in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Remarkably absent from the list of objections to *Twombly* and *Iqbal* was whether the Court's decisions were sensible given the objectives of the law. *See* Alfred W. Cortese, Jr., Iqbal & Twombly: *Sensible Interpretations of the Pleading Rules* 19, The Metropolitan Corporate Counsel (July 2010). Similarly, while many commentators have expressed concern that raising the pleading bar may disadvantage some plaintiffs, only rarely has the debate considered the beneficial or perverse effect on primary social behavior. The law and rule makers should attend to optimizing society's objectives. In other words, rule makers must attend to optimizing responsible, productive social and litigation behavior.

The implications of these points became painfully clear in the debate that followed the *Iqbal* and *Twombly* decisions. The debate largely proceeded as if the only issue was whether someone who wished

> outdated, confusing and complex patchwork of vague and indeterminate standards that are in need of a major overhaul. Accordingly, we suggest that your Committee consider focusing for now on developing a clean, straightforward rewrite of the Rules governing discovery, preservation, and cost allocation.
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> *Letter, Hon. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell*, March 21, 2012.

It is long past time for meaningful action to amend the Federal Rules, action that every DRI member should strongly support.

The dawn of the twenty-first century brought great promise and hope that advances in technology would make all aspects of the civil litigation system more efficient and cost effective. This great hope, however, has evaporated and instead litigants have been pounded by a tornado of spiraling costs and excessively and unwarrantedly burdensome discovery that has produced the opposite result. The plaintiffs' bar frequently has attempted to use the technology and information explosion to coerce settlements from corporate America by threatening costly discovery battles over millions of gigabytes of information. Faced with skyrocketing costs and unacceptable risks, corporate America often decides to choose the certainty of settlement.

A far more fundamental shift has occurred, however, as a result of unacceptably burdensome and intrusive discovery. The merits actually determine the outcome of very few cases. Discovery-coerced settlements mean that parties don't resolve disputes through trials. As a result, an entire generation of new lawyers misses out on the opportunity to learn trial skills by actually trying cases. Many experienced defense trial lawyers have sounded the alarm:

> The days of the trial lawyer are essentially gone. Even the term "trial lawyer" has fallen out of favor over the past four decades as a majority of "trial lawyers" now describe themselves as litigators. Trials themselves are essentially gone as well. Since the 1960s, there has been a steep decline in the actual number of civil jury trials and the number of civil jury trials as a percentage of the cases filed in both state and federal court.
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> Tracy Walters McCormack and Christopher Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, originally published in the 23 Georgetown Journal of Legal Ethics 155 (Winter 2010) ("there is an entire generation of litigators for whom trial is merely a theoretical concept.")

Something must change if the civil justice system as we know it is to survive. This change can only happen by adopting incentive based rules that recognize the fundamental fairness required by a system of justice—fairness borne out by clarity, predictability, consistency, proportionality, and perspective.

to air a complaint had access to a courtroom to do so. It neglected that litigation also imposes costs on defendants—often astonishing costs.

While we need to address the risk of an error suffered by a plaintiff, we must not fail to address the harm suffered by innocent individuals, such as employees, shareholders, and other stakeholders, when a defendant must defend against spurious allegations. Nor can we overlook the harm suffered by the public at large, since many defendants will pass on these legal costs to consumers. Litigation costs do lead to increased prices and limit available goods and services, which in turn hits wage earners. So we need rules that weed out unjustifiable litigation costs partly for economic reasons. Legal procedural rules are instrumental to that task as well as to the tasks of optimizing productive social and litigation behavior.

Rules of Procedure Must Adjust to the Dynamics of Modern Litigation

The original drafters of the Federal Rules of Civil Procedure knew that procedural rules can encourage beneficial primary social behavior. The Federal Rules of Civil Procedure historically intended, in part, to address the systematic disadvantage experienced by plaintiffs by removing the barriers to entry to the legal system so that plaintiffs had access to the courts. The original rule makers also assumed that discovery and trials could proceed relatively cheaply and efficiently.

However, things change. The system has become enormously expensive and burdensome, and attorneys have learned to game it. For one, a well-organized and well-funded plaintiffs' bar can take strategic advantage of the costs of litigation to obtain unjustifiable settlements all too frequently. Each time that a defendant settles a case because of the risk of ruinous litigation costs, it undermines the goals of the law, and the public at large suffers the consequences. In light of the way that things have changed since the 1930s, the law and procedural rules can justifiably take such matters into account, and not doing so qualifies as socially perverse.

Discovery Problems Continue to Obscure the Merits of Disputes in the Federal System

Excessive discovery and evasion and resistance to reasonable discovery requests pose significant problems…. the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time consuming activities that are disproportionate to the nature of the case, the amount involved or the issues or values at stake.

The preceding quote opens the advisory committee note to the 1983 amendments to Federal Rule of Civil Procedure 26. These amendments, adopted more than a quarter of a century ago, intended to address growing problems that threatened the viability of effective dispute resolution in the federal system. Since 1983 one set of additional amendments has followed another at a pace unheard of in preceding years, culminating in 2006 with efforts specifically to address the exploding problems with e-discovery. Four times since the pronouncement in the 1983 advisory note, the Committee on Rules of Practice and Procedure has recommended revising the federal rules to prevent the scope and cost of modern litigation from outstripping the federal system's ability to uphold the fundamental premise of Federal Rule of Civil Procedure 1: the "just, speedy, and inexpensive determination of every action."

Time has shown that current problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. In fact, due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite "meet and confer" amendments and calls for "cooperation." Better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens, and unintended consequences of unnecessary preservation and discovery.

Some have voiced concern that, in light of how rapidly technology is changing, rule changes at present would be counterproductive. However, what would truly be counterproductive for both the system and the economy would be to maintain the current discovery system.

Rather than focusing judicial attention on the merits of an action, the lack of clear and specific rules has resulted in an ad hoc patchwork of individual solutions to the complex problems created by large volumes of ESI. Rule-based solutions would provide uniform, real world relief to costly real world problems. The need for national uniformity, consistency, and clarity is urgent and immediate.

The Rules Should Implement the Pleading Standard of Twombly and Iqbal

Pleading should not allow litigants to defer identifying dispute issues or claims until after discovery, which allows frivolous cases to impose unwarranted and costly burdens on the courts and litigants. Discovery often proceeds without a judge determining whether asserted claims on their face sufficiently warrant the substantial time and resources that discovery entails.

In complex litigation most courts over time have required more particular pleading standards so that cases did not proceed to discovery unless the allegations met certain manageable thresholds of particularity and plausibility. Applying that same discipline to the full range of civil cases would achieve efficiencies while imposing only slight but justifiable and reasonable burdens on legitimate litigants.

Rule makers should amend Federal Rules of Civil Procedure 8, 9, 12, and 65 to implement pleading standards that are currently being used by courts—without controversy, in many categories of cases—so that they apply to all civil actions. There should be a general stay of discovery pending resolution of a challenge to the sufficiency of a pleading through a motion to dismiss, for a more definite statement, or for a judgment on the pleadings—a procedure that has proved successful under the Private Securities Litigation Reform Act. Essentially this proposed amendment would implement the *Twombly-Iqbal* standard requiring "a short and plain statement, *made with particularity, of all material facts known to the pleading party that support* the claim, ~~showing~~ *creating a rea-*

sonable inference that the pleader is *plausibly* entitled to relief" and would define "material fact" as "…*one that is necessary to the claim and without which it could not be supported*." *See* Lawyers for Civil Justice, *et al*., Reshaping the Rules, *supra*, at 8–10.

The System Requires Clear, Concise, and Limited Discovery Rule Amendments

For the last several decades, courts and commentators have noted the increasing inability of federal discovery rules to keep pace with technological advances, and the concomitant increase in expense and delay in the litigation process. Numerous studies, case law, and anecdotal evidence show that litigants are being overwhelmed by the volume of data subject to discovery and the commensurate costs of properly handling such data throughout the litigation process. Absent definitive action by the Rules Committee to relieve the burdens of electronic discovery, the problems will only continue to grow.

Numerous prior rule amendments have unfortunately failed to achieve meaningful progress in alleviating continuing discovery problems. Further specific, decisive action to amend the discovery rules along the following lines will render the process more efficient.

First, Rule 26 should be amended by limiting the scope of discovery to "any non-privileged matter that would support proof of a claim or defense," subject to a "proportionality assessment" as required by Rule 26(b)(2)(C). The explosion of electronic discovery has dramatically changed litigants' experience of the discovery process, but the fundamental purpose of discovery—namely, "the gathering of material information"—remains unchanged. Thus, one obvious response is to limit the scope of discovery to evidence that is most material to the claims and defenses in each case. *See*, *e.g.*, English Civil Procedure Rules, The White Book Note CPR 31.6.3 (2), adopted pursuant to the recommendations of the Lord Woolf Committee Report in 1998.

Second, Rule 26(b)(2)(B) should be amended to identify specifically the categories, types, or sources of electronically stored information that are presumptively exempted from preservation and discovery, absent a showing of "substantial need and good cause" along the lines of the Federal Circuit Patent Rules and Seventh Circuit E-Discovery Principles.

Third, the provisions for protective orders, embodying the so called "proportionality rule," Rule 26(b)(2)(C), should be amended to include explicitly its requirements to limit the scope of discovery and to make it clear that it is available to limit and manage excessive demands for unreasonable and burdensome preservation.

> Litigation costs do lead to increased prices and limit available goods and services, which in turn hits wage earners.

Fourth, and finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.

These steps would address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance and materiality, lessening the likelihood of satellite litigation on discovery issues and, consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.

The Rules Must Address Information Preservation

Until recently, the rule for preservation was simply, "do not destroy material relevant to a dispute." However, an *ad hoc* judge-made framework has turned that rule into an *affirmative* duty to preserve material that may become relevant to a dispute and to prevent the inadvertent disposal of material by otherwise appropriate recycling efforts. This inconsistent creation of new duties converted the system from one of professionalism, in which litigants and attorneys were presumed to have acted in good faith and not to have destroyed material pertinent to a dispute, to one of suspicion, in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen, and policed, will engage in regular spoliation—*without any real evidence* to suggest that such a change is necessary or desirable. Under this system, today's litigants are spending billions of dollars to address an undefined and largely non-existent spoliation risk based on the existence of a few high profile sanctions decisions.

Trigger

Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated—upon "reasonable anticipation of litigation"—it is an almost impossible task to determine confidently the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates a "bright line" standard. What is necessary to give useful guidance is a clear, bright line standard that will meaningfully clarify the time at which a duty to preserve information for purposes of litigation is triggered. As a result we endorse a "commencement of litigation" standard.

A "commencement of litigation" trigger rule would eliminate the current gotcha game of demanding unreasonably expansive pre-litigation preservation and the costs of over-preservation to respond to those demands. That standard will permit each district court to be engaged in the preservation process as necessary (rather than second guessing the propriety of pre-litigation activity) and subject the requesting party to Rule 11 (rather than the current absence of sanctions for overly broad preservation demands); and the preserving party to Rule 37 (rather than the court's inherent power).

Scope

The problems with preservation, most notably its significant costs and burdens, are not merely the product of the post-

modern age and evolving technology. The real problem is the lack of identifiable boundaries on which parties may rely when analyzing the scope of their preservation obligations. Faced with the prospect of preserving all information relevant to the subject matter of potential litigation, the ambiguous standard for the scope of discovery of Rule 26(b)(1), parties are forced to rely on "amorphous" principles and widely divergent court opinions in order to comply with their preservation obligations.

A workable solution to the problems of costly and burdensome preservation must include a narrowed scope governing all discovery—not a separate scope of preservation rule. Narrowing the scope of discovery would provide a simple, straightforward, and easily understood resolution of the problems of preservation—a simplicity that is sorely needed within the Federal Rules. Moreover, a narrowed scope of discovery limited to information that is material to the case would have the immediate and direct effect of reducing the costs and burdens of discovery and preservation of information—precisely the problems the committee has been attempting to address for many, many years.

Sanctions

The possibility of a sanctions order has highly negative *in terrorem* effects on responsible American corporations and the individual employees who are internally responsible for making preservation decisions. As a result, regardless of the infrequency of sanctions motions and awards, and notwithstanding the financial impact and costs of the sanctions awards themselves, the companies spend billions of dollars to over-preserve material that is merely "potentially" relevant. Hubbard, William H.J., Preliminary Report on the Preservation Costs Survey of Major Companies, September 8, 2011, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Civil%20Justice%20Reform%20Group.pdf.

Sanctions for failing to preserve or produce relevant and material ESI should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step. Therefore, we have proposed a sanctions rule that permits sanctions to be imposed by a court only if information relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions.

> What would truly be counterproductive for both the system and the economy would be to maintain the current discovery system.

Rule 37, which currently has limited application to sanctions for failure to preserve, should be amended to include those failures in its scope to reduce the reliance of courts on their undemocratic "inherent powers," which can also be accomplished by amending Rule 37(e), as LCJ has proposed or as Connecticut has done, to give it new scope and life. *See* Sec. 13-14 *Connecticut Practice Book* (2011) (eff. Jan. 2012) and New Standards Comment.

The Rules Must Confront Runaway Discovery Costs

How can the judicial system deliver on Rule 1's promise of just, speedy, and inexpensive determination of actions if a litigant may ask for limitless costly, burdensome, and time consuming discovery—and pay for none of it?

The Cost of Discovery Is out of Control

Numerous amendments to the discovery Rules aimed at reining in the ever-increasing costs of discovery have not adequately or effectively controlled these costs. Today, discovery is too often used as a weapon to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes (and/or megabytes) of information that is very expensive to collect and review in an effort to force opposing parties to consider settlement based primarily on the threat of excessive litigation costs. And many parties do in fact decide to settle to avoid expensive and protracted discovery instead of undertaking a fair and practical examination of the merits.

Existing Rules and Practices Do Not and Cannot Control Costs

The current Federal Rules provide no reliable remedy to curb discovery and preservation costs. Judges are asked to manage the scope of discovery, but are prevented from being effective by institutional limitations. Without effective guidance discovery costs soar. For these reasons, parties need a cost-effective, workable, self-executing solution for access to relevant information. *See* Redish, *Allocation of Discovery Costs and the Foundations of Modern Procedure*, 2 (forthcoming chapter in The American Illness, The Yale Univ. Press, 2012), available at http://buckleysmix.com/wp-content/uploads/2010/10/Redish.pdf.

The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining truly critical evidence is the best way to achieve that purpose. *See* Peter B. Rutledge, *The Proportionality Principle and the (Amount in) Controversy*, (forthcoming chapter in The American Illness, The Yale Univ. Press, 2012), available at http://buckleysmix.com/wp-content/uploads/2010/10/Rutledge.

A much more effective remedy would be—to limit the scope of discovery and to enforce those limits by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it. Recognizing this, we propose that the Federal Rules be amended to require that each party pay the costs of the discovery it seeks. Such an explicit rule is needed because even after numerous rounds of discovery rule amendments, existing rules and the practices of both lawyers and judges have not prevented the current discovery/preservation crisis. If we continue on the same path, cost escalation will never be brought under control.

The Economic Logic of Requiring "Requester Pays"

Numerous scholars have recognized the unfairness and economic perversity of the existing system and have likewise argued persuasively that making the consumer of discovery pay for what he or she consumes will naturally balance the process, largely without need for management by judges.

It is axiomatic that when the consumer does not have to pay for what he or she consumes, the consumer will demand more than is economically rational. Several scholars have noted that the incentive a party already has to consume that which is "free" is multiplied by creating a "free" benefit to the requester on one side of the ledger, and a detriment to the opponent on the other side. *See*, *e.g.*, Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, Northwestern University School of Law, Law and Economics Series, No. 10-16.

A rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party—the party in the best position to control the scope of those demands and, therefore, their cost. It would undoubtedly represent significant savings for the litigation system and the economy. The Rule would also discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. *See*, Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure*, 37 (forthcoming, U. Fla. L. Rev. (2012).

Conventional economic theory on prices as a mechanism for efficient allocation of resources is adequate justification for a "requester pays" rule. Professor Bone has described the law-and-economics version of utilitarianism as "The optimal rule from a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs." Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 910 (2009).

The abuses discussed herein are only possible because of the gross disproportionality engendered by the deadly combination of loose pleading rules, unlimited discovery, nebulous duties to preserve information, and the ability of the requester to "free ride" by demanding everything and paying for nothing. *See* Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation* at 12.

A rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses.

Rather than enshrine economically perverse activity, the Federal Rules should encourage parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. As Redish and McNamara state, "Subsidization—through allocation of the total costs to the responding party—renders discovery costs a complete externality, and removes all incentives for litigants to limit the scope of their requests." Redish & McNamara at 33.

A party who benefits by making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage focused requests designed to obtain that information necessary for the just adjudication of the issues without causing the "*de facto* hidden litigation subsidy" that incentivizes excessive discovery. Redish & McNamara at 34.

The perverse cost incentives of the current system are most pronounced in cases of asymmetrical information, those in which the bulk of information resides with one party. Incentives diverge and the burden of responding to discovery is largely borne by one side; there are fewer incentives to self-discipline. *See* Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 13, (2011), forthcoming, U. Fla. Law Rev. (2012) (referencing, Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. Rev. 635, 643 (1989).

Requiring Payment for Requested Discovery Will Not Curb Access to Justice

There is no reason to believe that imposing a fair system of cost allocation should curb access to justice. Private, individual litigants rarely bear the expenses of initiating lawsuits under the contingency-fee systems that prevail in the United States. The current system of discovery cost allocation is difficult to explain as anything other than an historical anomaly that—if it ever did—no longer serves a laudable purpose.

The cost allocation rule proposed in *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to focus discovery on the merits and to settle meritorious cases before the completion of discovery. More cases will be tried, and will be fairer to both sides and more likely to be resolved on the merits, without the perverse incentives created by the current system.

Conclusion

The intensive review of the Federal Rules of Civil Procedure currently underway by the Judicial Conference of the United States Committee on Rules of Practice and Procedure represents a once in a century opportunity to achieve real relief from the costly and inefficient administration of justice that has come to characterize the current civil justice system. Adopting clear, concise, and meaningful amendments to the Federal Rules of Civil Procedure in four key areas would help reduce the extraordinary costs, burdens, and unacceptable risks of modern litigation and increase the number of cases that actually are tried to verdict. These four areas are (1) pleadings, (2) discovery, (3) preservation, and (4) cost allocation.