March 22, 2013

Via Electronic Mail Only

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules

Honorable Paul W. Grimm
Member, Advisory Committee on Civil Rules

Honorable John G. Koeltl
Chair, Duke Subcommittee on Civil Rules and
Member, Advisory Committee on Civil Rules

Re: Comments by COSAL on Proposed Changes to the Federal Rules of Civil Procedure

Dear Judges Campbell, Grimm and Koeltl:

The Committee to Support the Antitrust Laws (COSAL) was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL closely monitors and comments on congressional and administrative activity with respect to antitrust policy and plays a leadership role in building support for the antitrust laws. COSAL prepared these comments based on members' intimate and extensive knowledge of the role that the Federal Rules of Civil Procedure play in complex antitrust litigation. We respectfully request that you consider these views as you make revisions to the proposed changes in the Federal Rules.

PROPOSED CHANGES TO FEDERAL RULES 26(b)(1), 30, 33 AND 34(a) ARE INADVISABLE AND THREATEN THE EFFECTIVENESS OF THE CIVIL JUSTICE SYSTEM

It is the considered opinion of COSAL that proposed changes by the Advisory Committee on Civil Rules ("Advisory Committee") to Rules 26(b)(1), 30, 33 and 34(a) of the Federal Rules of Civil Procedure are inadvisable, potentially unfair to parties bearing the burden of proof in complex civil litigation in particular, and could, in certain cases, result in increasing the costs, inefficiencies, and burdens of litigation for all parties.

The Advisory Committee's proposed changes appear to arise out of a well-intentioned desire to reduce the costs and burdens associated with discovery in federal civil litigation. By narrowing the scope of available discovery, lowering key presumptive discovery limits, and encouraging cost shifting and a sharper focus on costs, these rule changes could, as an unintended consequence, sharply curtail the ability of plaintiffs to uncover wrongdoing and prove their cases, especially in the large complex cases with which the COSAL membership is most familiar.

Many of the proposed rule changes raise serious concerns because they could have the effect of substantially curtailing the ability of litigants to gather evidence from defendants and third parties. This is especially problematic when paired with recent substantive trends in many fields of law—including antitrust, securities, and civil rights—increasing the evidentiary burdens as a matter of procedural and substantive law. For instance, recent decisions with respect to class certification, including, *e.g.*, *Dukes*, *In re Hydrogen Peroxide* and *In re Initial Pub. Offering*[1] have expanded the evidentiary requirements at the class certification stage. Moreover, the Class Action Fairness Act has brought state law class actions into federal courts, and many of these cases are premised on the laws of multiple states. As a matter of substantive law, and in antitrust in particular, courts have been moving away from "*per se*" rules and toward legal standards that require substantial amounts of data and data analysis, as well as the gathering, comprehension, and understanding of a great deal of documentary and testimonial evidence. *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) ("Vertical price restraints are to be judged according to the rule of reason."); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906 (9th Cir. 2008) (adopting data intensive "discount attribution" standard to bundling antitrust cases).

In our view, many of the proposals to curtail or otherwise restrict discovery are unnecessary and unwarranted, and should be rejected. In the alternative, new restrictions should include commentary in the advisory committee notes observing that courts should be expected to

[1] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

substantially vary the rules, and especially the presumptive limits and caps, in complex or large cases consistent with the interests of justice.

Asymmetrical Information Characterizes a Vital Segment of Complex Litigation

COSAL members have spent their careers challenging antitrust violations under state and federal antitrust laws. Plaintiffs in these cases, especially in direct and indirect purchaser class actions, contend with substantial information asymmetry: defendants (and third parties) have the bulk of the relevant information regarding the market, the product, and the alleged conduct, while plaintiffs tend to be on the outside looking in at the outset of a case. Antitrust conspiracies and cartels, by their nature, are secretive and sometimes can only be proven by putting together strands of direct evidence of agreement from multiple sources, by assembling circumstantial evidence from a variety of sources and means, or both. Second, anticompetitive schemes are often hatched and executed deep within the workings of complex businesses and industries. Taking a single antitrust case from motion practice to a jury trial can require proving relevant markets, proving anticompetitive conduct, showing impact and damages flowing from the challenged conduct, and refuting procompetitive justifications. The evidence vital to each of these elements and issues is regularly in the sole possession of the defendants, or sometimes dispersed amongst a variety of far flung third parties. For antitrust plaintiffs facing information asymmetry, the discovery rules must provide fair access to defendants' and third parties' information and documents—or the antitrust laws cannot be effectively enforced through private civil litigation.

COSAL members have the comments on proposed rule changes as set forth below:

Rule 26(b)(1): "Don't Fix It If It Ain't Broke"

PROPOSED ADVISORY COMMITTEE CHANGES TO RULE 26(b)(1)
(b) Discovery Scope and Limits. **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~including 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

The well-understood language of Rule 26(b)(1) ***should be preserved.*** The proposed changes to the rule are significant and problematic. Decades of law students have learned the simple rule that discovery is limited to that which "appears calculated to lead to the discovery of admissible evidence." The new Rule proposes to eliminate that language without replacing it with any equivalent text. Under the present rule the burden is on a party withholding information to establish that the withheld information is beyond the scope or too burdensome to produce. The proposed rule imposes a multi-factor "proportionality" determination that will place a heavy burden on the party seeking information to satisfy the requisite "proportionality." In addition, sorting out the application of the proposed "proportionality" examination will subject just about every discovery request to scrutiny, as "proportionality" is very open ended, and in the eye of the beholder.

The proposed changes to Rule 26(b)(1) are problematic in several other ways. Application of the "proportionality" concept cannot be reliably applied at the outset of complex cases characterized by asymmetric information. Where one party has all the information, discovery will necessarily appear disproportional until the evidence is used to prove claims. The value of the claims and importance of the issues are often understood only **after** discovery.

As currently written and understood, Rule 26(b)(1) generally treats litigants equally without regard to the amount of potentially relevant information they may have. In contrast, the proposed rule appears to offer protection to larger parties who have a monopoly on information, by allowing them to use that disproportionate burden to avoid document production.

Rule 30: Going the Wrong Way

PROPOSED ADVISORY COMMITTEE CHANGES TO RULE 30
(a) When a Deposition May Be Taken. * * * (2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1~~2~~): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * (d) Duration; Sanction; Motion to Terminate or Limit. (1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

The proposed limitation on the number of depositions is troubling, especially from the perspective of those who litigate class actions and other complex, multi-state cases. MDL proceedings, for example, are consolidated in distant states for pre-trial proceedings. There, dozens of depositions are sometimes needed both to gather evidence from far flung parties and witnesses, and to preserve testimony of witnesses that will be unavailable for trial. Moreover, in complex litigation, depositions are necessary for authentication of documents for summary judgment and class certification. The modified presumptive limits also fail to consider the role of experts. In antitrust suits, for example, a single side may have a higher number of expert witnesses than the total presumptive number of depositions under the proposed rule. Expert witness depositions should be excluded from the presumptive witness list and treated separately.

The presumptive limit on depositions likely influences the total number of depositions permitted in complex cases even when a court is inclined to permit a higher number of depositions in any particular case. Thirty depositions per side, a number common in complex cases, is currently only three times the presumptive limit. Under the proposed changes, thirty depositions will be six times the presumptive limit. Similarly, reducing the presumptive limit to just five depositions significantly alters the bargaining position of the parties, and places plaintiffs in complex antitrust cases in the position of facing what would be, in effect, a dispositive motion in the form of a critical negotiation over deposition caps before the case has even begun. The net effect is to drag down the number of allotted depositions below a level necessary to prosecute a complex case, and thereby potentially put parties in the position of having no way to obtain information on key elements of their claims.

It would also be unwise to adopt the proposed presumptive time limit of 4 hours for depositions. Antitrust and other complex cases regularly involve large numbers of documents. In depositions, witnesses are taken through the documents and then questioned. In these circumstances, the proposed presumptive time limit could be exhausted by the examination of the documents alone. Similarly, economic issues in antitrust cases require painstaking understanding of analyst documents and data spreadsheets. The proposed presumptive time limit threatens the ability of litigants to properly question deponents regarding analyst documents and data spreadsheets. Moreover, in cases with multiple parties, the time allotted to each party is often only one-half or less of the 7 hours, and thus reducing the presumptive limit to 4 hours would make an effective deposition almost impossible.

The short time limit will invite filibustering and require needless judicial refereeing. Moreover, across all types and categories of litigation, depositions have a two-fold purpose: to prepare testimony for trial and conduct discovery. The proposed presumptive time limit of 4 hours does not offer enough time to accomplish both tasks. Particular types of deposition, including expert depositions, uniformly require more than 4 hours. Given that 4 hours will rarely be sufficient in complex cases, a huge amount of resources will need to be expended negotiating deposition time limits with every third party witness in multiple jurisdictions around the country. This could result in numerous wasteful motions for expansion of the time in courts around the country in every single complex antitrust class action.

At the very least, the proposed presumptive limits must be modified by Committee comment to exempt expert and third party depositions from the proposed limits. Alternatively or in addition, a general rule eliminating speaking objections (excepting instructions invoking privilege) would reduce strategic behavior and overly long depositions. In addition, the proposed rule could include clarification that the presumptive limit on depositions is per party, not per side.

Rule 34(a): An Arbitrary Numerical Limit on Requests for Production is a Solution in Search of a Problem

PROPOSED ADVISORY COMMITTEE CHANGES TO RULE 34(a)
(a) In General. A party may serve on any other party ~~a~~ no more than [25] request**s** within the scope of Rule 26(b): * * * (3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

The proposed change to Rule 34 unwisely limits the number of requests for production to 25 where, at present, no numerical limit is imposed. One key problem with this new presumptive limit is that it could be counterproductive to the ends these rule changes presumably seek to achieve. Imposing a presumptive limit will force requesting parties, for fear of not

asking for all relevant materials, to broaden the scope of their document requests. Thus, by discouraging narrowly targeted requests, the result will be less precision in search, review and production. Less precision could potentially increase the number of documents produced and the corresponding costs of production.

A presumptive limit on the number of document requests will not effectively address concerns over the cost of e-discovery. Practitioners and courts are already reducing costs associated with ESI through direct means. For example, costs have been reduced by using targeted 30(b)(6) depositions to identify custodians followed by targeted custodian searches, targeted data searches and predictive coding.

Rule 33(a): There is an Unaddressed Need to Limit or Eliminate Wasteful Early Contention Interrogatories

PROPOSED ADVISORY COMMITTEE CHANGES TO RULE 33(a)
(a) In General. **(1) Number**. Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

The proposed rule reducing the presumptive number of interrogatories from 25 to 15 does not effectively address the problem of early contention interrogatories in complex litigation. In actions characterized by asymmetric information, plaintiffs rely on the discovery process to gather evidence from the defendant to prove their claims. In such cases, defendants regularly invoke Rule 33 to propound contention interrogatories early in a case, often before or just after the defendant produces information to the plaintiffs. The contention interrogatories generally ask plaintiffs to list the evidentiary bases for each of their claims and allegations even though defendants are the parties in possession of the bulk of the documentary or other evidence. Rather than seek relevant information, these early contention interrogatories are used by defendants to impose unnecessary costs on plaintiffs. COSAL suggests the following changes to Rule 33(a)(2) to curb unnecessary early contention interrogatories.

PROPOSED COSAL ADDITIONS TO RULE 33(a)
(a) In General. **(2) Scope.** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. A contention interrogatory that relates to documentary or other evidence not in the possession of the answering party need not be answered until discovery is complete.

Thank you for considering our views.

Respectfully submitted,

Eric Cramer/pg

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