October 13, 2022

Supreme Court of Appeals of West Virginia
Attn.: Edythe Nash Gaiser, Clerk of the Court
Capitol Complex
1900 Kanawha Boulevard East
Building One, Room E-317
Charleston, WV 25305

Re: Amendments to the West Virginia Rules of Civil Procedure, No. 21-Rules-12

To the Honorable Justices of the Supreme Court of Appeals of West Virginia:

The undersigned are leading national organizations representing lawyers who primarily represent civil defendants. Our members include numerous West Virginia defense attorneys. We are also leading West Virginia and national business, civil justice, and public policy organizations with members that include countless West Virginia employers and their insurers.

The proposed amendments will more closely align the West Virginia Rules of Civil Procedure with the Federal Rules of Civil Procedure (FRCP). The new rules generally replace the existing civil rules in West Virginia with language from the FRCP. This will promote harmony in West Virginia's federal and state courts and reduce incentives to forum shop.

We applaud the efforts on the proposed amendments sent out for comment. We have some suggestions for the Court's consideration, such as the adoption of reasonable limits on discovery.

From the defense perspective, civil litigation takes too long and costs too much. Much of this time and expense relates to pretrial discovery. All too often the discovery process is subject to abuse, marked by "fishing expeditions" by plaintiffs and use of the tools of discovery to harass and pressure defendants into settlements.

Civil discovery reform is critical because "discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs." Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation* 4 (2010).

Appendix A to this letter provides specific examples of the type of waste companies experience in civil discovery. The examples are pulled from comments submitted to the federal judiciary when potential amendments to the FRCP were being studied several years ago.

As the comments describe, plaintiffs can force corporate defendants to produce massive amounts of information at no cost to themselves. A company may have to spend millions of dollars. Typically, only a tiny portion of this information is used at trial. One survey concluded, "Inefficient and expensive discovery does not aid the fact finder. The ratio of pages discovered to pages entered as exhibits is as high as 1000/1." Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies* 3 (May 2010).

In December 2015, a number of amendments to the FRCP took effect that address some of these problems. The federal judiciary spent years developing the 2015 amendments. The rules reflect the participation of both sides of the bar and are balanced. Balance is important to businesses because discovery is a two-way street. Businesses may be plaintiffs in business-versus-business cases and need access to information to prosecute their claims. Further, defendants in all cases need access to information to determine the validity of a claim and mount a defense.

Years have passed since the 2015 FRCP amendments took effect. They have proven to be workable and fair. There is also a body of case law interpreting the provisions—including decisions by West Virginia's two federal district courts—that state courts can draw upon.

We suggest that West Virginia adopt these key parts of the 2015 FRCP amendments:

- Require the scope of discovery to be "proportional to the needs of the case" (FRCP 26(b)(1)) instead of either the existing "reasonably calculated to lead to the discovery of admissible evidence" approach or the committee's proposed new standard (any discovery "which is relevant to the subject matter involved in the pending action").

- Authorize protective orders that address cost-allocation (FRCP 26(c)(1)(B)).

The federal proportionality concept is well on its way to becoming the majority rule in the states along with the authority of courts to enter protective orders to allocate discovery costs among the parties. *See* Mark Behrens & Christopher Appel, *States Are Embracing Proportional Discovery, Moving Into Alignment With Federal Rules*, 29:5 Legal Opinion Letter (Wash. Legal Found., July 17, 2020) (discussing post-2015 amendments to state rules of civil procedure).

We also suggest that West Virginia generally limit use of the tools of discovery to curb unduly burdensome requests, like many other states. These include the limit on interrogatories in the committee's proposal (*see also* FRCP 33(a)), adoption of similar limits on oral and written depositions (*see* FRCP 30(a)(2), 31(a)(2) (1993)), and requests for production and requests for admission.

Lastly, we suggest that the revised rules address these significant issues or emerging trends:

- Require disclosure of third-party litigation funding (new Rule 26(a)(1)(A)(v)).

- Modify the committee's proposed 1 day, 7-hour limit on depositions by oral examination in Rule 30(d) by excluding product liability cases or lengthening the time limit to something like 30 hours for at least one deponent to account for the unique nature of West Virginia asbestos or other product liability cases. The cases cannot be adequately defended with a 7-hour limit or might require the frequent filing of costly motions seeking additional time (new Rule 30(d)).

- Stop the unfair joinder of claims that are not linked by a distinct litigable event, such as claims that involve plaintiffs exposed in different settings to the same product (new proposed Rule 20(c)), and bar multi-plaintiff consolidated trials in toxic tort cases (other than the plaintiff and members of that person's household) because of the prejudice to defendants when such cases are tried together (new proposed Rule 42(d)).

- Provide more specific limits on preservation and production of electronically stored information as some states have done (new Rule 26(b)(2)(B)-(C)).

Appendix B includes our specific recommendations as to these issues. Appendix C lists technical edits to the proposed amendments, many of which the Court or committee may have identified by now, but we provide nonetheless in the spirit of assisting the Court.

We appreciate the opportunity to provide these comments.

Respectfully submitted,

West Virginia Chamber of Commerce
West Virginia Trucking Association
Federation of Defense & Corporate Counsel
U.S. Chamber Institute for Legal Reform
Product Liability Advisory Council, Inc.
American Property Casualty Insurance Association
Coalition for Litigation Justice, Inc.
Washington Legal Foundation
American Trucking Associations
Pharmaceutical Research and Manufacturers of America
West Virginia Manufacturers Association
International Association of Defense Counsel
Association of Defense Trial Attorneys
American Tort Reform Association
National Federation of Independent Business
National Association of Mutual Insurance Companies
Alliance for Automotive Innovation
AdvaMed-Advanced Medical Technology Association

/s/ Danielle M. Waltz
Danielle M. Waltz
JACKSON KELLY PLLC
500 Lee Street East
Charleston, WV 25301
Tel.: (304) 340-1160
dwaltz@jacksonkelly.com

Of Counsel:

Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
Tel.: (202) 639-5621
mbehrens@shb.com

Enclosures

APPENDIX A

BROAD AND DIVERSE CORPORATE SUPPORT EXISTS FOR CIVIL DISCOVERY REFORM

In support of the 2015 amendments to the Federal Rules of Civil Procedure, many corporations told the federal judiciary's rules committee about the need for civil discovery reform.

CSX Transportation, Inc.

"*CSX Transportation, Inc. v. Robert N. Peirce, Jr., et al.*, (5:05-cv-202)(N.D.W.V.) is a case 'aris[ing] from the successful efforts of the defendants to deliberately fabricate and prosecute objectively unreasonable, false and fraudulent asbestosis claims against CSX'... During discovery, the defense adopted a strategy of seeking broad and wide sweeping categories of information that resulted in a CSX discovery spend of *more than $3.5 million* in attorney fees and expenses...."

"Among other things, CSX collected files from more than 30 law firms scattered across the United States. The volume of those files was enormous—over 75,000 electronic documents and 1,900 boxes of hard copy documents—and the ensuing privilege review was a massive undertaking that resulted in a log containing over 150,000 individual entries. Due to the sheer volume of documents collected, CSX was forced to lease space in three separate locations—at a cost of $11,000 per month—to house the hard copy documents for privilege review and the defendants' subsequent inspection and copying. CSX also made 300,000 electronic documents available for copying and inspection via an electronic database hosted by a third party vendor."

"Having inflicted a substantial burden in money and resources on CSX, the defense made little effort to review the documents made available. For example, they waited over three months before sending just two individuals to review the 900 hard copy boxes at one of the locations. Those two individuals completed the task in just four days and selected only 631 documents for production. Overall, the defendants requested copies of just 4,600 documents from the 1,900 hard copy boxes (i.e., over 3.5 million pages) CSX made available and none of the 300,000 electronic documents."

"At trial, from the full universe of documents CSX made available in that massive and costly production, the defense offered but a single exhibit. That exhibit was excluded by the court as irrelevant."

General Electric Company

"[In one case,] GE produced approximately 340,000 unique documents (in pages, more than 6 million) to plaintiffs. . . . At trial, a total of 194 documents were marked as exhibits by both sides. Thus, less than 0.1% of the documents produced (and a far, far smaller percentage of the documents preserved or collected) were actually used at trial."

In "an intellectual property dispute that culminated in a $170 million judgment for GE in federal court in Dallas . . . GE collected and preserved 2.4 terabytes of data or roughly 180,000,000 pages. To provide a tangible comparison, that is about 72,000 banker's boxes of documents. We produced only 7% of that in discovery. The total volume of exhibits eventually admitted in evidence fit into two binders, a total of 165 documents."

Google Inc.

"In an age where email and word processing documents create huge volumes of data, discovery for even a single lawsuit often costs millions of dollars."

Johnson & Johnson

"In one representative set of cases, J&J companies had to collect documents from 350 custodians. Under the current discovery practice, J&J collected over 56 *million* documents amounting to 625 *million* pages. Even after application of extensive key word filtering and de-duplication, third party vendors reviewed over 13 *million* documents amounting to over 148 *million* pages. After this massive discovery effort, in two resulting trials, the parties entered into evidence a grand total of less than 200 documents in each trial."

"In another representative set of cases, J&J companies collected documents from 370 custodians amounting to 194 *million* pages of electronically stored information that J&J had to pay to de-duplicate and filter prior to review of over 22 *million* pages of documents. At trial, the parties submitted only 410 documents into evidence."

Hallmark Cards, Inc.

"In one recent case, in response to our opponent's third set of document requests, and utilizing the efforts of nearly 85 people, Hallmark produced more than a million pages of electronic documents – and only one was utilized at the subsequent jury trial."

Pfizer Inc.

"Over the years, Pfizer has been subjected to tens of thousands of discovery requests. Responding to these requests under the current rules has required Pfizer to preserve and collect staggering amounts of data far out of proportion to the volume of data actually produced and, even more telling, the number of documents ultimately used at trial. Pfizer's experience with a recent products liability litigation is illustrative. In that matter, for eight years, Pfizer preserved an extraordinary 1.2 million back-up tapes, each of which holds up to 100 gigabytes of data. Preservation of these tapes cost Pfizer nearly $40 million, yet Pfizer never had to retrieve a single document from the tapes. Rather, Pfizer collected millions and millions of documents from more than 170 custodians and over 75 centralized systems (e.g., databases housing regulatory documents). Ultimately, approximately 2.5 million documents (representing more than 25 million pages) were produced to plaintiffs, but only about 400 company documents were marked at trial. Thus, for every one document used at trial, approximately 625,000 additional documents were produced."

Anadarko Petroleum Corporation

"In many cases, corporate parties . . . over-preserve at exorbitant expense in order to avoid tactical threats of spoliation sanctions. At present, 16% of our electronic data and 60% of our corporate e-mail are subject to a Legal Hold."

Farmers Insurance Exchange

"The single largest factor contributing to the unusually high cost of litigation in the United States is discovery. Yet, in large cases, very few documents obtained in discovery impact the lawsuit. A survey on the topic found that when cases of at least moderate size (with defense costs exceeding $250,000) go to trial, on average just 0.1% of the pages produced in discovery are even offered as trial exhibits."

Microsoft

"[F]or every single page that is actually used as evidence in litigation, Microsoft produces about 1000 pages, manually reviews about 4000 pages, collects and processes about 120,000 pages (both physically and through the use of technology), and preserves 673,693 pages. . . ."

Results of Microsoft case study:

- "Microsoft placed an average of 45 custodians under a litigation hold per matter in 2013, and preserved – as a result – approximately 59,285,000 pages of material per matter.
- As Microsoft moves through a case, we narrow the group of custodians for collection and processing. At this stage Microsoft collects from an average of 8 custodians, and processes, on average, 241 GB, or 10,544,000 pages of data.
- After applying a range of technological tools to filter that data, Microsoft ends up with about 8 GB, per case, or about 350,000 pages that need to be manually reviewed by attorneys for privilege and responsiveness.
- That process further narrows the set to about 2 GB, or 87,500 pages that Microsoft produces in the average case.
- Of that, only about 1 in 1000 pages are ever actually admitted as exhibits in trial. In the average case, therefore, only about 88 pages of material are actually used."

"Put simply, discovery is too broad. The entire process has taken on a life of its own, and it has made litigation enormously costly. About 30% to 50% of Microsoft's out-of-pocket litigation costs (depending on the type of case and the time it takes to resolve) are attributable to this discovery process. In the last decade, Microsoft paid about $600 million in fees to outside counsel and vendors, just to manage this process. And that figure captures only some of the costs.

- It does not include Microsoft's investment in in-house technology and personnel. . . .
- It does not take into account the costs of database management, and in particular the management of data that from time to time must be extracted from legacy systems that are not currently used for business purposes.
- It does not address all of the employee time spent managing the discovery process, and the lost productivity of the thousands of employees that must take time away from their productive tasks to comply with preservation and discovery obligations.
- Most fundamentally, it does not address how the costs of preservation and discovery impact the calculus involved in whether to litigate to reach a result on the merits or to settle. . . . There have been occasions on which we have settled a case to avoid incurring disproportionate expense, although we sometimes choose to continue litigating even though a strict cost-benefit analysis might militate in favor of settling."

Verizon Communications Inc.

"The mounting costs of the preservation, review, and production of electronically stored information do not solely affect large scale litigation; in fact, it may have an even greater impact on small to medium size cases. In such cases, the potential discovery costs often approach or exceed the amount at issue. Such discovery costs are often one-sided: while Verizon may incur

large expenses to preserve and produce information from a large number of employees or systems, the opposing party may not have much if any relevant information to collect or produce. This results in an incentive for that party to use disproportionate discovery as leverage to increase the costs associated with litigating the case for one party in order to secure a favorable settlement."

Ford Motor Company

"In *Stokes v. Ford Motor Co.*, [No. 05-1236 (Mont. 13th Jud. Dist. Ct. 2011)] the plaintiff sued Ford in a products liability action relating to a fatality arising from a single-vehicle crash. The plaintiff propounded requests for discovery seeking litigation materials from other personal injury cases, including cases involving other vehicle models. Ford responded with uncontroverted evidence demonstrating that these other vehicle models had entirely distinct designs and *did not share any of the components at issue.* [T]he court . . . ordered Ford to produce the requested material."

"Compliance with the court's order imposed an enormous burden. Ford identified more than 1,300 lawsuits and 1,200 witness transcripts meeting the parameters specified in the requests. The vast majority of these 1,300 cases had been closed years earlier, and most of the specific documents covered by the court's order were maintained only within the archived or off-site files of the outside counsel who had represented Ford. Culling through these 1,300 other cases—by hand on a document-by-document basis to identify responsive items, separate out materials not requested, and log and remove privileged documents from this enormous number of cases—required the work of 60 law firms and numerous individuals from Ford's in-house legal team. Ford estimated that complying with the court's discovery order would consume more than 800 hours from Ford's legal staff and cost $2 million in outside counsel legal fees."

"All told, Ford produced to the *Stokes* plaintiff nine computer hard drives containing more than 360 GB of documents and 1,200 witness transcripts. . . . The true purpose of the *Stokes* plaintiff's discovery requests was to drive settlement value that was not warranted by the case facts."

"[T]he evidence actually presented at trial demonstrated just how insignificant the onerous discovery was to the plaintiff's case: he attempted to introduce exactly *one* document drawn from the court-ordered other lawsuit production and he initially offered only *six* transcripts. After the court ruled on admissibility from the "other lawsuit" production, *none* of the testimony transcripts were actually presented to the jury and *none* of the documents gleaned from the court-ordered production were admitted into evidence. Thus, the court's order . . . resulted in the utter waste of hundreds of hours of internal legal staff time and millions of dollars. The interests of justice were not served at all."

"Ultimately Ford won the battle with a 12-0 defense jury verdict, but lost the war in the sense that Ford cannot recover the wasted expenditures required by the sweeping court order...."

The Hartford Financial Services Group, Inc.

"The preservation and production of stored information that is either irrelevant or, at best, tangentially related to the just resolution of litigated disputes pose enormous financial burdens. The Hartford alone spends millions of dollars every year preserving and producing documents that never find their way into a courtroom and play no part in the ultimate outcome of any lawsuit. These substantial costs skew heavily against corporate defendants and are borne ultimately by customers and clients of those defendants."

Services Group of America

In 2014, Services Group of America reported spending $1 million on discovery in cases where legal costs exceeded the amount in controversy and no findings were made against the company.

BP America Inc.

"Our experience has been that even seemingly modest-sized civil disputes routinely require collection and review of tens or hundreds of thousands of electronic documents and communications under the current rules. More complex disputes require processing volumes many times that, often including millions of documents measured in multiple gigabytes or terabytes of electronic data. A common rule of thumb is that a gigabyte of data equates to 70,000 pages. Even when technology assisted review is employed, many hundreds or thousands of hours of attorney review time is required for reviewing data and creating privilege logs. Technology assisted review does not result in significant cost savings that make up for the ever-increasing volume of data subject to discovery. Yet for all these efforts and expenses, the number of exhibits used in litigation is a small fraction of the universe of documents and data subject to preservation, collection, review, and production."

Mack Trucks, Inc.

"[L]itigation today is inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases. This stems, in large part, from costly and inconsistent obligations to preserve, process and produce vast amounts of data for discovery, even though much of that data has no real relevance to the issues in dispute and, in many cases, the data is never used at trial. . . . [P]arties are driven to simply settle claims or defenses based on the disproportionately high cost of retrieval and production of electronically stored information, rather than on the merits of the litigation."

Bayer

Bayer produced 2.1 million pages of documents in a case that went to trial for eight weeks, and only 0.04 percent of that information was used at trial.

State Farm

"In a recent wage and hour collective and class action, plaintiffs requested that State Farm search the email of its managers for emails regarding employees' right to opt-in to the collective action. The request was prompted by the low percentage of employees who elected to opt-in to the collective action. State Farm's objections were overruled and the mailboxes of approximately 4,700 management employees were searched. More than 23,000,000 *potentially relevant files* consisting of more than 550 gigabytes of information (the equivalent of 40 million pages) were identified. State Farm hired an outside vendor who used predictive coding to conduct the search and the search yielded approximately 500 emails that met the Court's criteria. These emails did not substantiate the plaintiffs' suspicions that State Farm improperly communicated with its employees and none of the emails was ever used in a subsequent hearing or briefing."

Vodafone US Inc.

"The preferred tactic of the plaintiffs' bar is to burden corporate defendants with massive discovery requests that force the corporate defendant to ignore the merits of the case and instead weigh the costs of settlement against the costs of production."

GlaxoSmithKline

"The overly broad scope of discovery...creates an overwhelming preservation and production burden for corporate litigants while providing little evidentiary benefit to any party at trial. Fortune 200 companies surveyed reported that in 2008, an average of 1,000 pages was produced in discovery in major cases for every one page used at trial, or one-tenth of 1 percent. GSK's own experience is similar. For example, in one federal multidistrict product litigation that settled shortly before trial in 2011, GSK produced 1.2 million documents, yet plaintiffs included only 646 GSK documents on their exhibit list – less than five-hundredths of 1% of the production."

Boston Scientific

Boston Scientific reported in 2014 that one-half of its employees were subject to litigation holds, and that preservation cost the company $5 million in 2013 alone.

Polaris Industries Inc.

"Like most large manufacturing companies, Polaris has been involved in a wide variety of commercial, consumer, products liability, patent, and other cases. In many of those, Polaris was forced to spend significant financial and personnel resources to gather, review, and produce tens of thousands of documents that had no bearing on the outcome of the case. Plaintiff's attorneys routinely use the burdens of discovery as a means to drive settlement based on nuisance value rather than the merits of the case."

Sanofi US

"The cost Sanofi faces when made to produce or place electronically-stored information on legal hold, is substantial. These costs are fixed and do not vary with the merits of a given case. In the past five years alone, Sanofi US has produced an estimated 47,095,853 pages of documents in various litigations. The processing, hosting, and production of these pages bore its own cost, an estimated $20,451,633, which was merely an initial fraction of the total expense Sanofi shouldered. This fraction represented only the base cost – before any lawyer reviewed a single document."

"Opposing counsel are well-aware of these costs and therefore often employ the strategy of leveraging the high cost of responding to their discovery requests against the value of the case. Indeed, the business distraction and sheer expense associated with excessive discovery all too often drive the outcome of disputes. It is only once Sanofi makes the conscious decision to endure the extortive price tag of currently sanctioned e-discovery practices, that we might hope to eventually defend ourselves in court."

"The following illustrates an example of how disproportionate and irrelevant discovery practices are currently being exploited in our system:

> In an active antitrust litigation . . . Sanofi US has produced more than 12 million pages of documents from more than 110 custodians, more than 8.75 million of which were from the custodial files of 75 sales representatives. Sanofi US employees spent over 4,200 hours working to identify, collect, and facilitate production of documents in response to discovery requests from plaintiff, and Sanofi US's counsel has spent over 86,000 hours reviewing and producing these documents. The cost to Sanofi US for these discovery efforts exceeded $10 million."

Nationwide Mutual Insurance Company

"[T]he costs and burdens of preservation and discovery on Nationwide have continued to grow over time. For example, in a recent case filed against Nationwide, Nationwide was required to search over 11 terabytes of data (approximately 110 million documents). From this search, Nationwide collected approximately 290,000 documents and produced approximately 224,000 documents (approximately 6.4 million pages). Although this case has yet to go to trial, this is but one of the thousands of matters in which Nationwide is involved every year."

ExxonMobil

In 2013, ExxonMobil reported 5,200 employees subject to litigation holds and estimated that the navigation of those holds cost the company 327,000 hours a year in lost productivity.

Medtronic, Inc.

"[T]he costs and burdens of discovery – particularly e-discovery – are far too high."

Vulcan Materials Company

"I have seen countless cases where the time and cost of discovery was hugely disproportionate to the claims made by the plaintiff. All too often, however, we are forced to settle what we believe are non-meritorious, if not downright frivolous, lawsuits due to the costs and burden of responding to discovery. We encounter plaintiffs' lawyers whose strategy is to make the discovery process so time-consuming, burdensome, and costly...."

Eli Lilly and Company

"In a recent product liability case, Lilly reviewed more than 20 million pages of documents and produced 4.2 million pages, of which about 200 documents were admitted at trial.... In [a] patent lawsuit, Lilly reviewed more than 6 million pages of documents and produced more than 1.2 million pages with fewer than 140 documents being admitted at trial. Overall, Lilly has spent more than $50 million in the past three years processing, reviewing, and producing documents."

APPENDIX B

RECOMMENDED CHANGES TO PROPOSED AMENDMENTS

Rule 20 – Permit Joinder Only When a Distinct Litigable Event Links the Parties

Rule 20. Permissive Joinder of Parties.

. . .

(c) Definition. The phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties.

EXPLANATORY NOTE

Rule 20 should require "a distinct litigable event linking the parties" to prevent prejudice to defendants when claims are joined that involve plaintiffs exposed in different settings to the same product. The proposed language borrows from notes that accompany Mississippi Rule of Civil Procedure 20. These notes explain, "Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail." Miss. R. Civ. P. 20 Advisory Comm. Notes; *see also* Mo. Rev. Stat. § 507.040 ("All persons may be joined in one action as defendants . . . arising out of the same transaction, occurrence, or series of transactions or occurrences.... Notwithstanding any other provision of law to the contrary, claims arising out of separate purchases of the same product or service, or separate incidents involving the same product or services shall not satisfy this section.").

[See also proposed amendment to Rule 42 (Consolidation)].

* * * * *

Rule 26(a)(1)(A)(v) – Require Third Party Litigation Funding Disclosure

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

. . .

(v) any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

EXPLANATORY NOTE

Rule 26(a)(1) should require disclosure of any agreement in which a third party fronts funds to a party in exchange for obtaining a contractual right to a portion of any litigation proceeds. There is no doubt that litigation funders are increasingly acquiring direct pecuniary interests in the outcome of civil cases. "Swiss Re research found there was around $17 billion invested in litigation finance globally in 2020, with more than half of that deployed in the U.S." Katherine Gemmell, *Here's*

How Hedge Funds are Speculating on Justice, Wash. Post (online), Aug. 27, 2022. One company committed more than $1 billion in 2021 alone." Burford 2021 Annual Report at iv ("We wrote $1.1 billion in group-wide new commitments in 2021, and we deployed $841 million in cash during the year."). As litigation finance provider LexShares explains, "Solutions are...structured as non-recourse investments, which means that the funding recipient owes nothing if the lawsuit does not result in a recovery. If the case reaches a positive outcome, then the funding recipient would owe a predetermined portion of any damages recovered." LexShares Frequently Asked Questions, https://www.lexshares.com/faqs. The proposed rule promotes transparency in light of the proliferation of litigation funding agreements. There should be a continuing duty to disclose such information through trial.

Third-party litigation funding agreements can significantly impact the just, speedy, and inexpensive determination of an action. The chief investment officer at a leading litigation funding company has said, "We make it harder and more expensive to settle cases." Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018. Further, such agreements raise serious ethical issues. *See* U.S. Chamber Inst. for Legal Reform, *Selling More Lawsuits, Buying More Trouble* 18-28 (Jan. 2020) (describing third-party litigation funding as a "recipe for ethical impropriety," discussing numerous ethical concerns surrounding such agreements, and calling for disclosure of funding agreements to "minimize the prospect for these abuses and promote other salutary effects on our civil justice system.").

In 2018, Wisconsin became the first state to require a party's initial disclosure of any third-party litigation financing agreement. *See* Wis. Code § 804.01(2)(bg). In 2019, West Virginia adopted a similar disclosure requirement for consumer lending lawsuits. *See* W. Va. Code Ann. § 46A-6N-6. Proposed Rule 26(a)(1)(v) extends this disclosure requirement to other civil cases.

The proposed rule furthers a trend toward disclosure. *See* Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); D.N.J. Civ. R. 7.1.1 (Disclosure of Third-Party Litigation Funding) (June 21, 2021); Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement (N.D. Cal. Nov. 1, 2018); *see also* David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Ctr. for L. & Pub. Pol'y, Third Party Litigation Funding Working Group, at 31-32 (2018); Advisory Comm. on Civil Rules, Agenda Book, Apr. 10, 2018, at 209 (Memo. by Patrick A. Tighe, Rules Law Clerk of the Advisory Comm. on Civil Rules, Feb. 7, 2018, re Survey of Federal and State Disclosure Rules Regarding Litigation Funding).

* * * * *

Rule 26(b)(1), (b)(2)(C)(iii) – Adopt Proportionality Rule for Scope of Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

. . .

(b) Discovery Methods, Scope, and Limits.

(1) *Scope in General.* Unless otherwise limited by court order issued pursuant to Rule 26(b)(3)(A), the scope of discovery is as follows: Parties may obtain discovery regarding any matter, not privileged, which is relevant to **any party's** ~~the subject matter involved in the pending action, whether it relates to the~~ claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the**

importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ~~of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.~~ Information within this scope of discovery need not be admissible in evidence to be discoverable.

. . .

(2) ***Limitations on Frequency and Extent.***

. . .

(C) *When Required.* On motion or on its own, the court must limit the frequency, scope or extent of discovery otherwise allowed by these rules if it determines that:

. . .

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1). ~~the burden or expense of the proposed discovery outweighs its likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues in the case.~~

EXPLANATORY NOTE

Rule 26(b)(1)

Rule 26(b)(1) should include the proportionality concept in Fed. R. Civ. P. 26(b)(1). The proposal does not include "the parties' resources" as a factor to be considered, unlike the federal rule.

The federal judiciary spent years developing the 2015 amendment. According to the Civil Rules Advisory Committee, "parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Fed. R. Civ. P. 26 Comm. Notes on Rules—2015 Amend. Establishing "proportionality as an express component of the scope of discovery" helps to ensure that the burden or expense of proposed discovery is "determined in a realistic way," especially in an age of electronically stored information. *Id.*

Since 2015, at least 15 states and the District of Columbia have amended their civil rules to require discovery to be "proportional to the needs of the case." *See* Ala. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1); Colo. R. Civ. P. 26(b)(1); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(1); Ind. Commercial Ct. R. 6(A); Kan. Stat. § 60-226(b)(1); Mich. Ct. R. 2.302(B)(1); Minn. R. Civ. P. 26.02(b); Mo. Sup. Ct. R. 56.01(b)(1); Nev. R. Civ. P. 26(b)(1); Ohio R. Civ. P. 26(B)(1); Okla. Sta. tit. 12 § 3226(B)(1); Vt. R. Civ. P. 26(b)(1); Wis. Code § 804.01(2)(a); Wyo. R. Civ. P. 26(b)(1).

Utah and Illinois adopted proportional discovery before the federal rule took effect. *See* Ill. Sup. Ct. R. 201(c)(3); Utah R. Civ. P. 26(b). Other states have incorporated elements of proportional discovery. *See* N.Y. R. Unif. Trial Cts. § 202.20-c(e) (encouraging parties to "use the most efficient means to review documents, including electronically stored information ('ESI'), that is consistent with the parties' disclosure obligations . . . and proportional to the needs of the case").

The National Center for State Courts has said, "proportionality must be a guiding standard in discovery and the entire pretrial process." Nat'l Ctr. for State Courts, *Call to Action: Achieving Justice for All* 24 (2016). The Sedona Conference Working Group on Electronic Document

Retention & Production said, "Achieving proportionality in civil discovery is critically important to securing the 'just, speedy, and inexpensive resolution of civil disputes,' as mandated by Rule 1 of the Federal Rule of Civil Procedure."). The Sedona Conf., *Commentary on Proportionality in Electronic Discovery,* 18 Sedona Conf. J. 141, 147 (2017). According to the American College of Trial Lawyers and The Institute for the Advancement of the American Legal System, civil discovery "should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness." Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 8 (rev. Apr. 15, 2009); *see also* Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 Denv. U.L. Rev. 513, 532 (2010) ("Proportionality must be made the norm, not the exception...."); Hon. Jennifer D. Bailey, *Why Don't Judges Case Manage?*, 73 U. Miami L. Rev. 1071, 1080 (2019) ("judges must ...shape the discovery to the reasonable needs of that case.") (quoting Judicial Conf. Advisory Comm. on Civil Rules and the Comm. on Rule of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 4 (2010)).

Proportional discovery has been viewed favorably by state bar associations. *See* Civil Discovery Court Rule Special Committee Final Report and Proposal, State Bar of Mich., Apr. 21, 2018, at 1 (proportional discovery "will make the discovery process less expensive and less burdensome and Michigan courts more accessible to all."); Judge Richard A. Frye & John D. Holschuh, *2020 Ohio Civil Rules Amendments*, Ohio State Bar Ass'n (July 2020), https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2020-ohio-civil-rules-amendments/ (Ohio's proportionality "rule (like others in the 2020 package) should penalize no part of the bar and no category of litigant.").

There are benefits to closer alignment between the federal and state courts regarding the scope of civil discovery. *See* Gregory C. Cook & Sloane Bell, *Alabama Supreme Court Amends Rules 26 and 37 to Address Proportionality and ESI*, 80 Ala. Law. 96, 102 (Mar. 2019) (state rules requiring proportional discovery "make discovery a more efficient and right-sized process" and "bring these rules onto somewhat even ground with current federal rules"); Ryan M. Billings, et al., *Sweeping Changes to Rules of Civil Procedure*, 91 Wis. Law. 12 (June 2018) (states adopting proportionality "have the benefit of the early federal experience in interpreting this new standard.").

The committee's proposed amendment to West Virginia Rule 26(b)(1) omits express reference to the proportionality assessment included in Fed. R. Civ. P. 26(b)(1). The proposed scope of discovery is far too broad, allowing discovery on any nonprivileged matter "which is relevant" to a case. A court may conduct a proportionality analysis under Rule 26(b)(2)(C), but this is inefficient and unpredictable.

The federal approach is more consistent with Rule 1, does not require court involvement, there is a body of case law interpreting the federal rule, and would bring about greater harmony between West Virginia's federal and state courts. Rule 26(b)(1) should follow the federal approach.

Rule 26(b)(2)(C)(iii)

Rule 26(b)(2)(C)(iii) should reflect the federal rule if the proportionality concept is adopted. [The language in strike-through should be restored if the final rule reflects the committee's approach].

* * * * *

Rule 26(b)(2)(B)-(C) – More Specific Limits on Production/Preservation of ESI

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

. . .

(b) Discovery Methods, Scope, and Limits.

. . .

(2) *Limitations on Frequency and Extent.*

. . .

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of **the following categories of** electronically stored information **absent a showing by the requesting party of substantial need and** ~~from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows~~ good cause, considering the limitations of **Rule 26(b)(1) and** Rule 26(b)(2)(**D**~~C~~)~~.~~**:**

(i) Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved;

(ii) Backup data that are substantially duplicative of data that are more accessible elsewhere;

(iii) Legacy data remaining from obsolete systems that are unintelligible on successor systems; or

(iv) Data that producing party identifies as not reasonably accessible because of undue burden or cost.

(C) ***Preservation of on Electronically Stored Information.*** **A party is not required to preserve electronically stored information that is not subject to production under Rule 26(b)(2)(B) unless otherwise stipulated or ordered by the court.**

(D) When Required. On motion or on its own, the court must limit the frequency, scope or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1). ~~the burden or expense of the proposed discovery outweighs its likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues in the case.~~ **[NOTE: This paragraph assumes the adoption of the proportionality approach in Rule 26(b)(1), otherwise the strike-through language should be preserved].**

EXPLANATORY NOTE

Rule 26 should set forth specific requirements for the preservation and production of electronically stored information. The proposed amendment clarifies that a party's obligation to preserve

electronically stored information does not include categories of information that are not subject to production under the rule. These categories include electronically stored information that would be unduly burdensome to produce, such as certain types of backup data, obsolete data, or data that is not available or not reasonably accessible because of undue burden or cost. In addition, the amended rule provides that a party is not required to produce these categories of electronically stored information unless the requesting party demonstrates a substantial need and good cause. The amended rule also makes clear that any requested production must be consistent with the proportionality assessment of proposed Rule 26(b)(1) and the limitations on cumulative, duplicative, or otherwise unduly burdensome discovery in proposed Rule 26(b)(2)(D).

Many jurisdictions have adopted specific limitations regarding discovery of electronically stored information. Like Fed. R. Civ. P. 26(b)(2)(B), state rules often are directed at limiting a party's production of electronically stored information that is not reasonably accessible because of undue burden or cost. *See* Ala. R. Civ. P. 26(b)(2); Ariz. R. Civ. P. 26(b)(2)(B); Ark. R. Civ. P. 26.1(h); Cal. Civ. Proc. Code § 1985.8(i); D.C. Super. Ct. R. Civ. P. 26(b)(2)(B); Idaho R. Civ. P. 26(b)(1)(B); Iowa R. Civ. P. 1.504(2); Kan. Stat. § 60-226(b)(2)(B); Md. R. Civ. P., Cir. Ct. 2-402(b)(2); Mass. R. Civ. P. 26(f); Mich. Ct. R. 2.302(B)(6); Minn. R. Civ. P. 26.02(b)(2); Miss. R. Civ. P. 26(b)(5); Mo. Sup. Ct. R. 56.01(b)(3); Mont. R. Civ. P. 26(b)(2)(B); Nev. R. Civ. P. 26(b)(2)(B); N.C. R. Civ. P. 26(b)(1b); N.D. R. Civ. P. 26(b)(1)(B)(ii); Ohio R. Civ. P. 26(B)(5); Okla. Sta. tit. 12 § 3226(B)(2)(b); R.I. Super. Ct. R. 26(b)(6)(D); Tenn. R. Civ. P. 26.02(1); Va. Sup. Ct. R. 4:1(b)(7); Vt. R. Civ. P. 26(b)(2)(A); Wyo. R. Civ. P. 26(b)(2)(B).

Some courts have adopted a category approach, as in the proposed amendment. *See* U.S. Dist. Ct. R., N.D. Ill. LPR ESI 2.3(d) (identifying 6 categories of electronically stored information that "generally are not discoverable"); Ill. Sup. Ct. R. 201 Comm. Comments—2014 Amend. (stating proportionality analysis often may preclude discovery of certain categories of electronically stored information and identifying 8 categories); *see also* Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 15 (rev. Apr. 15, 2009) ("Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes."). The proposed amendment incorporates the categories of electronically stored information contained in Wis. Code § 804.01(2)(e)(1g).

* * * * *

Rule 26(c)(1)(B) – Clarify Authority of Courts to Allocate Expenses in Protective Orders

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

. . .

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place **or the allocation of expenses**, for the disclosure or discovery;...

EXPLANATORY NOTE

Rule 26(c) should incorporate Fed. R. Civ. P. 26(c)'s express recognition that courts may specify terms for the allocation of discovery expenses in protective orders. An explicit recognition of cost allocation "will forestall the temptation some parties may feel to contest this authority." Fed. R. Civ. P. 26 Comm. Notes on Rules—2015 Amend. West Virginia courts do not appear to have asserted this authority under Rule 26(c), but have recognized allocation of expenses with respect to a party's failure to comply with discovery. *See Vincent v. Preiser*, 338 S.E.2d 398, 401 n.6 (W.Va. 1985) ("[T]he award of reasonable expenses, including attorney fees, is mandatory in every case imposing sanctions for failure to comply with an order to provide or permit discovery (unless the court finds that an award of expenses would be unjust).").

Many jurisdictions expressly recognize a court's authority to allocate discovery expenses. *See* Ala. R. Civ. P. 26(c)(2); Colo. R. Civ. P. 26(c)(2); Del. Ch. Ct. R. 26(c)(2); Del. Super. Ct. R. Civ. P. 26(c)(2); D.C. Super. Ct. R. Civ. P. 26(c)(1)(B); Iowa R. Civ. P. 1.504(1)(a)(2); Kan. Stat. § 60-226(c)(1)(B); Md. R. Civ. P., Cir. Ct. 2-403(a)(3); Mass. R. Civ. P. 26(c); Minn. R. Civ. P. 26.03(a)(2); Mo. Sup. Ct. R. 56.01(c)(2); Nev. R. Civ. P. 26(c)(1)(B); Ohio R. Civ. P. 26(C)(2); Okla. Sta. tit. 12 § 3226(C)(1)(b); Vt. R. Civ. P. 26(c)(2); Wis. Code § 804.01(3)(a)(2); Wyo. R. Civ. P. 26(c)(1)(B); *see also* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural History*, 79 Geo. Wash. L. Rev. 773, 777 (2011) ("it is morally untenable to allow the requesting party to retain the benefit of its opponent's labor without, at the very least, reimbursing the costs of discovery incurred by the producing party."); John H. Langbein, *The Disappearance of the Civil Trial in the United States*, 122 Yale L.J. 522, 551-552 (20120) ("'[I]t is almost invariably cheaper to ask for materials than to produce them,' which tempts litigants 'to seek costly information of marginal relevance.'").

* * * * *

Rule 30(a)(2), (d)(1) – Limit Oral Depositions; Exclude Products Cases From Duration Limit

Rule 30. Depositions by Oral Examination.

(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) and (2):**

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

. . .

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **The 1 day, 7-hour limit in this subsection does not apply to products liability cases.**

. . .

EXPLANATORY NOTE

Rule 30(a)(2)

Rule 30(a)(2) should adopt the 10 deposition limit in Fed. R. Civ. P. 30(a)(2). One reason is "to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case." Fed. R. Civ. P. 30 Comm. Notes on Rules—1993 Amend.

Many jurisdictions limit depositions by oral examination. *See* D.C. Super. Ct. R. Civ. P. 30(a); Haw. R. Civ. P. 30(a); Ind. Commercial Ct. R. 6(D)(2); Mo. Sup. Ct. R. 57.03; Mont. R. Civ. P. 30(a); Nev. R. Civ. P. 30(a); N.Y. Ct. R. § 202.70, Rule 11-d (commercial cases); Wis. Code § 804.045; Wyo. R. Civ. P. 30(a); King County (Wash.). Super. Ct. Local Ct. R. 26(b)(3); *see also* Alaska R. Civ. P. 30(a) (3 depositions); Colo. R. Civ. P. 26(b)(2) (1 deposition of each adverse party and 2 other persons); Me. R. Civ. P. 30(a) (5 depositions).

Rule 30(d)(1)

Rule 30(d)(1) should exclude product liability actions from the proposed 1 day, 7-hour limit. This is not part of the federal rule, but is fair because of over-naming by some West Virginia firms.

In a recent year, the average asbestos complaint in West Virginia named almost 120 defendants—about double the national average. *See* Chris Dickerson, *Over-naming Continues to Be a Problem in W.Va. Asbestos Cases, Study Shows*, W. Va. Record, Jan. 18, 2021; Sue Reisinger, *Asbestos Attys 'Over-Naming' Companies To Sue, Study Says*, Law360, Jan. 21, 2021. One Charleston-based firm averaged 283 defendants in each asbestos lawsuit it filed. One case had 361 defendants. *See* Jessica Karmasek, *W.V. Firm Blames Almost 300 Companies in Each Asbestos Lawsuit*, Forbes.com, June 28, 2016. Another firm averaged 149 defendants per case, and had one case with 180 defendants. A 2021 report found that upwards of 70% of the defendants named in some West Virginia asbestos lawsuits were dismissed without payment. *See* Mary Margaret Gay, *The Defendant Over-Naming Trouble: West Virginia Asbestos Litigation*, Jan. 15, 2021, *at* https://www.gayjoneslaw.com/the-defendant-over-naming-trouble. The legislature attempted to address this issue by requiring asbestos plaintiffs to "specif[y] the evidence that provides the basis for each claim against each defendant," W. Va. Code Ann. § 55-7G-4(d) (2021), but compliance is not being enforced. Large numbers of defendants continue to be named, even though most will eventually be dismissed because plaintiffs' lack evidence of exposure.

The imposition of a 7-hour time limit would substantially prejudice defendants in toxic tort cases, especially asbestos defendants, where witnesses may offer testimony about various products, premises, or types of exposure. A blanket 7-hour time limit would severely impair the ability of counsel to effectively examine the witness. In addition to the number of parties involved in each

case, the latency period between exposure and diagnosis requires questioning about events that occurred long ago. Conducting effective discovery regarding such events takes time.

In addition to the large number of defendants, and the fact that exposures can span decades, other factors contribute to the complexity of toxic tort cases. For example, allegations of exposure might arise from multiple sources (e.g., occupational and residential), creating a mix of defendants.

A list from West Virginia counsel shows the long duration of some asbestos case depositions:

- Plaintiff Edward Simpson went 7 days
- Plaintiff Thomas Ginocchi, Sr. went 6 or 7 days
- Plaintiff Carl Douglas went 7 days
- Plaintiff Glenn Johnson went 6 or 7 days
- Gary Evans went 5 days in the Inis Evans case
- Plaintiff Robert Kincaid went 4 days
- Lewis Dowdy in the Michelle Zierer case went 4 or 5 days
- Plaintiff Michael Burris went 4 days
- Plaintiff Charles Mayberry went 5 days
- Plaintiffs Dennis Doty, Joseph Maxian, Donald Godfrey in the Patty Godfrey case, Stanley Jasinski in the Joseph Jasinski case, and James "Peck" Martin went 3 days.
- There are many more examples: David Barre (4 days), Vernon Reed (3 days), Michael Radcliff (3 days), Donald McIlvain (3 days), Robert Corbin (2 days), Charles Barre (2 days), Robert Comisso in Gampolo and Kopras cases (2 days), John Iwasyk (2 days), John Cheshire (2 days), Stuart Cox in Donna Cox (2 days), William Kitzmiller (2 days), Charles Hartline (2 days), and Darrell Amie (2 days)

Each defendant should be given the opportunity to effectively defend the claims asserted against it, and that includes the opportunity to effectively depose a witness without fear of running out of time. And while a court may grant a defendant's motion for additional time under the committee's rule, such orders are uncertain and raise defense costs, even when they are freely granted.

Alternatively, the court could increase the time limit for complex cases. For example, Arizona separates cases that are logistically or legally complex, including products liability cases. For complex cases that fall within this category, each side has 30 total hours of fact witness depositions. *See* Ariz. R. Civ. P. 26.2(b)(3), (f)(3); *see also* N.H. Super. Ct. R. 26(a) (each party allowed 20 deposition hours unless otherwise stipulated by the parties or ordered by the court for good cause shown); Tex. R. Civ. P. 190.2 (20 deposition hours for each party in expedited actions); Vt. R. Civ. P. 80.11(e)(4)(D) (15 hours for depositions of parties and fact witnesses in expedited actions). Seattle courts allow each party to "conduct one deposition that shall be limited to two days and seven hours per day." King County (Wash.). Super. Ct. Local Ct. R. 26(b)(3). A similar exception for products liability cases in West Virginia would eliminate the unnecessary cost and delays of requiring the parties to take action to extend the time for a deposition.

Alternatively, the Court could forgo adoption of the federal court limit of 10 depositions and the committee's proposed 1 day, 7-hour limit, omitting any limitations on the number or duration of depositions. Massachusetts took this approach in Mass. R. Civ. P. 30 (effective Sept. 1, 2022).

If the court limits the duration of depositions, trial courts should be instructed to liberally allow depositions to go longer than the specified limit in asbestos and other product liability cases.

* * * * *

Rule 31(a)(2) – Limit Depositions by Written Questions

Rule 31. Depositions by Written Questions.
(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) and (2):**
(A) if the parties have not stipulated to the deposition and:
(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;
(ii) the deponent has already been deposed in the case; or
(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or
(B) if the deponent is confined in prison.

EXPLANATORY NOTE

Rule 31(a)(2) should incorporate the limit on written depositions found in Fed. R. Civ. P. 31(a)(2). The limits on depositions by oral examination in Fed. R. Civ. P. 30 and by written questions in Fed. R. Civ. P. 31 were adopted in 1993 to "enable courts to maintain a 'tighter rein' on the extent of discovery and to minimize the potential cost of '[w]ide-ranging discovery' and the potential for discovery to be used as an 'instrument for delay or suppression.'" *Whittingham v. Amherst Coll.*, 163 F.R.D. 170, 171-72 (D. Mass. 1995)) (citing federal rules commentary). A number of jurisdictions have the same limit. *See* D.C. Super. Ct. R. Civ. P. 31(a); Haw. R. Civ. P. 31(a); Mo. Sup. Ct. R. 57.04(a)(2); Mont. R. Civ. P. 31(a); Nev. R. Civ. P. 31(a); Wis. Code § 804.045; Wyo. R. Civ. P. 31(a); *see also* Alaska R. Civ. P. 31(a) (3 depositions).

* * * * *

Rule 33 – Support Proposed Limit on Interrogatories to Parties

We support the 25 interrogatory limit in proposed Rule 33(a).

EXPLANATORY NOTE

We support the 25 interrogatory limit in proposed Rule 33(a). Other jurisdictions limit interrogatories. *See* Fed. R. Civ. P. 33(a); Mo. Sup. Ct. R. 57.01(a) (25 interrogatories); Wis. Code § 804.08(1)(am) (25 interrogatories); Ind. Commercial Ct. R. 6(D)(1) (25 interrogatories); N.Y. Ct. R. § 202.70, Rule 11-a (25 interrogatories for commercial cases); Wyo. R. Civ. P. 33(a) (25 interrogatories); *see also* S.D. Codified Laws § 15-6-73(2)(A) (10 interrogatories in expedited actions); Tex. R. Civ. P. 190.2(b)(5) (15 interrogatories in expedited cases); Vt. R. Civ. P. 80.11(e)(4)(A) (15 interrogatories in expedited actions); Ariz. R. Civ. P. 26.2 (20 interrogatories for complex cases); Utah R. Civ. P. 26(c)(5) (20 interrogatories in cases seeking $300,000 or more

in damages); Mich. Ct. R. 2.309(A)(2) (20 interrogatories); Va. Sup. Ct. R. 4:8(g) (30 interrogatories); Colo. R. Civ. P. 26(b)(2) (30 interrogatories); Fla. R. Civ. P. 1.340(a) (30 interrogatories); Ill. Comp. Stat. S. Ct. Rule 213(c) (30 interrogatories); Iowa R. Civ. P. 1.509(1)(e) (30 interrogatories); Ky. R. Civ. P. 33.01 (30 interrogatories); Maine R. Civ. P. 33(a); (30 interrogatories); Mass. R. Civ. P. 33(a)(2) (30 interrogatories); D.C. Super. Ct. R. Civ. P. 33(a) (40 interrogatories); Idaho R. Civ. P. 33(a) (40 interrogatories); Nev. R. Civ. P. 33(a)(1) (40 interrogatories); *see also* Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 10 (rev. Apr. 15, 2009) (in case management conferences courts should discuss numerical limitations, "e.g., only 20 interrogatories or requests for admissions").

* * * * *

Rule 34 – Limit Requests for Production

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes.

(a) In general....

. . .

(3) Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 requests, including discrete subparts.

EXPLANATORY NOTE

Rule 34(a) should set a limit of 25 requests for production, similar to the proposed 25 interrogatory limit. The companion federal rule does not limit requests for production, but adopting such a limit would promote more selective and efficient requests for productions by parties. Other jurisdictions limit requests for production. *See* Ariz. R. Civ. P. 26.2 (10 requests for complex cases); S.D. Codified Laws § 15-6-73(2)(B) (10 requests in expedited actions); Colo. R. Civ. P. 26(b)(2)(E) (20 requests); Tex. R. Civ. P. 190.2(b)(4) (15 requests in expedited cases); Vt. R. Civ. P. 80.11(e)(4)(B) (15 requests in expedited actions); Utah R. Civ. P. 26(c)(5) (20 requests in cases seeking $300,000 or more in damages); *cf.* Wis. Code § 804.09 (5-year limit for such requests).

* * * * *

Rule 36 – Limit Requests for Admission

Rule 36. Requests for Admission.

(a) In general....

. . .

(3) Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 requests, including discrete subparts.

EXPLANATORY NOTE

Rule 36 should establish a limit of 25 requests for admission, similar to the proposed amendment's 25 interrogatory limit. The companion federal rule does not limit requests for admission, but many jurisdictions do. *See* S.D. Codified Laws § 15-6-73(2(C) (10 requests in expedited actions); Tex. R. Civ. P. 190.2(b)(5) (15 requests in expedited cases); Vt. R. Civ. P. 80.11(e)(4)(C) (15 requests

in expedited actions); Ariz. R. Civ. P. 26.2 (20 requests in complex cases); Colo. R. Civ. P. 26(b)(2)(E) (20 requests); Mo. Sup. Ct. R. 59.01(a) (25 requests); Utah R. Civ. P. 26(c)(5) (20 requests in cases seeking $300,000 or more in damages); Ill. Sup. Ct. R. 216(f) (30 requests); Iowa R. Civ. P. 1.510(1) (30 requests); Ky. R. Civ. P. 33.01 (30 requests); Okla. Stat. tit. 12 § 3236(A) (30 requests); Va. Sup. Ct. R. 4:11(e)(1) (30 requests); Fla. R. Civ. P. 1.370(a) (30 requests); Cal Civ. P. Code § 2033.030(a) (35 requests); Nev. R. Civ. P. 36(a)(7) (40 requests); *see generally* Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 10 (rev. Apr. 15, 2009) (in case management conferences courts should discuss numerical limitations, "e.g., only 20 interrogatories or requests for admissions"); Nat'l Ctr. for State Courts, *Call to Action: Achieving Justice for All* 22 (2016) ("Presumptive discovery maximums have worked well in various states . . . where there are enumerated limits on . . . requests for admission.").

* * * * *

Rule 42 – Require Consent for Multi-Plaintiff Consolidated Toxic Tort Trials

Rule 42. Consolidation; Separate Trials.

. . .

(d) A court may consolidate for trial any number and type of tort actions alleging harm from a toxic substance, including an allegedly harmful product, with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only toxic tort actions relating to the exposed person and members of that person's household.

EXPLANATORY NOTE

Rule 42 should require consent before a toxic tort action may be consolidated for trial unless the case is limited to an exposed person and members of that person's household. This change extends W. Va. Code § 55-7G-8(d) to all toxic tort cases. *See* W. Va. Code § 55-7G-8(d) ("A court may consolidate for trial any number and type of nonmalignant asbestos or silica actions with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only asbestos or silica actions relating to the exposed person and members of that person's household.").

The Michigan and Ohio Supreme Courts prohibit consolidation of certain toxic tort cases for trial. *See* Ohio R. Civ. P. 42(A)(2); Mich. S. Ct. A.O. No. 2006-6, Prohibition on "Bundling" Cases (Aug. 9, 2006). The Michigan Supreme Court explained, "It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases." *Id.*

Many other states preclude consolidation of asbestos (or silica) cases for trial unless the parties consent or the claims involve members of the same household. *See* Tex. Civ. Prac. & Rem. Code Ann. § 90.009; Ga. Code Ann. § 51-14-11; Kan. Stat. Ann. § 60-4902(j); Iowa Code § 686B.7(4); Tenn. Code Ann. § 29-34-706(d); Tenn. Code Ann. § 29-34-306(b); N.D. Cent. Code Ann. § 3246.2-06(4). Louisiana bans consolidations that cause jury confusion, prevent a fair and impartial trial, give one party an undue advantage, or prejudice the rights of any party. *See* La. Code of Civ. P. Art. 1561(B). The Mississippi Supreme Court added a comment to its procedural rules to require "a distinct litigable event linking the parties." Miss. R. Civ. P. 20 Comm. Notes.

The decision by courts to consolidate dissimilar cases for trial can cause substantial prejudice to defendants and may violate due process. It can amount to "guilt by association," especially when inflammatory evidence in one case taints the others.

Consolidation is ill-suited for toxic tort cases because exposures are often highly individualized. Plaintiffs may allege exposures to different products at different sites over many decades. Consolidating claims for trial can sacrifice basic fairness for perceived efficiency.

Courts have recognized the "specific risks of prejudice and possible confusion" that can result from the piling on of evidence in cases consolidated for trial. *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992). Plaintiffs may overwhelm a jury with evidence that would otherwise be inadmissible in separate trials. When multiple plaintiffs in a consolidated trial allege injuries from the same product, jurors may incorrectly assume that the claims must have merit.

The risk of prejudice is great in multi-defendant cases because of the "higher probability that at least one defendant will appear callous, and this benefits all plaintiffs." Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 373 (June 2006).

Empirical evidence shows that consolidated trials "significantly improve outcomes for plaintiffs." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319, 1337-1338 (2002) (plaintiffs' probability of winning "when two or three plaintiffs have a consolidated trial" is "statistically significant," and increases with more cases); Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. of Applied Psychol. 909, 916 (2000) (juries in small trial consolidations were significantly more likely to find for the plaintiff and render a larger award than if the cases were tried individually); Irwin A. Horowitz & Kenneth S. Bordens, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43, 66 (1998) ("empirical research shows clearly that consolidation can alter the patterns of verdicts and awards handed down by jurors" and these changes "are generally more favorable to the plaintiffs than the defense.").

For example, a study of New York City asbestos litigation (NYCAL) data from 2010 through 2014 found that "consolidated trial settings...result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts." Peggy Ableman, et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency*, Vol. 30, No. 7 Mealey's Litig. Rep.: Asbestos 38, 38 (May 6, 2015).

A serious due process problem arises when consolidated cases involve punitive damages. "Under current Supreme Court precedent, consolidating plaintiffs' cases for trial when plaintiffs assert punitive damages claims is quite likely a per se constitutional violation." James M. Beck, *Little in Common: Opposing Trial Consolidation in Product Liability Litigation,* 53 No. 9 DRI For The Def. 28, 33 (Sept. 2011). The Court has held that the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts...upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). There is "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id.* at 354; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("A defendant should be punished for the conduct that harmed the plaintiff....").

Lastly, consolidations may not produce hoped-for efficiency gains because they incentivize the filing of more cases, *see* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("If you build a superhighway, there will be a traffic jam."), and the complexity of trying dissimilar cases may require more trial time per plaintiff.

* * * * *

Rule 56(a) - Reasons for Grant/Denial of Summary Judgment on the Record

Rule 56. Summary Judgment.

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. **The court should state on the record the reasons for granting or denying the motion.**

EXPLANATORY NOTE

Rule 56(a) should require judges to state on the record their reasons for granting or denying a motion for summary judgment, consistent with the federal rule. Most courts recognize this practice. "Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion." Fed. R. Civ. P. 56 Comm. Notes on Rules—2010 Amend. Requiring trial courts to place on the record their reasons for granting or denying summary judgment motions is particularly important in West Virginia because appellate courts frequently decide those issues in prohibition proceedings. *See, e.g., State ex rel. W. Va. Mut. Ins. Co. v. Salango*, 246 W. Va. 9, 866 S.E.2d 74 (2021).

APPENDIX C

TECHNICAL CHANGES TO PROPOSED AMENDMENTS

Rule 4(c)(2)(B)

Delete strike-through on word "plaintiff's ~~request of the plaintiff~~" to read:

(B) ~~(3)~~ By Deputy Sheriff. At the plaintiff's request ~~of the plaintiff,~~ and upon payment....

Rule 4(d)(4)(B)(i)

Restore spelling of "council," delete proposed word "counsel," as reference is to a city council:

(i) ...complaint to its mayor, city manager, recorder, clerk, treasurer, or any member of its council ~~counsel~~ or board of commissioners~~;~~.

Rule 5(c)(1)

Delete strike-through on word "own" in "~~of~~on its ~~owninitiative"~~ and close up space to read:

...the court may, ~~upon~~on motion or ~~of~~on its own~~initiative, may~~, order that ~~service of~~....

Rule 8(b)

Add spaces between words in the title that now read "andDenials" to read:

And Denials.

Rule 10

Add spaces between each word in the title that now reads "Rule10.FormofPleadings." to read:

Rule 10. Form of Pleadings.

Rule 11

Capitalize words in title that are in lower case to be consistent with other rules to read:

Rule 11. Signing of Pleadings, Motions and Other Papers; Representations to Court; Sanctions.

Rule 11(b)(2)

Strike-through word "the" in "argument for the ~~extension, modification, or reversal of~~ extending, modifying, or reversing" to read:

...argument for ~~the extension, modification, or reversal of~~ extending, modifying, or reversing...

Rule 14

An "(a)" is needed before the header "When a Defending Party May Bring in a Third Party." as in the federal rule, and the first subparagraph should be renumbered "(1)" to read:

(a) When a Defending Party May Bring in a Third Party.

(1) ~~(2) (a) When defendant may bring in third party. At any time after commencement of the action~~*Timing of the Summons and Complaint*....

Rule 14(a)(2)(C)

A space is needed between words "plaintiffhas" to read:

...plaintiff has to the plaintiff's claim....

Rule 14(a)

Subparagraph "(a)" at the end should be relettered "(b)" as in the federal rule to read:

(b) When ~~plaintiff may bring in third party. When a counterclaim~~a claim is asserted....

Rule 15(a)(1)

A space is needed between the words "matterofcoursewithin" to read:

...matter of course within ....

Rule 15(a)(2)

Word "so" in the last line seems to be surplusage and can be deleted to read:

...should freely ~~given~~give leave when justice ~~so~~ requires....

Rule 23(b)(2)(B)

The internal rule reference in "considering the limitations of Rule 26(b)(3)(C)" should be fixed to read:

... considering the limitations of Rule 26(b)(2)(C).

Rule 30(c)

Add space between words "**WrittenQuestions**" in the heading to read:

... **Written Questions.**

Rule 30(e)(2)

A space is needed between "**(2)**Changes" to read:

(2) Changes....

Rule 30(f)(1)

Close up space between "that the witness" unless caused by full justification to read:

...that the witness....

Rule 31

There are two "(b)" paragraphs in this section. Change the second "(b)" to "(c)."

Rule 36

The existing rule is in underline but should be in strike-through for any future drafts.

Rule 37(a)(5)(A)(ii)

A space and comma are needed between the words "answernondisclosure" to read:

...answer, nondisclosure....

Rule 44(b)

Spacing needs to be fixed in "search...ofdesignated records" to read:

...search of designated records....

Rule 45(a)(3)

Proposed changes should be marked and words corrected in "The clerk shallmust issue a subpoena, signed but otherwise in blank, to a party requesting it, who shallrequests it. That party must complete it before service. An attorney as officer of the court may also may issue and sign a subpoena. if the attorney is authorized to practice in the issuing court." to read:

...The clerk ~~shall~~must issue a subpoena, signed but otherwise in blank, to a party who request~~sing~~ it.~~,~~ That party must ~~who shall~~ complete it before service. An attorney as officer of the court may ~~also may~~ issue and sign a subpoena.~~ ~~if the attorney is authorized to practice in the issuing court.

Rule 45(d)(2)(B)(i)

Fixes needed to "the serving party may move the court for the court on behalf of which the subpoena was issued is required for an order compelling production or inspection." to read:

...the serving party may move the court in the jurisdiction where compliance is required for an order compelling production or inspection.

Rule 45(d)(3)(ii)

Undo proposed change to "in person or at a ~~place~~placed fixed by order of the court" to read:

... in person or at a place fixed by order of the court....

Rule 47

Title **"Selecting jurors."** should use a capital letter on "Jurors" like other headings to read:

Rule 47. Selecting Jurors.

Rule 47(b)

Remove extra period in header "**(b)** Jury ~~Selection~~. selection." to read:

"**(b)** Jury ~~Selection.~~ selection."

Rule 51(b)(1)

Add "arguments" after phrase "final jury." and replace period with semicolon to read:

...final jury arguments;

***

Lastly, we appreciate that the Committee Comments after each amendment will likely be deleted with publication of the final rule. Otherwise, we recommend review to ensure consistency. For example, while most such notes state "COMMITTEE COMMENT ON RULE [fill in Rule]," many say "2020 COMMITTEE COMMENT ON RULE [fill in Rule]," (e.g., Rules 37-53), Rule 53.1 is followed by "ADVISORY COMMITTEE NOTES 2020 AMENDMENTS," some rules say "COMMITTEE COMMENT" without referencing the accompanying rule, and others are mistyped as "COMMITTEECOMMENTONRULE."