

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Portland, OR  
April 10-11, 2014**



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## Agenda

April 10-11, 2014

### Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair  
    Standing Committee Meeting and Judicial Conference
2. **ACTION ITEM:** Minutes for November meeting
3. Legislative Activity
4. **ACTION ITEM:** Recommend Duke Conference Rules for Adoption
5. **ACTION ITEM:** Recommend Rule 37(e) for Adoption
6. **ACTION ITEMS:** Recommend Rules 6(d), 55(c) for Adoption
7. **ACTION ITEM:** Recommend abrogation of Rule 84, adoption of Rule 4 amendments and forms
8. **ACTION ITEM:** Recommend publication of amended Rule 82
9. **ACTION ITEM:** Recommend publication of amended Rule 4(m)
10. **INFORMATION ITEM:** "3 days are added"
11. Report of Rule 23 Subcommittee (oral)

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Paul S. Diamond	D	Pennsylvania (Eastern)		2009 2015
Robert Michael Dow, Jr.	D	Illinois (Northern)		2013 2016
Parker C. Folse	ESQ	Washington		2012 2015
Paul W. Grimm	D	Maryland		2009 2015
Peter D. Keisler	ESQ	Washington, DC		2008 2014
Robert Klonoff	ACAD	Oregon		2011 2014
John G. Koeltl	D	New York (Southern)		2007 2014
Scott M. Matheson, Jr.	C	Tenth Circuit		2012 2015
David E. Nahmias	CJUST	Georgia		2012 2015
Solomon Oliver, Jr.	D	Ohio (Northern)		2011 2014
Gene E.K. Pratter	D	Pennsylvania (Eastern)		2010 2016
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# TAB 1

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# TAB 1A

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

1 The Civil Rules Advisory Committee met at the Administrative  
2 Office of the United States Courts in Washington, D.C., on November  
3 7-8, 2013. Participants included Judge David G. Campbell, Committee  
4 Chair, and Committee members John M. Barkett, Esq.; Elizabeth  
5 Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge  
6 Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W.  
7 Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John  
8 G. Koeltl; Judge Scott M. Matheson, Jr.; Chief Justice David E.  
9 Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter.  
10 Professor Edward H. Cooper participated as Reporter, and Professor  
11 Richard L. Marcus participated as Associate Reporter. Judge  
12 Jeffrey S. Sutton, Chair, and Professor Daniel R. Coquillette,  
13 Reporter, represented the Standing Committee. Judge Arthur I.  
14 Harris participated as liaison from the Bankruptcy Rules Committee.  
15 Laura A. Briggs, Esq., the court-clerk representative, also  
16 participated. The Department of Justice was further represented by  
17 Theodore Hirt, Esq.. Judge Jeremy Fogel and Dr. Emery Lee  
18 participated for the Federal Judicial Center. Jonathan C. Rose,  
19 Andrea Kuperman, Benjamin J. Robinson, and Julie Wilson represented  
20 the Administrative Office. Observers included Judge Lee H.  
21 Rosenthal, past chair of the Committee and of the Standing  
22 Committee; Jonathan Margolis, Esq. (National Employment Lawyers  
23 Association); John K. Rabiej (Duke Center for Judicial Studies);  
24 Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq.  
25 (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery,  
26 Esq., and Andre M. Mura, Esq. (Center for Constitutional  
27 Litigation); Thomas Y. Allman, Esq.; Ariana Tadler, Esq.; Henry  
28 Kelsen, Esq.; and Elsa Rodriguez Preston, Esq. (Law Department,  
29 City of New York).

30 The first day of the meeting, November 7, was devoted to a  
31 public hearing on proposed rule amendments that were published for  
32 comment in August, 2013. The testimony of forty-one witnesses is  
33 preserved in a separate transcript.

34 Judge Campbell opened the second day of the meeting, November  
35 8, by welcoming Judge Dow as a new Committee member. Judge Dow has  
36 served in the Northern District of Illinois since 2007. He had been  
37 serving on the Appellate Rules Committee - "We won the tug-of-war."  
38 He has degrees from Yale, Oxford (as a Rhodes Scholar), and  
39 Harvard. He served as law clerk to Judge Flaum, and practiced as a  
40 litigator and appellate lawyer.

41 Chief Justice Nahmias and Parker Folse also were welcomed to  
42 the first meeting they have been able to attend in person; they  
43 were able to participate in their first meeting as members last  
44 April only by telephone.

45 Judge Pratter and Elizabeth Cabraser have been renewed for  
46 their second three-year terms. And, in a welcome departure from the  
47 usual two-term limit, the Chief Justice has extended Judge Koeltl's  
48 term by one year, to maintain continuity in perfecting the proposed  
49 amendments that have grown out of the 2010 Duke Conference.

50 Judge Gorsuch will be the new liaison from the Standing  
51 Committee.

52 John Vail, who has been a long-time friend of the Committee,  
53 has entered private practice. Two new representatives from the  
54 Center for Constitutional Litigation are attending this meeting,  
55 but all hope that Vail will continue to be involved.

56 The next meeting will be on April 10 and 11 in Portland,  
57 Oregon. The first day will be at the Lewis and Clark Law School;  
58 part of the day will be devoted to a conference in tribute to Judge  
59 Mark R. Kravitz, the immediate prior chair of this Committee and of  
60 the Standing Committee. The second day, to be held at the federal  
61 court house, will likely be a full day.

62 The Standing Committee acted at its June meeting to approve  
63 publication of the Civil Rules amendments in August.

64 Judge Sutton noted that the Standing Committee got the rules  
65 proposals recommended for adoption and the Standing Committee  
66 meeting minutes to the Judicial Conference earlier than usual. With  
67 the Conference's approval of the proposals, this will give the  
68 Court a bit more time to consider the proposals in the fall. And,  
69 if the Court has concerns, there will be more time for the  
70 Committee to respond. As an example of the benefits, it has been  
71 possible to consider the question whether one of the Bankruptcy  
72 Rule proposals should be withheld because the Court granted  
73 certiorari on a related issue late last June.

74 Judge Campbell observed that the present rules proposals  
75 reflect the need for more effective case management in some courts.  
76 "We can write rules." But training by the Federal Judicial center  
77 is an essential part of making them effective. Judge Fogel observed  
78 that there seems to be a perception in Congress that judges do not  
79 manage cases effectively enough. The current efforts to encourage  
80 early and active case management will provide important reassurance  
81 that the rules committees are pursuing these issues vigorously.

82 The Committee had no proposals for review at the September  
83 Judicial Conference meeting.

84 The Rule 45 Subpoena amendments will take effect December 1.  
85 The Administrative Office forms are being revised to account for

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86 the changes. John Barkett will hold an ABA webinar to inform  
87 lawyers about the changes. Judge Harris has written an article to  
88 inform bankruptcy lawyers of the changes. It is important that the  
89 bar learn of the changes and adapt to them – technically, a lawyer  
90 who on December 1 issues a subpoena from a district court in  
91 Michigan to a witness in Michigan for a deposition in Michigan to  
92 support an action in Illinois will be issuing an invalid subpoena,  
93 since the new rules direct issuance from the court in Illinois.

94 Judge Campbell concluded his opening remarks by thanking all  
95 the observers for their interest and attendance.

96 *April 2013 Minutes*

97 The draft minutes of the April 2013 Committee meeting were  
98 approved without dissent, subject to correction of typographical  
99 and similar errors.

100 *Legislative Activity*

101 Benjamin Robinson reported on current legislative activity.

102 Congress is considering bills to amend Rule 11. The House has  
103 passed similar bills in recent years. The full House is expected to  
104 vote on the Lawsuit Abuse Reduction Act next week. It is not clear  
105 whether the Department of Justice will express views on the bill.  
106 The rules committees have clearly expressed their opposition. The  
107 dissenters in the House have addressed the concerns with the  
108 provisions that would make sanctions mandatory. Should the bill  
109 pass in the House, prospects in the Senate are uncertain.

110 Representative Goodlatte has a bill, House 3309, that  
111 addresses discovery costs and concerns, especially in patent-  
112 infringement actions. Section 6 requires the Judicial Conference,  
113 using existing resources, to generate rules. Section 6 further  
114 prescribes the content of the rules, mandating discovery cost-  
115 shifting for discovery beyond "core" discovery. Judge Sutton and  
116 Judge Campbell have submitted a letter expressing concerns about  
117 the relationship of these provisions to the Enabling Act procedure  
118 that Congress has adopted for revising court rules. Working with  
119 staffers on the Hill in the last few months has been productive.  
120 The best outcome for the Enabling Act process may be an expression  
121 of the sense of Congress on what might be desirable rules. One  
122 possibility, for example, would be to generate for patent cases  
123 something like the protocol for individual employment cases  
124 developed under the leadership of the National Employment Lawyers  
125 Association. Much further work should be done in assessing the  
126 desirability of a system in which a party requesting discovery pays  
127 for the cost of responding to all discovery beyond the "core,"

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128 however the core might be defined. One reason to avoid precipitous  
129 action is that there are pilot projects for patent litigation, and  
130 much may be learned from them.

131 Judge Fogel noted that the Federal Judicial Center is studying  
132 the pilot projects. The pending bills reflect the sense of both  
133 political parties and the White House that something should be done  
134 about patent litigation brought by nonpracticing entities, referred  
135 to by some as "patent trolls." There is a perception that these  
136 plaintiffs use the cost of discovery as a weapon to force  
137 settlement. The bill, in its present form, is not very flexible. It  
138 prohibits discovery on anything but claim construction before the  
139 Markman hearing, absent exceptional circumstances. But there are  
140 cases in which claim construction is not a critical issue, and in  
141 which prompt discovery on other issues is important. Another  
142 provision directs that the nonprevailing party pay the other  
143 party's fees unless it can show its position was substantially  
144 justified.

145 Judge Campbell noted that the rules committees comment only on  
146 the parts of pending legislation that affect civil procedure  
147 directly. Substantive issues - here, substantive patent issues -  
148 are beyond the committees' scope. We do urge Congress to respect  
149 the Enabling Act. But there are many procedural provisions. Core  
150 discovery is limited to documents. The requester pays for  
151 everything after that, including non-core documents and attorney  
152 fees for depositions. Discovery of electronically stored  
153 information is limited to 5 custodians, and search terms must be  
154 specified. The committees are pleased to address issues that  
155 Congress finds troubling or important, but they ask that Congress  
156 not dictate the terms of rules amendments. Staff members in both  
157 houses seem receptive to this message.

158 One specific provision of the patent bill directly abrogates  
159 Form 18 of the Rule 84 official forms. Congress knows that the  
160 Committee proposes to abrogate Rule 84 and all the forms, but it  
161 also knows how much time remains in the full Enabling Act process.  
162 Some are impatient with that. "It is an ongoing process."

163 It also was noted that there are private groups that oppose  
164 the patent bill. They believe there should be no distinctions  
165 between nonpracticing entities and other patent owners. Free  
166 transfer of patent rights is argued to enhance the value of the  
167 patent system. There will be vigorous representation of all views.

168 Benjamin Robinson also described a November 5 hearing by the  
169 Senate Judiciary Committee Subcommittee on Bankruptcy and the  
170 Courts that was, in substance, deliberate and thoughtful. The  
171 witnesses were well-informed and thoughtful. They expressed

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172 concerns about the adequacy of judicial resources. And there were  
173 criticisms of the rules proposals published in August, which are  
174 seen to create "procedural stop signs." Many of those at the  
175 hearing reflected their interest in the Enabling Act process, and  
176 were concerned that the committees work hard to "get it right."  
177 Four specific questions were posed at the end: what, specifically,  
178 the proposals are intended to accomplish; what failures of the  
179 system they are designed to correct; whether the amendments are  
180 likely to be effective; and what are the likely costs, including  
181 collective costs, and how the costs should be weighed against the  
182 hoped-for benefits. Concerns also were expressed that recent  
183 procedural developments will impede access to justice – pleading  
184 standards and summary judgment are particular subjects of concern.

185 *E-Rules*

186 The Standing Committee has appointed a subcommittee  
187 constituted by two representatives from each of the advisory  
188 committees, together with the reporters. Judge Chagares serves as  
189 chair. Professor Capra is the reporter. Judge Oliver and Clerk  
190 Briggs are the delegates from the Civil Rules Committee. The task  
191 of the subcommittee is to consider the ways in which developing  
192 methods of electronic communication may warrant adoption of common  
193 approaches that are adopted in each set of rules. The initial goal  
194 has been to produce a set of proposals that can be recommended for  
195 publication in time for the June 2014 Standing Committee meeting.

196 Rule 6(d): "3 days are added": A proposal to eliminate the "3 days  
197 are added" provision for reacting after being served by electronic  
198 means has reached a consensus. All committees with this rule will  
199 eliminate the 3 added days. A common Committee Note has been  
200 drafted. There is one small issue for the text of Civil Rule 6(d).  
201 Professor Capra suggested that parenthetical word descriptions  
202 should be added to the cross-references to the rules that will  
203 continue to activate the 3 added days to respond. The  
204 parentheticals could prove useful to avoid repeated flipping back  
205 to the corresponding Rule 5 provisions. Although only Rules 5.1 and  
206 5.2 intervene between Rule 5 and Rule 6, the added convenience may  
207 be more useful because there are 3 cross-references to service by  
208 mail, by leaving with the clerk, and by other means consented to.  
209 There is no risk that these simple identifying words will create  
210 confusion in the rules. On the other hand, there are many cross-  
211 references throughout the rules, and they do not add parenthetical  
212 descriptions. Generalizing this practice might encounter greater  
213 dangers that parenthetical descriptions would be read as  
214 interpretations. And the burden of following cross-references may  
215 be reduced by the growing use of hyperlinks in electronic versions  
216 of the rules. The Style Consultant will no doubt have views on this  
217 proposal.

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218           The Committee approved recommendation of the draft Rule 6(d)  
219 for publication.

220 Electronic Signatures: Verification of signatures on papers filed  
221 by electronic means has raised some disquiet. An amendment of  
222 Bankruptcy Rule 5005 addressing these issues was published this  
223 summer. The first part provides that the user name and password of  
224 a registered user serves as a signature. The second part addresses  
225 signatures by persons other than the registered user who makes the  
226 filing. Two alternatives are provided. The first alternative states  
227 that by filing the document and the signature page, the registered  
228 user certifies that the scanned signature was part of the original  
229 document. The second alternative directs that the document and  
230 signature page must be accompanied by an acknowledgment of a notary  
231 public that the scanned signature was part of the original  
232 document.

233           The Civil Rules delegates to the subcommittee are puzzled by  
234 the alternative that would require a notary's acknowledgment. The  
235 underlying concern seems to be that as compared to paper documents,  
236 it easier to misuse an authentic signature many times by electronic  
237 submissions. An original paper signature page might be detached  
238 from one document and attached to a filed document. An electronic  
239 signature might be replicated many times. And bankruptcy practice  
240 may involve more frequent needs for the same person to sign several  
241 documents than arise in other areas of practice. That of itself may  
242 serve to distinguish the bankruptcy rules from the other sets of  
243 rules – if they need the notary alternative, there may be good  
244 reason to adopt a different approach in the other sets of rules.  
245 Interest in adopting a different approach stems from uncertainty  
246 about how the notary will participate in a way that reduces the  
247 perceived danger. If the paper is signed before it is filed, the  
248 notary could guarantee authenticity only by retaining the  
249 electronic file and being present at the time of filing – indeed,  
250 perhaps, making the filing to ensure there is no legerdemain in the  
251 filing process. Or the notary could be present at the time of  
252 signing and simultaneous filing. Either alternative seems  
253 cumbersome at best. And it could apply to many filings – the  
254 affidavits or declarations of several witnesses might be needed for  
255 a summary-judgment motion, for example. Involving a notary also  
256 seems inconsistent with the movement away from requiring  
257 notarization, as reflected in 28 U.S.C. § 1746. Relying on the  
258 filer to ensure authenticity has seemed to work for paper filings.  
259 It is not clear that anything more should be required for e-  
260 filings.

261           These observations were elaborated by comments that e-  
262 signatures have generated much discussion. The Evidence Rules  
263 Committee planned to present a panel on these issues, developed by

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264 the Department of Justice, at the conference scheduled for October  
265 but cancelled for the government shutdown. The IRS has used scanned  
266 e-signatures, under a statute that relieves the prosecutor of the  
267 burden. The FBI argues that it is impossible to verify forgeries of  
268 scanned signatures. One solution is to require that lawyers keep  
269 "wet signature" documents. Lawyers do not want that burden. Nor are  
270 lawyers eager to have to produce documents that harm their clients'  
271 positions. The Department of Justice has discussed these issues  
272 extensively, and finds them complicated.

273 It was noted that the problems of filing are complemented by  
274 evolving concepts of admissibility in evidence. Social media  
275 postings, for example, may be offered to show motive and intent.  
276 Evidence Rules 803(6)(E) and (8)(B), and 901(a), are not much help  
277 in telling you what needs to be done to show a source is  
278 trustworthy. Addressing what need be done to file a paper is like  
279 the tail wagging the dog – the more important questions are what  
280 can be done with the paper. "This is a moving target."

281 Further discussion confirmed that the signature rule is  
282 addressed to all papers signed by someone other than the registered  
283 user. The example of affidavits or declarations submitted with a  
284 summary-judgment motion recurred. The rule applies to anything  
285 filed. A settlement agreement would be another example. And the  
286 fear indeed is that a lawyer will cheat. But fraudsters will cheat  
287 in either medium, paper or electronic filing. The burden of  
288 invoking notarization would be great. It was urged again that we  
289 should continue to rely, as we do now, on the integrity of lawyers.

290 e=Paper: Continuing advances in electronic technology and parallel  
291 advances in its use raise the question whether the time has come to  
292 adopt a general rule that electrons equal paper. The subcommittee  
293 has prepared a generic draft rule that provides that any reference  
294 to information in written form includes electronically stored  
295 information, and that any act that may be completed by filing or  
296 sending paper may also be accomplished by electronic means. The  
297 draft recognizes that any particular set of rules may need to  
298 provide exceptions – that could be done either by adding "unless  
299 otherwise provided" to the general rule and adding specific  
300 provisions to other rules, or by listing a presumably small number  
301 of exceptions in the general rule. The task of identifying suitable  
302 exceptions may be challenging; multiple questions are suggested in  
303 the materials. It will be helpful to think about the need for a  
304 general provision by starting with e-service and e-filing. If those  
305 rules cover most of the important issues, and if it is difficult to  
306 be confident in creating exceptions to a more general rule, it may  
307 be that the provisions for service and filing will suffice for now.

308 e-Service, e-Filing: Rule 5(b)(2)(E) now provides for electronic

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309 service of papers after the initial summons and complaint if the  
310 person served consented in writing. This "consent" provision has  
311 been stretched in many courts by local rules that require consent  
312 as an element in registering to participate in electronic filing.  
313 At least some courts would be more comfortable with open authority  
314 to require e-service. The agenda includes a draft that begins by  
315 authorizing service by electronic means, and then suggests a number  
316 of alternative exceptions - "unless" good cause is shown for  
317 exemption, or a person files a refusal at the time of first  
318 appearing in the action, or the person has no e-mail address, or  
319 local rules provide exemptions. The initial temptation to exempt  
320 pro se filers was resisted because some courts are experimenting  
321 successfully with programs that require prisoners to participate in  
322 e-filing and e-service.

323 Rule 5(d)(3) authorizes a court to adopt a local rule that  
324 allows e-filing, so long as reasonable exceptions are allowed. Here  
325 too it may be desirable to put greater emphasis on e-action. The  
326 agenda materials include a draft directing that all filings must be  
327 by electronic means, but also directing that reasonable exceptions  
328 must be allowed by local rule.

329 Judge Oliver opened the discussion by noting that many courts  
330 effectively require consent to e-service, and that the subcommittee  
331 is interested in emphasizing e-service. At the same time, some  
332 exceptions will prove useful. Clerk Briggs noted that her court  
333 has a good-cause exception, but it has been invoked only once - and  
334 that was eight or nine years ago. They have a prisoner e-filing  
335 project that has been surprisingly successful. Another committee  
336 member observed that e-service is done routinely; "this is the  
337 world we live in."

338 The value of allowing exceptions by local rules was supported  
339 by suggesting that this is an area where geography may make a  
340 difference. Some areas may encounter distinctive circumstances that  
341 warrant a general exception by local rule.

342 A question was raised about a pro se litigant who wants to be  
343 served electronically but may present difficulties. One has argued  
344 an equal protection right to be treated the same as litigants  
345 represented by counsel.

346 Benjamin Robinson reported that a survey of all districts  
347 uncovered 92 local rules and 2 administrative orders. Eighty-five  
348 districts mandate e-filing. Nine are permissive. One difficulty in  
349 unraveling this is that some local rules treat civil and criminal  
350 proceedings together. All have various exceptions. The variety may  
351 make life difficult for a lawyer who practices in multiple  
352 jurisdictions, but registration itself is the biggest hassle.

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353 Without going further into the agenda materials - and  
354 particularly without returning to the question whether to recommend  
355 a general rule that equates electrons with paper, and electronic  
356 action with paper action, it was asked whether these issues alone  
357 suggest that it may be too ambitious to attempt to develop  
358 recommendations for rules that warrant publication next summer. One  
359 reason for caution is the hope that courts and lawyers will be able  
360 to work together to develop sensible solutions to problems as they  
361 arise, and that this process will provide a better foundation for  
362 new rules than more abstract consideration. If there are no general  
363 calls for help, no widespread complaints that the rules need to be  
364 brought into the present and near future, perhaps there is no need  
365 to rush ahead on a broad basis.

366 One committee member offered his own experience as an  
367 anecdote. "I practice all over the country. I do not see these  
368 issues as problems." It makes sense to do the simple and obvious  
369 things now. Leaving the rest to the future is not a bad idea. These  
370 questions do not impact daily practice, even though 99% of practice  
371 is accomplished by electronic means.

372 A judge observed that he had never seen a problem with e-  
373 communications. They are happening, and working.

374 Caution was urged with respect to service of the initial  
375 summons and complaint under Rule 4, and similar acts that bring a  
376 party into the court's jurisdiction. Expanding e-service to this  
377 area could affect the "finality" of judgments, both directly and in  
378 terms of recognition and enforcement in other courts. This caution  
379 was seconded.

380 Discussion returned to the concern that local rules that  
381 impose consent to e-service as a condition of registering with the  
382 court's sytem are potentially inconsistent with the national rule  
383 that recognizes e-service only with the consent of the person  
384 served.

385 On the other hand, "the big problem is the people who are not  
386 in the e-system." Pilot projects that are bringing prisoners into  
387 the e-system are really important.

388 A committee member suggested that it is worthwhile to look at  
389 these questions more thoughtfully, but not immediately. "There are  
390 issues out there, but they are not yet big issues. Time will bring  
391 more information." We should do the obvious things now, and find  
392 out whether lawyers are complaining about other things.

393 A broader view noted that this discussion reflects a regular  
394 pattern in rulemaking. We often confront a choice. We could attempt

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395 to anticipate the future and provide for it. Or we can wait and  
396 codify what the world has come to do, at least generally. "We do  
397 want to reflect what people are doing. But perhaps not just yet."

398 States "may get ahead of us." And we can learn from them.

399 So there are any number of cybersecurity experts who worry  
400 about many of these problems. They are working, for example, to  
401 develop electronic notary seals. "Answers may emerge and be used."

402 The discussion concluded by suggesting three steps. First, the  
403 Committee agrees to the proposal to delete the "3 added days" to  
404 respond after e-service. And it will wait to see what can be  
405 learned from public comments on the Bankruptcy Rule proposal for  
406 dealing with e-signatures. Second, a few Committee members should  
407 be assigned to talk to bar groups and state groups to learn what  
408 problems may be out there and what efforts are being made to  
409 address them. Finally, the Committee believes that it may be better  
410 not to attempt broad action as soon as a recommendation to publish  
411 next June, although the 3 added days question itself seems to be  
412 rightly resolved.

413 Separate note was made of a suggestion by the Committee on  
414 Court Administration and Case Management that a notice of  
415 electronic filing should serve as a certificate of service. The  
416 agenda materials include a sketch of Rule 5(d)(1) that so provides,  
417 while maintaining the certificate requirement for any party that  
418 was not served by means that provide a notice of electronic filing.  
419 Preliminary consideration of this question suggested a further  
420 question. It is not clear on the face of the rules whether a  
421 certificate of service need be served on the parties, or whether  
422 filing suffices. The Rule 5(a)(1)(E) reference to "any similar  
423 paper" is open to interpretation. These questions will be held in  
424 abeyance pending further advice from CACM.

425 *Rule 17(c)(2)*

426 The second sentence of Rule 17(c)(2) provides: "The court must  
427 appoint a guardian ad litem – or issue another appropriate order –  
428 to protect a minor or incompetent person who is unrepresented in an  
429 action." The court grappled with this provision in *Powell v.*  
430 *Symons*, 680 F.3d 301 (3d Cir.2012), finding a relative dearth of  
431 case guidance that would help a court determine whether it is  
432 obliged to act on its own to open an inquiry into the competence of  
433 an unrepresented party. It urged the Advisory Committee to consider  
434 whether something might be done to provide greater direction. This  
435 question was considered at the April meeting, and postponed for  
436 further research in the case law. Judge Grimm enlisted an intern  
437 and a law clerk to undertake the research. The results of their

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438 work are described in a memorandum and a circuit-by-circuit  
439 breakdown in the agenda materials.

440 The additional research has found the state of the law much as  
441 the Third Circuit found it. Although there are variations in  
442 expression, there is a clear consensus that a court is not obliged  
443 to open an inquiry into the competence of an unrepresented litigant  
444 unless there is something like "verifiable evidence of  
445 incompetence." If the inquiry is opened, whether on the court's own  
446 or by request, the court has broad discretion both in determining  
447 competence and in choosing an appropriate order if a party is found  
448 not competent. An adjudication of incompetence for other purposes,  
449 for example, need not automatically compel a finding of  
450 incompetence to conduct litigation.

451 The questions of initiating the inquiry and of dealing with a  
452 party who is not competent to litigate are both independent and, in  
453 part, interdependent. What circumstances might trigger a duty to  
454 inquire will be shaped by the concepts applied in measuring  
455 competence. So too, practical constraints on what can be done to  
456 secure a guardian ad litem or other representation may be  
457 considered in determining whether it is practical to pursue further  
458 development of Rule 17(c)(2).

459 So the present question is whether the Committee should pursue  
460 this question further by developing a rule amendment that might be  
461 recommended for publication and comment. The agenda materials  
462 provide initial sketches of two different approaches. The first  
463 would expand the duty to inquire: "The court must inquire into a  
464 person's competence on motion or when the person's litigating  
465 behavior [strongly] suggests the person is incompetent to act  
466 without a representative [or other appropriate order]." The second  
467 approach would attempt to capture the present approach, for more  
468 reassuring guidance: "The court must inquire into a person's  
469 competence when evidence is presented to it that [alternative 1 the  
470 person has been adjudicated incompetent] [alternative 2 strongly  
471 suggests the person is incompetent] [alternative 3 the person is  
472 incompetent to manage the litigation without appointment of a  
473 guardian ad litem or other appropriate order]." The third  
474 approach, to do nothing and remove the question from the agenda,  
475 does not require an illustrative sketch.

476 Judge Grimm opened the discussion by noting that his intern  
477 and law clerk had done a good job of researching the issue. The  
478 threshold that imposes an obligation to open an inquiry into an  
479 unrepresented party's competence is high. The Fourth Circuit has  
480 provided an illustrative statement of the behavior that may not  
481 trigger an inquiry: "Parties to a litigation behave in a great  
482 variety of ways that might be thought to suggest some degree of

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483 mental instability. Certainly the rule contemplates by  
484 'incompetence' something other than mere foolishness or  
485 improvidence, garden-variety or even egregious mendacity or even  
486 various forms of the more common personality disorders." *Hudnall v.*  
487 *Sellner*, 800 F.2d 377, 385 (4th Cir.1986).

488 The problem may not be a need for more guidance; at most, it  
489 is lack of familiarity with the guidance that in fact is provided  
490 by the cases. A real part of the challenge, however, is to do  
491 something effective after a party is found to lack competence. One  
492 pending case provides an illustration. A person confined in a state  
493 mental hospital has filed a petition for habeas corpus complaining  
494 of events in the hospital. State courts have appointed a guardian  
495 for her property and for her person. On inquiry put to the  
496 guardians, the petitioner objected that she did not want them to  
497 represent her. What should be done? "We cannot by rule address the  
498 problems of what to do when you find incompetence."

499 It would ask too much to impose a duty to inquiry when a court  
500 sees something irregular. It would be better to leave the rule as  
501 it is.

502 Another example was provided of a pro se litigant who asked  
503 for counsel in a § 1983 action against prison guards. He was found  
504 incompetent on the basis of a state criminal court finding that he  
505 was not competent. Now the challenge is to find a lawyer to  
506 represent him. It has not been easy. But how could we write a rule  
507 that gives the court more guidance?

508 Another judge suggested that these questions verge into the  
509 broader questions characterized as "civil Gideon." "Now is not the  
510 time to wade into this."

511 Yet another judge suggested that it is difficult to imagine a  
512 rule that would do much to help with the question put by the Third  
513 Circuit. The issue often arises in § 2254 petitions and § 2255  
514 motions. Can we appoint guardians ad litem for them?

515 An illustration of the problems was provided by the example of  
516 a child pornography prosecution of the child victim's father. The  
517 statute directs that a guardian ad litem be appointed for the  
518 child. But the statute does not provide a source of funding, and  
519 none can be found.

520 The Committee concluded to remove this topic from the agenda.

521 *Rule 82*

522 Rule 82 provides that the rules do not extend or limit

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523 jurisdiction or venue. The second sentence cross-refers to a venue  
524 statute that has been repealed. And there is a new venue statute to  
525 be considered. Rule 82 must be amended in some way. The proposal is  
526 to adopt this version:

527 An admiralty or maritime claim under Rule 9(h) is not a  
528 civil action for purposes of 28 U.S.C. §§ 1390-1391 =  
529 ~~1392~~.

530 New section 1390 provides that the general venue statutes do  
531 not govern "a civil action in which the district court exercises  
532 the jurisdiction conferred by section 1333." Section 1333  
533 establishes exclusive federal jurisdiction of "[a]ny civil case of  
534 admiralty or maritime jurisdiction, saving to suitors in all cases  
535 all other remedies to which they are otherwise entitled."

536 The complication addressed by Rule 9(h) and invoked in Rule 82  
537 arises from the "saving to suitors" clause. Some claims are  
538 intrinsically admiralty claims. For such claims, a federal court  
539 inherently exercises the § 1333 jurisdiction. But there are other  
540 claims that can be brought either as an admiralty claim or as a  
541 general civil action. Rule 9(h) gives the pleader an option in such  
542 cases. The pleader may designate the claim as an admiralty claim  
543 for purposes of Rules 14(c), 38(e), and 82.

544 The effect of invoking Rule 9(h) to designate a claim as an  
545 admiralty claim is that the court is then exercising § 1333  
546 jurisdiction. Section 1390(b) confirms the longstanding  
547 understanding that in such cases the general venue statutes do not  
548 apply. It makes sense to add § 1390 to the cross-reference in Rule  
549 82.

550 The other step is simpler. Congress has repealed § 1392, which  
551 applied to "local actions." The cross-reference to § 1392 must be  
552 deleted from Rule 82.

553 The Committee voted to recommend the proposed Rule 82  
554 amendment to the Standing Committee for publication. Although the  
555 amendment seems on its face to be a clearly justified technical  
556 change to conform to recently enacted legislation, it seems better  
557 to publish for comment. Admiralty jurisdiction involves some  
558 questions that are arcane to most, and complex even to those who  
559 are familiar with the field. A period for comment will provide  
560 reassurance that there are no unwelcome surprises.

561 *Rule 67(b)*

562 The final sentence of Rule 67(b) provides that money paid into  
563 court under Rule 67 "must be deposited in an interest-bearing

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564 account or invested in a court-approved, interest-bearing  
565 instrument." In 2006 the IRS adopted a regulation dealing with  
566 "disputed ownership funds on deposit." Interpleader actions are a  
567 common illustration. The regulation requires a separate account and  
568 administrator for each fund, and quarterly tax reports. The  
569 Administrative Office became aware of the regulation in 2011. The  
570 practice has been to deposit these funds in a common account. The  
571 burden of establishing a separate account for each fund, with  
572 separate administration, and providing quarterly tax reports, would  
573 be considerable. The estimated annual cost is \$1,000 per fund, with  
574 an additional \$400 for the quarterly tax reports. This cost  
575 compares to the report that the average fund is \$36,000. And the  
576 clerk of court cannot be appointed as administrator. But the IRS  
577 has taken the position that it will look to the clerks to assure  
578 compliance.

579 The Administrative Office staff initially proposed that rule  
580 67(b) should be amended to delete the interest-bearing account  
581 requirement. But further discussion has led to a preferred position  
582 that would carry forward with a common depository fund, with a  
583 single administrator. Preparing a common quarterly tax report would  
584 not be much burden. The opportunity to garner some income on the  
585 deposited funds would be maintained – an opportunity that seems  
586 likely to become more important as interest rates return closer to  
587 historically normal levels. This approach is functionally better.  
588 And it avoids the need to embark on a rule amendment that would  
589 draw strong opposition – forgoing interest on deposited funds does  
590 not make any obvious sense.

591 The Administrative Office has begun discussions with the IRS  
592 to explore the preferred solution. This should be to the advantage  
593 of the IRS as well as the court system and claimants to deposited  
594 funds. A single fund is likely to generate greater aggregate income  
595 than many separate, and often rather small, funds. The IRS will get  
596 as much or more tax revenue, and it will have to deal with only a  
597 single return. Everyone will be better off.

598 Further consideration of these questions will await the  
599 outcome of negotiations with the IRS.

600 *Requester Pays For Discovery*

601 Judge Campbell opened discussion of "requester pays" discovery  
602 issues by noting that various groups, including members of  
603 Congress, have asked the Committee to explore expansion of the  
604 circumstances in which a party requesting discovery can have  
605 discovery only by paying the costs incurred by the responding  
606 party. The suggestions are understood to stop short of a general  
607 rule that the requesting party must always bear the cost of

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608 responding to any discovery request. Instead they look for more  
609 modest ways of shifting discovery costs among the parties.

610 Judge Grimm outlined the materials included in the agenda  
611 book. There is an opening memorandum describing the issues; a copy  
612 of his own general order directing discovery in stages and  
613 contemplating discussion of cost-shifting after core discovery is  
614 completed; notes of the September 16 conference-call meeting of the  
615 Discovery Subcommittee; and Professor Marcus' summary of a cost-  
616 shifting proposal that the Standing Committee approved for adoption  
617 in 1998, only to face rejection by the Judicial Conference.

618 Several sources have recommended further consideration of  
619 cost-shifting. Congress has held a hearing. Patent-litigation  
620 reform bills provide for it. Suggestions were made at the Duke  
621 Conference. The proposed amendments published for comment this  
622 August include a revision of Rule 26(c) to confirm in explicit rule  
623 text the established understanding that a protective order can  
624 direct discovery on condition that the requester pay part or all of  
625 the costs of responding. That builds on the recently added  
626 provisions in Rule 26(b)(2)(B).

627 The Subcommittee has approached these questions by asking  
628 first whether it is possible to get beyond the "anecdotal" to find  
629 whether there are such problems as to justify rules amendments. Are  
630 such problems as may be found peculiar to ESI? to particular  
631 categories of actions? What are the countervailing risks of  
632 limiting access to justice? How do we get information that carries  
633 beyond the battle cries uttered on both sides of the debate?

634 The 1998 experience with a cost-bearing proposal that  
635 ultimately failed in the Judicial Conference is informative. The  
636 Committee began by focusing on Rule 34 requests to produce as a  
637 major source of expense. Document review has been said to be 75% of  
638 discovery costs. Technology assisted review is being touted as a  
639 way to save costs, but it is limited to ESI. The 1998 Committee  
640 concluded that a cost-bearing provision would better be placed as  
641 a general limit on discovery in Rule 26(b), as a lead-in sentence  
642 to the proportionality factors.

643 Discussions since 1998 have suggested that a line should be  
644 drawn between "core" discovery that can be requested without paying  
645 the costs of responding and further discovery that is available  
646 only if the requester pays.

647 Emery Lee is considering the question whether there is a way  
648 to think about getting some sense of pervasiveness and types of  
649 cases from the data gathered for the 2009 case study. Andrea  
650 Kuperman will undertake to survey the literature on cost shifting.

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651 Other sources also will be considered. There may be standing  
652 orders. Another example is the Federal Circuit e-mail discovery  
653 protocol, which among other provisions would start with presumptive  
654 limits on the number of custodians whose records need be searched  
655 and on the number of key words to be used in the search.

656 One of the empirical questions that is important but perhaps  
657 elusive is framed by the distinction between "recall" and  
658 "precision." Perfect recall would retrieve every responsive and  
659 relevant document; it can be assured only if every document is  
660 reviewed. Perfect precision would produce every responsive and  
661 relevant document, and no others. Often there is a trade-off. Total  
662 recall is totally imprecise. There is no reason to believe that  
663 responses to discovery requests for documents, for example, ever  
664 achieve perfect precision. But such measures as limiting requests  
665 to 5 key words are likely to backfire – one of the requests will  
666 use a word so broad as to yield total recall, and no precision.

667 Judge Grimm continued by describing his standard discovery  
668 order as designed to focus discovery on the information the parties  
669 most need. It notes that a party who wants to pursue discovery  
670 further after completing the core discovery must be prepared to  
671 discuss the possibility of allocating costs. This approach has not  
672 created any problems. Case-specific orders work. For example, it  
673 might be ordered that a party can impose 40 hours of search costs  
674 for free, and then must be prepared to discuss cost allocation if  
675 it wants more.

676 Although this approach works on a case-by-case basis,  
677 "drafting a transsubstantive rule that defines core discovery would  
678 be a real challenge."

679 The question is how vigorously the Subcommittee should  
680 continue to pursue these questions.

681 Professor Marcus suggested that the "important policy issues  
682 have not changed. Other things have changed." It will be important  
683 to learn whether we can gather reliable data to illuminate the  
684 issues.

685 Emery Lee sketched empirical research possibilities. Simply  
686 asking lawyers and judges for their opinions is not likely to help  
687 with a topic like this. It might be possible to search the CM/ECF  
688 system for discovery disputes to identify the subjects of the  
689 disputes and the kinds of cases involved. That would be pretty easy  
690 to do. Beyond that, William Hubbard has pointed out that discovery  
691 costs are probably distributed with a "very long tail of very  
692 expensive cases." The 2009 Report provided information on the costs  
693 of discovery. Extrapolating from the responses, it could be said

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694 that the costs of discovery force settlement in about 6,000 cases  
695 a year. That is a beginning, but no more. Interviewing lawyers to  
696 get more refined explanations "presents a lot of issues." One  
697 illustration is that we have had little success in attempts to  
698 survey general counsel – they do not respond well, perhaps because  
699 as a group they are frequently the subjects of surveys. A different  
700 possibility would be to create a set of hypothetical cases and ask  
701 lawyers what types of discovery they would request to compare to  
702 the assumptions about core and non-core discovery made in  
703 developing the cases. The questions could ask whether requester-  
704 pays rules would make a difference in the types of discovery  
705 pursued.

706 Discussion began with a Subcommittee member who has reflected  
707 on these questions since the conference call and since the  
708 testimony at the November 6 congressional hearing. Any proposal to  
709 advance cost-bearing beyond the modest current proposal to amend  
710 Rule 26(c) would draw stronger reactions than have been drawn by  
711 the comments on the "Duke Package" proposals. "So we need data.  
712 But what kind? What is the problem?" Simply learning how much  
713 discovery costs does not tell us much. E-discovery is a large part  
714 of costs. But expert witnesses also are a large part of costs. So  
715 is hourly billing. But if the problems go beyond the cost of  
716 discovery, what do we seek? Whether cost is in some sense  
717 disproportionate, whether the same result could be achieved at  
718 lower cost? How do we measure that? Would it be enough to find – if  
719 we can find it – whether costs have increased over time? Then let  
720 us suppose that we might find cost is a problem. Can rulemaking  
721 solve it? And will a rule that addresses costs by some form of  
722 requester pays impede access to the courts? There is a risk that if  
723 we do not do it, Congress will do it for us. But it is so difficult  
724 to grapple with these questions that we should wait a while to see  
725 what may be the results of the current proposed amendments.

726 Another member said that these questions are very important.  
727 "The time needed to consider, and to decide whether to advance a  
728 proposal, is enormous." It took two years to plan the Duke  
729 Conference, which was held in 2010. It took three years more to  
730 advance the proposed amendments that were published this summer.  
731 That is a lot of preparation. It is, however, not too early to  
732 start now. Among the questions are these: Does discovery cost "too  
733 much"? How would that be defined? Requester-pays rules could reduce  
734 the incidence of settlements reached to avoid the costs of  
735 discovery; in some cases that would unnecessarily discourage trial,  
736 but there also are cases that probably should settle. A different  
737 measure of excess cost is more direct – does discovery cost more  
738 than necessary to resolve the case, resulting in wasted resources?  
739 What data sources are available? We have not yet mined a lot of the  
740 empirical information provided for the Duke Conference. The RAND

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741 report reviewed corporate general counsel, assuring anonymity; its  
742 results can be considered. We might enlist the FJC to interview  
743 people who have experience with the protocol developed for  
744 individual employment cases under the leadership of NELA – it would  
745 be good to know what information they got by exchanges under the  
746 protocol, and how much further information they gathered by  
747 subsequent discovery. All of these things take time. The pilot  
748 project for patent cases is designed for ten years. FJC study can  
749 begin, but will take a long time to complete. And other pilot  
750 projects will help, remembering that they depend on finding lawyers  
751 who are willing to participate. All of this shows that it is  
752 important to keep working on these questions, without expecting to  
753 generate proposed rules amendments in the short-term future.

754 A member expressed great support for case management, but  
755 asked how far it is feasible to approach these problems by general  
756 national rules. "What is our jurisdiction"?

757 A partial response was provided by another member who agreed  
758 that this is a very ambitious project. "Apart from 'jurisdiction,'  
759 what is our capacity to do this?" Forty-one witnesses at the  
760 hearing yesterday divided in describing the current proposals –  
761 some found them modest, others found them a sea-change in discovery  
762 as we know it. Requester-pays proposals are far more sensitive. A  
763 literature search may be the best starting point. What is already  
764 out there? And we can canvass and inventory the pilot projects.  
765 That much work will provide a better foundation for deciding  
766 whether to go further. If the current proposals are adopted – no  
767 earlier than December 1, 2015 – they may work some real changes  
768 that will affect any decisions about requester-pays proposals.

769 A lawyer member observed that Rule 26(b)(2)(B) provides for  
770 cost shifting in ordering discovery of ESI that is difficult to  
771 access. "There have been a number of orders. We could follow up  
772 with experience." One anecdote: in one case a plaintiff seeking  
773 discovery of 94 backup tapes, confronted by an order to pay 25% of  
774 the search costs, reacted by reducing the request to 4 tapes.  
775 Beyond that, Texas Rule 196.4 has long provided for requester  
776 payment of extraordinary costs of retrieving ESI. We might learn  
777 from experience. So, reacting to the Federal Circuit model order  
778 for discovery in patent actions, the Eastern District of Texas has  
779 raised the initial limit from 5 custodians to 8, and has omitted  
780 the provision for cost-shifting if the limit is exceeded; it  
781 prefers to address cost-shifting on a case-by-case basis. And we  
782 should remember that "cloud" storage may have an impact on  
783 discovery costs.

784 The Committee was reminded that if the proposed Rule 26(c)  
785 amendment is adopted, experience in using it could provide a source

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786 of data to support further study.

787 The discussion concluded by determining to keep this topic on  
788 the agenda. The Duke data can be mined further. We can look for  
789 cases that follow in the wake of the Supreme Court's recognition  
790 that the presumption is that the responding party bears the expense  
791 of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358  
792 (1978).

793 *CACM*

794 The agenda materials describe continuing exchanges with the  
795 Committee on Court Administration and Case Management. The question  
796 whether pro se filers should be required to provide social security  
797 numbers to assist in identifying problem filers can be put off  
798 because the current version of the "NextGen" CM/ECF system does not  
799 include a field for this information. And CACM agrees that there is  
800 no present need to consider rules amendments to address the  
801 prospect that a judge in one district might, as part of accepting  
802 assignment to help another district, conduct a bench trial by  
803 videoconferencing.

804 The meeting concluded with thanks to all participants and  
observers for their interest and hard work.

Respectfully submitted,

Edward H. Cooper  
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of January 9-10, 2014  
Phoenix, Arizona  
**Draft Minutes as of March 13, 2014**

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**ATTENDANCE**

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

- Judge Jeffrey S. Sutton, Chair
- Dean C. Colson, Esquire
- Roy T. Englert, Jr., Esquire
- Gregory G. Garre, Esquire
- Judge Neil M. Gorsuch
- Judge Susan P. Graber
- Chief Justice Wallace B. Jefferson
- Dean David F. Levi
- Judge Patrick J. Schiltz
- Judge Amy J. St. Eve
- Larry D. Thompson, Esquire
- Judge Richard C. Wesley
- Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
  - Judge Steven M. Colloton, Chair
  - Professor Catherine T. Struve, Reporter (by telephone)
- Advisory Committee on Bankruptcy Rules —
  - Judge Eugene R. Wedoff, Chair
  - Professor S. Elizabeth Gibson, Reporter (by telephone)
  - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
  - Judge David G. Campbell, Chair
  - Professor Edward H. Cooper, Reporter
  - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
  - Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)  
Professor Nancy J. King, Associate Reporter (by telephone)  
Advisory Committee on Evidence Rules —  
Judge Sidney A. Fitzwater, Chair  
Professor Daniel J. Capra, Reporter

### **INTRODUCTORY REMARKS**

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

#### *Committee Membership Changes*

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

### **APPROVAL OF THE MINUTES OF THE LAST MEETING**

**The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.**

### **REPORT OF THE ADMINISTRATIVE OFFICE**

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

### **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

#### *Informational Items*

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

#### FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

#### FED. R. APP. P. 4(c)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

#### LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

#### AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.



**REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

*Amendment for Final Approval*

## FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

**The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.**

*Informational Items*

## CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

## ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistance in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

#### FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

#### *Amendments for Publication*

#### FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or



maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court’s subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, “saving to suitors in all cases all other remedies to which they are otherwise entitled.” By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

**The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.**

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing “consent” from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member’s point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee’s plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

**The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.**

#### *Informational Items*

#### FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that “[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

#### E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

#### DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

**CACM PROJECTS**

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

**PUBLISHED PROPOSALS**

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

**REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

*Amendment for Final Approval***FED. R. CRIM. P. 12**

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of “good cause” for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring “good cause” alone in (A) and “prejudice” alone in (B), the implication was that there was no requirement of showing “prejudice” in (A). That is not what the committee intended. On the other hand, by requiring “good cause” in (A), and only “prejudice” in (B), the committee had intended the negative implication to be that there was no requirement of showing “cause” under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — “good cause,” the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than “good cause.” That is why the advisory committee eventually decided to use just “prejudice” for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that “good cause” would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee’s view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a “good cause” standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that “good cause” is “a flexible standard that requires consideration of all interests in the particular case.” She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words “cause and prejudice” were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that “good cause” is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year’s rulemaking cycle. She said it was the Standing Committee’s decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all



interests in the particular case.” The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that “good cause” is a “flexible standard” makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that “good cause” suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the “good cause” standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

**The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.**

*Informational Items*

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

## FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

#### FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

#### OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

**REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

*Informational Items*

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

**PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING**

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

**REPORT OF THE CM/ECF SUBCOMMITTEE**

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be



accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].” He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the “CM/ECF Next Gen” was being overseen by that committee and it would clearly have implications for the subcommittee’s work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee’s work as well.

#### **NEXT COMMITTEE MEETING**

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose  
Secretary

Andrea L. Kuperman  
Chief Counsel

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**REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE**

A package of proposed amendments developed by the Duke Conference Subcommittee and approved for publication by the Advisory Committee and Standing Committee was published last August. Amendments were proposed for Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The proposals, along with other proposals published at the same time, were explored at three maximum-capacity hearings in November (Washington, D.C.), January (Phoenix, Arizona), and February (Dallas, Texas). They also were addressed in more than 2,000 written comments submitted to the Committee. A partial summary of the comments is attached, with the hope that time will allow preparation of a complete summary in time for submission to the Standing Committee when it meets at the end of May.

The Subcommittee recommends that the Committee transmit most of the published proposals to the Standing Committee with a recommendation that it approve them for approval by the Judicial Conference and adoption by the Supreme Court. The Subcommittee recommends that the Committee withdraw these proposed amendments: to reduce the presumptive numbers of depositions under Rules 30 and 31 and interrogatories under Rule 33; to limit the number of requests to admit under Rule 36; and to reduce deposition length from seven hours to six hours. The reasons for these recommendations are described below.

These proposals were carefully developed as a package in response to the advice offered by some 200 voices at the Duke Conference in 2010. There was nearly unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management. It also was agreed that these goals should be pursued by several means. Continuing education of bench and bar was one means; the Federal Judicial Center has accepted this advice and worked toward enhanced education programs. A second means was exploration through pilot projects structured to facilitate rigorous evaluation. The Federal Judicial Center is actively monitoring some of these projects. Careful appraisal of state-court procedures is a related activity, advanced in part by work of the Institute for the Advancement of the American Legal System. The Conference also prompted a project launched by the Committee and the National Employment Lawyers Association to develop protocols for initial discovery in individual employment cases. The protocols were developed by a team of lawyers evenly balanced between those who commonly represent employees and those who commonly represent employers. The protocols have been adopted by numerous District Judges; experience with the protocols has led to calls for more widespread adoption, and the hope that similar protocols might be developed for other categories of litigation. These programs of education and innovative pilot projects continue.

Rule amendments were the third component of the response to the Conference. There was widespread agreement that the present rule structure is basically sound, that the time has not come to consider fundamental revision of the familiar structure. But there is room to pursue careful changes that will advance the goals of cooperation, proportionality, and active judicial case management. The proposed amendments were published as a package of integrated measures that would work toward those goals. The parts that are carried forward toward adoption remain an integrated package aimed at the same goals. The parts that are omitted were designed to contribute to these ends, but the remaining package will function well without them.

The Subcommittee has carefully studied the public testimony and comments. The comments were divided, but largely supportive, on the proposal to amend Rule 1 to advance cooperation among the parties, and on the proposals to amend Rules 4 and 16 to enhance early and active case management. Reactions to the discovery proposals were mixed. Many comments, often identifiable as reflecting pro-plaintiff or pro-defendant views, divided sharply between strong opposition and strong support. Other comments provided more balanced assessments of possible advantages and disadvantages. Many of these comments came from public agencies or from organized bar groups that generated their positions by a process that sought to establish a consensus acceptable to all sides. After considering all points of view, the Subcommittee is convinced that the recommended amendments will make the civil litigation process work better for all parties.

Rather than take the package in numerical rule order, these recommendations begin with the discovery proposals. Rules 1, 4, and 16 follow at the end.

### ***I Discovery Proposals***

The Subcommittee recommends that the Committee propose that the Standing Committee forward most of the published discovery proposals for adoption, with a few revisions in rule texts and with considerably expanded Committee Notes. The Subcommittee also recommends, however, that the Committee put aside the proposals for new and reduced presumptive limits for discovery under Rules 30, 31, 33, and 36. All that remains of these proposals are the parts that amend Rules 30, 31, and 33 to reflect the proposal to transfer the operative provisions of present Rule 26(b)(2)(C)(iii) to Rule 26(b)(1).

#### *Rule 26(b)(1): Four Elements*

The Rule 26(b)(1) proposal includes four major elements. The cost-benefit factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery. These factors identify elements to be considered in determining whether requested discovery is proportional to the needs of the case. The examples



recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated as no longer necessary. The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing of good cause, is also eliminated. And the provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery or admissible evidence" is rewritten. Each element deserves separate consideration.

#### SCOPE OF DISCOVERY: PROPORTIONALITY

There was widespread support at the Duke Conference for the proposition that discovery should be limited to what is proportional to the needs of the case. But discussions at the two miniconferences sponsored by the Subcommittee revealed significant discomfort with simply adding a bare reference to "proportional" discovery to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To illuminate and constrain the concept of proportionality, the Committee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which courts now are to consider in limiting "the frequency or extent of discovery," be relocated to Rule 26(b)(1) and included in the scope of discovery. All discovery is currently subject to those factors by virtue of a cross-reference in Rule 26(b)(1), and the Committee was informed that these factors are understandable and work well.

This proposed change provoked a stark division in the comments. Those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed only to favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy any uniform application among different courts. They asserted that "proportionality" will become a new automatic and blanket objection to all discovery requests, leading to increased motion practice with attendant costs and delays. And they were particularly concerned that proportionality would routinely defeat the rather extensive discovery ordinarily needed to prove many claims that involve modest amounts of money but principles important not only to the plaintiffs but also to the public interest. These problems were particularly emphasized in noting categories of cases that typically involve "asymmetric information" - plaintiffs in many employment and civil rights actions have little relevant information, while defendants hold all the important information and reveal it only through extensive discovery. Many asserted that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Finally, some argued that the proportionality proposal is a solution in search of a problem - that discovery in civil litigation already is proportional to the needs of cases.

The subcommittee has considered these comments carefully, as well as those that favored the proportionality change, and remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery – with some modifications as described below – would constitute a significant improvement to the rules governing discovery. The subcommittee reaches this conclusion for three primary reasons.

1. Findings from Duke

A principal conclusion of the Duke conference was that discovery in civil litigation would more often achieve the goal of Rule 1 – the just, speedy, and inexpensive determination of every action – through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys done in preparation for the conference. In a report to the Chief Justice on the Duke conference, the Committee summarized findings from the conference as follows: “One area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case.” The report added: “What is needed can be described in two words – cooperation and proportionality – and one phrase – sustained, active, hands-on judicial case management.” The Subcommittee remains convinced that these conclusions are correct, and that emphasizing proportionality in Rule 26(b)(1) will help achieve the just, speedy, and efficient resolution of civil cases.

As noted above, some comments on the proportionality change suggest that the change is not needed – that discovery in civil litigation already is proportional to the needs of cases. Many of these comments rely on a closed-case survey prepared by the Federal Judicial Center for the Duke conference. The subcommittee does not agree that the FJC survey or other surveys prepared for the conference suggest no need for change.

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the “right amount” of information, and more than half reported that the costs of discovery were the “right amount” in proportion to their client's stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5 percent of plaintiff attorneys and 39.9 percent of defendant attorneys in cases that actually settled. On the question whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those

representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs, defendants, and both about equally, that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke conference showed even greater dissatisfaction with the costs and extent of civil discovery. In surveys of lawyers from the American College of Trial Lawyers ("ACTL"), the ABA Section of Litigation, and the National Employment Lawyers Association ("NELA"), more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. A report from the ACTL Task Force on Discovery and the Institute for the Advancement of the American Legal System ("IAALS") reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today's civil litigation system takes too long and costs too much, resulting in some deserving cases not being brought and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: "Proportionality should be the most important principle applied to all discovery."

The surveys of the ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of Litigation, 78% percent of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, and 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreed that litigation costs are not proportional in large cases. In the NELA survey, primarily of plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits of the case than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce proportionality limitations on their own.

2. *The history of proportionality and Rule 26(b)(1).*

The proportionality factors to be added to Rule 26(b)(1) are not new. As detailed in the expanded Committee Note, they were added to Rule 26 in 1983 and originally resided in Rule 26(b)(1). Their original intent, according to the 1983 Committee Note, was "to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry," and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." Although the factors were later moved to Rule 26(b)(2)(C) when section (b)(1) was divided, they remain part of the scope of discovery. The last sentence of current Rule 26(b)(1) specifically states that "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." And several of the proportionality factors are found in Rule 26(g), which provides that a lawyer's signature on a discovery request, objection, or response constitutes a certification that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

Despite the existence of these proportionality factors in the current rules, the clear sense of the Duke conference was that a greater emphasis on proportionality is needed. The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and deciding discovery disputes. If the expressions of concern reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.

3. *Adjustments to the 26(b)(1) proposal.*

The Subcommittee has listened carefully to concerns expressed about the move of the proportionality factors to Rule 26(b)(1) - that it will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended by the Subcommittee, and the proposed committee note has been revised to address them. The note explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The note also states that the change does not support boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court. And the Subcommittee remains convinced that the proportionality considerations - which already govern discovery and parties' conduct in discovery - should not and will not increase the costs of litigation. To the contrary, the committee believes that more proportional discovery will decrease the cost of resolving disputes in federal court without sacrificing

fairness.

One proposed revision in the rule text is to invert the order of the first two factors so they now are "the importance of the issues at stake, the amount in controversy \* \* \*." This rearrangement adds prominence to the importance of the issues at stake, avoiding any possible implication that the amount in controversy is the first and therefore most important concern. In addition, the Committee Note is expanded to address in depth the need to take account of private and public values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies.

A second revision in rule text adds a new factor drawn from the Utah discovery rules: "the parties' relative access to relevant information." This factor addresses the common concern that the frequently asymmetric distribution of information means that discovery often will impose greater burdens on one party than on another. These differential burdens are often entirely appropriate. They can be taken into account under the familiar factors already in Rule 26(b)(2)(C)(iii) and transposed by the amendment to (b)(1), and should be. But it is useful to underscore this element of the analysis. The Committee Note elaborates on this theme.

#### DISCOVERY OF DISCOVERABLE MATTERS

Rule 26(b)(1) now illustrates discoverable matters as "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." These words do no harm; there is no indication that the absence of any reference to electronically stored information has supported untoward negative implications. But Rule 26 is more than twice as long as the next longest rules (Rules 71.1 and 45 vie for that dubious distinction), the point illustrated in this language is now widely understood by courts and attorneys, and removing excess language is a positive step. Some of the comments expressed doubt about the Committee's assertion that discovery of these matters is so well entrenched that the language is no longer needed. They urged that the Committee Note should include this statement, so as to thwart any ill-founded attempts to draw negative inferences from the deletion. The Note has been revised to address this concern.

#### SUBJECT-MATTER DISCOVERY

Up to 2000, Rule 26(b)(1) provided for discovery of "any nonprivileged matter "relevant to the subject matter involved in the pending action." Responding to repeated suggestions that discovery should be confined to the parties' claims or defenses, the 2000 amendments narrowed the scope of discovery by preserving

subject-matter discovery, but allowing discovery to extend beyond what was relevant to the pleaded claims or defenses only on court order for good cause. The 2000 Committee Note conceded that the dividing line that separates discovery relevant to the subject matter from discovery relevant to the pleaded claims or defenses "cannot be defined with precision." The change was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." The distinction between lawyer-managed discovery and court-managed discovery, however, has not had any noticeable effect in encouraging judges who remain reluctant to provide more active management of discovery to become more active.

Some comments have sought to defend discovery of information relevant to the subject matter of the action by explaining that allowing discovery on this theory avoids the need to draw fine lines in determining what is relevant to the claim or defense of any party and proportional to the needs of the case. The proposal reflects the view that it is better to think carefully, when need be, about what is relevant to the parties' claims and defenses. The expanded Committee Note describes three examples the 2000 Note provided of information that, suitably focused, would be relevant to claims or defenses: other incidents similar to those at issue in the litigation; information about organizational arrangements or filing systems; and information that could be used to impeach a likely witness. Suitable focus is the key. The Committee Note also recognizes that if discovery relevant to the pleaded claims or defenses reveals information that would support new claims or defenses, the information can be used to support amended pleadings.

"REASONABLY CALCULATED TO LEAD"

The final change in Rule 26(b)(1) substitutes this sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable," for the current sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The new provision carries forward the central principle – nonprivileged information is discoverable so long as it is within the scope of discovery, even though the information is in a form that would not be admissible in evidence. The change is designed to curtail reliance on the "reasonably calculated" phrase to expand discovery beyond the permitted scope.

Original Rule 26 governed depositions. An amendment of Rule 26(b) adopted by the Supreme Court in 1946 that took effect in 1948 provided: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The 1946 Committee Note explained that the purpose of the sentence was to prevent parties from refusing discovery of relevant information on admissibility grounds. In 2000, this provision was amended to limit it to "[r]elevant information." The 2000 Committee Note expressed concern that this provision "might

swallow any other limitation on the scope of discovery." It explained that "relevant" as added to the sentence "means within the scope of discovery as defined in this subdivision." In other words, the sentence has never been intended to define the scope of discovery. It is merely a ban on admissibility-based refusals to provide relevant discovery. And yet lawyers and courts often rely on this provision as an independent definition of the scope of discovery that extends beyond information relevant to the parties' claims or defenses, or even the subject matter of the action.

The perception that the "reasonably calculated" language has taken on an independent role in defining the scope of discovery is implicitly bolstered by many comments on the published proposal. These comments describe the "reasonably calculated" language as a bedrock definition of the scope of discovery. That perception is itself reason to attempt to make good on the purpose the 2000 amendment may have failed to achieve in a uniform way.

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

Rule 26(b)(2)(C)(iii) would be amended to reflect transposition of its operative elements to Rule 26(b)(1).

*Rule 26(c)(1)*

Rule 26(c)(1)(B) would be amended to include "the allocation of expenses" among the terms that may be included in a protective order.

Rule 26(c)(1) now authorizes an order to protect against "undue burden or expense." This authority includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. Some courts are exercising that authority now. It is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note admonishes that recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding. The Discovery Subcommittee plans to explore the question whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding.

*Rule 34: Specific Objections, Production, Withholding*

Three proposals would amend Rule 34 (a fourth, dealing with requests served before the Rule 26(f) conference, is described later).

The first change would require that an objection to a request to produce must be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and may state a reasonable time for the response. The third requires that an objection state whether any responsive materials are being withheld on the basis of that objection.

These Rule 34 proposals have been well supported by the testimony and comments, although some qualms have been expressed. It has been noted, for example, that a party may state a reasonable time to produce but later find that more time is needed. Such events are common in discovery, and can be handled as they are now.

A particular concern is that a party who limits the scope of its search may not know what documents or ESI it has not found, and cannot state whether any responsive materials are being "withheld." This concern has been addressed by expanding the brief comment in the published Committee Note. A party who does not intend to search all sources that would be covered by a request should object to the request by stating that it is overbroad and by specifying the bounds of the search it plans to undertake. The objection, for example, could state that the search will be limited to sources created after a specified date, or to identified custodians. This objection serves also as a statement that anything outside the described limits is being "withheld." That is all the requesting party needs to know if it wishes to seek more searching discovery.

The proposals also amend Rule 37(a)(3)(B) to reflect the increased emphasis in proposed Rule 34 on responding by way of producing.

*Early Discovery Requests: Rule 26(d)(2)*

The proposals would add Rule 26(d)(2) to allow a party to deliver a Rule 34 request before the Rule 26(f) conference. The request is treated as served at the first Rule 26(f) conference for measuring the time to respond. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose is to facilitate discussion at the conference by providing concrete discovery proposals.

The comments on this proposal are mixed. Some express the concerns that the Subcommittee considered at length before recommending publication. Doubts are expressed whether anyone will seize this new opportunity, in part by wondering why a party would want to disclose its discovery plans before the conference. And fears are expressed that requests formed before the conference will be inappropriately broad, and will encourage the requesting party to adhere to them without taking account of good-faith objections expressed at the conference.

Other comments, however, echoed the Subcommittee's thoughts.



Lawyers who represent plaintiffs have been more likely to say they would use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) conference. Lawyers who represent defendants are more likely to say that they would welcome receiving advance requests than to say that they would likely make them.

The Subcommittee believes that this proposal deserves to be adopted.

#### *Numerical Limits*

The published proposals sought to encourage more active case management, and to advance the efficient use of discovery, by amending the presumptive numerical limits on discovery. The intent was to promote efficiency and prompt a discussion, early in the case, about the extent of discovery truly needed to resolve the dispute. Rules 30 and 31 would have been amended to reduce from 10 to 5 the presumptive limit on the number of depositions taken by the plaintiffs, the defendants, or the third-party defendants. Rule 30(d) would have been amended by reducing the presumptive limit for an oral deposition from one day of 7 hours to one day of 6 hours. Rule 33 would have been amended to reduce from 25 to 15 the presumptive number of interrogatories a party may serve on any other party. And, for the first time, a presumptive limit of 25 would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents from the count.

These proposals garnered some support. They also encountered fierce resistance. The most basic ground of resistance was that the present limits in Rules 30, 31, and 33 work well. There is no shown need or reason to change them. Nor is there any experience that would suggest that requests to admit are so frequently over-used as to require introduction of a first-time presumptive limit.

The proposals addressing depositions were further resisted by urging that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that any agreement among the parties might be reached only by paying inappropriate trade-off prices in other areas; and that the rule would be seen to express a presumptive judgment that 5 depositions ordinarily are the ceiling of reasonableness – that the sorts of showings now required to justify an 11th or 12th deposition would come to be required to justify a 6th or 7th deposition. All of these concerns were commonly bundled into the argument that reduced limits would generate more contentiousness and increased motion practice. It also was commonly observed that contingent-fee attorneys have every incentive to hold the numbers of depositions down to what is necessary to the case.

Resistance to the reduction of the presumptive number of

interrogatories, and to introducing a presumptive limit on requests to admit, was similar. But it also reflected repeated observations that written discovery by interrogatories or requests to admit is a low-cost, effective way to exchange information and to identify the witnesses that should be deposed. It should be encouraged, not further limited. And numerical limits could encourage parties to frame broader questions and requests, perhaps inflicting greater burdens than a greater number of better-focused requests and perhaps leading to less useful responses.

Narrower concerns addressed the proposal to reduce the presumptive time for an oral deposition from one day of 7 hours to one day of 6 hours. The Subcommittee originally contemplated a 4-hour limit, based on successful experience in some state courts. A reduction of that magnitude could have significant advantages in cost and efficiency. But prepublication comments expressed such grave concerns that the Subcommittee decided to recommend a more generous 6-hour limit. That recommendation rested as much on concerns for the burdens imposed on the deponent as on hopes for reduced cost and increased efficiency. Many comments, however, suggested the need for at least the full 7 hours in cases that involve several parties, questioning based on lengthy documents that the deponent must review, or obstructive behavior such as speaking objections or other tactics designed to "run the clock."

These concerns have persuaded the Subcommittee that it is better not to press ahead with these proposals. Some of the more extreme expressions of concern may be overblown, but the body of comments suggests reasonable ground for caution. The intent of the proposals was never to limit discovery unnecessarily, but many worry that the changes would have that effect on judges and litigants. Other changes in the proposed amendments, such as the renewed emphasis on proportionality and steps to prompt earlier and more informed case management should achieve many of the objectives of the proposed presumptive limits. In addition, an increased emphasis on early and active case management in judicial education programs and by other means will encourage all judges to take a more active case management role.

## ***II Early Case Management***

The proposals aimed at encouraging early and active case management drew far fewer comments than the discovery proposals. The proposals to add to Rule 16 met general, although not unanimous, approval. The Subcommittee recommends the Rule 16 proposals for adoption without change. The proposal to reduce the time for service under Rule 4(m) encountered substantial opposition. The Subcommittee considered these comments and recommends that the time to serve be reduced from 120 to 90 days, rather than the earlier proposal to reduce the time to 60 days.

### *Rule 16*

Four sets of changes are proposed for Rule 16.

The words allowing a scheduling conference to be held "by telephone, mail, or other means" is deleted. The rule text now requires "a scheduling conference." The Committee Note explains that such a conference can be held by any means of direct simultaneous communication among the court and the parties. A telephone conference remains permitted; mail is not permitted, nor are any "other means" that do not involve direct simultaneous communication. But Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties' report under Rule 26(f) without holding a conference.

The time for the scheduling conference is set at the earlier of 90 days after any defendant has been served, down from 120 days in the present rule, or to 60 days after any defendant has appeared, down from 90 days in the present rule. But the proposal also adds, for the first time, a provision allowing the judge to set a later time on finding good cause for delay. The concerns about these shortened times expressed in the testimony and comments echoed concerns the Subcommittee considered in recommending publication. The concerns rest on the fear that the new times may not suffice to prepare adequately for the conference, particularly when the case is complex or when a large institutional party needs time to work through the complexities of its internal organization. The Department of Justice has expressed special concerns in this connection. The Subcommittee, however, recommends that the proposal be recommended for adoption as published. It remains desirable to get the case started sooner, not later. Adding the new provision to delay the conference for good cause addresses the concern that some cases may properly require more time if the first scheduling conference is to be effective. The Committee Note has been expanded to emphasize this flexibility.

The proposal also adds two subjects to the list of contents permitted in a scheduling order: the preservation of ESI, and agreements reached under Evidence Rule 502. Parallel provisions are added to the subjects for discussion at the parties' Rule 26(f) conference. There is no significant objection to these provisions.

Finally, the proposal also lists as a permitted topic a direction in the scheduling order that before moving for an order relating to discovery, the movant must request a conference with the court. The Subcommittee originally thought it might be desirable to adopt the pre-motion conference as a requirement, not simply a topic permitted for a scheduling order. A good number of courts have adopted such requirements by local rule or scheduling order. Experience shows that this practice is effective in resolving discovery disputes quickly and at low cost. But what works for some courts may not work for all. Simply calling attention to this practice, as a means of encouraging it, carries no noticeable costs.

*Rule 4(m): Time to Serve*

Rule 4(m) now sets 120 days as the presumptive limit for serving process. The published proposal sought to expedite actual initiation of the litigation by reducing this period to 60 days. The comments and testimony have led the Subcommittee to recommend that the period be set at 90 days.

Many comments offered reasons why 60 days is not enough time to serve process. Some cases involve many defendants. Some defendants are difficult to identify through chains of interlocking or changing corporate relationships. Some defendants seek to evade service. Pro se plaintiffs may find it difficult to accomplish service. The Marshal's Service may find it difficult to effect service when ordered to do so under Rule 4(c)(3) for an in forma pauperis plaintiff or for a seaman. Some comments even suggested that the time between filing and actual service can be put to good use in satisfying Rule 11 obligations that cannot effectively be met within the time to file required by a limitations period, or to negotiate a settlement.

Other comments suggested that a 60-day period will effectively undercut the opportunity to request a waiver of service. Very little time will be left to effect service after it becomes clear that the defendant will not waive service. This point seemed particularly persuasive.

After considering all of the comments, the Subcommittee has concluded that the time should be set at 90 days. Language has been added to the Committee Note to recognize that even at 90 days, the new limit "will increase the frequency of occasions to extend the time for good cause."

Finally, several comments asked whether the Committee has thought about the relationship between Rule 4(m) and Rule 15(c)(1)(C), which governs relation back of an amendment changing or adding a party against whom a claim is made. Rule 15(c)(1)(C) requires high quality notice of the action to the new party "within the period provided by Rule 4(m) for serving the summons and complaint." This relationship has in fact been considered throughout the development of this proposal. The Committee Note is revised to note this relationship.

### ***III Cooperation***

The published proposal amends Rule 1 to direct that the rules "be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Subcommittee recommends approval of this proposal for adoption without change to either rule text or Committee Note.

Cooperation among the parties was a theme heavily and

frequently emphasized at the Duke Conference. It has been vigorously urged, and principles of cooperation have been drafted by concerned organizations. There is little opposition to the basic concept of cooperation.

Such doubts as have emerged go in different directions. One concern is that Rule 1 is "iconic," and should not be touched. Another is that the rules directly provide procedural requirements, while the rules of professional responsibility add requirements both for effective representation and responsible use of procedural rules. Attempting to complicate these provisions by a vague concept of "cooperation" may invite confusion and ill-founded attempts to seek sanctions for violating a duty to cooperate.

A more specific question, largely ignored in the comments, asks whether the parties should be directed to construe and administer the rules, as well as to employ them, to the desired ends. The rule could be written: "construed and administered by the court, and employed by the parties, to secure \* \* \*." But on balance it seems better to retain the hint that the parties should undertake to construe the rules for their intended purposes, and – to the extent that the parties commonly administer the rules, as in discovery – to administer them for the same purposes.

None of these concerns has seemed to warrant any change of the published proposal.

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**DUKE RULES PACKAGE**

**Rule 1 Scope and Purpose**

\* \* \* [These rules] should be construed, ~~and~~  
administered, and employed by the court and the parties  
to secure the just, speedy, and inexpensive determination  
of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should  
construe and administer these rules to secure the just, speedy, and  
inexpensive determination of every action, so the parties share the  
responsibility to employ the rules in the same way. Most lawyers  
and parties cooperate to achieve these ends. But discussions of  
ways to improve the administration of civil justice regularly  
include pleas to discourage over-use, misuse, and abuse of  
procedural tools that increase cost and result in delay. Effective  
advocacy is consistent with – and indeed depends upon – cooperative  
and proportional use of procedure.

**Rule 4 Summons**

\* \* \*

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 90  
days after the complaint is filed, the court \* \* \* must  
dismiss the action without prejudice against that defendant or  
order that service be made within a specified time. But if  
the plaintiff shows good cause for the failure, the court must  
extend the time for service for an appropriate period. This  
subdivision (m) does not apply to service in a foreign country  
under Rule 4(f) or 4(j)(1) or to service of a notice under  
Rule 71.1(d)(3)(A).

Committee Note

The presumptive time for serving a defendant is reduced from  
120 days to 90 days. This change, together with the shortened times  
for issuing a scheduling order set by amended Rule 16(b)(2), will  
reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the  
frequency of occasions to extend the time for good cause. More time  
may be needed, for example, when a request to waive service fails,  
a defendant is difficult to serve, or a marshal is to make service  
in an in forma pauperis action.

The final sentence is amended to make it clear that the  
reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule  
4(m). Dismissal under Rule 4(m) for failure to make timely service  
would be inconsistent with the limits on dismissal established by

42 Rule 71.1(i)(1)(C) when "the plaintiff has already taken title, a  
43 lesser interest, or possession as to any part of" the property.

44 Shortening the time to serve under Rule 4(m) means that the  
45 time of the notice required by Rule 15(c)(1)(C) for relation back  
46 is also shortened.

47 **Rule 16 Pretrial Conferences; Scheduling; Management**

48 (b) SCHEDULING.

49 (1) *Scheduling Order.* Except in categories of actions  
50 exempted by local rule, the district judge - or a  
51 magistrate judge when authorized by local rule - must  
52 issue a scheduling order:

53 (A) after receiving the parties' report under Rule  
54 26(f); or

55 (B) after consulting with the parties' attorneys and  
56 any unrepresented parties at a scheduling  
57 conference ~~by telephone, mail, or other means.~~

58 (2) *Time to Issue.* The judge must issue the scheduling order  
59 as soon as practicable, but ~~in any event~~ unless the judge  
60 finds good cause for delay, the judge must issue it  
61 within the earlier of ~~120~~ 90 days after any defendant has  
62 been served with the complaint or ~~90~~ 60 days after any  
63 defendant has appeared.

64 (3) *Contents of the Order.* \* \* \*

65 (B) *Permitted Contents.* The scheduling order may: \* \* \*

66 (iii) provide for disclosure, ~~or discovery,~~ or  
67 preservation of electronically stored  
68 information;

69 (iv) include any agreements the parties reach for  
70 asserting claims of privilege or of protection  
71 as trial-preparation material after  
72 information is produced, including agreements  
73 reached under Federal Rule of Evidence 502;

74 (v) direct that before moving for an order relating  
75 to discovery, the movant must request a  
76 conference with the court;

77 [~~present (v) and (vi) would be renumbered~~] \* \* \*

78 Committee Note

79 The provision for consulting at a scheduling conference by  
80 "telephone, mail, or other means" is deleted. A scheduling  
81 conference is more effective if the court and parties engage in  
82 direct simultaneous communication. The conference may be held in  
83 person, by telephone, or by more sophisticated electronic means.

84 The time to issue the scheduling order is reduced to the  
85 earlier of 90 days (not 120 days) after any defendant has been  
86 served, or 60 days (not 90 days) after any defendant has appeared.  
87 This change, together with the shortened time for making service  
88 under Rule 4(m), will reduce delay at the beginning of litigation.



89 At the same time, a new provision recognizes that the court may  
90 find good cause to extend the time to issue the scheduling order.  
91 In some cases it may be that the parties cannot prepare adequately  
92 for a meaningful Rule 26(f) conference and then a scheduling  
93 conference in the time allowed. Litigation involving complex  
94 issues, multiple parties, and large organizations, public or  
95 private, may be more likely to need extra time to establish  
96 meaningful collaboration between counsel and the people who can  
97 supply the information needed to participate in a useful way.  
98 Because the time for the Rule 26(f) conference is geared to the  
99 time for the scheduling conference or order, an order extending the  
100 time for the scheduling conference will also extend the time for  
101 the Rule 26(f) conference. But in most cases it will be desirable  
102 to hold at least a first scheduling conference in the time set by  
103 the rule.

104 Three items are added to the list of permitted contents in  
105 Rule 16(b)(3)(B).

106 The order may provide for preservation of electronically  
107 stored information, a topic also added to the provisions of a  
108 discovery plan under Rule 26(f)(3)(C). [Parallel amendments of Rule  
109 37(e) recognize that a duty to preserve discoverable information  
110 may arise before an action is filed.]

111 The order also may include agreements incorporated in a court  
112 order under Evidence Rule 502 controlling the effects of disclosure  
113 of information covered by attorney-client privilege or work-product  
114 protection, a topic also added to the provisions of a discovery  
115 plan under Rule 26(f)(3)(D).

116 Finally, the order may direct that before filing a motion for  
117 an order relating to discovery the movant must request a conference  
118 with the court. Many judges who hold such conferences find them an  
119 efficient way to resolve most discovery disputes without the delay  
120 and burdens attending a formal motion, but the decision whether to  
121 require such conferences is left to the discretion of the judge in  
122 each case.

123 **Rule 26. Duty to Disclose; General Provisions; Governing**  
124 **Discovery**

125 \* \* \*

126 (b) DISCOVERY SCOPE AND LIMITS.

127 (1) *Scope in General.* Unless otherwise limited by court order,  
128 the scope of discovery is as follows: Parties may obtain  
129 discovery regarding any nonprivileged matter that is  
130 relevant to any party's claim or defense and proportional  
131 to the needs of the case, considering the importance of  
132 the issues at stake in the action, the amount in  
133 controversy, the parties' relative access to relevant  
134 information, the parties' resources, the importance of

135 ~~the discovery in resolving the issues, and whether the~~  
136 ~~burden or expense of the proposed discovery outweighs its~~  
137 ~~likely benefit. Information within this scope of~~  
138 ~~discovery need not be admissible in evidence to be~~  
139 ~~discoverable. —including the existence, description,~~  
140 ~~nature, custody, condition, and location of any documents~~  
141 ~~or other tangible things and the identity and location of~~  
142 ~~persons who know of any discoverable matter. For good~~  
143 ~~cause, the court may order discovery of any matter~~  
144 ~~relevant to the subject matter involved in the action.~~  
145 ~~Relevant information need not be admissible at the trial~~  
146 ~~if the discovery appears reasonably calculated to lead to~~  
147 ~~the discovery of admissible evidence. All discovery is~~  
148 ~~subject to the limitations imposed by Rule 26(b)(2)(C).~~

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

150 \* \* \*

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

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

163 \* \* \*

164 (c) PROTECTIVE ORDERS.

165 (1) *In General.* \* \* \* The court may, for good cause, issue an  
166 order to protect a party or person from annoyance,  
167 embarrassment, oppression, or undue burden or expense,  
168 including one or more of the following: \* \* \*

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

172 (d) TIMING AND SEQUENCE OF DISCOVERY.

173 (1) *Timing.* A party may not seek discovery from any source  
174 before the parties have conferred as required by Rule  
175 26(f), except:

176 (A) in a proceeding exempted from initial disclosure  
177 under Rule 26(a)(1)(B) 7i or

178 (B) when authorized by these rules, including Rule  
179 26(d)(2), by stipulation, or by court order.

180 (2) Early Rule 34 Requests.

181 (A) Time to Deliver. More than 21 days after the summons  
182 and complaint are served on a party, a request  
183 under Rule 34 may be delivered:

184 (i) to that party by any other party, and  
185 (ii) by that party to any plaintiff or to any other  
186 party that has been served.

187 (B) When Considered Served. The request is considered as  
188 served at the first Rule 26(f) conference.

189 (23) Sequence. Unless, on motion, the parties stipulate or  
190 the court orders otherwise for the parties' and  
191 witnesses' convenience and in the interests of justice:

192 (A) methods of discovery may be used in any sequence;  
193 and

194 (B) discovery by one party does not require any other  
195 party to delay its discovery.

196 \* \* \*

197 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY. \* \* \*

198 (3) Discovery Plan. A discovery plan must state the parties'  
199 views and proposals on: \* \* \*

200 (C) any issues about disclosure, or discovery, or  
201 preservation of electronically stored information,  
202 including the form or forms in which it should be  
203 produced;

204 (D) any issues about claims of privilege or of  
205 protection as trial-preparation materials,  
206 including - if the parties agree on a procedure to  
207 assert these claims after production - whether to  
208 ask the court to include their agreement in an  
209 order under Federal Rule of Evidence 502;

210 Committee Note

211 ~~The scope of discovery is changed in several ways. Rule~~  
212 ~~26(b)(1) is revised to limit the scope of discovery to what is~~  
213 ~~proportional to the needs of the case. The considerations that bear~~  
214 ~~on proportionality are moved from present Rule 26(b)(2)(C)(iii).~~  
215 ~~Although the considerations are familiar, and have measured the~~  
216 ~~court's duty to limit the frequency or extent of discovery, the~~  
217 ~~change incorporates them into the scope of discovery that must be~~  
218 ~~observed by the parties without court order.~~

219 Rule 26(b)(1) is changed in several ways.

220 Information is discoverable under revised Rule 26(b)(1) if it  
221 is relevant to any party's claim or defense and is proportional to  
222 the needs of the case. The considerations that bear on  
223 proportionality are moved from present Rule 26(b)(2)(C)(iii),  
224 slightly rearranged and with one addition.

225 Most of what now appears in Rule 26(b)(2)(C)(iii) was first

226 adopted in 1983. The 1983 provision was explicitly adopted as part  
227 of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1)  
228 directed the court to limit the frequency or extent of use of  
229 discovery if it determined that "the discovery is unduly burdensome  
230 or expensive, taking into account the needs of the case, the amount  
231 in controversy, limitations on the parties' resources, and the  
232 importance of the issues at stake in the litigation." At the same  
233 time, Rule 26(g) was added. Rule 26(g) provided that signing a  
234 discovery request, response, or objection certified that the  
235 request, response, or objection was "not unreasonable or unduly  
236 burdensome or expensive, given the needs of the case, the discovery  
237 already had in the case, the amount in controversy, and the  
238 importance of the issues at stake in the litigation." The parties  
239 thus shared the responsibility to honor these limits on the scope  
240 of discovery.

241 The 1983 Committee Note stated that the new provisions were  
242 added "to deal with the problem of over-discovery. The objective is  
243 to guard against redundant or disproportionate discovery by giving  
244 the court authority to reduce the amount of discovery that may be  
245 directed to matters that are otherwise proper subjects of inquiry.  
246 The new sentence is intended to encourage judges to be more  
247 aggressive in identifying and discouraging discovery overuse. The  
248 grounds mentioned in the amended rule for limiting discovery  
249 reflect the existing practice of many courts in issuing protective  
250 orders under Rule 26(c). \* \* \* On the whole, however, district  
251 judges have been reluctant to limit the use of the discovery  
252 devices."

253 The clear focus of the 1983 provisions may have been softened,  
254 although inadvertently, by the amendments made in 1993. The 1993  
255 Committee Note explained: "[F]ormer paragraph (b)(1) [was]  
256 subdivided into two paragraphs for ease of reference and to avoid  
257 renumbering of paragraphs (3) and (4)." Subdividing the paragraphs,  
258 however, was done in a way that could be read to separate the  
259 proportionality provisions as "limitations," no longer an integral  
260 part of the (b)(1) scope provisions. That appearance was  
261 immediately offset by the next statement in the Note: "Textual  
262 changes are then made in new paragraph (2) to enable the court to  
263 keep tighter rein on the extent of discovery."

264 The 1993 amendments added two factors to the considerations  
265 that bear on limiting discovery: whether "the burden or expense of  
266 the proposed discovery outweighs its likely benefit," and "the  
267 importance of the proposed discovery in resolving the issues."  
268 Addressing these and other limitations added by the 1993 discovery  
269 amendments, the Committee Note stated that "[t]he revisions in rule  
270 26(b)(2) are intended to provide the court with broader discretion  
271 to impose additional restrictions on the scope and extent of  
272 discovery \* \* \*."

273 The relationship between Rule 26(b)(1) and (2) was further  
274 addressed by an amendment made in 2000 that added a new sentence at

275 the end of (b)(1): "All discovery is subject to the limitations  
276 imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule  
277 26(b)(2)(C)]." The Committee Note recognized that "[t]hese  
278 limitations apply to discovery that is otherwise within the scope  
279 of subdivision (b)(1)." It explained that the Committee had been  
280 told repeatedly that courts were not using these limitations as  
281 originally intended. "This otherwise redundant cross-reference has  
282 been added to emphasize the need for active judicial use of  
283 subdivision (b)(2) to control excessive discovery."

284 The present amendment restores the proportionality factors to  
285 their original place in defining the scope of discovery. This  
286 change reinforces the Rule 26(g) obligation of the parties to  
287 consider these factors in making discovery requests, responses, or  
288 objections.

289 Restoring the proportionality calculation to Rule 26(b)(1)  
290 does not change the existing responsibilities of the court and the  
291 parties to consider proportionality, and the change does not place  
292 on the party seeking discovery the burden of addressing all  
293 proportionality considerations.

294 Nor is the change intended to permit the opposing party to  
295 refuse discovery simply by making a boilerplate objection that it  
296 is not proportional. The parties and the court have a collective  
297 responsibility to consider the proportionality of all discovery and  
298 consider it in resolving discovery disputes.

299 The parties may begin discovery without a full appreciation of  
300 the factors that bear on proportionality. A party requesting  
301 discovery, for example, may have little information about the  
302 burden or expense of responding. A party requested to provide  
303 discovery may have little information about the importance of the  
304 discovery in resolving the issues as understood by the requesting  
305 party. Many of these uncertainties should be addressed and reduced  
306 in the parties' Rule 26(f) conference and in scheduling and  
307 pretrial conferences with the court. But if the parties continue to  
308 disagree, the discovery dispute could be brought before the court  
309 and the parties' responsibilities would remain as they have been  
310 since 1983. A party claiming undue burden or expense ordinarily has  
311 far better information – perhaps the only information – with  
312 respect to that part of the determination. A party claiming that a  
313 request is important to resolve the issues should be able to  
314 explain the ways in which the underlying information bears on the  
315 issues as that party understands them. The court's responsibility,  
316 using all the information provided by the parties, is to consider  
317 these and all the other factors in reaching a case-specific  
318 determination of the appropriate scope of discovery.

319 The direction to consider the parties' relative access to  
320 relevant information adds new text to provide explicit focus on  
321 considerations already implicit in present Rule 26(b)(2)(C)(iii).  
322 Some cases involve what often is called "information asymmetry."

323 One party – often an individual plaintiff – may have very little  
324 discoverable information. The other party may have vast amounts of  
325 information, including information that can be readily retrieved  
326 and information that is more difficult to retrieve. In practice  
327 these circumstances often mean that the burden of responding to  
328 discovery lies heavier on the party who has more information, and  
329 properly so.

330 Restoring proportionality as an express component of the scope  
331 of discovery warrants repetition of parts of the 1983 and 1993  
332 Committee Notes that must not be lost from sight. The 1983  
333 Committee Note explained that "[t]he rule contemplates greater  
334 judicial involvement in the discovery process and thus acknowledges  
335 the reality that it cannot always operate on a self-regulating  
336 basis." The 1993 Committee Note further observed that "[t]he  
337 information explosion of recent decades has greatly increased both  
338 the potential cost of wide-ranging discovery and the potential for  
339 discovery to be used as an instrument for delay or oppression."  
340 What seemed an explosion in 1993 has been exacerbated by the advent  
341 of e-discovery. The present amendment again reflects the need for  
342 continuing and close judicial involvement in the cases that do not  
343 yield readily to the ideal of effective party management. It is  
344 expected that discovery will be effectively managed by the parties  
345 in many cases. But there will be important occasions for judicial  
346 management, both when the parties are legitimately unable to  
347 resolve important differences and when the parties fall short of  
348 effective, cooperative management on their own.

349 It also is important to repeat the caution that the monetary  
350 stakes are only one factor, to be balanced against other factors.  
351 The 1983 Committee Note recognized "the significance of the  
352 substantive issues, as measured in philosophic, social, or  
353 institutional terms. Thus the rule recognizes that many cases in  
354 public policy spheres, such as employment practices, free speech,  
355 and other matters, may have importance far beyond the monetary  
356 amount involved." Many other substantive areas also may involve  
357 litigation that seeks relatively small amounts of money, or no  
358 money at all, but that seeks to vindicate vitally important  
359 personal or public values.

360 So too, consideration of the parties' resources does not  
361 foreclose discovery requests addressed to an impecunious party, nor  
362 justify unlimited discovery requests addressed to a wealthy party.  
363 The 1983 Committee Note cautioned that "[t]he court must apply the  
364 standards in an even-handed manner that will prevent use of  
365 discovery to wage a war of attrition or as a device to coerce a  
366 party, whether financially weak or affluent."

367 A portion of present Rule 26(b)(1) is omitted from the  
368 proposed revision. After allowing discovery of any matter relevant  
369 to any party's claim or defense, the present rule adds: "including  
370 the existence, description, nature, custody, condition, and  
371 location of any documents or other tangible things and the identity

372 and location of persons who know of any discoverable matter."  
373 Discovery of such matters is so deeply entrenched in practice that  
374 it is no longer necessary to clutter the long text of Rule 26 with  
375 these examples. The discovery identified in these examples should  
376 still be permitted under the revised rule when relevant and  
377 proportional to the needs of the case. Framing intelligent requests  
378 for electronically stored information, for example, may require  
379 detailed information about another party's information systems and  
380 other information resources.

381 The amendment deletes the former provision authorizing the  
382 court, for good cause, to order discovery of any matter relevant to  
383 the subject matter involved in the action. The Committee has been  
384 informed that this language is rarely invoked. Proportional  
385 discovery relevant to any party's claim or defense suffices, given  
386 a proper understanding of what is relevant to a claim or defense.  
387 The distinction between matter relevant to a claim or defense and  
388 matter relevant to the subject matter was introduced in 2000. Until  
389 then, the scope of discovery reached matter "relevant to the  
390 subject matter involved in the pending action." Rule 26(b)(1) was  
391 amended in 2000 to limit the initial scope of discovery to matter  
392 "relevant to the claim or defense of any party." Discovery could  
393 extend to "any matter relevant to the subject matter involved in  
394 the action" only by court order based on good cause. The Committee  
395 Note observed that the amendment was "designed to involve the court  
396 more actively in regulating the breadth of sweeping or contentious  
397 discovery." But even with court supervision, discovery should be  
398 limited to matter relevant to the parties' claims or defenses,  
399 recognizing that the parties may amend their claims and defenses in  
400 the course of the litigation. The uncertainty generated by the  
401 broad reference to subject matter is reflected in the 2000 Note's  
402 later recognition that "[t]he dividing line between information  
403 relevant to the claims and defenses and that relevant only to the  
404 subject matter of the action cannot be defined with precision."  
405 Because the present amendment limits discovery to matter relevant  
406 to any party's claim or defense, it is important to focus more  
407 carefully on that concept. The 2000 Note offered three examples of  
408 information that, suitably focused, would be relevant to the  
409 parties' claims or defenses. The examples were "other incidents of  
410 the same type, or involving the same product"; "information about  
411 organizational arrangements or filing systems"; and "information  
412 that could be used to impeach a likely witness." Such discovery is  
413 not foreclosed by the amendments. Discovery that is relevant to the  
414 parties' claims or defenses may also support amendment of the  
415 pleadings to add a new claim or defense that affects the scope of  
416 discovery.

417 The former provision for discovery of relevant but  
418 inadmissible information that appears "reasonably calculated to  
419 lead to the discovery of admissible evidence" is also deleted.  
420 Hearsay is a common illustration. The qualifying phrase — "if the  
421 discovery appears reasonably calculated to lead to the discovery of  
422 admissible evidence" — is omitted. Discovery of inadmissible

423 ~~information is limited to matter that is otherwise within the scope~~  
424 ~~of discovery, namely that which is relevant to a party's claim or~~  
425 ~~defense and proportional to the needs of the case. The discovery of~~  
426 ~~inadmissible evidence should not extend beyond the permissible~~  
427 ~~scope of discovery simply because it is "reasonably calculated" to~~  
428 ~~lead to the discovery of admissible evidence. The phrase has been~~  
429 ~~used by some, incorrectly, to define the scope of discovery. As the~~  
430 ~~Committee Note to the 2000 amendments observed, use of the~~  
431 ~~"reasonably calculated" phrase to define the scope of discovery~~  
432 ~~"might swallow any other limitation on the scope of discovery." The~~  
433 ~~2000 amendments sought to prevent such misuse by adding the word~~  
434 ~~"Relevant" at the beginning of the sentence, making clear that~~  
435 ~~"'relevant' means within the scope of discovery as defined in this~~  
436 ~~subdivision \* \* \*." The "reasonably calculated" phrase has~~  
437 ~~continued to create problems, however, and is removed by these~~  
438 ~~amendments. It is replaced by the direct statement that~~  
439 ~~"Information within this scope of discovery need not be admissible~~  
440 ~~in evidence to be discoverable." Discovery of nonprivileged~~  
441 ~~information not admissible in evidence remains available so long as~~  
442 ~~it is otherwise within the scope of discovery.~~

443 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of  
444 the considerations that bear on proportionality to Rule 26(b)(1).  
445 The court still must limit the frequency or extent of proposed  
446 discovery, on motion or on its own, if it is outside the scope  
447 permitted by Rule 26(b)(1).

448 Rule 26(c)(1)(B) is amended to include an express recognition  
449 of protective orders that allocate expenses for disclosure or  
450 discovery. Authority to enter such orders is included in the  
451 present rule, and courts already exercise this authority. Explicit  
452 recognition will forestall the temptation some parties may feel to  
453 contest this authority. Recognizing the authority does not imply  
454 that cost-shifting should become a common practice. Courts and  
455 parties should continue to assume that a responding party  
456 ordinarily bears the costs of responding.

457 Rule 26(d)(1)(B) and (2) are added ~~is amended~~ to allow a party  
458 to deliver Rule 34 requests to another party more than 21 days  
459 after that party has been served even though the parties have not  
460 yet had a required Rule 26(f) conference. Delivery may be made by  
461 any party to the party that has been served, and by that party to  
462 any plaintiff and any other party that has been served. Delivery  
463 does not count as service; the requests are considered to be served  
464 at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time  
465 to respond runs from service. This relaxation of the discovery  
466 moratorium is designed to facilitate focused discussion during the  
467 Rule 26(f) conference. Discussion at the conference may produce  
468 changes in the requests. The opportunity for advance scrutiny of  
469 requests delivered before the Rule 26(f) conference should not  
470 affect a decision whether to allow additional time to respond.

471 Rule 26(d)(3) is renumbered and amended to recognize that the



472 parties may stipulate to case-specific sequences of discovery.

473 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add  
474 two items to the discovery plan – issues about preserving  
475 electronically stored information and court orders under Evidence  
476 Rule 502.

477 **Rule 30 Depositions by Oral Examination**

478 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

479 (2) *With Leave*. A party must obtain leave of court, and the  
480 court must grant leave to the extent consistent with Rule  
481 26(b)(1) and (2): \* \* \*

482 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

483 (1) *Duration*. Unless otherwise stipulated or ordered by the  
484 court, a deposition is limited to one day of 7 hours. The  
485 court must allow additional time consistent with Rule  
486 26(b)(1) and (2) if needed to fairly examine the deponent  
487 or if the deponent, another person, or any other  
488 circumstance impedes or delays the examination.

489 Committee Note

490 Rule 30 is amended in parallel with Rules 31 and 33 to  
491 reflect the recognition of proportionality in Rule 26(b)(1).

492 **Rule 31 Depositions by Written Questions**

493 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

494 (2) *With Leave*. A party must obtain leave of court, and the  
495 court must grant leave to the extent consistent with Rule  
496 26(b)(1) and (2): \* \* \*

497 Committee Note

498 Rule 31 is amended in parallel with Rules 30 and 33 to reflect  
499 the recognition of proportionality in Rule 26(b)(1).

500 **Rule 33 Interrogatories to Parties**

501 (a) IN GENERAL.

502 (1) *Number*. \* \* \* Leave to serve additional interrogatories may be  
503 granted to the extent consistent with Rule 26(b)(1) and (2).

504 Committee Note

505 Rule 33 is amended in parallel with Rules 30 and 31 to reflect  
506 the recognition of proportionality in Rule 26(b)(1).

507 **Rule 34 Producing Documents, Electronically Stored Information,**  
508 **and Tangible Things, or Entering onto Land, for Inspection and**  
509 **Other Purposes \* \* \***

510 (b) PROCEDURE. \* \* \*

511 (2) *Responses and Objections.* \* \* \*

512 (A) *Time to Respond.* The party to whom the request is  
513 directed must respond in writing within 30 days  
514 after being served or – if the request was  
515 delivered under Rule 26(d)(2) – within 30 days  
516 after the parties' first Rule 26(f) conference. A  
517 shorter or longer time may be stipulated to under  
518 Rule 29 or be ordered by the court.

519 (B) *Responding to Each Item.* For each item or  
520 category, the response must either state that  
521 inspection and related activities will be  
522 permitted as requested or state the grounds  
523 for objecting to the request with specificity,  
524 including the reasons. The responding party  
525 may state that it will produce copies of  
526 documents or of electronically stored  
527 information instead of permitting inspection.  
528 The production must then be completed no later  
529 than the time for inspection stated in the  
530 request or a later reasonable time stated in  
531 the response.

532 (C) *Objections.* An objection must state whether any  
533 responsive materials are being withheld on the  
534 basis of that objection. An objection to part of a  
535 request must specify the part and permit inspection  
536 of the rest. . \* \* \*

537 Committee Note

538 Several amendments are made in Rule 34, aimed at reducing the  
539 potential to impose unreasonable burdens by objections to requests  
540 to produce.

541 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The  
542 time to respond to a Rule 34 request delivered before the parties'  
543 Rule 26(f) conference is 30 days after the first Rule 26(f)  
544 conference.

545 Rule 34(b)(2)(B) is amended to require that objections to Rule  
546 34 requests be stated with specificity. This provision adopts the  
547 language of Rule 33(b)(4), eliminating any doubt that less specific  
548 objections might be suitable under Rule 34. The specificity of the  
549 objection ties to the new provision in Rule 34(b)(2)(C) directing  
550 that an objection must state whether any responsive materials are  
551 being withheld on the basis of that objection. An objection may  
552 state that a request is overbroad, but if the objection recognizes  
553 that some part of the request is appropriate the objection should  
554 state the scope that is not overbroad. Examples would be a

555 statement that the responding party will limit the search to  
556 documents or electronically stored information created within a  
557 given period of time prior to the events in suit, or to specified  
558 sources. When there is such an objection, the statement of what has  
559 been withheld can properly identify as matters "withheld" anything  
560 beyond the scope of the search specified in the objection.

561 Rule 34(b)(2)(B) is further amended to reflect the common  
562 practice of producing copies of documents or electronically stored  
563 information rather than simply permitting inspection. The response  
564 to the request must state that copies will be produced. The  
565 production must be completed either by the time for inspection  
566 stated in the request or by a later reasonable time specifically  
567 identified in the response. When it is necessary to make the  
568 production in stages the response should specify the beginning and  
569 end dates of the production.

570 Rule 34(b)(2)(C) is amended to provide that an objection to a  
571 Rule 34 request must state whether anything is being withheld on  
572 the basis of the objection. This amendment should end the confusion  
573 that frequently arises when a producing party states several  
574 objections and still produces information, leaving the requesting  
575 party uncertain whether any relevant and responsive information has  
576 been withheld on the basis of the objections. The producing party  
577 does not need to provide a detailed description or log of all  
578 documents withheld, but does need to alert other parties to the  
579 fact that documents have been withheld and thereby facilitate an  
580 informed discussion of the objection. An objection that states the  
581 limits that have controlled the search for responsive and relevant  
582 materials qualifies as a statement that the materials have been  
583 "withheld."

584 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**  
585 **Sanctions**

586 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

587 (3) *Specific Motions.* \* \* \*

588 (B) *To Compel a Discovery Response.* A party seeking  
589 discovery may move for an order compelling an  
590 answer, designation, production, or inspection.  
591 This motion may be made if: \* \* \*

592 (iv) a party fails to produce documents or fails  
593 to respond that inspection will be permitted –  
594 or fails to permit inspection – as requested  
595 under Rule 34.

596 Committee Note

597 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice  
598 of producing copies of documents or electronically stored  
599 information rather than simply permitting inspection. This change  
600 brings item (iv) into line with paragraph (B), which provides a  
601 motion for an order compelling "production, or inspection."

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Rules Text

1

**Rule 1 Scope and Purpose**

2

\* \* \* [These rules] should be construed, and  
3 administered, and employed by the court and the parties  
4 to secure the just, speedy, and inexpensive determination  
5 of every action and proceeding.

6

**Rule 4 Summons**

7

\* \* \*

8

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 90  
9 days after the complaint is filed, the court \* \* \* must  
10 dismiss the action without prejudice against that defendant or  
11 order that service be made within a specified time. But if  
12 the plaintiff shows good cause for the failure, the court must  
13 extend the time for service for an appropriate period. This  
14 subdivision (m) does not apply to service in a foreign country  
15 under Rule 4(f) or 4(j)(1) or to service of a notice under  
16 Rule 71.1(d)(3)(A).

17

**Rule 16 Pretrial Conferences; Scheduling; Management**

18

(b) SCHEDULING.

19

(1) *Scheduling Order.* Except in categories of actions  
20 exempted by local rule, the district judge - or a  
21 magistrate judge when authorized by local rule - must  
22 issue a scheduling order:

23

(A) after receiving the parties' report under Rule  
24 26(f); or

25

(B) after consulting with the parties' attorneys and  
26 any unrepresented parties at a scheduling  
27 conference ~~by telephone, mail, or other means.~~

28

(2) *Time to Issue.* The judge must issue the scheduling order  
29 as soon as practicable, but in any event unless the judge  
30 finds good cause for delay, the judge must issue it  
31 within the earlier of ~~120~~ 90 days after any defendant has  
32 been served with the complaint or ~~90~~ 60 days after any  
33 defendant has appeared.

34

(3) *Contents of the Order.* \* \* \*

35

(B) *Permitted Contents.* The scheduling order may: \* \* \*

36

(iii) provide for disclosure, or discovery, or  
37 preservation of electronically stored  
38 information;

39

(iv) include any agreements the parties reach for  
40 asserting claims of privilege or of protection  
41 as trial-preparation material after  
42 information is produced, including agreements  
43 reached under Federal Rule of Evidence 502;

44

(v) direct that before moving for an order relating  
45 to discovery, the movant must request a

46 conference with the court;  
47 [present (v) and (vi) would be renumbered] \* \* \*

48 **Rule 26. Duty to Disclose; General Provisions; Governing**  
49 **Discovery**

50 \* \* \*

51 (b) DISCOVERY SCOPE AND LIMITS.

52 (1) *Scope in General.* Unless otherwise limited by court order,  
53 the scope of discovery is as follows: Parties may obtain  
54 discovery regarding any nonprivileged matter that is  
55 relevant to any party's claim or defense and proportional  
56 to the needs of the case, considering the importance of  
57 the issues at stake in the action, the amount in  
58 controversy, the parties' relative access to relevant  
59 information, the parties' resources, the importance of  
60 the discovery in resolving the issues, and whether the  
61 burden or expense of the proposed discovery outweighs its  
62 likely benefit. Information within this scope of  
63 discovery need not be admissible in evidence to be  
64 discoverable. —including the existence, description,  
65 nature, custody, condition, and location of any documents  
66 or other tangible things and the identity and location of  
67 persons who know of any discoverable matter. For good  
68 cause, the court may order discovery of any matter  
69 relevant to the subject matter involved in the action.  
70 Relevant information need not be admissible at the trial  
71 if the discovery appears reasonably calculated to lead to  
72 the discovery of admissible evidence. All discovery is  
73 subject to the limitations imposed by Rule 26(b)(2)(C).

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

75 \* \* \*

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

80 (iii) the burden or expense of the proposed  
81 discovery is outside the scope permitted by  
82 Rule 26(b)(1) outweighs its likely benefit,  
83 considering the needs of the case, the amount  
84 in controversy, the parties' resources, the  
85 importance of the issues at stake in the  
86 action, and the importance of the discovery in  
87 resolving the issues.

88 \* \* \*

89 (c) PROTECTIVE ORDERS.

90 (1) *In General.* \* \* \* The court may, for good cause, issue an  
91 order to protect a party or person from annoyance,  
92 embarrassment, oppression, or undue burden or expense,  
93 including one or more of the following: \* \* \*  
94 (B) specifying terms, including time and place or the  
95 allocation of expenses, for the disclosure or  
96 discovery; \* \* \*

97 (d) TIMING AND SEQUENCE OF DISCOVERY.

98 (1) *Timing.* A party may not seek discovery from any source  
99 before the parties have conferred as required by Rule  
100 26(f), except:

101 (A) in a proceeding exempted from initial disclosure  
102 under Rule 26(a)(1)(B)~~7~~i or

103 (B) when authorized by these rules, including Rule  
104 26(d)(2), by stipulation, or by court order.

105 (2) Early Rule 34 Requests.

106 (A) Time to Deliver. More than 21 days after the summons  
107 and complaint are served on a party, a request  
108 under Rule 34 may be delivered:

109 (i) to that party by any other party, and

110 (ii) by that party to any plaintiff or to any other  
111 party that has been served.

112 (B) When Considered Served. The request is considered as  
113 served at the first Rule 26(f) conference.

114 (23) *Sequence.* ~~Unless, on motion, the parties stipulate or~~  
115 ~~the court orders otherwise for the parties' and~~  
116 ~~witnesses' convenience and in the interests of justice:~~

117 (A) methods of discovery may be used in any sequence;  
118 and

119 (B) discovery by one party does not require any other  
120 party to delay its discovery.

121 \* \* \*

122 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY. \* \* \*

123 (3) *Discovery Plan.* A discovery plan must state the parties'  
124 views and proposals on: \* \* \*

125 (C) any issues about disclosure, or discovery, or  
126 preservation of electronically stored information,  
127 including the form or forms in which it should be  
128 produced;

129 (D) any issues about claims of privilege or of  
130 protection as trial-preparation materials,  
131 including – if the parties agree on a procedure to  
132 assert these claims after production – whether to  
133 ask the court to include their agreement in an  
134 order under Federal Rule of Evidence 502;

135 **Rule 30 Depositions by Oral Examination**

136 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

137 (2) *With Leave*. A party must obtain leave of court, and the  
138 court must grant leave to the extent consistent with Rule  
139 26(b)(1) and (2): \* \* \*

140 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

141 (1) *Duration*. Unless otherwise stipulated or ordered by the  
142 court, a deposition is limited to one day of 7 hours. The  
143 court must allow additional time consistent with Rule  
144 26(b)(1) and (2) if needed to fairly examine the deponent  
145 or if the deponent, another person, or any other  
146 circumstance impedes or delays the examination.

147 **Rule 31 Depositions by Written Questions**

148 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

149 (2) *With Leave*. A party must obtain leave of court, and the  
150 court must grant leave to the extent consistent with Rule  
151 26(b)(1) and (2): \* \* \*

152 **Rule 34 Producing Documents, Electronically Stored Information,**  
153 **and Tangible Things, or Entering onto Land, for Inspection and**  
154 **Other Purposes** \* \* \*

155 (b) PROCEDURE. \* \* \*

156 (2) *Responses and Objections*. \* \* \*

157 (A) *Time to Respond*. The party to whom the request is  
158 directed must respond in writing within 30 days  
159 after being served or - if the request was  
160 delivered under Rule 26(d)(2) - within 30 days  
161 after the parties' first Rule 26(f) conference. A  
162 shorter or longer time may be stipulated to under  
163 Rule 29 or be ordered by the court.

164 (B) *Responding to Each Item*. For each item or  
165 category, the response must either state that  
166 inspection and related activities will be  
167 permitted as requested or state the grounds  
168 for objecting to the request with specificity,  
169 including the reasons. The responding party  
170 may state that it will produce copies of  
171 documents or of electronically stored  
172 information instead of permitting inspection.  
173 The production must then be completed no later  
174 than the time for inspection stated in the  
175 request or a later reasonable time stated in  
176 the response.

177 (C) *Objections*. An objection must state whether any  
178 responsive materials are being withheld on the  
179 basis of that objection. An objection to part of a  
180 request must specify the part and permit inspection  
181 of the rest. . \* \* \*

182 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**



183

**Sanctions**

184 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

185 (3) *Specific Motions.* \* \* \*

186 (B) *To Compel a Discovery Response.* A party seeking  
187 discovery may move for an order compelling an  
188 answer, designation, production, or inspection.  
189 This motion may be made if: \* \* \*

190 (iv) a party fails to produce documents or fails  
191 to respond that inspection will be permitted -  
192 or fails to permit inspection - as requested  
193 under Rule 34.

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194 NOTES, FEBRUARY 7, 2014, DUKE CONFERENCE SUBCOMMITTEE

195 The Duke Conference Subcommittee met at the Dallas-Fort Worth  
196 Airport on February 7, 2014, after the close of the third public  
197 hearing on the Civil Rules proposals that were published for  
198 comment in August, 2013. Subcommittee members and other Advisory  
199 Committee members present included Judge John G. Koeltl, John M.  
200 Barkett, Elizabeth Cabraser, Judge David G. Campbell, Judge Paul W.  
201 Grimm, Peter D. Keisler, and Judge Gene E.K. Pratter. Judge Jeffrey  
202 S. Sutton, Chair of the Standing Committee, also attended.  
203 Professors Edward H. Cooper and Richard L. Marcus were present as  
204 Reporters. Ted Hirt, Department of Justice, observed. Jonathan Rose  
205 represented the Rules Committee Support Office.

206 Judge Campbell initiated the discussion by noting that the  
207 purpose is not yet to reach decisions on recommendations to the  
208 full Committee. The period for public comments remains open, and  
209 comments continue to flow in. But it is useful to begin considering  
210 the testimony at the three hearings and the hundreds of comments  
211 that have already been filed, both before publication and since  
212 publication. There will not be much time for Subcommittee  
213 deliberations between the close of the comment period and the  
214 deadline for getting recommendations into the agenda materials for  
215 the April Committee meeting.

216 Judge Koeltl then observed that the testimony and comments  
217 already available support a reasonably clear view of what proposals  
218 have drawn the most support and the most opposition. Often a  
219 particular proposal has drawn both fervent support and equally  
220 fervent opposition. Those may properly be the first topics for  
221 discussion, followed by those that have attracted less interest.

222 One theme common to statements in opposition is the assertion  
223 that the proposals have little or no support in empirical research.  
224 Those comments seem to draw from a particularized concept of what  
225 constitutes empirical research. Much survey work has undergirded,  
226 even stimulated, these proposals. The American College of Trial  
227 Lawyers and the Institute for the Advancement of the American Legal  
228 System, working together, undertook a survey in 2008 that was  
229 presented to the Standing Committee. Work then began to plan the  
230 Duke Conference, which drew many studies. The Committee asked the  
231 Federal Judicial Center to undertake studies, which were presented  
232 at the Conference and later. The written comments report results,  
233 or initial results, of pilot projects and surveys of state-court  
234 rules similar to the proposals. All of this work may have been  
235 designed as it was because of the enormous challenges that would  
236 confront any attempt at more rigorous work comparing the actual  
237 results in terms of cost, time, and outcome of applying different  
238 discovery regimes to cases so closely alike in subject-matter,  
239 court, judges, parties, attorneys, and stakes as to support  
240 accurate measurements. Awaiting work of that character could easily  
241 paralyze all reform.

242 In addition to the many studies that have informed the  
243 proposals, comments, and testimony, the proposals have been shaped  
244 in the process that has characterized the initial development of  
245 the rules from the beginning nearly 80 years ago. The informed  
246 views of practicing lawyers, judges, and academics, based on  
247 thoughtful evaluation of a great breadth of shared experience,  
248 provide wise guidance. This process has developed to become ever  
249 richer. The Committee itself has become accustomed to seeking the  
250 advice of the Federal Judicial Center on the forms of inquiry most  
251 useful to a particular proposal, and to benefiting from the work as  
252 executed by the Center. It has considered increasing amounts of  
253 work done by others as civil procedure scholars and other groups  
254 have started to develop forms of study suited to questions of  
255 procedure. The amount of shared experience it considers has been  
256 expanded by such devices as miniconferences and the Duke Conference  
257 itself. And the trend has been to ever greater participation in the  
258 process of public hearings and comments. The volume of comment on  
259 the present proposals is itself a source of highly valuable  
260 information.

261 One participant noted the role of consensus in the rulemaking  
262 process. It is reassuring when a proposal wins approval by  
263 consensus in the Advisory Committee, the Standing Committee, and  
264 public comments and testimony. Such consensus also eases the path  
265 for adoption through the subsequent stages of Judicial Conference,  
266 Supreme Court, and Congress. But a lack of full consensus cannot  
267 establish a veto. Differences of opinion may reflect different  
268 predictions of how a rule will work. Such differences are cause for  
269 caution, for deliberate reconsideration. But many proposals have  
270 been adopted, and have succeeded, in the face of some dissent.

271 Particular care is required when a set of proposals prompts  
272 nearly universal approval by those who represent one set of  
273 identifiable interests and nearly universal disapproval by those  
274 who represent conflicting interests. Some discovery proposals have  
275 drawn widespread protest by those who commonly represent  
276 plaintiffs, and widespread support by those who commonly represent  
277 defendants. But at the same time they are supported by many  
278 organized bar groups, each of which seeks to combine the views of  
279 plaintiffs and defendants, and each of which has participated  
280 helpfully in many rules projects over the years. It is important to  
281 listen carefully to the conflicting views, and to seek  
282 accommodation when the new information shows the way to more  
283 effective and fairer approaches. The comments and public hearings  
284 have suggested ways in which the proposals can be improved and  
285 clarified to accomplish their intended purpose of furthering the  
286 goals of Rule 1.

287 *Numerical Limits*

288 Discussion of specific proposals began with the numerical  
289 limits on discovery events. The presumptive number of depositions  
290 allowed under Rules 30 and 31 would be reduced from 10 to 5. The

291 presumptive duration of an oral deposition would be reduced from  
292 one day of 7 hours to one day of 6 hours. The presumptive number of  
293 interrogatories permitted under Rule 33 would be reduced from 25 to  
294 15. And for the first time, a presumptive limit would be adopted  
295 for Rule 36 requests to admit, not counting requests to admit the  
296 genuineness of documents.

297       Opposition to reducing the number of depositions was voiced by  
298 many who commonly represent plaintiffs, including a great many who  
299 pursue actions for individual employees claiming discrimination or  
300 violations of the Fair Labor Standards Act. They assert that most  
301 routine cases in these areas require more than 5 depositions. They  
302 commonly need to discover who actually made the decision claimed to  
303 be discriminatory, and if the decision was made by a group, to  
304 depose each participant. Often they need to discover the details  
305 surrounding treatment of other employees similarly situated,  
306 "comparators." It is not uncommon to need more than the 10  
307 depositions set by the current rules. Often enough opposing counsel  
308 will agree to exceed the limit, but the agreement may come at a  
309 price by negotiating away something else. And when agreement fails  
310 – as happens with troubling frequency – some courts are impatient  
311 with employment litigation generally, or fail to understand the  
312 needs for discovery. Plaintiffs' lawyers, further, typically work  
313 on contingency and have no interest in advancing the costs of  
314 unnecessary depositions. Reducing the limit to 5 will do nothing to  
315 change the need for depositions, and it is not necessary to  
316 stimulate greater care in planning deposition practice. But there  
317 is a grave risk that the presumptive limit will be taken by some  
318 judges as a judgment on the number that suffices for most cases.  
319 Cases that now, without any controversy, involve more than 5 but no  
320 more than 10 depositions, will come to generate work for the courts  
321 and at times will fail to win permission for needed discovery. And  
322 cases that now win agreement or permission for more than 10 will be  
323 limited to fewer.

324       Further discussion reflected the views that led to the  
325 proposed reduction. The FJC data indicate that the mean number of  
326 depositions is about 3, but there are still a significant number of  
327 cases that have between 5 and 10 depositions per party and where  
328 the parties believe that the costs of the litigation are  
329 disproportionate to the stakes involved. Resetting the presumed  
330 number closer to the general experience that most cases involve  
331 fewer than 5 may help to reset party expectations, to encourage  
332 more careful thought about the number of depositions really needed  
333 for effective discovery and presentation of the action. General  
334 experience suggests that agreement of the parties is forthcoming,  
335 both when experienced litigators realize the practicalities of a  
336 case and when they yield to the expectation that the court will  
337 authorize a greater number and will not be pleased with the failure  
338 to agree. The net effect of lowering the presumed number is likely  
339 to be less costly and quicker litigation across the federal docket  
340 as a whole.

341 Balancing these competing arguments, it was suggested that it  
342 may be better to stay on the side of caution. Many comments suggest  
343 that the system works well with the present presumptive limit set  
344 at 10. Many comments reflect deep anxiety, backed by at least some  
345 occasional experience with difficulties in getting permission to  
346 take the depositions truly needed for effective discovery.

347 The counsel of caution prevailed. The Subcommittee tentatively  
348 decided, subject to reconsideration in light of comments still to  
349 be filed, to recommend that the proposed reduction to a presumed  
350 limit of 5 depositions be abandoned for both Rule 30 and Rule 31.

351 Discussion turned to the proposal to reduce the presumed  
352 duration of an oral deposition from one day of 7 hours to one day  
353 of 6 hours. Many comments have urged that the full 7 hours is  
354 needed. The need arises at times from deliberate stalling tactics  
355 of witness and counsel, designed to eat up the time and prevent  
356 effective questioning. In multiparty cases the need arises from the  
357 need to allocate time among all parties. And some depositions deal  
358 with intrinsically complex facts that cannot be fully explored even  
359 in 7 hours. The proposal, however, continues to be supported by at  
360 least two observations. One is that some states have had several  
361 years of successful experience with a 4-hour limit. Federal judges  
362 in those states often propose that the 4-hour limit be adopted in  
363 their scheduling orders, and counsel agree readily. The other  
364 concern is that, measuring time after excluding breaks, even a 6-  
365 hour day is an arduous, often draining, experience for the  
366 deponent.

367 The Subcommittee concluded, at least at this stage, that the  
368 6-hour limit should go forward as proposed.

369 The proposal to add a presumed numerical limit of 25 Rule 36  
370 requests to admit, excluding requests addressed to the genuineness  
371 of documents, was discussed next. As compared to some other  
372 proposals, there has not been a lot of comment. Both support and  
373 opposition have been expressed. Many of the comments suggest that  
374 requests to admit are an efficient, low-cost method of narrowing  
375 the issues by identifying facts that are not actually in dispute.  
376 They can help focus other discovery, and simplify the issues for  
377 trial. A committee member noted that he had used requests to admit  
378 to good effect while in practice, but that doing it right requires  
379 that the request be clearly and narrowly focused on a single fact.  
380 Another committee member suggested that Rule 36 is underutilized.  
381 If people were better trained in its use, we might feel better  
382 about this mode of discovery and be inclined to reject a numerical  
383 limit. Done well, they are good. Another judge asked whether it  
384 makes sense to impose a numerical limit if we believe that this is  
385 a good but underutilized tool. Still another member suggested that  
386 serious burdens would be imposed only by a "really large" number of  
387 requests. Perhaps a presumptive numerical limit is not needed. The  
388 FJC survey suggested that in many cases Rule 36 is simply not used,  
389 while in cases where it is used the numerical median and means are

390 just short of 25, which suggests that this Rule is not being  
391 overused.

392 Further discussion noted that Rule 36 is a hybrid in the  
393 discovery rules. It can be used to "discover" fact information, but  
394 it also is akin to supplemental pleading, aimed at asking for a  
395 specific response to a specific statement. An analogy was suggested  
396 in the "plaintiff fact sheets" commonly used in MDL litigation.  
397 Each plaintiff is directed to provide a list of specific personal  
398 information about that plaintiff and claim.

399 It was noted on the other hand that Rule 36 requests can be  
400 abused. The wording often is not helpful. The answers can be an  
401 exercise in avoidance. This view is reflected in the comments that  
402 say "I do not use them, but still I oppose numerical limits." The  
403 Southern District of New York pilot project for complex cases  
404 imposes a numerical limit of 50. And Rule 26(b)(2)(A) expressly  
405 recognizes that local rules may limit the number of requests under  
406 Rule 36.

407 Another judge noted that his standard scheduling order sets a  
408 limit at 25 requests. There never has been any problem with this.

409 The discussion concluded with the observation that there is no  
410 evidence of any serious problems with abusive use of Rule 36. If a  
411 problem is encountered in a particular case, there is ample  
412 authority to address it by protective order. In light of this, and  
413 given the many comments opposing a new numerical limit, the  
414 Subcommittee reached a tentative conclusion that this proposal  
415 should be put aside.

416 The proposal to reduce the presumptive limit from 25 to 15  
417 Rule 33 interrogatories came on next. Interrogatories can be  
418 abused. Many lawyers believe that they have degenerated into  
419 elaborate questions framed by lawyers in an attempt to head off any  
420 possible evasion, met by answers framed by other lawyers who manage  
421 to avoid providing any useful information. Some of the comments  
422 come from lawyers who say they do not use them. A Local Rule in the  
423 Southern District of New York limits interrogatories at the  
424 commencement of discovery to those seeking names of witnesses, the  
425 computation of damages, and identification of documents and other  
426 physical evidence or similar information. Other interrogatories may  
427 be served only if they are a more practical method of obtaining the  
428 desired information or on court order. Contention interrogatories  
429 are allowed only "[a]t the conclusion of other discovery."

430 A judge observed that his scheduling order in every case sets  
431 a limit of 15 interrogatories. Lawyers find the limit works "just  
432 fine," including in employment cases.

433 On the other side, many lawyers have stated that  
434 interrogatories are an effective and low-cost way to frame more  
435 costly discovery, particularly depositions. They can identify the

436 people who should be deposed. Many of the comments came from those  
437 who represent plaintiffs in employment cases. They find  
438 interrogatories useful in identifying people in the chain of  
439 command, documents, and other employees who can be used as  
440 comparators. They assert that they can use up more than 15  
441 interrogatories simply in these preliminary inquiries. And the idea  
442 that much of the required information should be provided by the  
443 employer's initial disclosures is met with the observation that  
444 this does not happen.

445 Further discussion found no strong feelings about this  
446 proposal. There has been a disillusionment with contention  
447 interrogatories, after a great fad in the 70s and 80s. They became  
448 a game of attrition, and people tired of it. Much of the work that  
449 once was done by interrogatories has come to be done by Rule  
450 30(b)(6) depositions of an entity. Leaving the limit where it is,  
451 at 25, will address the fears of the many comments that anticipate  
452 an increase in costly motion practice in cases where parties fail  
453 to agree on a sensible need for more than 15. The value to be  
454 gained by the proposed reduction seems marginal in comparison to  
455 other and more important proposals in the present package. It may  
456 be better to focus on the other proposals, leaving all the  
457 numerical limits - or, for Rule 36, the absence of any numerical  
458 limit - as they are.

459 The Subcommittee tentatively agreed to recommend that the  
460 proposed reduction of the Rule 33 limit be put aside.

461 RULE 26(B)(1)

462 Discussion of the Rule 26(b)(1) proposals addressed four  
463 topics: elimination of "subject matter" discovery, deletion of the  
464 list exemplifying discoverable materials, substitution of new  
465 language for the "reasonably calculated" language, and the  
466 introduction of proportionality to defining the scope of discovery.

467 Elimination of "subject matter" discovery has not generated  
468 much excitement. Parties should be able to justify reasonable  
469 discovery as relevant to the claims or defenses. The distinction  
470 from discovery relevant to the parties' claims or defenses was  
471 first made in the 2000 amendments. The Committee Note then  
472 recognized that the distinction is uncertain, but explained that  
473 the purpose was "to involve the court more actively in regulating  
474 the breadth of sweeping or contentious discovery." But the sense  
475 has been that the distinction between lawyer-managed discovery and  
476 court-managed discovery has not had any pervasive impact on actual  
477 practice. Active judicial management occurs, or not, without anyone  
478 paying much attention to this distinction. Still, it may be that  
479 eliminating this factor will generate disputes over the scope of  
480 discovery that do not arise now because fine lines of relevance can  
481 be expanded by embracing the broad "subject matter" of the dispute.  
482 Even now, "it is amazing how often arguments are raised, and at  
483 times taken seriously." If the distinction is to be eliminated,



484 however, it may be important to add something to the Committee Note  
485 to offset possible lingering effects of the 2000 Committee Note.  
486 That Note identified several subjects of discovery that "could be"  
487 relevant to the claims or defenses raised in the pleadings. They  
488 included "incidents of the same type, or involving the same  
489 product"; "organizational arrangements or filing systems \* \* \* if  
490 likely to yield or lead to the discovery of admissible  
491 information"; and "information that could be used to impeach a  
492 likely witness." Discoverability would "depend[] on the  
493 circumstances of the pending action." These examples might be  
494 restated in a more positive light. Still, it is dangerous to rely  
495 on Committee Note language, apart from responding to or drawing  
496 from earlier Committee Notes. Working through the Notes to an oft-  
497 amended rule can be a challenge, particularly when it is difficult  
498 to find a step-by-step account of the time and nature of successive  
499 revisions of rule text. But it should be clear that similar  
500 incidents and comparator information are relevant to the claims and  
501 defenses and that could be made clear in the Committee Note.

502 Deletion of the list exemplifying discoverable materials also  
503 has generated little comment. But fears have been expressed that  
504 overly contentious lawyers may now attempt to argue that discovery  
505 no longer extends to the existence of documents or the identity of  
506 witnesses. This fear can be addressed in an expanded Committee  
507 Note, stating clearly that the deletion is designed only to reduce  
508 the length of the rule by removing this statement of a truism.

509 Substituting new language for the "reasonably calculated"  
510 language has drawn a lot of comment. Many thoughtful bar groups and  
511 others support the change. And the comments that protest the change  
512 in fact offer boomerang support for the substitution. These words  
513 were added in 1948 to overcome decisions that denied discovery of  
514 relevant information when the information was in a form that would  
515 not be admissible in evidence. Hearsay was the common example. The  
516 purpose was to allow discovery of information in inadmissible form,  
517 but only within the scope of discovery stated by the rule. The  
518 protests assert that the "reasonably calculated" language is the  
519 part of Rule 26(b)(1) that actually defines – and expands – the  
520 scope of discovery. These protests, and the many supporting cases  
521 described by Andrea Kuperman in her lengthy memorandum, are  
522 "empirical evidence" of the need for reform. This language has been  
523 used incorrectly to expand the scope of discovery rather than a  
524 simple response to objections that discovery is prohibited simply  
525 because the information is in a form not admissible in evidence. An  
526 attempt at reform was made in 2000 by adding an explicit  
527 limitation: "*Relevant* information need not be admissible at the  
528 trial if the discovery appears reasonably calculated to lead to the  
529 discovery of admissible evidence." The Committee Note explicitly  
530 stated that "'relevant' means within the scope of discovery as  
531 defined in this subdivision \* \* \*." The Subcommittee agreed, always  
532 subject to new considerations that may emerge during the close of  
533 the public comment process, that the published proposal should go  
534 forward unchanged.

535 Introducing proportionality as a limit on the scope of  
536 discovery has provoked a great deal of comment and testimony.  
537 Support has been offered by many of the bar groups that work to  
538 find common ground among those who typically represent plaintiffs  
539 and those who typically represent defendants. But there has been  
540 strong opposition as well.

541 Opposition to proportionality is focused in part on the  
542 vagueness of the concept itself. The strategy of giving content to  
543 the scope of discovery as limited to what is proportional by moving  
544 up the factors listed as limits in present Rule 26(b)(2)(C)(iii) is  
545 opposed by arguing that the factors are themselves vague, and  
546 subject to misapplication. Vagueness will itself encourage  
547 resistance to discovery – the worst images are those of parties who  
548 steadfastly refuse to respond to any discovery requests by  
549 insisting they are not proportional to the needs of the case. This  
550 vision couples with fear that promoting these factors from a court-  
551 managed limit on discovery to restrictions on the scope of  
552 discovery will inflict new burdens of justification on requesting  
553 parties. The anticipated outcome is much more motion practice,  
554 leading to unwarranted restrictions on discovery of information  
555 controlled by one party and necessary to proving another party's  
556 case.

557 Looking to "the amount in controversy," and putting it first  
558 in the list of considerations, has generated more anxiety than any  
559 of the other factors. Those who represent plaintiffs with small  
560 dollar claims – and especially those who represent individual  
561 employees with discrimination or Fair Labor Standards Act claims –  
562 fear that the result will be very tight limits on discovery even  
563 though the employer controls access to all of the necessary  
564 information. They fear courts will be sympathetic to the argument  
565 that an employer should not have to incur \$50,000 of discovery  
566 costs designed to prove a claim that at most will recover \$20,000.  
567 This fear is underlined by pointing to an element of unfairness: if  
568 the very same discrimination is practiced against a highly paid  
569 employee whose claim may be worth millions, discovery will be  
570 vastly expanded. And they fear that the next factor, "the  
571 importance of the issues at stake in the action," will not offset  
572 these tendencies, never mind that this factor was included at the  
573 creation of what now is Rule 26(b)(2)(C)(iii) to recognize that  
574 among other examples, cases involving employment practices "may  
575 have importance far beyond the monetary amount involved." At the  
576 other end of the line on this factor, some defendants have  
577 expressed concerns that litigation involving controversies reaching  
578 hundreds of millions or billions of dollars will lead to unlimited  
579 discovery.

580 The factor that considers the importance of the discovery in  
581 resolving the issues also comes under attack on the ground that  
582 there is no way to know whether the discovery will prove important  
583 until the discovery has been had. The court will have no foundation  
584 for making even an educated guess, particularly when disputes arise

585 before much significant discovery has been accomplished.

586 The fears about shifting the burden of justification to the  
587 requesting party are frequently expressed by looking to a "burden  
588 of proof" on proportionality. The theory is that at present, Rule  
589 26(b)(2)(C)(iii) is a limit that is to be invoked by the court on  
590 its own, or by a motion resisting discovery. The requesting party  
591 is not obliged to consider the limits in formulating the requests,  
592 so long as they are relevant to the parties' claims or defenses. If  
593 a motion is made, the moving party must show the need to limit  
594 discovery under the listed factors. But if these factors define the  
595 scope of discovery, the party requesting discovery will have the  
596 burden of showing that they justify discovery.

597 Discussion expressed skepticism about the arguments going to  
598 the burden of justification. The founding assumption is wrong. Rule  
599 26(g) already imposes on the requesting party the responsibility to  
600 ensure that the request is not unreasonably burdensome or  
601 expensive, as measured by factors much the same as those in Rule  
602 26(b)(2)(C)(iii). A requesting party is not free to ignore these  
603 limits until the court or another party invokes them. When the  
604 question is raised, the court will look for information from the  
605 parties best able to provide it. The requesting party should be  
606 able to articulate a theory that makes the information relevant.  
607 The responding party should be able to show the extent of the costs  
608 required to respond. Often this showing will be informed by showing  
609 what sources of information may available, of what kind and in what  
610 forms, to search for responses. It is not a question of "burden of  
611 proof" in present practice, and it will not become so under the  
612 proposed amendment. The Committee Note can be revised to make this  
613 clear, although in any event it should be clear from the ordinary  
614 ways in which discovery issues are presented and resolved.

615 Concerns addressed to the specific factors may be offset by  
616 the considerations that shaped the proposed change. Proportionality  
617 was strongly favored by the participants at The Duke Conference as  
618 well as at the Dallas miniconference, but this was partly offset by  
619 the vagueness of "proportional to the needs of the case" standing  
620 alone. The idea of incorporating the factors from 26(b)(2)(C)(iii)  
621 in the scope of discovery, so as to give content to  
622 proportionality, was suggested as the answer. The factors are  
623 familiar and well understood when someone thinks to invoke them. A  
624 party who requests, objects, or responds is already required to  
625 consider them; Rule 26(g) directs that. The hosts of comments  
626 addressed to the factors may indirectly support the perception that  
627 too often they may go missing in action.

628 Many of the concerns aimed at the factors, moreover, can be  
629 addressed by recounting the history, which begins with locating  
630 them – albeit as a limit – in Rule 26(b)(1). The concerns expressed  
631 now were noted and met in the 1983 Committee Note. The present  
632 Committee Note can be expanded to renew the guidance that has been  
633 provided by earlier Committees.

634           The specific concern that "the amount in controversy" may take  
635 on undue weight is often expressed by noting that this factor has  
636 been placed first to accomplish a smooth graft of the factors into  
637 the scope of discovery. Primacy in location may seem to imply  
638 primacy in importance. That concern can be addressed by reversing  
639 the order of the first two factors, to become "considering the  
640 importance of the issues at stake in the action, the amount in  
641 controversy, \* \* \*." The change will be drafted for further  
642 consideration.

643           Concerns about the amount in controversy and the importance  
644 of the issues at stake are commonly brought together by invoking  
645 categories of litigation that frequently pit a plaintiff who has  
646 little discoverable information against a defendant who controls  
647 access to most or all of the information required to establish a  
648 claim. This concern is readily addressed through the factors  
649 incorporated in the proposal. The asymmetric availability of  
650 information makes discovery important in resolving the issues. It  
651 also can be urged that the factor describing the resources of the  
652 parties addresses not only financial resources but also information  
653 resources. The Committee Note can say that.

654           Rather than rely on the present factors and the Committee  
655 Note, it is possible to add a new factor to the rule text. Drawing  
656 from the present Utah rule, the factor might be "the parties'  
657 [relative] access to relevant information." This factor would be  
658 intended to underscore the importance, and consequent  
659 proportionality, of allowing discovery of information that can be  
660 obtained only from an opposing party, or that can be obtained from  
661 an opposing party more readily than from other potential sources.  
662 Looking to "relative" access might be challenged on the theory that  
663 it suggests that a burden of inquiry might be placed on a party who  
664 does not have the information but who can investigate at lower  
665 cost. "Relative," on the other hand, may emphasize the problems  
666 that arise when information truly is controlled by one party.  
667 Employee plaintiffs, for example, commonly find that rules of  
668 professional responsibility are interpreted to bar any  
669 communication with other employees except through depositions. The  
670 employer, on the other hand, can talk with them freely.

671           Adding a new factor to the list that has been in the rules  
672 since 1983, a factor that was not in the published proposal, met  
673 resistance on the ground that it is better to stick with the  
674 familiar language that has been in the rules for thirty years. One  
675 important aspect of the proposal has been that it seeks to draw on  
676 a well-known body of experience. Adding something new, and  
677 therefore not entirely predictable, may seem to undercut a core  
678 strength of the published proposal. The view was expressed that the  
679 present factors should be supplemented only if there is a real  
680 need, and there is no need here because asymmetry in access to  
681 information can should be accommodated in administering the current  
682 proportionality factors. The question remains open for further  
683 discussion. But it was agreed that if this factor is added, it

684 should be third in the list: importance of the stakes, amount in  
685 controversy, access to relevant information.

686 Another possibility also was suggested. Proportionality could  
687 be separated from the scope of discovery, narrowing the proposal to  
688 a relocation of the present limit. The revised Rule 26(b)(1) would  
689 begin:

690 Parties may obtain discovery regarding any nonprivileged  
691 matter that is relevant to any party's claim or defense.  
692 The court must ensure that discovery is proportional to  
693 the needs of the case, considering \* \* \*.

694 This approach would accept the objections that proportionality  
695 should not define the scope of discovery. But it would bring the  
696 calculus of present Rule 26(b)(2)(C)(iii) to a more prominent place  
697 in Rule 26(b)(1), substituting for the codicil at the end of  
698 present (b)(1) stating the redundant proposition that "[a]ll  
699 discovery is subject to the limitations imposed by Rule  
700 26(b)(2)(C)."

701 Discussion began with the observation that the factors now in  
702 Rule 26(b)(2)(C)(iii) began as, and until the present proposal have  
703 remained, a limit on discovery. They have not defined the scope of  
704 discovery, even though essentially the same factors are  
705 incorporated in the Rule 26(g) directions to a party requesting  
706 discovery. Continuing to define the factors as limits would provide  
707 a clear response to those who fear that transposing them into the  
708 scope of discovery will change the allocation of burdens between  
709 the requesting party and the resisting party. On the other hand,  
710 increased prominence also may be resisted by judges who will see  
711 this as imposing a new obligation on them rather than a shared  
712 obligation of the parties and the court. And it may be wondered how  
713 judges are to discharge this responsibility, either under the  
714 present rule or under the present rule as relocated to (b)(1).  
715 Motions to compel or for protection are obvious means, but those  
716 are the parties' responsibility. Discussions in Rule 16 conferences  
717 are another obvious means, but there is little sense that courts  
718 are now acting on their own, without motion, to discharge the duty  
719 imposed by the present rule. Perhaps the answer is that the cases  
720 where proportionality most needs enforcement are those that are not  
721 actively managed by the court.

722 The next observation was a question. What is the purpose of  
723 the proposal? Is it only to further educate bench and bar in the  
724 values expressed in Rule 26(b)(2)(C)(iii), hoping that the new  
725 location will give greater effect to propositions now buried in the  
726 next paragraph after (b)(1), and lost in the long-distant  
727 subdivision (g)? Or is it to bolster actual implementation? Some  
728 comments have addressed Rule 26(g) by suggesting that it allows a  
729 request to be made with a very general appraisal of cost, burden,  
730 and prospective benefit, while amending the scope of discovery will  
731 impose a greater duty of restraint. These comments often suggest

732 that is a bad thing. But it may be necessary if the proposal is to  
733 have any effect. The many voices that speak of the need for some  
734 more effective means of harnessing discovery by a working  
735 proportionality principle deserve continuing and careful attention.  
736 Placing proportionality in the scope of discovery underlines the  
737 importance of the concept and discourages parties and courts from  
738 expanding the scope of discovery beyond what is proportional.

739 The question whether to restore proportionality to the role of  
740 a limit that falls to the court's responsibility was left for  
741 further deliberation.

742 One final item was noted in the Rule 26(b)(1) discussion.  
743 Several comments have urged that the scope of discovery should be  
744 further limited, reaching only information that is both relevant to  
745 the claims and defenses and also "material." This suggestion was  
746 rejected as vague, generally not useful, and fraught with  
747 possibilities that would unduly limit discovery.

748 INITIAL TIME LIMITS

749 Proposals to amend the time limits in Rule 4 and Rule 16 are  
750 designed to get cases moving faster. "Time is money."

751 The Rule 4 proposal would shorten the time for service from  
752 120 days to 60 days. It has been resisted on several grounds. Some  
753 aim directly at the time needed to serve multiple defendants or  
754 evasive defendants. Some lament the time needed to accomplish  
755 service on foreign defendants. Some note that service by a marshal  
756 in in forma pauperis proceedings often takes a long time because of  
757 competing demands on the Marshals Service. A more general objection  
758 is that reducing the time will make it more difficult to seek a  
759 waiver of service. Little time would be left to effect service  
760 after the plaintiff concludes that the request to waive will not be  
761 accepted.

762 The effects on waiver of service could be significantly  
763 ameliorated by setting the time at 90 days or, perhaps, by revising  
764 the waiver process. The other problems might be addressed by  
765 keeping the limit at 60 days but using the Committee Note to offer  
766 examples of situations that routinely justify extensions. So today,  
767 foreign service frequently needs more time than even 120 days and  
768 extensions are routinely granted.

769 Concerns about the effects on waiver of service led to a  
770 tentative conclusion that the Rule 4 time to serve should be moved  
771 up to 90 days.

772 The reduced time for issuing a scheduling order, to 90 days  
773 after any defendant has been served or 60 days after any defendant  
774 has appeared, has been resisted by the Department of Justice. The  
775 Department has resisted this limit from the outset. The proposal  
776 was modified in light of the Department's concerns, first by

777 abandoning initial drafts that set the times at 60 days and 45  
778 days, and second by adding – for the first time – authority for the  
779 court to set a later time on finding good cause for delay. Still,  
780 the Department invokes what may be called a "cascading  
781 bureaucracies" concern. This concern reflects the policies that  
782 give the Department a longer time to answer in Rule 12. It is not  
783 only that the Department itself is a large organization, faced with  
784 a need to allocate dispersed resources to provide the best  
785 representation in any particular action. It is also that the  
786 Department's clients are often other government agencies, and  
787 perhaps plural government agencies. Once the Department has  
788 identified suitable lawyers for the action, the lawyers must  
789 identify the proper persons within the client agencies to bring  
790 into the process, and those persons often will have to consult  
791 widely within the agency. The earlier the scheduling conference,  
792 the dimmer the prospects that the government can be represented by  
793 a lawyer who is sufficiently familiar with the litigation to  
794 support an efficient and effective conference. The present 120 days  
795 are well spent in helping counsel to become prepared, to know the  
796 case, and to know the likely workings of ESI discovery. The short-  
797 term gain from an earlier conference is likely to be lost to the  
798 costs of a less-well-prepared conference.

799 The tentative view seemed to be to adhere to the published  
800 proposal. The need for more time can be accommodated through the  
801 provision for a good-cause extension.

802 WITHHOLDING REQUESTED DOCUMENTS

803 One of the comments on proposed Rule 34(b)(2)(C) was that  
804 "withheld" is not a well-chosen word to describe a party's  
805 obligation to identify the documents that will not be provided in  
806 response to a request to produce. "Withhold," on this view,  
807 describes something you have identified and decided not to produce.  
808 But it does not describe something you have not found, commonly  
809 because you have not searched for it.

810 Discussion suggested that "withhold" works. The obligation is  
811 to state whether "any responsive materials are being withheld on  
812 the basis of that objection." The key is the objection. Proposed  
813 Rule 34(b)(2)(B) requires that an objection be made "with  
814 specificity." A party who believes that a request is too broad  
815 should object by stating the reasons why it is too broad. The  
816 proposed Committee Note draws the connection explicitly: "An  
817 objection that states the limits that have controlled the search \*  
818 \* \* \* qualifies as a statement that the materials have been  
819 'withheld.'" The Committee Note will be considered further, but the  
820 idea is there.

821 RULE 26(C): ALLOCATION OF EXPENSES

822 Some of the comments have suggested that the proposal to add  
823 an explicit reference to protective orders that allocate the

824 expenses of discovery establishes a step down the path to  
825 "requester pays" practice. It may be desirable to add to the  
826 Committee Note a statement that there should be no change in the  
827 general presumption that the party who has discoverable information  
828 bears the cost of finding and producing it. The Note could go  
829 further, to suggest that an allocation of expenses may be one  
830 response to a proportionality objection: proportionality can be  
831 achieved if the requesting party agrees to pay part or all of the  
832 costs. There is an analogy to the provisions of Rule 26(b)(2)(B) on  
833 discovery of ESI that is not reasonably accessible because of undue  
834 burden or cost. But it may be better for forgo that excursion.

835 RULE 1

836 Many comments endorse the value of the proposal that directs  
837 the parties to employ the rules to achieve the just, speedy, and  
838 inexpensive determination of every action and proceeding. The need  
839 for cooperation is not explicitly stated in the rule text, and some  
840 comments urge that it should be included. Other comments, however,  
841 express doubts even about the proposal as published. One doubt  
842 arises from the overlap with the obligations imposed by rules of  
843 professional responsibility. Another doubt arises from fear that  
844 Rule 1 would become a source of satellite litigation, akin to the  
845 experience with Rule 11 between 1983 and 1993.

846 Brief discussion reflected apparent satisfaction with the Rule  
847 1 proposal as published.

848 NOTES, MARCH 3, 2014, DUKE CONFERENCE SUBCOMMITTEE

849 The Duke Conference Subcommittee met by conference call on  
850 March 3, 2014. Participants included Subcommittee members Judge  
851 John G. Koeltl (chair), Judge Paul W. Grimm, Peter D. Keisler, and  
852 Judge Gene E.K. Pratter. Judge David G. Campbell, Advisory  
853 Committee Chair also participated. Judge Jeremy Fogel represented  
854 the Federal Judicial Center. Professors Edward H. Cooper and  
855 Richard L. Marcus were present as Reporters. Ted Hirt, Department  
856 of Justice, also participated. Andrea L. Kuperman and Julie Wilson  
857 represented the Rules Committee Support Office.

858 *Numerical Limits*

859 Judge Koeltl opened the meeting by noting that at the February  
860 7 meeting the Subcommittee tentatively decided, subject to  
861 reviewing further comments, to withdraw the published proposals  
862 that would reduce the presumptive number of depositions from 10 to  
863 5 per "side," reduce the presumptive number of interrogatories from  
864 25 to 15, and create a first-time-ever presumptive number of 25  
865 requests to admit (not counting requests to admit the genuineness  
866 of documents). Should that tentative decision be made firm?

867 Initial discussion was direct: later comments confirm the  
868 weight of the testimony at the three hearings and the earlier



869 comments. The question is how to explain the decision. Many  
870 comments suggested a basic point: the present limits work; there is  
871 no basis in experience to believe they encourage excessive  
872 discovery. As to Rule 36, further, there is no experience to  
873 suggest that the absence of a numerical limit has led to frequent  
874 imposition of excessive requests, and for that matter Rule 36 is a  
875 hybrid of discovery with case management by the parties. Rule 33  
876 and Rule 36 written discovery, moreover, has been championed by  
877 many comments as efficient and low-cost means of shaping a case and  
878 making more efficient the use of depositions and document requests.

879 A related observation was that the Committee hoped the primary  
880 virtue of reduced numbers would be to encourage early discussion  
881 among the parties and, when needed, with the court. That will  
882 encourage effective case management. Other proposals in the  
883 package, however, will encourage effective case management. At  
884 least for now, it may not be necessary to seek further support in  
885 reduced numerical limits. This view was supported by another judge,  
886 who added that reducing the numerical limits may create new  
887 problems. Some judges, for example, may fail to understand the  
888 great flexibility that is intended by presumptive numerical limits  
889 – if the rule sets a limit at 5 depositions, for example, these  
890 judges may infer a judgment by the rulemakers that 5 is the  
891 appropriate ceiling for all but truly extraordinary cases.

892 Discussion turned to the related proposal that would reduce  
893 the presumptive duration of an oral deposition from one day of 7  
894 hours to one day of 6 hours. This proposal has not met with great  
895 favor from the organized bar – such support as there is seems more  
896 grudging approval than true support. And other comments are  
897 strongly opposed. The Subcommittee tentatively decided to carry  
898 forward with this proposal at the February meeting, but the  
899 decision to withdraw the other presumptive limits means that this  
900 one remaining proposal will not do much to reduce delay and cost.  
901 The primary value that remains is to make the process more humane  
902 for the witness.

903 Concern for the witness was reiterated. "A six-hour trial day  
904 is exhausting." Is there enough to be gained by the seventh hour to  
905 justify this imposition on the witness?

906 The argument for retaining the 7-hour limit was that setting  
907 a 6-hour limit will increase the amount of jockeying among lawyers  
908 and, at times, an obstructive witness. The Subcommittee initially  
909 intended to propose a 4-hour limit, drawing on successful  
910 experience in some states, but reluctantly went to 6 hours in the  
911 face of substantial opposition. Many of the comments argue that  
912 even 6 hours is not enough to accommodate cases with many parties,  
913 examinations that draw extensively from documents that the witness  
914 must review, complex facts, speaking objections, and efforts to  
915 "run the clock."

916 Agreement was expressed for the view that a 6-hour limit is

917 more humane, but that this is offset by increasing the opportunity  
918 for gamesmanship. This is a subjective judgment. The difference  
919 between 6 and 7 hours is only marginal. The strong opposition in  
920 much of the testimony and comments "can tip the scales."

921 A similar view was that it is "hard to be excited" about the  
922 difference between 6 and 7 hours. This is a question that can be  
923 addressed in the case-management process. Lawyers often say that  
924 they do not use the full 7 hours; indeed comments on the number of  
925 depositions frequently suggest that in some kinds of cases a party  
926 may take half a dozen one-hour depositions in the same day.

927 The discussion concluded with the observation that not much  
928 will be gained by clinging to this last vestige of the proposals to  
929 reduce the presumptive limits on discovery. The remainder of the  
930 package addresses discovery and case management in ways that can  
931 make up for the failure to reduce the limits. And it is important  
932 to pay attention and to learn from public comments.

933 The Subcommittee decided to recommend withdrawal of the  
934 proposal to reduce the presumptive length of oral depositions.

935 *Proportionality*

936 Public comments and testimony have reflected many concerns  
937 about the proposal to amend Rule 26(b)(1) to state that the scope  
938 of discovery is limited to what is proportional to the needs of the  
939 case, and to move the factors that measure proportionality from  
940 present Rule 26(b)(2)(C)(iii) into Rule 26(b)(1). But the need to  
941 encourage proportionality was a major theme at the Duke Conference.  
942 Proportionality has not been opposed by the comments from the  
943 organized bar, nor by the Department of Justice or the EEOC. The  
944 Subcommittee began with proportionality. An unadorned reliance on  
945 proportionality, however, elicited concerns at the miniconferences  
946 that the concept is abstract and should be supported by more  
947 specific guidance. At the same time, it was said that the factors  
948 in Rule 26(b)(2)(C)(iii) are familiar and reliable when court and  
949 parties pause to consider them.

950 One suggestion has been that "proportional to the needs of the  
951 case" should be changed to "consistent with the needs of the case."  
952 The first reaction was that it is harder to think about  
953 "consistency." This view was seconded by observing that  
954 "'consistent' does not carry the same cost-benefit connotation." If  
955 it is challenging to define proportionality, consistency would  
956 introduce its own new set of questions. Further agreement was  
957 expressed, adding that proportionality carries a quantitative sense  
958 that cannot be found in "consistent with." It was agreed to stick  
959 with proportionality.

960 Another suggestion has been that proportionality should be  
961 separated from the scope of discovery, expressing it instead as a  
962 limit. Rule 26(b)(1) would define the scope of discovery as what

963 "is relevant to any party's claim or defense. The court must ensure  
964 that discovery is proportional to the needs of the case,  
965 considering \* \* \*." This approach might alleviate the concern  
966 expressed by many comments that the published proposal will impose  
967 on a party who requests discovery a new burden to prove  
968 proportionality.

969 The first reaction was that requiring the court to ensure  
970 proportionality will generate a standard of appellate review that  
971 diminishes the extent of district-judge discretion. To be sure,  
972 Rule 26(b)(2)(C) now says that "on motion or on its own, the court  
973 must limit the frequency or extent of discovery \* \* \*" to satisfy  
974 the proportionality factors in (C)(iii). But tying this directly  
975 into (b)(1) could make a difference. This concern might be reduced  
976 by adding a direct reference to discretion: "the court must  
977 exercise its discretion to ensure \* \* \*." But some judges still  
978 will worry about the force of the rule command. And shifting to  
979 discretion will dilute the value of the proposal as published.

980 A further observation was that directing the court to ensure  
981 proportionality implies a proactive monitoring function that often  
982 will not happen. Discovery requests are not filed; courts have few  
983 opportunities to monitor discovery absent motions or frequent Rule  
984 16 conferences.

985 Later discussion reinforced these observations. Directing the  
986 court to ensure proportionality "leaves out the obligations of the  
987 parties under Rule 26(g), and the expectation that the parties will  
988 work it out in most cases," beginning with the Rule 26(f)  
989 conference. If we make it a burden on the court, not the  
990 responsibility of the parties, the rule will reduce understandings  
991 of how the parties should behave and what they should talk about.  
992 It should remain with the parties to confer and agree on  
993 proportional discovery, and with the court to enquire when they  
994 disagree or, at times, when the parties seem to be letting the case  
995 run out of control.

996 It also was suggested that the greatly expanded draft  
997 Committee Note provides sufficient reassurance that the proposed  
998 rule text will not impose a new burden of justification on the  
999 party who requests discovery.

1000 The comment of the Philadelphia Bar Association was noted  
1001 separately, with a question about the meaning of their concern that  
1002 proportionality would cut off a great deal of legitimate discovery  
1003 that is allowed now. One participant suggested that the puzzling  
1004 aspects of this part of a generally helpful comment result from an  
1005 attempt to resolve competing views by piling up elements of each  
1006 into a confusing pattern. The fear seems to be that somehow  
1007 plaintiffs who do not plead their claims with sufficient care will  
1008 be denied discovery that would lead to critical information, the  
1009 proverbial "smoking gun." And there also may be some fears on the  
1010 "burden" question.

1011 The Subcommittee was reminded that the FJC study shows that  
1012 most lawyers think that discovery generally is proportional. The  
1013 proposal to amend Rule 26(b)(1) "will not affect most cases." But  
1014 it will force discussions among the parties and with the court in  
1015 complex cases. That is the intent, and much good can be  
1016 accomplished without significant harm.

1017 The concern about changing the burden of justification was  
1018 addressed again, this time with a reminder that Rule 26(g) now  
1019 requires all parties to consider proportionality in making  
1020 discovery requests, objections, and responses. The proposal does  
1021 not impose any added step, any new obligation, on the requesting  
1022 party. We should make it clear that this is not a burden issue, but  
1023 an ultimate baseline limit on discovery, as it has been for 30  
1024 years.

1025 This view was further supported. The proposal probably does  
1026 not affect most cases if the parties act appropriately under Rule  
1027 26(g) and behave cooperatively. The New York City Bar Association  
1028 suggests the Committee Note should say that. The revised draft  
1029 Committee Note says this clearly.

1030 Further support for the rule text as published began: "I don't  
1031 think judges will do something screwy on burden. They will not  
1032 shift a 'burden' to the requesting party." The revised Committee  
1033 Note makes this clear. Changing the rule text, moreover, could have  
1034 a "ripple effect" on other things.

1035 A separate concern was noted. Many comments suggest that  
1036 adding proportionality to the scope of discovery will lead to  
1037 reflexive objections - the first response will be an automatic  
1038 protest that every request is not proportional, forcing the  
1039 requesting party to justify the request. Is this potential problem  
1040 a reason to separate proportionality from the scope of discovery?  
1041 These protests will surely be repeated as the proposal moves  
1042 forward toward adoption by the Supreme Court and approval by  
1043 Congress.

1044 It was agreed that the goal should be to propose the best rule  
1045 that is likely to be supported at later stages in the Enabling Act  
1046 process. But often that means recommendation of the best rule that  
1047 can be devised to accomplish the intended purposes. The arguments  
1048 about new burdens are not realistic. A party who protests that a  
1049 request is too burdensome to be proportional will have to explain  
1050 what the burden is and why it is not proportional. And the proposal  
1051 has found much support in the organized groups that bring together  
1052 and harmonize the views of lawyers with opposing experiences and  
1053 interests.

1054 Further support was expressed for the proposal as published.  
1055 It is the most elegant and reasonable way of reinforcing principles  
1056 that have been in the rules for the last thirty years. Changes in  
1057 rule text to meet the arguments about changing burdens could easily

1058 fail to persuade the doubters, in part because the opposition  
1059 centers on the concept of proportionality itself. Adopting the  
1060 "court must ensure" formulation might even stir greater anxieties  
1061 because it may imply a change of principle that the published  
1062 proposal does not attempt.

1063 It also was suggested that separating proportionality from the  
1064 scope of discovery might be seen as a step back from the present  
1065 rules. Rule 26(b)(1) now says expressly that "[a]ll discovery is  
1066 subject to the limitations imposed by Rule 26(b)(2)(C)." Rule 26(g)  
1067 reinforces this proposition. Moving the factors in (b)(2)(C)(iii)  
1068 up to (b)(1) may make them more prominent and foster better  
1069 observation by parties and courts, but it is hard to know whether  
1070 that would be offset by characterizing these factors as a limit  
1071 imposed by the court, not as part of the scope of discovery.

1072 Further support for adopting proportionality in some form was  
1073 expressed by urging that anything that will encourage more active  
1074 case management is a good thing.

1075 The discussion concluded with the observation that the  
1076 Subcommittee recommendation will be considered by the Advisory  
1077 Committee. An Advisory Committee recommendation will be reviewed by  
1078 the Standing Committee. The Subcommittee can recommend adoption of  
1079 the proposal as published, if that is its judgment, recognizing  
1080 that the issues will be fully explored.

1081 Revisions in the published rule text for Rule 26(b)(1) were  
1082 discussed next. The comments reflect widespread concern that  
1083 listing "the amount in controversy" as the first factor in  
1084 considering proportionality will obscure the need to reflect on the  
1085 need to allow effective discovery in many cases that involve  
1086 comparatively low dollar stakes but matters of high private and  
1087 public importance. Although the next factor looks to the importance  
1088 of the issues at stake in the action, this secondary position is  
1089 not sufficient. The Subcommittee agreed that this concern can be  
1090 addressed in part by inverting the order of these factors, listing  
1091 first the importance of the issues at stake. The draft Committee  
1092 Note has been expanded to emphasize that the importance of  
1093 interests that cannot be compensated in money has been a central  
1094 part of the calculus from the beginning in 1983.

1095 Another revision in the rule text was suggested. Many of the  
1096 comments focus on the asymmetric distribution of discoverable  
1097 information in several categories of actions. The fact that one  
1098 party has little discoverable information, while the other party  
1099 controls a great deal of discoverable information, means that the  
1100 party with the information is properly subjected to greater burdens  
1101 in responding to discovery. This concern can be reflected by adding  
1102 a factor drawn from the Utah rule: "the parties' relative access to  
1103 relevant information."

1104 This factor is subject to two reservations. One is that it

1105 addresses considerations that should be reflected in proper  
1106 administration of the factors already described in Rule  
1107 26(b)(2)(C)(iii) and transported to Rule 26(b)(1). A second is that  
1108 adding a new factor may seem to undermine the position that little  
1109 risk is run in simply moving the same factors from a somewhat  
1110 obscure position in Rule 26(b)(2) to a more prominent position in  
1111 Rule 26(b)(1).

1112 These reservations were met. If relative access to information  
1113 is implicit in the present factors, what harm is there in making it  
1114 explicit and reducing the opportunities for ill-founded  
1115 contentiousness? How can the court and parties avoid asking who has  
1116 the information? This factor directly addresses asymmetry; if it is  
1117 a placebo, it is a good one. And it provides a direct response to  
1118 those who fear that arguments about proportionality will take on a  
1119 disproportionate role as the parties discuss discovery. It gives  
1120 the requesting party something to push back with, and will  
1121 facilitate effective engagement of the parties. The rule will be  
1122 better balanced.

1123 The Subcommittee agreed to recommend adding as a factor "the  
1124 parties' relative access to relevant information." The Committee  
1125 Note can be expanded to say more about asymmetric information.

1126 *Rule 26(c): Cost Allocation*

1127 The proposals would amend Rule 26(c) by adding an express  
1128 reference to "the allocation of expenses" as one term available in  
1129 an order designed to protect against undue burden or expense in  
1130 discovery. Courts already recognize authority to order an  
1131 allocation of expenses. The express provision in rule text may  
1132 encourage more frequent consideration of this middle way between an  
1133 outright refusal to allow burdensome discovery and imposing all the  
1134 costs on the responding party.

1135 One concern expressed in the comments is that this revision  
1136 will encourage more cost-shifting orders than should be. The  
1137 Subcommittee agreed that the Committee Note should be expanded to  
1138 state that recognizing the authority does not imply that cost-  
1139 shifting should become a common practice. Courts and parties should  
1140 assume that the responding party ordinarily bears the costs of  
1141 responding.

1142 Several of the comments have urged that the Committee Note  
1143 should say that this proposal does not derogate from "the American  
1144 Rule" that a losing party is not responsible for attorney fees  
1145 incurred by the victor.

1146 Doubts were expressed about addressing "the American Rule" in  
1147 the Committee Note. This rule reflects a basic concern about access  
1148 to courts and to judgment on the merits. Parties should be able to  
1149 bring and defend against claims without fear of liability for an  
1150 adversary's expenses and attorney fees. Those concerns do not bear

1151 directly on a determination whether a responding party should have  
1152 to bear the costs of responding to discovery requests that at best  
1153 come close to the margins of relevance and proportionality. In  
1154 many cases the largest – or most readily quantifiable – costs will  
1155 be attorney fees, perhaps coupled with expenses for providers who  
1156 assist in retrieving electronically stored information.

1157 Further discussion concluded that the questions raised by the  
1158 role of "the American Rule" are complex. An attempt to address them  
1159 in the Committee Note could easily go astray. It is better to  
1160 remain silent.

1161 *Rule 16: Time For Scheduling Conference*

1162 The Department of Justice has continually expressed concerns  
1163 that it has unique needs for time to prepare for the first  
1164 scheduling conference. These concerns were reflected by revising  
1165 the Subcommittee's initial proposals, leading to publication of a  
1166 proposal that embodied only half the original reductions. They also  
1167 were reflected in the addition of a new provision allowing the  
1168 court to delay the conference for good cause. The Department  
1169 continues to express its concerns. The Subcommittee concluded that  
1170 at least at this stage, the language added to the Committee Note  
1171 encouraging courts to recognize the needs of large organizations  
1172 suffices to address these concerns. The Department's concerns can  
1173 be evaluated further by the Advisory Committee.

1174 *Rule 4(m): Time to Serve*

1175 The published proposal sought to accelerate case disposition  
1176 by reducing the time to serve the summons and complaint set in Rule  
1177 4(m) from 120 days to 60 days. Many comments described situations  
1178 in which 60 days are not enough, and expressed concern that a 60-  
1179 day period would interfere with requests to waive service because  
1180 so little time would be left to make service after it has become  
1181 clear that the defendant will not waive service.

1182 The Subcommittee confirmed its tentative decision in February  
1183 to extend the for service time to 90 days.

1184 The Subcommittee also approved addition of a brief statement  
1185 in the Committee Note recognizing that shortening the time to serve  
1186 under Rule 4(m) will shorten the time allowed by Rule 15(c)(1)(C)  
1187 for notice of an action to support relation back of an amendment  
1188 adding or changing a party against whom a claim is made.

1189 Finally, it was noted that many of the comments complained  
1190 that even 120 days are not enough to effect service in a foreign  
1191 country. These comments point to an ambiguity in present Rule 4(m).  
1192 It says that "subdivision (m) does not apply to service in a  
1193 foreign country under Rule 4(f) or 4(j)(1)." The problem is that  
1194 service on a corporation "at a place not within any judicial  
1195 district of the United States" is not directly governed by Rule

1196 4(f). Instead, Rule 4(h)(2) directs service "in any manner  
1197 prescribed by Rule 4(f) for serving an individual, except personal  
1198 delivery under (f)(2)(C)(i)." That might be read to mean that  
1199 service is "under Rule 4(f)," but it also can be read to mean that  
1200 service is not under Rule 4(f), only in a manner prescribed by Rule  
1201 4(f) – and not quite all of Rule 4(f) at that. There is no apparent  
1202 reason to impose the 120-day, or 90-day, limit on service under  
1203 Rule 4(h)(2). It is tempting to recommend adoption, without  
1204 publication, of an amendment that adds Rule 4(h)(2) to the list:  
1205 "subdivision (m) does not apply to service in a foreign country  
1206 under Rule 4(f), 4(h)(2), or 4(j)(1) \* \* \*." But this does not seem  
1207 the kind of technical amendment that should be adopted without  
1208 opportunity for illumination by public comment.

1209 The discussion concluded by suggesting a recommendation to  
1210 publish for comment an amendment of Rule 4(m) that would except  
1211 service under Rule 4(h)(2).



# TAB 2B

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## SUMMARY OF TESTIMONY & COMMENTS, AUGUST 2013 PUBLICATION

Four sets of summaries capture the core of the public testimony and written comments on the package of proposals published for comment in August, 2013. One set is devoted exclusively to Rule 37(e). Three sets cover the remaining proposals. All of the testimony at the three hearings and the post-publication comments through number 486 are summarized in some detail. New thoughts provided in comments submitted after number 486 are included in this set. A separate summary, much more compact, describes the pre-publication comments. And a final summary catches up the post-publication comments that cover ground already thoroughly explored in earlier comments. Comments between number 487 and 600 that are not covered in the more extensive set are counted as if votes on the points they address. Comments after number 600 that add nothing new to the discussion are not listed separately.

It should be emphasized that the decision to forgo summaries of many of the higher-numbered comments does not reflect on the qualities of those comments. Many thoughtful, sophisticated, elegantly nuanced observations are made in them. But a summary of a thousand pages would not serve the purpose of providing a reminder of the points that must be considered in reviewing the published proposals. The summaries are designed to capture all elements of the comments, including those that support the proposals, those that oppose them, and those that seek to improve them. Constant repetition of the same points could get in the way of refreshing memories of all the testimony heard and all the comments read.

In both the early and mid-term comments some themes recur frequently. It remains to be seen what truly new observations will appear in the comments beyond number 804. A few hundred of those comments have been reviewed; only a few of them bear separate notes. Skimming through these summaries may be a useful refresher, but they do not serve as a comprehensive anticipation of what may come to be revealed in higher-numbered comments.

## GENERAL COMMENTS

[This category was added late in the venture to reflect some very brief comments.]

415, Bill Lockett: Favors all the proposals, apart from some suggestions to modify proposed Rule 37(e).

418, Harlan I. Prater, IV: Generally supports all the proposals, with specific support of Rule 26(b)(1) and some suggestions to change Rule 37(e).

422, Thomas Schwab: "I strongly support the proposed changes."

425, David Hudgins: Supports the proposed amendments "as a means to help control runaway costs of litigation which increasing[ly] threaten our justice system and the Constitutional right to trial by jury in civil cases."

427, John F. Schultz for Hewlett-Packard Co.: Supports the proposals generally, recommending a few changes, and "also supports the active and early judicial involvement contemplated \* \* \*."

443, Grant Rahmeyer: The proposed rules "are completely one-sided, as in, they only favor major corporations." "The real purpose is to try and prevent cases from going before a jury."

444, James Cocke: Offers strong support for many of the proposed changes – as a medium sized company, a true attempt to comply with all discovery demands would shut down our operation.

729, Stephen B. Burbank: (1) "[T]he comments and testimony already submitted suggest that some interested observers regard repetition as an important means of influencing the rulemaking process." But if "the Enabling Act process is to be distinguishable from the legislative process, it must be in substantial part because reason and reliable data are more important than interest group talking points, self-serving assertions or cosmic anecdotes, however often or vigorously espoused." (2) "[I]f these proposals become effective, rulemaking would be destined for controversies, professional and political, akin to those which led to the 1988 amendments to the Enabling Act and attended the 1993 amendments – controversies that this Committee's predecessors worked hard to put behind them." Indeed, "forcing these changes through to effectiveness" would seriously undermine the integrity of the Enabling Act process. "That would be unfortunate."

735, Nicholas Wooten: "I am also dismayed that every 'tort-reform' group in the country has a link to the comment page here and is running an organized campaign to their members asking them to comment in support of these unnecessary amendments."

784, Michael Millen: "[Q]uestions such as proportionality call into question a very difficult political balance (e.g., economic realities of the defense versus the trial preparation realities of the plaintiffs) which I believe is best made by the people's representatives rather than a technical committee." The Committee should report that some of the proposals "are so politically charged that Congress should make the first move."

January Hearing, Jon L. Kyl: p. 45 It is important to move this rulemaking process to a conclusion. "[F]rustrated parties and interests \* \* \* have other options, such as \* \* \* congressional action \* \* \*."

February Hearing, John W. Griffin: p 57 As a member of defense groups, I have been implored to get my testimony in. As a member of plaintiff groups, I have been told I need to make my views known. "[T]his is not an election for people to get their votes in. This is serious business."

RULE 1

267, Lawyers for Civil Justice, by Alex Dahl: "While we believe cooperation is a valid aspirational goal, we do not believe the rules should be used as a tool to enforce it." Creating rule text will seem to create "a duty, the breach of which could lead to sanctions and more." The result will be the same as the experience under the prior version of Rule 11. In any event, the Committee Note should be revised to delete any reference to cooperation. The Committee decided not to add a duty to cooperate to rule text. The same considerations apply to the Note, which could be read to enshrine a duty to cooperate into the rule itself. The Sedona Conference sources on cooperation show how vague the concept is. Is a lawyer obliged to cooperate by disclosing information helpful to the adversary and damaging to the lawyer's client? Even despite the duties of loyalty and diligence? "Cooperation" has no settled meaning or usage: it is not fit for rules use.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality." Although indirect, p. 942, n. 63, seems to support adding parties to Rule 1 by invoking the Committee Note to the 1993 amendment. The Note recognizes "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[I]f Rule 1 is to be amended to encourage cooperation, it should be done explicitly and not indirectly through" the Committee Note. The 1993 Committee Note states that attorneys share responsibility with the judge. If greater cooperation is to be achieved, the proposal does not go far enough. "To enshrine cooperation as a touchstone of federal procedure, it needs to be made explicit in Rule 1. If such were to occur, the litigation that would ensue over compliance might very well be worth it." As it stands, the Section does not support the proposal.

311, James Coogan: (This is indirect, not a comment on Rule 1 as such: "Consider that the rules often do not affect reasonable litigants. The rules become an issue when parties to litigation are not reasonable."

327, Malini Moorthy for Pfizer Inc.: "[S]upports the proposed additional goals of increasing cooperation among lawyers \* \* \*."

331, Robert DiCello: "The proposals are not likely to encourage collegiality among lawyers – something much desired and needed today." (From the context, this appears to be directed to the

discovery proposals, not Rule 1.)

333, Racine Miller: Similar to 331 above.

335, Rebecca Heinegg: This comment seems at most an indirect reflection on Rule 1: "[T]he proposals are not likely to encourage collegiality among lawyers. If anything, they make it more likely that there will be contentious motion practice over the scope of discovery."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Opposes the proposal. Cooperation is desirable, but the change will encourage wasteful motion practice. Imposing duties in addition to those exacted by the Rules of Professional Conduct should be considered carefully, especially with respect to "conflict with the notions of this country's adversary system."

345, Kim Stone for Civil Justice Association of California: applauds the goal to improve cooperation among lawyers.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses the proposed rule text and the Committee Note. These proposals are consistent with The Sedona Conference Cooperation Proclamation. 494, Charles R. Ragan seems to endorse the Sedona language: "construed, complied with, and administered." But also illustrates an alternative within the framework of the published language: "and employed by the court, counsel, and the parties."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Endorses the proposal, "which is designed to embody the principle that the parties should cooperate in achieving the goals of" the Rules. This principle has been established in E.D.N.Y. since 1982 first adopted it in standing orders.

356, Richard McCormack: "Please add 'parties' to Rule 1 \* \* \*."

359, Andrew B. Downs: Rule 1 should be repealed. The judges who cite it do so "to justify some unfair personal modification to the generally understood mores of practice in a particular district," to "run roughshod over all counsel."

366, Paul D. Carrington: "[D]o we need to empower judges to make a more generalized disapproval of the role of an advocate in failing to maintain a cooperative spirit in the conduct of adversary litigation"? Extending the power to punish parties and counsel for excessive zeal is questionable.

November Hearing, Paul D. Carrington: p 60, 68 The Rule 1 proposal "kind of suggests that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side." "I would certainly not want to go very

far down the road of burdening plaintiffs' lawyers with duties that diminish their ability to bring their cases \* \* \*." The plaintiff's lawyer should not be made responsible for the outcome. Rule 1 is a good rule. "[B]ut trying to impose an independent duty on the part of a lawyer representing the plaintiffs to try to save costs and prevent this from being too vigorous a dispute is I think subject to the same kind of complaint" that was made to the original 1993 version of initial disclosure, which required an attorney to identify witnesses and documents harmful to the client.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery cooperatively and collegially, not as a club to inflict unnecessary costs. "We therefore applaud the goals \* \* \* to inject a more cooperative spirit into the discovery rules \* \* \*."

383, Alan B. Morrison: Without supporting or opposing, observes: (1) The Note says the change is to foster cooperation – if so, cooperation should be added to the rule text: "the parties are [expected] to cooperate to achieve \* \* \*." That would lead to deleting "employed by the court and parties." (2) Speedy and inexpensive are achieved by reducing the prospect of a just result. The tension should be reflected in rule text – "to secure by an appropriate balance the just," etc.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

399, Edward Miller: "Creating a duty to cooperate is a well-intentioned idea that is sure to lead to unintended negative consequences, including abusive motions \* \* \*. The meaning of 'cooperation' is vague, and the tension between cooperation and a lawyer's duties to the client are (sic) already complicated."

407, David J. Kessler: The language on cooperation should be removed from the Committee Note. If anything is to be said about cooperation, it should track *The Case for Cooperation*, The Sedona Conference Journal, Vol. 10 Supp., 339. "We are starting to see cooperation become a weapon and courts chastise parties for not being cooperative even when they follow the rules and simply decline to provide information to their opponents to which they are not entitled." Cooperation should not be available as a "meta-threat" used by courts to coerce parties into providing discovery not required by the rules. But if the Committee chooses to say something about cooperation in the Note, it should be this: "Cooperation means undertaking litigation and discovery in compliance with these Rules and acting in good faith. Parties and Counsel should refrain from abusing these rules. Parties are encouraged to cooperate and reach agreements to resolve disputes amicably during litigation, but cooperation does not require such agreements and parties that comply with these Rules need not



voluntarily cooperate if they believe in good faith that it is not in their best interest."

412, Mark S. Stewart for Ballard Spahr LLP: More than 120 United States district courts have signed on to the Sedona Cooperation Proclamation. The spirit of Rule 26(f) mandates cooperation in discovery, and Rule 37(f) permits sanctions for failure to participate in good faith in a Rule 26(f) conference. The proposal to amend Rule 1 does not clearly define cooperation and may provide a new basis for motion practice without altering the parties' obligations in any material way. The proposal should be abandoned.

421, Louis A. Jacobs: "Amending Rule 1 to encourage parties to play nice and responsibly is swell but in no way changes the adversarial system. In my experience [representing employment plaintiffs] defense counsel are honorable and represent their clients zealously." That means producing only the discovery that a judge would require be produced.

427, John F. Schultz for Hewlett-Packard Co.: Opposes the Rule 1 proposal. An exhortation to cooperate is well-intentioned, but "it is likely to lead to abusive motion practice whereby parties accuse each other of failing to cooperate."

455, W. Michael Scott for CrownQuest Operating, LLC: Opposes. "The possibility of motions \* \* \* for the failure to cooperate will only encourage wasteful motion practice." The Rules of Professional Responsibility should be supplemented only with great care, especially to the extent that the proposal could be considered at conflict with the notions of an adversary system.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the Rule 1 initiative. The rule text should not incorporate the principle of cooperation, which is better incorporated in the Committee Note. [This may be ambiguous. The Note cannot say anything unless the rule text is revised. The proposed rule text does not refer to cooperation.]

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: "We support efforts to encourage cooperation and civility."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: pp. 11-12 offer examples of pilot projects and district guidelines mandating cooperation. p. 15 applauds proposed Rule 1, but suggests it should reach attorneys as well as parties.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

489, Hon. Rebecca Love Kourlis for The Institute for the

Advancement of the American Legal System: This comment summarizes the discussion at a day-long conference of about 40 invited lawyers and judges with long experience on "both sides of the 'v'." The participants included a good number who have participated actively in the federal rulemaking process, including two former members of the Civil Rules Advisory Committee (Judge Lee H. Rosenthal and Daniel Girard), and the current chair of the Standing Committee (Judge Jeffrey Sutton). The overall report is clear and concise summary of views expressed by many others in the public comment process. Familiar divisions of view are found here. But there also is a greater level of consensus on some topics than may be found in the overall comments.

For Rule 1, "there was a mixed response." A slim majority favored the proposed language, hoping for a culture change; they would add "attorneys" to make it explicit that they are included. Some of the opponents did not oppose the concept, but did not want to tamper with the iconic language of Rule 1. Other opponents stressed the importance of vigorous advocacy, suggested there would be limited practical effect, and feared that the new language could be used as a tactical weapon.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn. (The same comments were reposted in a different format as 1196; the duplication is not noted in later summaries.): Endorses the proposal.

624, Joseph E. O'Neil: Able and experienced attorneys cooperate now. Those who are not cannot be educated to change their views or their behavior. The proposal will make no difference in behavior, but it will invite motion practice. It should not be adopted.

645, Allison O. Skinner: Offers several versions of a sentence to be added to the Committee Note,. The sentence would point to the advantages of using alternate dispute resolution techniques to encourage cooperation in discovery, or to actually resolve discovery disputes. Three articles are attached, one by Ms. Skinner, another by Judge Waxse, and a third co-authored by Judge Scheindlin. Together the articles run a bit more than 100 pages.

677, Noah G. Purcell for Washington State Attorney General's Office: "[W]elcomes the changes to Rule 1."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal as "mak[ing] explicit what is already implicit," and an attempt to refocus lawyers and courts on the foundational principles of Rule 1.

November Hearing, Jack B. McCowan: p. 8: "I support the committee's goals of \* \* \* attorney cooperation."

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 "I hope [this] will be vigorously enforced by the district courts and by the magistrate judges." That will have a positive impact in reducing the cost of litigation to all parties.

February Hearing, Ariana Tadler: p 325 Supports, but suggests that "cooperation" be added to the rule text. Cooperation "really, really works. It's a win, win." Judges know when the parties do not cooperate, and hold them accountable.

February Hearing, Danya Shocair Reda: p 349 Approves the Rule 1 amendment.

RULE 4

*Time to Serve*

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Reducing the time to serve to 60 days will undermine the waiver-of-service provisions because a plaintiff will not know about waiver until well into the 60-day period. And it is not time enough to serve defendant who cannot be found or who actively avoid service. Plaintiffs will be encouraged to move aggressively for extensions.

265, American Association for Justice Civil Rights Section, by Barry H. Dyller: The 60-day limit will effectively eliminate the ability to serve by mail. And there are countless examples of defendants ducking service. An illustration is provided by a doctor at a federal prison that has thwarted service by returning mailings, refusing to "forward" calls to the doctor, and so on. Nor is there any benefit to reducing the time.

266, American Association of Justice Aviation Section, by Michael L. Slack: 60 days is not enough time to serve foreign manufacturers and airlines in compliance with treaties. (This comment flags an ambiguity in Rule 4(m), which "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." Rule 4(f) applies directly only to service on an individual in a foreign country. Rule 4(h)(2) provides for service on a corporation or other entity in a foreign country "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(1)." Service on a foreign corporation thus seems to be "under" Rule 4(h), and only in a manner prescribed by Rule 4(f). If the 120-day limit applies to service on a foreign corporation, this concern is greater.)

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

276, John D. Cooney: The time reduction will discourage plaintiffs from requesting waivers of service because a plaintiff will not know whether the defendant will waive until some time after requesting the waiver, leaving only 30 days to effect service. A plaintiff may need to sue a company he worked for decades ago – extensive research may be required to find the company's current name. Time will be wasted on motions for an extension of time to serve. (321, Timothy M. Whiting, is similar.)

278, Perry Weitz: Changing only a few words, tracks 276, noted above.

279, Kyle McNew: "A lot of cases settle in between filing and

service, but 60 days just isn't enough to get a case settled." So fewer cases will settle.

280, Oren P. Noah: 60 days is not enough. In asbestos litigation, "service on entities that have changed names, moved offices, etc. in the decades since they caused the relevant asbestos exposures sometimes take[s] substantially longer." And shortening the period will encourage certain defendants to avoid service.

292, Lyndsey Marcelino for The National Center for Youth Law: Litigation on behalf of children typically involves many parties in many different locations. Social workers have a very high turnover rate. Cutting the time to serve in half "would be a nearly insurmountable burden in situations where we are litigating in different states against individual defendants with unknown locations."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Similar to 264, the AAJ Transvaginal Mesh Litigation Group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves the proposal, but recommends two additions to the Committee note: (1) Extensions for good cause should be liberally granted for the sake of better overall efficiency, and there is no change in the discretion to grant extensions even absent good cause. (2) An example of good cause should be provided – one would be "multi-party actions in which it may be difficult to identify, locate, and serve all defendants in two months (possibly excepting cases where fewer than all defendants must be served via the Hague Convention)." November Hearing, p 287, Michael C. Rakower for the Section: Repeats that the good cause provision is an important limit on the shorter time to serve, and urges that the Note "show situations in which good cause can be employed so that parties don't think that good cause should be a limited form of remedy."

306, William C. Faber, Jr.: "[S]ervice of summons can be more complicated than you imagine."

311, James Coogan: It often takes 60 days to find out that the address initially used for service is outdated. The proposal will increase delays by increasing the need to seek additional time to serve.

317, Steven Banks for the Legal Aid Society in New York City: In forma pauperis cases should be governed by the current 120-day limit. Service is made by the Marshals Service. Marshals frequently fail to make service within 120 days. IFP litigants are not penalized for this, but the failures undermine their faith in the fair administration of their claims. Reducing the time to 60 days will "raise expectations that cannot be satisfied and promote cynicism about government's adherence to the law."

327, Malini Moorthy for Pfizer Inc.: The amendments to Rule 4(m) and 16(b) are "important signals to the judiciary that early and active case management is critical \* \* \*."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing homes often are owned and managed by way of a complex organizational structure involving several defendants. A 60 day limit could result in costly refileing of complaints because of the logistical difficulties in serving all defendants.

360, Robert Peltz: Often defendants are located in other domestic and foreign jurisdictions. Long-arm service or substituted service can be very time consuming, "even if one knows where the defendant is." It is worse when it is necessary to track down the defendant. And a dismissal nominally without prejudice is with prejudice if the limitations period has run.

361, Caryn Groedel: This is an arbitrary change for the benefit of defendants and the detriment of plaintiffs.

363, Dean Fuchs, at request of NELA-Georgia Board: Reducing the time to serve will create a perverse incentive for defendants to evade service. It can be difficult to personally serve some defendants. They often utilize P.O. boxes, drop boxes, or other contrivances to obfuscate their actual addresses or whereabouts. "I am often forced to unnecessarily incur the expense of engaging private process servers, and on occasion, more expensive private investigators to stake out and surveil the defendants \* \* \*." Problems with timely service are more likely to arise from evasive defendants than lazy plaintiffs' counsel. There is one circumstance, however, in which plaintiff's counsel properly delays service. The 90 days available to sue after the EEOC issues a right-to-sue letter are used up in obtaining the EEOC investigative file under FOIA, and most competent attorneys will want to review the file before undertaking a case. A plaintiff may be required to file pro se while seeking representation. After investigation, prospective counsel may advise the plaintiff the case is not worth pursuing and should be voluntarily dismissed. If the case is pursued, counsel will have an opportunity to amend the complaint before it is served. In these circumstances, delay in service will promote judicial economy. The present 120-day period enhances the ability of plaintiffs with viable claims to retain counsel.

365, Edward P. Rowan: Service can be quite difficult. Statutes of limitations are extremely harsh. It is wrong to provide a harsh time period for service.

369, Michael E. Larkin: "The present time limit does not affect the length of litigation." Change achieves nothing meaningful.

372, J. Burton LeBlanc, for American Association for Justice:

Reducing the time to 60 days is entirely unnecessary. The 120-day period does not delay a case unnecessarily. It is an important stepping stone for the start of a case. In some kinds of cases, such as admiralty cases where plaintiffs must reach a ship to effect service, 60 days will almost always be inadequate. With the 120-day period, courts do not often confront motions for an extension of time; with a 60-day period, they will confront such motions much more frequently.

383, Alan B. Morrison: (1) Is there any evidence that plaintiffs are deliberately delaying service for tactical advantage? Remember that many statutes of limitations require service in a period shorter than 120 days after filing. (2) Rule 15(c)(1)(C) requires notice to a not-named defendant within the period provided by Rule 4(m) – if that is intended, the Note should say so. And there are other problems with relying on Rule 4(m) in Rule 15(c)(1)(C): Rule 4(m) does not apply to service in a foreign country, and the proposal also excludes notice under Rule 71.1(d)(3)(A). What of relation back in those settings? The cure is to delete the cross-reference in 15(c)(1)(C), substituting the desired number of days, whether 60 or 120.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

403, Donald H. Slavik for AAJ Products Liability Section: Products cases often involve manufacturers and sellers located overseas. Service is time-consuming. 60 days is not enough; 120 days usually are enough. [Note this comment points to an ambiguity in Rule 4. Rule 4(m) does not apply to service in a foreign country "under Rule 4(f) or 4(j)(1)." Rule 4(h)(2) provides for service on a corporation not within any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual. Literally, Rule 4(m) applies to service under Rule 4(h)(2). It may be useful to look into this.]

408, Elliot A. Glicksman for Arizona Association for Justice: "For example, in trucking cases, the very nature of a truck driver's job has them on the road, hard to find, and difficult to serve." 120 days often is extremely difficult; 60 days would often be unworkable. And the change would undermine the system of encouraging defendants to waive service.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Shortening the time for service is acceptable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Plaintiffs have the incentive to serve defendants as soon as possible. In multidefendant cases it is often necessary to request more than 120 days to effect

service on individuals and on agent partnerships in limited liability companies that are evading service. 448, Robert D. Curran, tracks 410.

443, Grant Rahmeyer: There is no need to change. "Corporations play shell games and intentionally make it difficult to serve the correct party."

457, Carl A. Piccarreta: "The 120 day limit has \* \* \* allowed for cases to informally resolve so as to avoid service of process and the initiation of formal/expensive litigation." And finding some defendants, for example interstate truckers, can be a problem.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The current time period should be retained. The Department often encounters defendants that attempt to evade service. It also often has cases involving multiple defendants, "some of whom can only be located with great difficulty." Shortening the time to 60 days is likely to discourage use of the Rule 4(d) waiver provisions. If the time is to be shortened, it should be to 90 days. And the Committee Note should state that the new limits may need to be extended where a defendant evades service or is difficult to locate. The Note also should say: "More time also may be needed to effect waiver of service under Rule 4(d)."

465, Neil T. O'Donnell: Plaintiffs attempt to serve as soon as possible. But some defendants are hard to find, and some avoid service. Reducing the time to serve also will interfere with the excellent rule for requesting waiver; the plaintiff will not know whether the defendant has waived until perhaps 25 days remain to make service.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: 60 days is not enough "in certain types of cases, most especially those with foreign defendants, or defendants who must be served by publication or other non-judicial means." The result will be more motion practice.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Reducing the time to serve will make the process less efficient because parties would often have to seek more time. "It would affect Oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

487, Peter J. Mancuso for Nassau County Bar Assn.: Opposes. The present rule does not prejudice plaintiffs or defendants.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Plaintiffs' attorneys at the conference thought there is little need for change;



pointed to the potential impairment of requests to waive service; and feared the effects when the "parties are trying to identify the defendant and the statute of limitations is close to expiring."

502, Peter Everett: 120 days allow more opportunity to try to resolve rather than litigate a dispute.

518, Robert Stoney: When a plaintiff comes late to the lawyer, "this requires a quick filing with time needed to prepare the case." 60-day service gives an advantage to the defendant.

November Hearing, Barry H. Dyller: p 183 Reducing the time to serve is unnecessary "because it's always in plaintiff's interest to get the summons and complaints served as soon as possible." And this is a de facto repeal of the Rule 4(d) waiver process – by the time I know there will be no response there will be about 25 days to accomplish service, and it is not always possible. I have never had a problem in getting extensions. But I generally serve by requesting waiver because that is most efficient; this will make me think twice about that.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: The proposal will undermine the procedure for waiving service. Finding the current name of a defendant may require research through a dozen mergers and acquisitions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The time should be not less than 90 days. Reducing it to 60 days will result in more motions to extend, "especially from parties with fewer resources to track down defendants' addresses and from pro se plaintiffs."

616, Marcia Murdoch: Insurance companies are often unwilling to discuss settlement until suit is actually filed. And "I have had numerous cases where defendants are not even known by the insurance company, and the insurance company requires service as propounded the rules." 60 days are not enough.

703, Jeffrey K. Rubin: "[G]iven that dismissal is without prejudice, at best this rule change increases costs by requiring refiling when a missing defendant is finally located."

726, Mark T. Lavery: "In most of the individual consumer cases that we file, we send a waiver of service to the defendant. \* \* \* [M]ost Defendants who are not interested in ducking service will waive service if given the opportunity." Reducing service time to 60 days will interfere with waiver practice – the plaintiff should have 90 days to serve when there is now waiver.

784, Michael Millen: Plaintiffs often approach me a few days before expiration of the limitations period. When I cannot take

the case I help them draft a pro per complaint. Then they look for an attorney to take over the case after filing it in pro per. And they are afraid to attempt to make service themselves while looking, lest they make a mistake. "There is a world of difference between finding an attorney in 60 days versus finding an attorney in 120 days."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal. It will require plaintiffs to be more diligent when seeking a waiver of service. The effects on relation back of an amendment changing defendants under Rule 15(c)(1)(C) do not alter the endorsement. In the small numbers of cases where limitations issues force filing before a Rule 11 investigation can be performed, 60 days are adequate.

1025, Senator Jeff Merkley, Senator Ron Wyden: The change "would affect oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

1054, Assn. of Bar of the City of New York: Generally 60 days is enough. But service under the Hague Convention on a foreign corporation or other entity routinely takes more than 60 days. Application of Rule 4(m) to service under Rule 4(h)(2) is not expressly excluded by the exclusions for service under Rule 4(f) and (j)(1). Courts seem to exclude such service, but offer no clear explanation. Rule 4(m) should be amended to expressly exclude service under Rule 4(h)(2). And the Committee Note might observe that pro se litigants often will deserve more time.

November Hearing, Nicholas Woodfield: p 235 Rule 4(m) is not broken; there is no need to "fix" it. And the reduction to 60 days will cause serious problems. In employment cases you often have a plaintiff appear at the last minute after receiving a right-to-sue letter. You're trying to protect the statute of limitations - "you can prepare pro se complaints over your own name or you can file it." Due diligence standards are lower in these circumstances; remember the defendant controls the evidence. Similar problems can arise in False Claims Act cases, which can be suspended under seal for months while the government decides whether to take over - long down the road, the government may decide not to intervene, but after accumulating much information that the plaintiff should get under the Freedom of Information Act. 120 days is not much time for that, much less 60. The full 120 days to serve may lead to a decision to withdraw the case without serving. And Rule 4(m) is not a major cause of delay in moving to final disposition. Routine motions to dismiss cause much delay. Another source of delay is taking too much time to decide motions for summary judgment.

January Hearing, P. David Lopez (EEOC): Agrees with the proposal.

February Hearing, Michael M. Slack: p 193 This is one of the several discussions that assumes the present 120-day limit applies to service on a foreign corporation. Even 120 days is not enough to comply with the often complicated treaty provisions that apply. We keep getting agitated calls from federal court asking why we have not made service within the limit. Please, please do not reduce it from 120 days.

*Exclude Condemnation Notice*

383, Alan B. Morrison: Excluding notice under Rule 71.1(d)(3)(A) from Rule 4(m) will create relation-back problems because Rule 15(c)(1)(C) governs relation back for a new defendant by invoking Rule 4(m). These problems may arise with some frequency because it may be easy to get wrong the names of persons with peripheral or remainder interests.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department suggested this change. "Service of a notice in condemnation actions is different from service of a complaint in other civil actions." Dismissal under Rule 4(m) for failure to serve the notice in 120 days would adversely affect, not benefit, prior landowners who are entitled to just compensation. The law now is as proposed by the amendment, which serves only to make the law clear.

RULE 16: TIME FOR SCHEDULING ORDER

(Some of the comments summarized here address case management generally, without focusing directly on the specific Rule 16 proposals.)

Nonofficial comments: It has been suggested that Rule 16(b)(1) should be revised to authorize standing orders that exempt categories of actions from the scheduling-order requirement. The point is that bankruptcy courts often adopt standing orders like this, and at the same time generally follow the civil rules. The published proposal simply carries forward the present provision: a court must issue a scheduling order "[e]xcept in categories of actions exempted by local rule." It would be easy drafting to add "or by standing order." The questions are whether it would be wise to do this as a general provision in the civil rules; whether the circumstances confronting bankruptcy courts suggest a special need for express authorization of standing orders; and whether, if there is a special need, it is better to meet it in the bankruptcy rules themselves.

This suggestion relates to an ongoing project to reconsider the permission to rely on local rules to exempt categories of cases from the scheduling order requirement. Rule 26(a)(1)(B) exempts nine categories of cases from the initial disclosure requirement. These exemptions are incorporated in Rule 26(d)(1), so the discovery moratorium does not apply. They also are incorporated in Rule 26(f), so the parties need not confer. It could be attractive to extend the exemptions to Rule 16(b)(1), displacing local-rule exemptions, so as to have a uniform set for these related purposes. The next step in this project is to study local-rule exemptions to determine whether they illustrate additional categories of cases that should be added to those now listed in Rule 26(a)(1)(B).

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves shortening the time to serve the worthy objective of reducing delay. There is some concern that the "good cause" exception will be routinely applied in cases involving parties with complex infrastructures and complex discovery issues. But, so long as the good-cause exception is retained, the court will have the necessary flexibility. The exception will address the problems that arise in multi-defendant cases when some defendants are served at the close of the 60-day period provided by revised Rule 4(m). The Committee Note should offer such cases as an example of good cause. November Hearing: Michael C. Rakower, p 287: Renews the Section's support, urging that "the good cause exception

should be underscored."

327, Malini Moorthy for Pfizer Inc.: [S]upports the proposed amendments to Rules 4(m) and 16(b) as important signals to the judiciary that early and active case management is critical \* \* \*." This goal can be furthered by using the rules "to encourage judges to develop standard discovery orders or case management plans that outline the scope of discovery and reinforce the parties' obligations to work together to manage discovery." Injecting judicial oversight, casting the judges as gatekeepers to prevent unnecessarily burdensome discovery will help end the use of onerous discovery merely as a leverage for settlement.

342, Stephen C. Yeazell: Exhortations to district judges to manage better are not likely to be effective. "Our experience, with Rule 16 and with the text of various Rules that already vest judges with the power to manage litigation, suggests that some simply will not or cannot." FJC conferences and manuals might help.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The proposal, adding "unless the judge finds good cause for delay," is "awkward because it implies that the parties have not been diligent, even though the court is to make its finding even before it meets the parties." The proposal should be revised to direct that the judge must issue the scheduling order within the prescribed times "unless the court anticipate that the complexity of the case, the needs of the parties, or the ends of justice warrant additional time."

352, Lee Kaplan: Supports the package as "commonsense recommendations that will speed up the litigation process."

383, Alan B. Morrison: (1) It would be better to state the time directly, rather than work backward from the Rule 26(f) conference. Require the parties to meet within a stated period after the first defendant is served, and set the scheduling conference at 21 days after that. (2) Delete "as soon as practicable." (3) Move "unless the judge finds good cause for delay" to the end of the sentence for better readability.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 16 proposals without further comment.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]he service of any defendant should not be the trigger for issuing a scheduling order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice:

"[A]ctive case management, particularly at the early stage of the case, is generally effective in reducing delay." But the amendment may be counterproductive. The integration of the discovery moratorium, the parties' Rule 26(f) conference, and the scheduling conference are designed to give the parties sufficient time to analyze the case before conferring and developing an effective discovery plan to present to the court. "[I]n many cases, scheduling orders issued under the accelerated time-lines will have been developed without sufficient time for the parties to discuss and plan proposed discovery and other case-related activities, and therefore to develop a comprehensive, carefully crafted case management proposal." "[P]reserving additional time at the outset of litigation pays dramatic dividends down the road." Acceleration will be a particularly pronounced problem in more factually complicated cases and in cases in which ESI may be produced. Counsel need sufficient time to understand their client's information systems before planning discovery. Acceleration, further, presents unique problems for the federal government. Time is needed to designate the proper litigator within the Department structure. Officials at client agencies also need time to organize and prepare. These needs are reflected in the additional time to answer provided by Rule 12(a)(2) and (3). All of these problems are accentuated in Bivens actions against individual government employees, particularly when time is needed to decide whether there is a conflict of interests that will lead to selection and payment of private counsel to represent the employee. And in districts that do not exempt actions under the Administrative Procedure Act from Rule 16(b), time is needed to understand the size and breadth of the record.

Some of these problems may be alleviated by the "good cause" exception added to the proposal, but the Department is concerned that relief "will be granted quite infrequently." At the least, the Note should recognize these problems by stating that good cause to extend the deadline will likely arise in complex cases (specific note language is suggested at p. 11).

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Applauds the proposed change.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Supports; it will improve the discovery process.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 16(b) proposals "to facilitate case management."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference, plaintiff and defense attorneys alike, "agreed that lawyers and parties are more cooperative when the judges are involved from the beginning of a case." Some thought the proposed case-management proposals should be adopted now, deferring the

"proportionality" amendment of Rule 26(b)(1) to see whether more active management under present rules will do the job.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The shortened time may get cases on a schedule earlier, and at least in theory lead to earlier resolution. But there is a risk that the shortened time will interfere with early court-sponsored settlement discussions. Southern District of California Local Rule 16.1, for example, requires an early neutral evaluation conference within 45 days after any defendant has appeared. Nearly 25% of civil cases there settle before the case management conference. Condensing the time to the scheduling conference may force the parties into an adversarial posture that interferes with early settlement efforts. It would help to state in the Committee Note that there is good cause for delay in a district that has an early neutral evaluation or ADR program.

635, Matthew D. Lango for NELA/Illinois: Supports.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, despite concerns that the reduction puts pressure to retain counsel, analyze the complaint, develop a litigation strategy and discovery plan, and prepare for and conduct the Rule 26(f) conference.

November hearing, Jack B. McCowan: p. 8: "I support the committee's goals of advancing early and effective case management."

November hearing, John C.S. Pierce: p. 24: Favors early case management. It provides an opportunity to consider the proposed presumptive limits and allow more discovery when appropriate.

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 "IJ welcomes the amendments encouraging early and active judicial case management."

November Hearing, Frank L. Steeves: p 302 Speaking from experience as General Counsel of Emerson Electric Co.: Our statutes do not function the way they are intended. Civil justice has "become reduced to a series of guides where cases can be just as much about finding and exploiting the other side's errors during pretrial phases as it is about finding what truthfully happened and therefore finding justice." Working with chief legal officers of companies across the globe, many of them cite our legal system as a reason to stay away from the United States. The proposed changes "will go far in knocking down opportunity for abuse." "Shortened discovery" will force a better focus at the outset. "[I]nvolvement of judges will enhance their early understanding," and reduce the "got-cha" mentality that clogs the courts.

January Hearing, Paul V. Avelar: p 250 The Arizona Chapter of the Institute for Justice "welcomes the amendments encouraging early and active case management."

February Hearing, Rebecca Love Kourlis, for IAALS: p. 37 The current systems involves gamesmanship. It is geared toward settlement, perhaps not a good thing. It is prohibitively expensive, not a good thing. Everyone agrees that more active judicial case management is a good thing; there is very little disagreement with that set of proposals.

February Hearing, Michael L. Slack: p 193 In several ways, this is a plea for more direct and active involvement by federal judges with their cases. Some do this. Many do not, viewing the process as too formal, too rigid. State-court judges in Texas are involved, with a status conference every 30 days. That is much better.

February Hearing, Conor R. Crowley: p 280 Endorses the Rule 16 proposals, and suggests several additions to "improve preservation," to include "privacy issues," and to state in the Committee Note that judicial intervention is appropriate only after the parties meet and confer in good faith.



RULE 16: ACTUAL CONFERENCE

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[A] scheduling conference is more effective if the court and the parties engage in direct simultaneous communication." E-discovery-specific disagreements should benefit significantly because they present numerous challenges. "Such challenges often manifest themselves in more pugilistic behavior as attorneys may be more willing to fight or use delaying tactics than address a novel issue." Still, geography or limited stakes may justify a conference by direct, simultaneous communication, rather than an in-person conference. And it is good to recognize that there are cases in which the judge can properly rely on the Rule 26(f) report without a conference.

316, Hon. Michael M. Baylson: Telephone conferences can be an effective and inexpensive way of conducting litigation in a great majority of cases. About half of the E.D.Pa. docket is employment discrimination and civil rights cases, with a congenial bar experienced in what discovery is appropriate. "Telephone" should be restored to rule text.

325, Joseph M. Sellers: Requiring telephone, in-person, or "other real-time means" for the conference is unobjectionable. But it does not seem likely that many conferences are held by mail now. And the real problem is that "scheduling conferences are often not focused on achieving early disclosure of key evidence, or are not held at all. Both attorneys and courts would benefit from stronger guidance on how to structure early scheduling conferences to identify key issues and design discovery and pre-trial process accordingly." November Hearing: p 306 Renews the theme. Speaking to civil rights cases, shares the concerns many have expressed as to the proposals on proportionality, numerical limits, and cost shifting. Contingent-fee attorneys are very careful about the discovery they undertake. The problems arise from a one-size-fits-all set of rules. "[M]uch earlier and more active involvement by the courts in the management of discovery would help greatly." Rule 16 should be amended to require this. Courts, working with the parties, could often stage discovery, "focusing on those matters that they believe \* \* \* are especially central to one side or the other or both." Courts now are empowered to do this, but they should be directed to do it. There may be some judges who will resist such a direction in the rules, but they should come to recognize that the investment of time at the beginning will be more than repaid by savings at later stages of the process. And it will be useful to wait to see what lessons can be learned from ongoing pilot projects, such as the complex litigation project in the Southern District of New York.

383, Alan B. Morrison: The idea is sound. It would be clearer to add " \* \* \* at a scheduling conference involving simultaneous

communication."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "The Department strongly supports the option of conferences by telephone or more sophisticated electronic means," particularly when that saves travel time and expense.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: A firm and reliable trial date is the best means to speed up an action. This does not mean a "rocket docket." In the past, "every new case filing would result in a status conference with the assigned judge." That no longer happens. But a party ought to be able to request a Rule 16 conference – or, if not a Rule 16 conference, an opportunity to "see the judge to discuss the progress and prospects of a case before the trial starts."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Endorses the proposal, "but we hope that in time, and with some experience, the Committee will see fit to make initial pretrial conferences mandatory." Even if a Rule 26(f) report provides a sound basis for a scheduling order, an "initial pretrial conference could do more than simply serve as the basis for a scheduling order." It can inform the court about the issues, and may narrow the issues. It provides an opportunity for the judge to get involved, learn the issues, and tailor the case. "Multiple pilot projects have emphasized the importance of the initial pretrial conference." If proportionality is incorporated in the discovery rules, "it reasonably falls to the judge to make that determination, and early engagement by the judge facilitates a fair and appropriate analysis."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was consensus at the conference that in-person conferences are more effective. Some would go further, to require face-to-face conferences absent good cause. But it was recognized that technology can offer creative and less expensive means.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses eliminating "by telephone, mail, or other means" as "outdated and unnecessary."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": "[I]t is an improvement to require that scheduling conferences be held by simultaneous and live communication \* \* \*."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. Telephone conferences are still permitted, but removing the word from the rule suggests preference for an in-person conference.

RULE 16: PRESERVING ESI, RULE 502 AGREEMENTS

287, Lynne Thomas Gordon, for the American Health Information Management Association: AHIMA members "typically manage electronic health record (EHR) systems." They play a key role in e-discovery. Federal statutes and regulations converge and overlap with the Civil Rules "to create an entangled environment ripe for e-discovery requests." The healthcare industry "is still primarily focused on the implementation of EHRs and their use in providing clinical care, rather than establishing new systems, processes, and policies to respond to litigation and regulatory investigations." The early stages of litigation often take far too long. To address this problem, and to ensure that "all forms, formats, and locations of information are preserved," the court should ensure "that qualified and credentialed HIM professionals are actively involved early on in any/all matters involving healthcare litigation or regulatory investigations."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports adding to the subjects of a scheduling order, and of a Rule 26(f) conference, preservation of ESI and Evidence Rule 502 orders. (1) At the conference the court may modify current preservation practices and set the rules for post-order preservation activity, providing greater certainty. Together with Rule 26(f)(3)(C), this will provide a strong incentive for the parties to cooperate on preservation issues and either agree or clearly identify their disagreements, providing a means to address preservation issues more efficiently. (2) The reference to Rule 502 will likely focus the parties' attention on the importance of such agreements. Increased use of Rule 502(d) orders will be a good thing.  
November Hearing: Michael C. Rakower, p 287: Renews the support.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Adding "preservation" to the list of topics is endorsed. But greater change is suggested, in part to bring all forms of information into the reach of preservation:

~~(iii) provide for disclosure, discovery, or preservation of electronically stored information. address the scope and limitations of discovery or preservation;~~

Suggests adding these words: "including agreements reached under Federal Rule of Evidence 502 and any agreements addressing legally protected privacy interests." This "would facilitate the resolution of an issue that is of increasing concern in civil litigation.

In Appendix C, an addition is suggested for the Committee Note that comments on providing for preservation of electronically stored information: "judicial intervention is appropriate only after the parties meet and confer in good faith about these issues." This suggestion seems tied to several other suggestions for revising Rule 16(a) and (b). Some of the

suggestions are noted in "other" at the end of these summaries; others go to more general preservation and spoliation issues focused on Rule 37(e).

349, Valerie Shands: This comment bears indirectly on the proposal, suggesting the rules should "enhance claw-back provisions for inadvertent disclosure," so that "one could speed up the process by allowing the producing party to disclose all of the information, then retract the few pieces that may be privileged."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Supports, but urges that preservation should be discussed by the parties and incorporated in the scheduling order in terms of all evidence, not only ESI.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports inclusion of Rule 502(d) in the list.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal, and the parallel provisions in Rule 26(f). The effort to encourage attorneys to discuss Evidence Rule 502(d) orders is desirable. Rule 502(a) is an underused but potentially valuable tool; a well-developed plan framed by a Rule 502(d) order "can all but eliminate the potential waiver of privilege during the production process."

RULE 16: CONFERENCE BEFORE DISCOVERY MOTION

292, Lyndsey Marcelino. for The National Center for Youth Law: "[R]equiring an information conference with the court before parties file discovery motions may reduce the time between service and a Rule 16 conference." That will be helpful.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Many local rules and many judges require a conference or a short letter before a discovery motion. Anecdotal experience suggests this reduces the number and burden of discovery motions. Some question whether a terse presentation could predispose the court to a decision before an adequate presentation is made by motion papers. So it is wise to make the pre-motion conference an option, not a requirement for all cases.

325, Joseph M. Sellers: This comment provides a strong endorsement of early, active, hands-on case management, summarized with the "discovery generally" comments. The pre-motion conference is such a good idea that it should be made the default – a judge who strongly resists this approach could opt out, but more judges would be encouraged to use it.

349, Valerie Shands: Suggests it will be useful to increase informal resolution of discovery disputes by a brief conference call with the judge.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Supports. "The vast majority of discovery disputes are simple and can be quickly resolved in a telephone conference with the court."

357, Joanne S. Faulkner: Courts already have the discretion to require a pre-motion conference. "[M]y experience is that off-the-cuff discovery rulings are often based on less than adequate information (such as would be contained in a brief)" and are wrong.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: This is acceptable.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: "Several jurisdictions around the country \* \* \* have implementd similar procedures \* \* \* with very positive results."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was broad support at the conference, from both plaintiff and defense attorneys. They reported positive experiences. Some noted that it may be useful to require a one- or two-page letter before the pre-motion conference. And some urged that the pre-motion conferences should be required before dispositive motions, including summary judgment motions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Because the proposal only permits and does not require a pre-motion conference, the Association is not opposed. But it would oppose a requirement that might conflict with local rules or practices.<sup>7</sup>

623, R. Matthew Cairns: Chief Judge LaPlante, D.N.H., "has this requirement (although his colleagues do not) and it has proven to be highly effective." February hearing, p 6, at 10: says the same.

635, Matthew D. Lango for NELA/Illinois: "This change will encourage cooperation between the parties, reduce gamesmanship, and generally aid in the efficient and speedy resolution of claims."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports.

November hearing, John C.S. Pierce: p. 24: My clients – defendants – do not like discovery disputes, do not like paying for them. Getting the judge on the phone resolves the issue. "That is a wonderful tool \* \* \*."

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Fully endorses this proposal.

RULES 26 ET SEQ.: DISCOVERY GENERALLY

261, David McKelvey: The proposals will not streamline litigation, but will favor parties with more financial resources to investigate matters presuit.

283, Christian Mester: Large companies and insurance companies routinely ignore interrogatories and requests for documents, forcing plaintiffs to make motions to compel that are unpopular with judges. The rules changes would prevent discovery that has been available under the present rules, taking procedure back to the days of trial by ambush, and placing plaintiffs at a further disadvantage.

286, Stephen J. Herman: Comments primarily on Rule 26(b)(1), but adds a footnote: "[T]he existing and proposed Rules attempt to 'micro-manage' the litigation process, and legislate issues that are better left to the Court's discretion, to be applied on a case-by-case basis." So generally opposes the proposed changes to Rules 30, 36, and 37, as well as the other changes to Rule 26.

289, Craig B. Shaffer & Ryan T. Shaffer: Magistrate Judge Shaffer begins this 30-page article, 7 Federal Courts Law Review 178, 179, by noting that the proposals "May become a background on which competing philosophical perspectives wage war over the role of civil litigation in today's society."

291, Fred Slough: As it is, in discrimination and consumer cases discovery limits have been closing the federal courts for the ordinary American. Plaintiffs need adequate discovery, but the limits imposed work all to the advantage of defendants who have all the information and need little from plaintiffs.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: "The uncertainty that these changes will inject into discovery will lead to mountainous collateral litigation \* \* \*."

301, Hillary G. Rinehardt: "The proposed changes will negatively impact almost all plaintiffs, but in particular those plaintiffs involved in complex litigation where there are multiple defendants." Typically defendants control the majority of relevant information, and will have new tools to avoid providing it.

302, John K. Rinehardt: Verbatim the same as 301.

306, William C. Faber, Jr.: "The complex organizational structure of organizations demands more discovery than the changes provide." There is little help for senior citizens seriously injured by the neglect of a nursing home or a citizen wounded by international banks' financial fraud."

310, Johnathan J. Smith, for NAACP Legal Defense Fund: "[T]he proposed amendments \* \* \* threaten to undermine the ability of civil rights plaintiffs to obtain relief through the federal courts." And the impact of limiting discovery (and limiting sanctions for failure to preserve discoverable information) should be assessed in the context of other recent developments that have made it more difficult to prevail on civil rights claims. Pleading standards have been raised. Class certification has become more difficult.

318, Brian Sanford: Further restrictions on discovery will mean that summary-judgment records are even more different from trial records. The restrictions will favor the defense and infringe on the right to jury trial. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

322, Michelle D. Schwartz, for Alliance for Justice: Includes a long preface to more specific comments. The proposals will not only make it more difficult for plaintiffs to stand up for their rights in court. They also will make it more difficult "for the public to learn of corporate wrongdoing and threats to their health and safety." These effects must be considered in a broader context that is restricting access justice. (1) Courts are understaffed and overburdened. (2) Forced arbitration clauses divert disputes to private proceedings with no discovery and "conducted by an arbitrator of the company's choosing." (3) Access to class actions is being limited. (4) Pleading standards have been heightened. Compounding these problems by restricting discovery will make plaintiffs less willing to come forward, and will make attorneys less willing to take their cases. Private enforcement of public policy will be further limited.

324, Jonathan J. Margolis: Writes primarily for employment plaintiff litigation, but reflects on other types of cases as well. Cumulatively, the proposed changes will favor those who have more information – commonly defendants – and harm those who have less – commonly plaintiffs. Information imbalance is especially rife in civil rights litigation. "The progression that has led to the near-extinction of civil trials will only be exacerbated if less discovery is permitted \* \* \*." The amendments, moreover, will encourage misuse of discovery by obstructionism. Efficiency will be impaired by more frequent motion practice – for example, there are few motions to take more than 10 depositions, but there will be many motions to take more than 5. There is little evidence of any need to impose these changes and costs.

325, Joseph M. Sellers: The proposed discovery changes will unsettle the law, "requiring parties more often to appeal to the courts to obtain discovery in excess of tightened presumptive limits, and providing more hooks on which to hang objections \* \*



\*." This comment includes a lengthy statement of the advantages of early, active, hands-on case management, but "agree[s] with the Committee's point that adoption of new, universal mandates regarding judicial case management is likely premature \* \* \*." Much can be learned from pilot projects, such as the NELA protocol for employment cases and the S.D.N.Y. complex-case project. And individual judges, such as Judge Grimm, are helping to mark the way through discovery management orders.

329, Bryan Spoon: "The proposed changes benefit large corporations and add another barrier between a Plaintiff and the materials that could prove, or disprove his/her case." (It is not clear from context whether this addresses only proposed Rule 37(e), or other of the proposals more generally.)

331, Robert DiCello: (These brief comments seem to be addressed to various aspects of the discovery proposals, although only the numerical limits proposals are directly identified.) There is no problem of excessive discovery. The numerical limits are too low for many serious or complicated cases, and will disproportionately impact civil rights case. They are completely one-sided in favor of defendants, and do not do much of anything to penalize obstruction in discovery and unwarranted motion practice. They will not make litigation more accessible to every day citizens.

332, Samuel Cohen: The proposals will not reduce costs; instead they will increase motion practice. They will disadvantage plaintiffs litigating against well-resourced defendants. The limits on depositions and document requests (?) should not be enacted.

335, Rebecca Heinegg: The proposals are one-sided. They hurt plaintiffs by limiting discovery, "but do nothing to penalize obstruction in discovery and unwarranted motion practice."

336, William York: The proposals are one-sided. They will limit discovery, hurting plaintiffs' attorneys. They will increase contention and disagreements, leading to more contentious motion practice.

340, Joseph Treese: Seems to be aimed at the full package of proposals in suggesting careful consideration of the expanded case-management burden faced by the judiciary.

341, Karen Larson: "These limitations on discovery are strictly for the benefit of defendants," who hold all the evidence. Plaintiffs largely bear the cost of depositions anyway. Further discovery disputes will result.

342, Stephen C. Yeazell: "[A]vailable empirical evidence does not suggest a crisis in civil litigation of the scope that would

merit the proposed changes. The FJC studies "do not portray a system in need of the[se] wide-ranging changes." They show only that occasional bad lawyers or less-than-diligent judges allow pretrial proceedings to impede justice. The studies contradict the proposals.

349, Valerie Shands: "As lawyers and judges, we suffer from perception bias." "[I]t may be that the length of time for discovery is entirely necessary and proper." Hard research is needed. We do not have it. The FJC analysis of surveys, including one by the American Bar Association Litigation Section and one by the American College of Trial Lawyers, shows remarkable inconsistencies of results. Further, "[t]he trial itself requires roughly two times the amount of man hours as the discovery process."

Also suggests amending Rule 37 to increase the use of sanctions to teach many attorneys that they can no longer "get away with frivolous motions, irrelevant discovery requests, and unfounded blanket objections."

351, Eric Hemmendinger for Shawe Rosenthal LLP: Discovery is the major reason for the excessive cost of litigation. It often pressures employers into settling nonmeritorious cases.

354, Joseph Scafetta Jr.: Rather than allocate this one paragraph among the several topics it covers, the point is that the rules should be expanded to allow more discovery. Not 10, but 20 depositions; not 25, but 50 interrogatories; unlimited requests to admit. "[C]ost should never enter into the equation defining what is discoverable."

357, Joanne S. Faulkner: Adopt a rule that discovery objections are waived unless the objector initiates and conducts a good faith conference within two weeks of the objection." "[T]ypically I have to chase objecting counsel for weeks on end to get a 'good faith' discovery conference going."

361, Caryn Groedel: From the plaintiff's perspective in employment law, the proposals appear "overwhelmingly and undeniably aimed at chilling the number of lawsuits filed in the federal courts."

364, Sarah Tankersley: In medical malpractice cases, defendants have vastly superior knowledge and much more documentation. "Restricting the ability of parties to obtain relevant information is going to lead to unfair results."

366, Paul D. Carrington: There are occasional excesses, but the FJC data do not support the claim that discovery is generally excessive. It has been made expensive by hourly billing, but the hourly fees in responding to requests to produce and sending teams of lawyers to depositions are declining, and technology

will bring further reductions. "The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the rights of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses."

371, AJ Bosman: In civil rights cases, "[I]t is already next to impossible to obtain necessary discovery in an action, with Defense counsel taking full advantage of the current rules to hide evidence essential" to plaintiffs. "Judges routinely interpret the existing rules against Plaintiffs and in favor of Defendants \* \* \*." "Raising the bar to obtain essential and necessary evidence is just going to leave Plaintiffs and their attorneys at the mercy of big companies and their big law firms – and the Judges with another excuse to favor the Defendants." Remember fee-shifting statutes reflect the role of private attorneys general. Please reconsider, or at least provide some protection for plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: AAJ disagrees with the claim that excessive discovery occurs in a worrisome number of cases, and creates serious problems. These concepts are not defined by the Committee. The FJC demonstrates there is no pervasive problem with discovery. In complex, high-stakes cases the parties will agree to extend beyond the narrow restrictions set by the proposed rules. The impact will occur only in cases involving smaller plaintiffs against large defendants. And they will create an incentive to maintain information in forms that are costly to access, in order to claim the cost of production outweighs possible benefits.

Additional general observations at pp. 24-25 suggest that the proposals will force plaintiffs "to engage in these mini-trials to prove unknown facts in order to even discover the facts." With less fact discovery, parties will have to rely on more experts to prove their cases; defendants can cover the cost, but plaintiffs cannot.

So, p. 25: "It is worth noting that this Committee and even the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach."

pp. 27-31 examine the "empirical" studies relied on by defense interests to show a crisis in discovery and conclude that the studies are biased. Other studies show discovery is working well.

The conclusion, pp. 31-33, argues that close analysis shows that discovery problems lie not in disproportionate costs imposed by small plaintiffs on corporate defendants, but in defendants that "deliberately drive up the costs of discovery by fighting discovery, hiding relevant documents, and coming up with excuses to avoid producing discovery that will allow the other side to

meet its burden of proof." Taken together, the proposed changes will have a devastating impact, and are a solution to a problem that does not exist.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Empirical evidence shows that the discovery system is working well. The presumptive limits would strip judges of the flexibility they now use to manage discovery as they find necessary. The proportionality standard will be impossible to apply.

The proposed changes "are extremely controversial and nearly universally opposed by the plaintiffs' bar." They are not ready for prime time.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): "[T]hese proposed rules appear to be the Committee's attempt to 'legislate' some form of tort reform."

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proposed changes should be considered in the context of other procedural hurdles – heightened pleading, obstacles to class certification, enforcement of arbitration clauses in consumer contracts, and those imposed by the Prison Litigation Reform Act.

383, Alan B. Morrison: "All of the changes move in one direction – less discovery – not just for the mega-cases, which are the only ones with reported problems, but for all cases. \* \* \* [C]umulatively they will have a very negative impact on many plaintiffs." And they will narrow judges' discretion by putting a heavy thumb on the scale of less discovery. Balanced recommendations would include a softening of the impact of the Twombly and Iqbal pleading decisions. The Committee should step back and ask whether these changes, which reduce a plaintiff's chance of prevailing, achieve a fair balance. When it is prepared to recommend adoption, the Committee should seek another, very brief, period of comment on its style choices, not the substance, to ensure the rules are as clear as possible.

The discovery rules have become very detailed, perhaps because of the process of incremental changes. They can become a trap for those who do not regularly practice in federal court. It may be too much to ask the Committee to take a fresh look at making the rules simpler and better integrated, but the problem of increased complexity should be kept in mind in considering these proposals.

384, Larry E. Coben for The Attorneys Information Exchange Group: On the whole, the pretrial discovery system continues to work well. The rules are not broken and do not need fixing. More importantly, the proposed changes will make discovery more expensive, more time consuming, and less productive. Responding

to the submission by the Ford Motor Company, offers examples, illustrated by lengthy attachments, of cases in which courts found in appropriate attempts to avoid discovery.

386, Arthur R. Miller: Decisions and rules amendments have erected a series of procedural stop signs that narrow citizen access to court. The effects both reduce individual remedies and curtail enforcement of important public policies. To a large extent defendants, by general motion practice and resistance to discovery, are to blame for high litigation costs. "Some restoration of the earlier philosophy of the Federal Rules seems necessary." These proposals turn away from the original vision of a relatively unfettered and self-executing discovery regime.

Changes designed to narrow discovery began in 1983. "In retrospect, the Committee's and my collective judgment was impressionistic, not empirical. \* \* \* [T]ime has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26. those doubts continue to be applicable to the comparable assertions one hears today." And the attack on discovery has continued in the 1993 amendments limiting the numbers of depositions and interrogatories and the 2000 amendment that required court permission to discover matters relevant to the subject matter of the litigation. The present proposals would magnify these limitations.

The problems of e-discovery are likely to resolve themselves as information retrieval science and technology prove to reduce costs, accelerate the process, and enhance the accuracy of retrieval through a combination of statistics, linguistics, and computer science.

"The Committee should focus more on how to make civil justice available to promote our public policies." "[O]ur civil justice system has lost some of its moorings." Much can be achieved through more extensive and sophisticated judicial management, and by promoting cooperation between and among counsel. It might even be wise to seek amendment of the Rules Enabling Act, as by removing the restriction to "general" rules so as to support rules that are specific to types of litigation by complexity, dimension, or substantive subject. January Hearing, p. 36: Professor Miller repeated the same themes, adding that there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect. We should not be preoccupied with the cliched invocations of cost, abuse, and extortion. Abuse is in the eyes of the beholder. Extortion is the settlement you just agreed to.

472, Christopher Benoit: Supports the perspectives offered by Professor Miller.

387, Morgan S. Templeton: (For want of a more obvious place to summarize:) "I want to let the Committee know that I support the proposed changes \* \* \*."

392, Senators Christopher A. Coons, Patrick J. Leahy, Richard J.

Durbin, Sheldon Whitehouse, and Al Franken: Specific mention is made of the reduced presumptive limits in Rules 30, 31, 33, and 36, but the general tenor is addressed to all of the discovery package, expressing the fear that the proposals are insufficient to address excessive discovery and susceptible to limiting access to justice. This is the full summary.

The Senate Judiciary Subcommittee on Bankruptcy and the Courts held a hearing on the discovery proposals on November 5, 2013. Four questions were explored.

(1) "We have no doubt that discovery abuses exist and contribute to excessive litigation costs when they occur." But there is a need for "a lot more empirical data." The Advisory Committee recognizes that in most cases discovery is reasonable and proportional to the needs of the case. Corporate structures and profits have grown; it should be expected that discovery costs will vary in proportion to the stakes of the litigation.

(2) It is doubtful whether the proposals will reduce excessive costs in the worrisome number of cases where discovery is said to be excessive. Attempts to curb perceived abuses are reflected in amendments made in 1980 (adding discovery to the pretrial conference); 1983 (adding proportionality); 1993 (adding presumptive numerical limits); 2000 (narrowing the scope); and 2006 (addressing ESI that is difficult to access). Additional "stop signs" have been erected in pleading, summary judgment, and class certification. All of these make litigation costs a persisting problem. Why would we expect proportionality, and tighter numerical limits, to work where other attempts have failed? "We fear that they would not."

(3) The proposals are likely to have significant collateral effects with "civil rights, consumer rights, antitrust, and other litigation where the government lacks sufficient civil and criminal enforcement resources to achieve optimal deterrence of socially injurious behavior." This is especially true in civil rights litigation, where social disapproval of discrimination means there often is no "smoking gun," forcing plaintiffs to rely on circumstantial evidence that is within the power of the defendant. Only one side is likely to benefit from the new limits in these cases. And the proposals will encourage defendants to increase motions practice before any facts are discovered, imposing especially burdensome burdens on clients with few resources.

(4) Rather than throw plaintiffs under the bus because of dramatic stories about million-dollar discovery cases, other means should be tried. Judicial training should be pursued. More judgeships should be created when needed, and qualified nominations promptly confirmed. Technology may offer solutions to the perceived cost of electronic discovery. And clients can monitor counsel to reduce the incentives created by hourly billing.

397, Patrick Barry: "The proposed amendments are wholly unwarranted and would further tilt the balance against those of

limited means and limited power." Lawyers should be trusted to behave professionally, not strangled by new rules.

401, Urs Broderick Furrer: Many of the proposals will streamline litigation, reducing time and expense. The Committee should consider adopting the additional proposals made by Lawyers for Civil Justice.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Begins with a long list of reasons why plaintiffs need much discovery. These are noted with the proposed numerical limits. But includes the observation that defendants in product liability cases commonly disclose the hot documents, plans, prior test results, and prior similar incidents only at the end of discovery, and only after the materials are uncovered after multiple depositions, request, hearings, and orders. Defendants, further commonly demand confidentiality agreements as part of settlement, and non-sharing agreements and protective orders to prevent plaintiffs in other cases from easily obtaining the fruits of discovery in concluded cases.

412, Mark S. Stewart for Ballard Spahr LLP: "The high cost of electronic discovery distorts the litigation process." It "tilts toward an asymmetrical burden" because plaintiffs in mass tort or class-action securities cases, and patent assertion entities generally do not bear the same discovery burdens as defendants. Plaintiffs' counsel "frequently focus on the discovery process itself as a means of obtaining strategic leverage."

424, Patricia Shaler: Supports the discovery proposals "for the reasons set forth by John Kyl, WSJ, Jan 21, 2014." And Rule 11 should be enforced more frequently. "Civil litigation has morphed from its intended purpose to an abusive, pugilistic battleground by lawyers and for lawyers."

426, James Moore: Writes as a non-attorney, inspired by John Kyl's column, noted with 424 above. Supports the proposed changes to Rule 26, having observed actions in which discovery is a fishing expedition, and in which frivolous actions are settled as a business decision to avoid the costs of discovery. Suggests consideration of the British system in which the plaintiff pays defense costs if the plaintiff loses.

428, Dave Stevens: Writes as owner of a small campground to support "any and all rule changes that might reduce the cost of discovery." Discovery and other costs seem to lead insurance companies to just settle. And insurers are no longer willing to cover many of the activities formerly provided at the campground, forcing the owners to withdraw those activities – no diving boards, no rope swing, no renting kayaks, no zip line.

429, Lori Overson: "I second the comments of James Moore [426

above] and Senator Kyl."

430, Attilio Di Marco: Strongly supports the revisions of the discovery rules "because they will decrease the high cost of litigation in federal courts."

431, Tom Ingram: Participated as an "expert witness" in a 9-year litigation. In the first week on the job he wrote a "request for disclosure" that produced the smoking gun. Four years of discovery followed, generating 200,000 pages of discovery that was not nearly as useful. Eventually they settled for \$3.5 million, but the CEO who chose to accept this sum repeatedly said they would have been better off to drop the suit and get back to business. Do anything you can to reduce the delay, cost, confusion, and opportunity for lawyer abuse arising from the discovery system.

432, Michael Croson: "I am in favor of the proposed changes to Rule 26."

437, Craig Rothburd: "The way to streamline litigation is not by placing limitations on information gathering, which harms all litigants and only benefits larger more powerful interests, but instead to provide more flexibility to the Courts in fashioning realistic and measured discovery plans." Many courts do that now.

438, Pat Smith: "These rule changes are common sense and should be enacted."

439, Kate Browne: "I have been a lawyer for almost 30 years and strongly believe the proposed rule changes would be very positive for all litigants."

440, Steve Mack: Writes not as a corporate lawyer but as a stockholder in many companies: "I support the proposed changes to discovery rules that will limit in scope the ability of parasitic plaintiffs/plaintiff attorneys to force defendant companies to spend inordinate sums of money" and to settle meritless claims to avoid discovery costs.

441, Cheryl Conway: The current rules of discovery damage nonprofits as well as for-profit enterprises. This very expensive legal process gives the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer.

442, Christopher Wright: The rules are not broken. Why fix them? The proposals "will only serve to deter meritorious cases, and give corporate defendants a tactical and evidentiary advantage over plaintiffs."



445, Gerald Acker, for Michigan Assn. for Justice: Endorses the comments submitted by AAJ. The proposals lack balance – they help defendants at the expense of plaintiffs, particularly in asymmetric information cases. There is no empirical demonstration of problems that need to be corrected; concerns about e-discovery should not sweep the board. The proposals have a cumulative impact. Less discovery means that more cases will be tried because the parties cannot accurately assess the risks of trial.

447, Charles Crueger: "I have never had a client even suggest that a case should settle because of the cost of discovery." Nor has an opposing party ever settled for this reason.

451, Brian McElwee: Favors the discovery proposals. "You only have to have one experience in a system that requires years to process and costs disproportionate to any possible outcome to know that the system needs to be improved."

452, David Hill: Many years a chief financial officer of various companies showed the need to seriously curtail fishing expeditions in discovery.

466, Lisa O. Kaufman for Texas Civil Justice League: "[S]trongly supports changes to FRCP 26(b)(1) that limit the scope of discovery to clearly pleaded claims and defenses." Texas has adopted changes that accomplish many of the same goals. "Our members report to us that these changes have reduced discovery costs and promoted better cooperation between parties without in any way impairing full and fair discovery."

471, Robert Fisher: Supports the proposed changes. Discovery is often more about gamesmanship than a legitimate effort to find relevant information.

474, Adam Childers: As an employer representative in employment-related matters, fully supports the proposals as "long past due."

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The proposals will lead only to more law and motion practice. There is no empirical evidence to support them; the FJC study shows that discovery generally is working well, reflecting wise exercise of judicial discretion. Tools to control discovery already exist. Perhaps the time has come to create two tracks for discovery – one for "complex" cases in which no limits apply, another for other cases in which the current limitations apply (perhaps with some modification).

481, J. Paul Allen: Supports. "Please narrow the scope of discovery to that which is necessary to the dispute."

482, Charles Cavas: Supports the proposals, which will restore rationality. "Tactical abuse of the existing rules has created a

system where too often fair resolutions do not occur but rather are driven by extortionist discovery demands and resulting expenses."

484, Torgny Nilsson: Supports the discovery proposals, but notes "that no amendments to the Rules will solve discovery abuses in general until the federal courts start aggressively holding both counsel and their clients accountable through monetary and other sanctions for their failure to abide by their discovery obligations."

485, Peter Morse: Supports the Rule 26(b)(1) changes "and believe that even more practical considerations should be made."

486, Timothy Guerriero: In supporting "the proposed e-discovery amendments," seems to embrace the discovery proposals in general as "just a small step in bringing some rationality and common sense to this aspect of our court system."

490, Patricia W. Moore: Professor Moore opposes the proposed amendments, but focuses on discovery. (1) The FJC Study shows discovery does not impose unreasonable cost of delay. (2) Average case disposition times, the best indicator, have remained essentially stable since 1986. (3) Judges and lawyers are well aware of proportionality, and implement it, as shown by many cases easily retrieved on WestLaw. (4) Federal courts are widely perceived as pro-defendant; these proposals will aggravate this perception.

494, Charles R. Ragan: "I have no doubt that some requesting parties have used the existing rules to force settlements on the basis of cost, rather than the merits of a case. On the other hand, I have no doubt that some producing parties have sought to delay merits adjudication or obfuscate factual issues through mischievous production tactics. It does not follow from these perceptions that the Committee should try in the rule-making process to legislate against every potential 'bad actor.'"

540, Alex Dahl for Lawyers for Civil Justice: Supplements comment 267, pointing to the testimony of several witnesses describing the great volumes of information preserved and produced. Discovery is slowing, and often preventing, reaching the merits.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "Important changes have been made to the rules, especially Rule 26, in recent years. Judges and lawyers need time to learn to use the changed rules, so that we can assess the efficacy of the changes that have been made and what further changes might be productive." Sufficient time should be allowed for any of the proposed changes to become part of the legal culture before undertaking any further changes.(1) The FJC study itself shows that discovery is a problem only in a small fraction of federal

cases. (2) Past efforts to reduce the burdens of discovery in these cases – involving high stakes, complexity, contentiousness, big law firms, and hourly billing – have failed. There is no reason to suppose that the present proposals will succeed on this front. (3) But the proposals will impede desirable discovery in many of the cases that now do not present problems. They will limit access to information, particularly in cases where one party holds much more relevant information than another. They will increase motion practice, in part because they are confusing. (4) The causes of high litigation costs may lie outside the Civil Rules; "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (5) All of the proposed changes to Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable \* \* \*."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The FJC study shows that discovery is not a problem in the large majority of federal cases. Even cases that involve high levels of discovery may well deserve high levels of discovery. (2) These proposals will not be effective in reducing the burdens of discovery in the cases that do encounter excessive discovery. The causes lie in the nature of the cases – high stakes, complex issues, contentious behavior, big law firms, and hourly billing. Attempts to address these problems in 1993 and 2000 have failed. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (3) These proposals will limit desirable discovery in cases that are not a problem now. (4) The changes, moreover, will engender confusion and invite increased motion practice. (5) All three of the major changes in Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable \* \* \*."

630, Jon Kyl & E. Donald Elliott: "The process needs to move to conclusion. Frustrated parties and interests have other options, such as the Congressional action being pursued on patent litigation reform." "Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in, with results that are not always easy to predict."

634, William W. Large, Mark K. DeLegal, and Matthew H. Mears for The Florida Justice Reform Institute: "The current rules do not adequately protect litigants from excessive discovery." "As a whole, the package of Proposed Amendments will be a decisive step forward."

684, Michael E. Klein for Altria and Philip Morris USA: "PM USA has maintained a public website containing documents it has produced in all products liability litigation. Today, plaintiffs have access to more than five million documents – nearly 25 million pages of information that detail virtually every aspect of PM USA's business since the 1930s."

707, David Angle: "These proposed amendments are transparently corrupt." And reprehensible.

729, Stephen B. Burbank: (1) After a detailed review of discovery rule amendments from 1980 onward, concludes: "Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective, further discovery amendments at this time (other than those that address special problems, as in 2006 and 2010) are at best premature. At worst they are overkill." (2) "[I]t is disconcerting to see how little attention the Advisory Committee has given to the benefits of litigation and discovery." Congress relied on simplified notice pleading and broad discovery in enacting many statutes that rely on private enforcement to substitute for public enforcement in implementing broad economic, political, and social values. The Enabling Act exercises delegated legislative power. It is not an exercise of Article III judicial power. The proposed reductions in discovery risks destabilizing the infrastructure that Congress has relied on. (3) It is a mistake to fixate on the ideal of transsubstantive rules to adopt amendments that aim at the problems generated by a small subset of contentions, high-stakes litigation but inflict serious costs on the much larger range of ordinary litigation.

730, Langrock Sperry & Wool: "[W]e've watched with growing alarm as the federal courts – once the models of even-handed justice in civil cases, where the 'little guy' could hold accountable even well-funded corporate wrongdoers – increasingly tilt in favor of the defense. We urge the Conference to reject" [the discovery and Rule 4 changes].

1023, Brett J. Nomberg: The survey prepared for the ABA Litigation Section was prepared by an attorney at one of the largest defense law firms. "Many lawyers who received the questionnaires wrote back stating that there was a clear bias in the survey questions." The bias pushed toward responses favoring limitations on discovery.

November Hearing, Altom M. Maglio: p 28: The proposed changes send the message to magistrate judges and district judges that they have been allowing too much discovery, real discovery. But real discovery is needed.

November Hearing, Cory L. Andrews for the Washington Legal Foundation: p 42 "[T]he status quo is completely unacceptable." "[D]iscovery-related costs are a competitive drag on the American economy." They deter foreign companies from locating here. They harm the international competitiveness of American business. They are passed on to consumers. This is a matter of fundamental fairness; "[t]he fact that an injustice is visited on litigants with a high net worth is no more reason to ignore it than if an injustice is visited on low net worth litigants." No litigant should be forced to settle an unfounded claim because the discovery costs of defending on the merits are too high. The proposals are "modest, they're incremental, they're common sense. They're not radical. They're not draconian." Costs can run out of control even in commercial litigation between large enterprises – "[T]here's no discounting the role of psychology in litigation."  
"[Y]ou might consider adding a materiality element \* \* \*."

November Hearing, Mary Massaron Ross – Immediate Past President, for DRI: p 49 Clients are fleeing the jury litigation system for private arbitrations, or are settling, because of cost. We need to find "an efficient way [to] the key information that will allow the case to be resolved on the merits." This will help both plaintiffs and defendants in § 1983 civil rights cases. Some municipal clients are very tiny townships. In litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Jonathan M. Redgrave: p 70 "I do not believe that we can wait forever for the ever-elusive empirical data to develop." A fourth category of lies may be the absence of statistics. Electronic information is developing at warp speed. The Duke Conference, and many of the written comments already submitted by disparate groups, reflect a consensus that the discovery rules need further amendments. All parties will benefit.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: The amendments should be viewed in a broader context of events that impede access to justice for victims. Judicial vacancies go unfilled and court budgets suffer draconian cuts. Forced arbitration agreements block access. Class actions face increasing limitations. Pleading standards have increased. Limiting discovery will further discourage victims from going to court.

November Hearing, Lily Fu Claffee – U.S. Chamber of Commerce: p 198 It is good to narrow the scope of discovery. Studies show

that discovery costs range from 25% to 90% of litigation costs; proper scope will help keep it at the 25% end. Cost results from the amount of materials available for searching. Cost harms global competitiveness. It also has a great impact on small businesses. Insurance does not cover the costs incurred by the firm itself, the time, energy, and psychic burden. More fundamentally, the cost of discovery makes it economically rational to settle unmeritorious claims. The proposed amendments will not revolutionize litigation behavior, but they remain desirable. It would be desirable to narrow the standard from relevance by requiring both relevance and materiality.

January Hearing, Henry Kelston: p. 52 Opposing altering the scope and amount of discovery through Rules 26, 30, 33, and 36 for broad reasons. Reaction to the proposals has been polarized because "they are highly skewed in favor of large corporate defendants." "By design, these amendments will reduce discovery costs for large corporations, simply by reducing plaintiffs' access to the information they need to prove their claims." And there is no evidence that there is a problem with discovery now. Better means can be found to reduce costs: Create incentives to cooperate; revitalize initial disclosure; sanction parties for later production of material adverse evidence.

January Hearing, William P. Butterfield: p. 142 The most important means of reducing discovery costs would begin by adopting a cooperation regime with real teeth. Various local rules and pilot projects provide illustrations. And rather than reduced presumptive limits, phased discovery should be adopted in a real way. The power to direct phased discovery exists in the rules now. But local rules often get in the way.

January Hearing, Henry M. Sneath: p 236 (Speaking for DRI) Generally supports all proposals. Offers the perspective of small business firms caught up in business-to-business litigation. The costs of discovery can be disabling. "Narrowing the goalposts" will provide a much better place to begin the conversations between lawyers about discovery.

February Hearing, Rebecca Love Kourlis, for AALS: p. 39 Overall, the proposals move in the right direction. A supplemental comment will note the results of two pilot projects. (1) A pilot project in New Hampshire seemed to show little difference. But attorneys liked what they were being asked to do because it comported with what they were doing anyway. "So it was a culture issue." But there was one interesting difference -- there was a statistically significant reduction in the number of default judgments against defendants. (2) The Boston Litigation Section project was an opt-out program; the evaluation was by survey of participating lawyers. The net conclusion was that the pilot project rules were better than the existing rules in providing a better resolution, speedier and less expensive resolutions.

February Hearing, William B. Curtis: p. 77 Focusing initially on the numerical limits, but also on proportionality: "You's hearing the defense side and the corporations they represent say, we lvoe it, and the plaintiff side and the folks that we represent saying, you're changing the way the game is played and it's unfair. I think that's a very telling point that we ought to be reminding ourselves of." It is not that discovery is too expensive. It is that disputes about discovery are too expensive. "Rather than restricting the scope \* \* \*, let's restrict the fight about the scope." And it is about defendants who produce millions of pages of documents – the Rule 34 proposals are at least a start, but no more, in aiming for responsible answers.

February Hearing, Bradford A. Berenson: p 111 Offers three examples of General Electric's experience to illustrate "the waste, burrden and cost of the current regime." Nuisance-value settlements "go on every day \* \* \* Because of the explosion in the cost of electronic discovery." And the use of sanctions for spoliation "creates very strong incentives to gin up sideshow litigation and gotcha games. \* \* \* If they cdan take attention away from the merits, divert it to this game tactical litigation advantage through ginning up a spoliation fight, they can often obtain settlement leverage, or an adverse inference instruction that will help a weak case."

February Hearing, David Werner: p 185 The main focus is on preservation, but agrees that "[t]he scope of discovery allowed by the rule should be narrowed as the committee has proposed."

February Hearing, Michael L. Slack: p 193 If you want to reduce the costs of discovery, do something about the "return or destroy" agreements. I get the 50,000 core documents in discovery. The case is resolved. Then I get another case growing out of the same defect. In federal court I have to litigate my efforts to discover the same 50,000 documents; defendants resist producing exactly what they produced in the earlier case. In state court I tell the judge the documents I want were produced in another case and the judge tells the defendant to produce them. "[W]e start on a slippery slope by putting technical things in rules, and once we get on that slope, we start tinkering with it, it becomes more technical and more technical and more technical. \* \* \* [T]he problem we have today is we're already technical, now we're ratcheting down further."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Technology changes every three years. It is likely that in three more years technology will solve the problems we now perceive in discovering ESI.

February Hearing, Lee A. Mickus: p 237 The proposals "are likely to sharpen the focus of the discovery process on the real needs of the parties."

February Hearing, Ashish S. Prasad: p 319 The form of technology assisted review known as predictive coding will, of itself, reduce the costs of discovery searches by about 25%. No more than that because lawyers and clients still want eyes-on review to protect personally identifiable information, trade secrets, business-sensitive information, and such. And this saving will be offset by large increases in data volume.

February Hearing, David Kessler: p 342 I have used TAR in dozens of cases, "I'm a huge proponent, but [do] not believe that this committee should rely on it as a solution, as a panacea, or should encourage it in the rules." There is disturbing trend to force parties, directly, or indirectly, to produce information that is not relevant, or is privileged, or is outside the scope of discovery, on the theory that TAR facilitates identification and Rule 502(d) protects against use of privileged information. A party who wants to review the documents before producing them cannot complain of the cost – that is the party's own choice. But 502(d) does not solve all problems; huge injury can flow from the production.

February Hearing, Danya Shocair Reda: p 349 The discovery proposals are too narrow. (1) They overlook "the power to impose costs by discovery avoidance, discovery delay, discovery attrition." (2) They interfere with our societal choice to rely on private enforcement of public regulatory values. Discovery problems are affected not only information asymmetry, but by the resources a litigant has available to acquire information. They also are affected by fee structure – whether billable hour, contingent, or donor-funded organization.



RULE 26(B)(1): PROPORTIONALITY; TRANSPOSED (B)(2)(C)(III) FACTORS

259, John Scanlon: Opposes all proposed changes. They "unfairly balance the scales against the party seeking information and in favor of a party who is unwilling to produce that information \* \* \*."

263, The Cady Law Firm, by Christopher D. Aulepp: Three of the five factors considered in determining proportionality are criticized, without reflecting that they have been present in Rule 26(b)(2) since 1983. (1) The amount in controversy "sends the message that only multi-million dollar cases are important. This is un-American." Implementation will create a new battleground in litigation. So will the problem presented by cases seeking relief that is not monetary.(2) The importance of the issues: "to my clients, their case is often the most important thing to them." Who decides what is important? If it is Congress, special interests would buy their issue to the top of the list. And it may be difficult to define what the issues are. (3) The parties' resources: No discovery would be available against the bankrupt City of Detroit.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Mistakenly asserts that the amendment eliminates the discovery of nonprivileged matter relevant to a party's claim or defense. Challenges the "five factor proportionality test" without noting present (b)(2)(C)(iii). These factors "would be devastating to individual women seeking to hold massive corporations accountable for their wrongdoing." "The time, expense, and level of litigation would dramatically increase" as the parties litigate the five factors. Judges will apply the factors differently. And this will make it more difficult to discover "subtle issues," such as the practice of medical device manufacturers to arrange "ghostwritten" articles on outcomes the manufacturers select, to be signed by "handpicked doctors."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Eliminating the relevancy standard will increase discovery disputes. The proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases.

266, American Association of Justice Aviation Section, by Michael L. Slack: (The first pages of this comment are a detailed illustration of the need to conduct extensive discovery in many "aviation crash" cases.) Proposed 26(b)(1) will "drastically limit[] the scope of discovery, \* \* \* which will inevitably morph into a new art form aimed at frustrating plaintiffs' discovery." (1) "proportional to the need of the case" "is flypaper for a defense objection." The proposed factors have too many subjective variables to support consistent application. (1) Will the "amount

in controversy" be determined by the tests that apply in establishing diversity jurisdiction? (2) "How can discovery be unimportant in an aviation crash case"? Does importance decline if a plaintiff settles with some defendants, with the effect of discouraging early settlements? Does importance vary with how frequently a produce fails? (3) What is the measure of "burden"? Can a defendant multiply the burden by throwing legions of first-year associates at a relatively simple task? Can a plaintiff get more discovery from a wealthy defendant than from a nearly bankrupt defendant?

267, Lawyers for Civil Justice, by Alex Dahl: The emphasis on proportionality, currently in Rule 26(b)(2)(C)(iii), is a great benefit. The concept is routinely ignored. But proportionality will be much better advanced if materiality is added to define the scope of discovery: "any non-privileged matter that is relevant and material to any party's claim or defense." Experience in England "has reportedly resulted in significant curtailment of excess discovery." This would align discovery more closely with the needs of individual cases. 540, Alex Dahl for Lawyers for Civil Justice: Supplements the first comment by refuting the arguments that the proposal effects a change of burden. The burden of showing that proportionality is not met is on the party who opposes discovery. And both requesting and responding parties have a substantial interest in presenting their best arguments. Rule 26(g) shows that the burden of ensuring proportionality falls on all parties. And those who argue that proportionality means "one size fits all" simply miss the point – proportionality means discovery tailored to the needs of each case.

270, Ohio Association for Justice, by John Van Doorn: The proportionality test "favors those accused of wrongdoing, especially in cases where there is an asymmetry of information." Defendants can hide information by objecting to the scope of discovery. They can take positions based on ill-defined factors. How can a plaintiff test a claim that discovery is too costly? There will be more discovery disputes. The change is unnecessary because present Rule 26(b)(2)(C), including (iii), provides protection. The difference is that the proposal shifts the burden – rather than providing for defendant objections, it will impose a burden on plaintiffs to justify the scope of discovery.

273, Cameron Cherry: Defendants control virtually all information. "[C]hanging the purpose of discovery so that each request must be weighed on a sliding scale" measured by the proportionality factors "will not just hamper, but hamstring justice. Rich and powerful corporations can afford to stonewall discovery, bury relevant documents in a barrage of paper, and file unnecessary objection after objection as it stands." The "studies" offered to support these changes are not impartial.

275, Glenn Draper: As Rule 26(b)(2)(C)(iii) now stands, the burden is on the party resisting discovery to seek protection and justify it. Transferring the same factors to define the scope of discovery will shift the burden to the party seeking information, and it will not have detailed knowledge as to what information is available or the cost of producing it. This is "an attempt to insert additional barriers to prevent the average citizen from confronting powerful corporations on an equal footing in court."

276, John D. Cooney: Eliminating the language that provides discovery of any nonprivileged matter relevant to a party's claim or defense, substituting a cost analysis, would severely restrict the ability of plaintiffs to uncover evidence and hold better-financed defendants accountable for their wrongdoing.

277, Marc Weingarten: Proportionality, measured by five subjective factors, will require a hearing, or at least a motion, for virtually every discovery request. If the parties could agree on the amount in controversy, the case would settle. A party objecting to discovery will not concede the importance of the information. So opinions will differ on expense and benefit. The respective resources of the parties "is usually not even contemplated with respect to the defendant until a punitive damage phase \* \* \* is reached."

278, Perry Weitz: Even without considering purposeful attempts to obscure information by corporate bureaucratic manipulation or unfounded claims of privilege, the proposals will have an unfair impact on mass tort plaintiffs. The change in the scope of discovery will eliminate the well-understood language and presumption that any nonprivileged matter relevant to a party's claim or defense is discoverable. Defendants will habitually object on the basis of the five-factor proportionality test. The delays will be devastating, especially to living but in extremis cancer victims who may lose the chance to have their day in court during their lifetime.

279, Kyle McNew: Now does plaintiff personal-injury litigation, but has been a defense commercial litigator. Changing the standard from relevance to utility will invite discovery fights – every party will believe the utility of requested information is outweighed by the burden of responding.

280, Oren P. Noah: Changing the standard to require both relevance and proportionality will defeat the presumption that relevant discovery is allowed. A party can simply refuse to provide discovery, forcing a motion to compel – and a well-funded corporate client can easily afford to have its attorneys do this. As cases – including asbestos cases – become increasingly complex, the need for accurate and reliable information increases. And asbestos plaintiffs typically do not have any of the information needed to prove their claims.

281, Daniel Garrie: When a company adopts a new and more efficient information system, it has a choice whether to migrate old information into the new system. Courts should not be afraid to impose the burden of retrieving information from the old system if the company chooses not to migrate it to the new system. There is no need to amend the rule; courts understand this now. But if the rule is amended, the amendment should account for this cost calculus.

282, Susan M. Cremer, Chair, AAJ Federal Tort and Military Advocacy Section: Lawyers in the section litigate many Federal Tort Claims Act actions for medical malpractice. These are complex cases, often involving multiple health care providers. "Under the new rule, the plaintiff would have to argue that the likely benefit of the unknown information outweighs the quantifiable cost and time burden to the defendant. This is an impossible burden." This is followed by a case example. The question was whether the anesthesiologist was present in the operating room when the patient emerged from anesthesia, as standard practice requires. The records did not show him present, but he testified that he was. The defendants resisted the discovery request, but the court ordered production of records from three other operating rooms; one record tended to prove he was in a different room. The plaintiff might not have got this crucial discovery under the proposed rule.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The Foundation champions individual liberty, free enterprise, and a limited and accountable government. The "ever increasing threat of exorbitant discovery costs [must not be] permitted to distort the substantive rights of parties in litigation." "The overly broad scope of discovery \* \* \* has long been a source of mischief." Adding proportionality establishes a balanced approach that is a meaningful improvement. If discovery confined to the parties' claims or defenses produces information suggesting new claims or defenses, the pleadings can be amended. Transplanting the list of proportionality factors to Rule 26(b)(1) is good, because present (b)(2)(C)(iii\_) too often is ignored or marginalized in practice. But care should be taken to ensure that the emphasis on the parties' resources does not lead to allowing unjust demands simply because a defendant has a high net worth.

The continuing failure of past amendments intended to rein the scope of discovery suggests that the scope of discovery should be further reduced: "any non-privileged matter that is relevant and material to any party's claim or defense." (Materiality is defined in the 1968 4th edition of Black's Law Dictionary as information that has a legitimate and effective influence or bearing on decision.)

286, Stephen J. Herman: Has experience representing corporate defendants, but writes on behalf of individual plaintiffs.

Untested contentions of defense counsel resisting discovery "frequently prove to be incorrect and/or incomplete." There is a "general disincentive" that dissuades "a defendant and its counsel \* \* \* from conducting a thorough investigation, from asking the tough questions, and from disclosing potentially relevant and material information to opposing counsel and to the court." Given the extreme disparity in knowledge between plaintiff and defendant, the proposed amendment will lead to one or the other of opposing bad results. Plaintiffs may be permitted to conduct preliminary discovery regarding the defendant's claims of burden or expense. Or plaintiffs will not be permitted to engage in such discovery, "thereby risk[ing] dismissal of the action based solely on the untested assertions of one party regarding the existence and nature of potentially relevant evidence." (There follow descriptions of five cases in which crucial information that was not revealed during early stages of discovery ultimately came to light.) "The proposed amendments, if adopted, would greatly foster the potential for additional, albeit unintentional, injustices; may tempt good lawyers to cross the line; and will aid and assist those few unscrupulous lawyers and companies who do have a win-at-all-costs mindset."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: "The availability of the evidence needed to prove liability in an injury or death case against a railroad is highly skewed." The railroad controls the equipment and access to the property involved. Moving the proportionality factors from Rule 26(b)(2)(C)(iii), where they become a condition of relevant discovery, not a check on abusive discovery, "will inevitably deprive worthy plaintiffs of access to evidence that is relevant and necessary \* \* \*." "Individual plaintiffs should not be punished for corporate complexity they had no part in creating and have no ability to simplify." Discovery is inevitably extensive, "due to both the sheer size and complexity of the industry and to the railroads' use of obstructionist tactics for as long as possible \* \* \*." (A specific example is given.) It is clear that because the railroad controls the information, but burden of discovery falls primarily on the railroad. The proposal risks raising that fact to become an obstacle to necessary discovery.

289, Craig B. Shaffer & Ryan T. Shaffer: Joins the discussion of proportionality with discussion of the proposal to eliminate the provision for discovery that extends beyond claims or defenses to include the subject-matter of the action. The broad conclusion is that although there is little seeming change, as a practical matter these proposals together will have the not undesirable consequence of reducing overbroad discovery requests. (1) "[R]elevance in the context of discovery, should be broadly construed." The only limits are that a party cannot rely on speculation or suspicion, cannot roam in the shadow zones of relevancy on the theory that matter that does not presently seem

germane on the theory that it might conceivably become relevant. Nothing in the proposals suggests a different measure of relevance. (2) Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) "does not effect any substantive change in the scope of discovery." Rule 26(b)(1) now expressly invokes Rule 26(b)(2)(C) as a limit on all discovery. Rule 26(b)(1)(B)(iii) entrenches the proposition that lawyers are responsible for heeding these concepts on their own. (3) Nonetheless, there may be not undesirable procedural and tactical consequences. All too often discovery requests are recycled or pattern interrogatories and requests for production. The problems are exacerbated when combined with ambiguous or overreaching definitions and instructions. Eliminating the provision for discovery relevant to the subject-matter takes away a safety net that might be relied upon to excuse such excesses. (4) Proportionality is case-specific. The proposed incorporation of proportionality in Rule 26(b)(1) is likely to increase the frequency of objections, but the objections are not likely to be granted more often than other kinds of objections, "particularly in response to carefully drafted interrogatories or requests for production."

290, Randall E. Hart: The present provision for discovery of information reasonably calculated to lead to the discovery of admissible evidence makes the process flow smoothly. Even with it, experience as a contingent-fee attorney finds routine stonewalling and groundless objections, in part responding to the incentives of hourly billing. Adding a multifactor proportionality test will cause a huge increase in motion practice, impeding the search for the truth.

292, Lyndsey Marcelino for The National Center for Youth Law: The work of this plaintiffs' advocacy group will be impaired by the cost-benefit balancing. Moving this from 26(b)(2)(C)(iii) to become part of the scope of discovery is particularly likely to affect child advocacy work "because the defendants in our cases are likely large public entities with limited financial resources." "'Disproportionate' will become the new 'burdensome,' but with a cruel twist in placing the burden of proof on the plaintiff, in our case - children \* \* \*."

293, John K. Rabiej, Maura R. Grossman, & Gordan V. Cormack: Proposes addition of this paragraph at the end of the first paragraph in the Committee Note to Rule 26(b)(1):

As part of the proportionality considerations, parties are encouraged, in appropriate cases, to consider the use of advanced analytical software applications and other technologies that can screen for relevant and privileged documents in ways that are at least as accurate as manual review, at far less cost.

The proposal is further supported by 24 persons, expressing a consensus reached at the Duke Law Conference on Technology-Assisted Review held on May 2013. This endorsement of the use of advanced analytical software applications and other technologies to screen for relevance and privilege is offered as an offset to the reluctance of some parties to explore these opportunities, the fear that some courts may not sufficiently understand them, and the risk that "an ill-founded opinion may be issued that would further retard the use of TAR."

The proposal is supported by a link to a RAND Study of litigant expenditures for producing electronic discovery and the full text of two articles. Grossman & Cormack, Technology-Assisted Review in E\_Discovery, XVII Richmond Journal of Law and Technology, 1-48, concludes: "Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort. Of course, not all technology-assisted reviews (and not all manual reviews) are created equal." The second, published online, is Roitblat, Kershaw, & Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review. This article recounts a comparison of manual review in a real proceeding, conducted by 225 lawyers, with a review of a random and representative sample of the same document collection by different teams of lawyers (5 lawyers for each team) and by technology assisted review. The conclusion is that machine categorization can be a reasonable substitute for human review.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Begins by noting: "Experienced plaintiff firms recognize that the 'game' is now to back a truck of virtual documents up to the courthouse and dump it, that may or may not include the real items requested. As a result, a broad net needs to be cast in the form of requests for production \* \* \*." But the proposals will restrict discovery. Offers as an example discovery against a manufacturer of a generic version of Reglan, a drug used to treat stomach disorders. The request as to produce the label used by the defendant, to determine whether it complied with FDA requirements. It took five years to gain production, which showed the label "was inaccurate and missing bolded warning language." Lengthy appendices describe the efforts to gain discovery. The label might never have been disclosed under the proposed proportionality provision, which will require the requesting party to show the need for full discovery rather than require the producing party to show a burden that justifies restricting discovery. Defendant corporations know what is in their files. Plaintiffs do not.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: The proposed change would eliminate the well-understood language that allows discovery of any non-privileged matter relevant to a party's claim or defense. Different understandings of proportionality will lead to inconsistent standards even with

the same jurisdiction. Parties will litigate each of the five factors, causing substantial prejudice to plaintiffs. "[I]t is not difficult to imagine situations in which discovery issues are litigated for the sole purpose of exhausting the resources of the plaintiffs and their attorneys." With Darvocet and generic propoxyphene, for example, it is often necessary to engage in extensive discovery simply to find out which of several different entities made or sold the drug that harmed the plaintiff. And echoes the comments in 264, the AAJ Transvaginal Mesh Group, that limits on discovery will make it difficult to show that manufacturers have arranged for ghost-written articles on their drugs.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality," 2012 Mich.St.L.Rev. 933-979. Although the Utah rule is given substantial treatment, most of the focus is on present federal practice and the need to adopt an express proportionality limit on the scope of discovery. (1) Among the current practices commended by the authors is the extensive guidelines provided by the District of Maryland. This is a good model, worthy of incorporation in the national rules, but the national rule must be more concise. "While a local jurisdiction perhaps has the luxury of promulgating voluminous procedures and practices, the Federal Rules cannot be cluttered with forty-three additional pages of rules and requirements \* \* \*." (2) The Rule 26(g) attorney certification requirement is incorporated into discovery-motion practice in N.D. Cal. This should be done in Civil Rule 37(a)(1), so that a party moving to compel discovery must certify "that the discovery being sought satisfies the proportionality limitations imposed by Rule 26[(b)(1) and (b)(2)] and Rule 26(b)(1)(B)(iii)." (3) It is anomalous that a party seeking a Rule 26(c) protective order should have the burden of showing that the discovery request is not proportional. Rule 26(c) should be amended to include a provision that "If the motion raises the proportionality limitations imposed by Rule 26(b)[(1) and (2)] and Rule 26(g)(1)(B)(iii), the party seeking the discovery has the burden of demonstrating that the information being sought satisfies those limitations." (4) Proportionality will work better if initial disclosures are expanded. At a minimum, each party should produce copies, not merely identify, documents it may use, and each should produce all documents it refers to in its pleadings. (5) Utah has divided civil litigation into three tiers. The top tier, for cases involving more than \$300,000, imposes limits of 20 interrogatories, 20 document requests, and 20 requests for admissions. Total fact deposition time is restricted to 30 hours. For matters between \$50,000 and \$300,000, these limits are halved. For matters under \$50,000, the limits are reduced to 5 document requests and requests for admissions, and fact depositions are limited to 3 hours total per side; interrogatories are eliminated.



299, Aaron Broussard: If intended to reduce discovery disputes, the proportionality proposal will backfire. Almost every discovery response is preceded by "unduly burdensome"; usually an opposing party thinks your discovery request is worthless, and will not admit its worth even when recognized.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Notes the continuing efforts of bar groups and rules committees to narrow the scope of discovery, going back to 1977. (1) "[T]here has been a continued movement toward proportionality in e-discovery as evidenced in the federal case law." "The Section supports these changes, although it does so with caution." (2) The change likely will lead to substantial litigation regarding application of the proportionality requirement, at least in the beginning. Making proportionality part of the scope of discovery may encourage objections, as compare to current reliance on Rule 26(c) motions for protective orders. (3) To avoid any doubt, the Committee Note should state that existing case law interpreting Rule 26(b)(2)(C)(iii) applies in determining proportionality. (4) "[T]he new Rule's most important function may be to signal strongly that the scope of discovery should be narrowed." The Advisory Committee thought it had solved the problem when it added the provision that has become Rule 26(b)(2)(C)(iii). The problems have not yet been solved. November Hearing: Michael C. Rakower, p 287: For the section: "[W]e continue to support the proposal, but we do so with caution." It is likely to lead to increased litigation during the early stages while parties and courts become comfortable with the notion and boundaries, but this will even out over time.

307, Hon. J. Leon Holmes: Suggests that making proportionality part of the scope of discovery will generate more disputes, and disputes that "will be less susceptible to principled resolution." This is tied to the proposal to revise the provision that allows discovery of relevant information that appears reasonably calculated, etc., as if this "relevant information" provision now defines the scope of discovery. Whether proposed discovery is reasonably calculated to lead to the discovery of admissible evidence is something that can be decided early in the case. Proportionality cannot be decided without understanding the value of the case and the information available through other sources – information that is not available until discovery is completed, or nearly so, and then will be a subjective matter. And adds that dockets should be managed by judges; cases should be managed by lawyers.

309, Kaspar Stoffelmayr: Writing from Bayer Corporation experience with mass tort cases in MDL proceedings, endorses Lawyers for Civil Justice Proposals. Discovery causes our system to cost far more than the procedure of other countries, with no improvement in results. Most discovery costs are wasted; only a

very small fraction of discovery materials are used as evidence. The fact that discovery is practiced in proportion to the needs of most cases should not disguise the fact that 5% of cases account for 60% of litigation costs (a study is cited in n. 4); fixing the system for those cases would be an important advance. Excessive discovery costs systematically increase settlement costs: all parties recognize that a defendant saves the large costs of discovery by settling at a figure well above the expected value of the claim. The proportionality test in present Rule 26(b)(2)(C)(iii) is seldom invoked. It is good to move it to become part of the scope of discovery. But more is needed. Discovery should be limited to information that is material to the parties' claims or defenses. January Hearing: p. 88: Similar, with an example of a case that went to an 8-week trial – Bayer produced over 2,000,000 pages of documents; 0.04% were used as exhibits. It would be hard to transfer the procedures of many other countries to our system, but in Britain they have single-event trials and manage with far less discovery.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Proportionality will frustrate the efforts of plaintiffs in civil rights cases to obtain necessary and vital discovery. Much circumstantial evidence is needed to prove intentional discrimination. Discriminators have learned to "'coat various forms of discrimination with the appearance of propriety,'" or to profess some nondiscriminatory motive.

A special danger is that defendants will self-apply the concept of proportionality in responding to discovery requests, and will monetize the importance of the case. The result will be less diligent efforts to find relevant and responsive information in replying to discovery requests. A defendant will make less effort to respond when a poorly paid plaintiff claims discrimination than when a highly paid executive makes the same claim. Plaintiffs like those who claim widespread abuse of "stop and frisk" police policies will face the same response – individual damages claims are small, or (as in the New York case) no damages are claimed. Present Rule 26(b)(2) leaves implementation of proportionality in the hands of judges. It is a mistake to put it in the hands of those who respond to discovery requests.

Nor is there any showing that discovery costs are a special problem in civil rights cases. If other types of cases present special problems, changes in the discovery rules should be limited

311, James Coogan: The proposal is "designed to harm a party seeking discovery from a large organization." A party requested to produce will have an incentive to complicate the process in order to complain that discovery is too costly. This "places the burden on the Plaintiff, who is not privy to the operations of a Defendant, to justify the unknown." It will increase disputes and thus delays.

313, Steve Telken: Defending parties will feel compelled to use proportionality "to attempt to block or delay even legitimate discovery requests, lest they be accused of less than zealous advocacy for a corporate client."

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): The current discovery system "is unbalanced and in need of repair." (1) Patent litigation often generates high discovery requests, and offers to settle calculated to fall well below discovery costs. (2) Gamesmanship in personal injury litigation leads to requests for sanctions "to discolor a defendant in the judge's eyes." No matter how careful a defendant is, "there can always be allegations that a page, document, or flash drive has not been produced." (3) Discovery has come to be used to challenge the process of responding. "[P]laintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system's relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions." The changes will be significant steps toward addressing the high, asymmetrical costs of excessive discovery.

Proportionality is the most important principle. The amendment will encourage judges to be active in weighing costs and benefits.

315, David Jensen: Proportionality is a "further invitation for large defendants to continue, or increase, their standard objections based on unarticulated burdens."

317, Steven Banks for the Legal Aid Society in New York City: (This long comment begins with a description of many different types of litigation that would suffer from the proposed proportionality limit and from reducing the presumptive numbers of discovery requests. The background is summarized here, but should be recalled with the comments on other specific proposals.)

Section 1983 actions against municipalities require many discovery events to show custom, policy, or practice of violating the law. Jail and prison litigation often requires proof of a claim under a deliberate indifference standard, and a plaintiff must overcome the deference often extended to prison officials. In Fair Labor Standards Act cases it may be necessary to establish joint employment to satisfy statutory thresholds for coverage; discovery of employment records to show wages and hours can be extensive. In discrimination or retaliation employment cases the defendants possess most of the evidence. Wal-Mart v. Dukes means plaintiffs often need discovery for class certification, increasing the number of discovery events. And slashing the limits will be taken as endorsing a more restrictive

approach to discovery generally. Finally, many prospective clients must be turned away, and must proceed, if at all, without representation. Their needs should be considered.

The proportionality limit is strongly opposed. Legal Aid clients often have comparatively small damages claims, regardless of the strength of their cases. Discovery should not be curtailed for this reason. Considering the importance of the issues at stake in the litigation "is insufficiently specific to guarantee heightened consideration for civil rights and other constitutional claims." Rule text or comments should state that constitutional and civil rights claims are presumed to have a high level of importance. And measuring the likely benefit of proposed discovery "is often unknowable at the outset of litigation."

318, Brian Sanford: Excessive discovery is adequately limited now. "The problem is disproportionately low discovery, not high." The \$100,000 claim of a cashier may be as complex as the \$10,000,000 claim of a business owner. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: The proposed changes will have a grossly disproportionate effect on plaintiffs in complex product liability cases. Defendants' information is compartmentalized; plaintiffs' information is a relatively open book. The proposed changes would eliminate the standard that allows discovery of information relevant to the parties' claims or defenses. "By replacing relevance with a cost analysis, these proposed rules would severely restrict the ability of plaintiffs to uncover evidence."

322, Michelle D. Schwartz, for Alliance for Justice: The change "will upset decades of precedent and invite disputes and uncertainty." And the language creates a risk of overreliance on monetary stakes in the cost-benefit analysis.

323, Jonathan Scruggs, Alliance Defending Freedom: "'Proportional to the needs of the case' is an extremely vague standard."  
"Governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake  
\* \* \*."

324, Jonathan J. Margolis: Deleting the classic definition of discoverable information – information reasonably calculated to lead to the discovery of admissible evidence – and replacing it with an overriding proportionality standard will mean that relevant evidence is not discoverable as of right. Application of proportionality will be difficult and inconsistent. The "needs of the case" cannot be defined. The amount in controversy will be difficult to assess at the beginning of the litigation, and the

inquiry will be unwieldy when equitable relief is significant. The possibility of multiple or punitive damages also must be counted. And balancing will prove inapt when it is necessary to go through discovery to find out what is at stake. And account should be taken of factors not subject to easy quantification, such as pain and suffering or emotional distress. And damages may increase during the course of the litigation. Looking for the amount in controversy could become a self-fulfilling prophecy by constricting the information needed to show what is at stake.

327, Malini Moorthy for Pfizer, Inc.: This change "has the potential to significantly reduce much of the undue burden that Pfizer routinely faces as a defendant responding to discovery requests." With two examples, also provided at the November 7 hearing: one is a litigation in which Pfizer spent \$40,000,000 under a court order to preserve backup tapes for 8 years without any party ever looking for anything there, and also collected multiple millions of documents from 170 custodians and over 75 centralized systems, producing 2,500,000 documents representing more than 25,000,000 pages, to have 400 of those documents marked at trial. Overall, in the year ended October 1, 2013, Pfizer, for as many as 60 ongoing litigation matters, collected roughly 1,000,000,000 pages of documents from 3,000 custodians. Of them about 140,000,000 were identified as potentially responsive. 25,000,000 pages were produced; 5,500,000 of them required at least one (expensive) redaction. "Pfizer is not, and should not be, in the business of discovery." This "is clearly money that could better be spent developing life-saving drugs and improving health outcomes around the world." November Hearing: p 261 Repeats the same observations.

328, U.S. Chamber Institute for Legal Reform: The proportionality provisions now in Rule 26 have failed to achieve their purpose. Litigants and judges commonly ignore them. Proposed Rule 26(b)(1) "would provide much-needed balance." It would help transform the "anything goes" approach into an approach that protects against the worst abuses. (There are figures for the costs of discovery.)

330, Wade Henderson for The Leadership Conference on Civil and Human Rights: Rule 26(b)(1) is the specific focus of comments addressed to "many of the proposed changes." The proportionality standard will impact plaintiffs, such as victims of employment discrimination, who have the burden of proving their claims "in the face of severe imbalances in access to relevant information. Such information asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." And there is no empirical basis for the proposed changes. The broader statements emphasize the vital importance of private plaintiffs, as private attorneys general, in enforcing civil rights claims. In 2005, out of 36,096 civil rights cases the United States was the plaintiff in 534, 1.5%. The rest were brought by private plaintiffs. And discovery is all the more important in light of recent decisions that "have

limited access to the courts for vulnerable Americans," both by substantive rulings and by such procedural rulings as those that heighten pleading standards and expand the reach of arbitration.

343, Doug Lampe for Ford Motor Company: Discovery is used against Ford in personal-injury product liability litigation "to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation." In each of several states Ford has more product litigation than in the rest of the world combined. And it is at a competitive disadvantage because, as a domestic company, most of its documents and witnesses are subject to discovery demands. Its foreign-based competitors have few documents or witnesses subject to discovery compelled by courts in the United States. The emphasis on proportionality invokes factors that are familiar to state and federal courts because they are now in the rules. It makes clear "the reality that discovery necessarily involves a balancing of interests." 450, Vickie E. Turner for Wilson Turner Kosmo LLP: "As counsel for Ford in numerous cases," quotes and adopts the passage quoted above.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The present rules work reasonably well. The changes will adversely affect our clients. Proportionality will be difficult to manage. The party requesting discovery is least in a position to show the cost of producing or the value of information not yet produced. Will there be an evidentiary hearing? Discovery on respective resources? How can the requesting party show the importance of the discovery in resolving the issues when the information remains hidden? Proportionality objections, further, will become boilerplate.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses moving the proportionality provision and limiting discovery to matter relevant to a party's claim or defense. This will help cabin excessive discovery, and may have an indirect effect on the burdens caused by over-preservation.

But, in line with other suggestions that the rules should expressly define the duty to preserve, suggests adding "or preservation" in Rule 26(b)(2)(C) at three points: "the court must limit the frequency or extent of discovery or preservation"; "the discovery or preservation sought is unreasonably cumulative \* \* \*;" the proposed discovery or preservation is outside the scope permitted by Rule 26(b)(1)."

347, Genie Harrison: It is not clear whether this comment addresses a supposed limit on the number of Rule 34 requests, or instead expresses concern with proportionality. Offers an example of a case in which the documents needed to prove a plaintiff's case could not have been asked for "under the rules change."

348, Stephanie Bradshaw: Proportionality will place plaintiffs at even more of a disadvantage to defendants. The Committee Notes that parties must observe proportionality without court order because it is made part of the scope of discovery. "[I]f parties were to miscalculate the proportionality determination, they could thus be exposed to sanctions, which could result in a chilling effect." Reducing the flow of information also will impede settlement, which is more readily achieved when all parties understand each others' positions. Together with the new numerical limits, plaintiffs will be placed at an informational disadvantage from which they are unable to recover.

349, Valerie Shands: "Working for plaintiffs' firms, I know we value transparency above costs. \* \* \* [W]e need to have that information to *know* that it is irrelevant or duplicative, and because its broad scope does occasionally turn up highly probative information." It is hard enough to get relevant information out of defense counsel as it is. "[T]he cost is worth it to achieve justice."

350, Pennsylvania Bar Association: Today, the proportionality factors "are rarely applied because of the notion of some that parties are entitled to discover all facts, without limit, unless and until a court says otherwise." But the Committee Note should emphasize that cost and burden are simply two factors to be considered along with the others. Part of the risk is that cost is the first factor listed.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Proportionality is particularly important with respect to ESI. In employment cases, "plaintiffs' counsel use electronic discovery requests tactically, to pressure the defendant into settlement or to lay the groundwork for a spoliation claim."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: The Committee has long recommended proportionality. But suggests that the Committee Note alleviate an ambiguity to stating that the reference to the importance of the issues at stake calls attention to the fact that importance is not measured solely in monetary terms.

357, Joanne S. Faulkner: "For a \$1,000 consumer protection case, defendants will surely argue that the consumer should be entitled to no discovery." This will thwart the purposes of consumer statutes that often provide a relatively nominal amount of statutory damages, but also provide for attorney fees. "'Monetary awards understate the real stakes.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Plaintiffs in nursing home litigation typically are unfamiliar with the court system. Defendants are represented by many lawyers and control the necessary information. The proposal "would impose

a significantly narrower range of factors for a court to consider when determining whether or not to permit particular discovery." Nursing homes typically utilize written policies and procedures; the proposal would make discovery more difficult. In considering the importance of the issues and the importance of the discovery items, the court could inadvertently usurp the role of the finder of fact.

359, Andrew B. Downs: The Rule 26 amendments do not go far enough. The scope of discovery should be limited to what is material.

360, Robert Peltz: The proportionality factors will have to be applied by the court in every case. The standard is too amorphous to be enforced fairly. Tremendous burdens will be imposed on district judges. And a ruling in one case will be much less significant precedent for other cases because a unique balancing of factors is required for each case.

361, Caryn Groedel: Proportionality will have a chilling effect on discovery and the plaintiff's ability to prove the case.

362, Edward Hawkins: Proportionality "will only encourage rule breaking plaintiffs and defendants to withhold evidence." Current Rule 26 provides protection enough.

363, Dean Fuchs, at request of NELA-Georgia Board: Proportionality will encourage defendants to file motions to narrow the scope of discovery, hoping the court will deny plaintiffs access to the evidence they need to prove their claims.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Placing on plaintiffs the burden of proving proportionality is harsh; their resources are generally more limited than defendants' resources. "With little or no information, upon what basis can the plaintiff argue the importance of the issue, the importance of the discovery in resolving it, and/or whether the burden or expense outweighs the likely benefit?"

365, Edward P. Rowan: The subjective weighing of cost and benefit will work an injustice "if a judge opines that discovery should not occur."

368, William G. Jungbauer: Replacing discovery relevant to the claims or defenses with a five-factor proportionality test, moved from 26(b)(2)(C)(iii), changes a shield to a sword, "shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden."

369, Michael E. Larkin: The change "flips the burden of proving



the utility of discovery on the party seeking the discovery." It will result in parties opposing discovery without having a burden to show why, generating more motion practice. And the addition of "allocation of expenses" to Rule 26(c)(1)(B) makes the change to proportionality unnecessary.

372, J. Burton LeBlanc, for American Association for Justice: Proportionality is examined at great length. The first statement is that introducing proportionality as a limit on the scope of discovery can be viewed as changing it "from a practical consideration to one that renders critical information off-limits merely because it may be expensive to retrieve." That will fundamentally alter the scope of discovery. (1) The amount in controversy is misleading; many cases are in federal court because Congress made federal law to support claims that seek small damages, or only injunctive or declaratory relief. This problem may not be resolved by considering the importance of the issues because there is no indication of the extent to which any particular court will rely on the importance of the issues. (2) Who determines how important an issue is? The court is not likely to have enough information to make this determination at the outset of the case. (3) As for the parties' resources, when a small plaintiff sues a large corporate defendant, whose resources determine this? Can the defendant argue for limited discovery because the plaintiff's resources are limited? (4) Defendants will argue in every case that the discovery is not important in resolving the issues. Without discovery, there will be virtually no information to support the court's determination. (5) Balancing likely benefit against burden or expense will support an argument in every case that discovery is too burdensome. It will create an incentive to preserve documents in formats difficult to access. "The proportionality test gives defendants a step-by-step formula to argue that critical relevant information should not be produced"; the argument will be made in every case.

If moving these factors into the scope of discovery is not intended to change the rule, as some have suggested, why make the change? The Committee Note says the revision limits the scope of discovery. The change "likely will be interpreted as a substantive change." The present rule, further, requires the court to make a determination that discovery should be limited; the proposed rule imposes an insurmountable burden on the party with fewer resources and less access to relevant information. Nor does the argument from Rule 26(g) persuade. The Rule 26(g) certification is made to the best of the party's knowledge, information, and belief formed after a reasonable inquiry. The party requesting discovery does not have to prove the requests are not unduly burdensome or expensive; the proposed rule likely will impose that burden.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as defining the scope of discovery under present Rule 26(b)(1), and urges that the multi-

element test of proportionality should not be substituted. The test is so subjective that a party could file a non-frivolous challenge to almost any discovery request. This tactical motion practice will have disproportionately negative effects on small business and other plaintiffs. In trademark, copyright, trade secret, and occasionally patent litigation it may be difficult to prove actual damages; if only injunctive relief is sought, the stakes may seem small. There is no need to further restrain discovery. The complaint will already have survived heightened pleading standards. Plaintiffs have little economic interest in pursuing voluminous discovery when the amount in controversy is relatively small. Varying standards will develop across the circuits, "further eroding uniform application of justice and the federal rules." Present protective order practice, and the authority to limit discovery under the same factors in present Rule 26(b)(2), afford protection enough. The default limit in 26(b)(2) should not be amplified as a default limit on discovery.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope. It incentivizes a defendant to claim production is too costly, "shift[ing] the burden to the plaintiff to attempt to explain why evidence the plaintiff has never seen is sufficiently beneficial to outweigh the costs unilaterally alleged by the defendant." In asbestos cases this "will result in the inability of a large number of sick and dying people to prove their cases."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "[P]roportionality is the comparison of two variables, and it cannot be asserted when the variables are unknown. Defining the scope of discovery using a proportionality standard without requiring the party in possession of all the information needed to evaluate proportionality to disclose it" will lead to uninformed rulings. Defendants regularly overstate the cost of responding. "Elevating proportionality from a protection against abuse to a barrier to access will only incentivize such overstatement because the proposed changes do not require defendants to back up such claims." In product liability cases, for example, liability is often "revealed through email communications between employees rather than the testing and design documents."

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): With proportionality, "plaintiffs would be faced with the impossible task of arguing that the likely benefit of unknown information outweighs the also-unknown cost to the defendant to produce it." The change would provide another tool for corporate defendants to avoid producing relevant information, a tool that is guaranteed to be abused.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm

practice is to use discovery cooperatively and collegially, not as a club to inflict unnecessary costs. Mandating proportionality is desirable. Rule 26(b)(1) generally has it right, but factoring "the amount in controversy" should be placed at the end, and all the factors should be introduced by adding "and also factoring" after the call to consider whether the burden or expense outweighs likely benefit. Surely a party should not be required to take a \$50,000 discovery step in a \$75,000 case. But if this factor is first in the list, "a court may be too likely to require unnecessarily expensive discovery steps in cases involving high amounts in controversy." The rule text, or at least the Committee Note, should explicitly state that the cost of discovery should not exceed or be disproportionate to the amount in controversy, and a large amount in controversy alone should not justify discovery when the burden or expense outweighs likely benefit.

379, John M. Gallagher: The subjective factors considered in determining proportionality invite every judge to apply a personal concept, and would require numerous mini-trials on the factors.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proportionality factors should remain in 26(b)(2)(C), to be invoked on review by the judge. Moving it enables a litigant to refuse to provide discovery if it determines in its own opinion that the request is not proportional to the needs of the case. "At least in our cases, this change would only benefit defendants." Most of the clients of these Legal Services Organizations are indigent, holding claims likely to yield small money damages. "Even cases with relatively limited remedies of[ten?] involve complex facts and proof."

381, John H. Beisner: Imposing a strong proportionality requirement is a marked improvement over the "anything goes" approach. It will help winnow overbroad requests and curtail abuse. January Hearing: p. 61: This is not a radical change. It cures the relative obscurity of a rule that has not produced an avalanche of motions, and will not. Nor will making it more prominent it change the burdens. A requesting party already is certifying to proportionality under Rule 26(g), A motion will generate a discussion in which both parties have to contribute. The plaintiff declares the amount in controversy. Each party speaks to available resources. The requesting party speaks to the importance of the discovery. The responding party speaks to the burdens.

383, Alan B. Morrison: (1) Must requesters factor proportionality into their requests? May the responding party object to almost any request on this ground? Or is the provision directed only to

judges? This language was directed to judges in (b)(2)(C)(iii). It would help to make a new sentence after "claim or defense" on line 9 of the published rule. The sentence would direct the judge to take into account the factors listed. (2) Delete "the scope of discovery is as follows"; it is unnecessary and confusing. (3) What difference is there between "proportional" and "whether the burden or expense \* \* \* outweighs its likely benefit"? The other factors are not independent tests, but factors or considerations. Say first either "proportional" or the "outweighs" test, then direct the judge to consider the factors. (4) What is meant by "the importance of the issues at stake"? Is the focus on each issue, or on the overall claims? If on each issue, what if some issues are routine but there is a liability or damages issue that is of great importance but the discovery does not bear on the important issue? If the focus is on the claim, "is a constitutional claim always more important than a statutory or common law claim? What if there are several claims, and discovery bears on only some of them? If this factor is to balance the amount in controversy factor, it might be revised to address "the nature and extent of any non-monetary relief sought." (5) The importance of the discovery in resolving the issues is similarly ambiguous. It could be fixed as "the importance of the discovery in resolving the [an][a significant] issues to which it is directed." (6) Proportionality and scope are the same; 26(b)(2)(C)(iii) should be "is ~~outside the scope~~ not permitted by Rule 26(b)(1)."

384, Larry E. Coben for The Attorneys Information Exchange Group: The proposals alter the playing field "by placing expediency above relevancy." The "reasonably calculated" sentence has defined the scope of discovery for more than 60 years. Proportionality changes this. "Each factor will benefit defendants at the expense of plaintiffs who need the information." Congress has created many claims that can be brought to federal court regardless of the amount in controversy. How will the court resolve the monetary value of the case – will experts be called? How is a court to determine the importance of the issues, or the importance of the discovery to resolving the issues? Subjective judgment will be called for, and there will not be enough information to make the judgment. Looking to the parties' resources may lead a wealthy defendant to argue that discovery should be limited because the plaintiff is impecunious – a victim's ability to pay for the needed information should not be a determining factor.

The proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether discovery should be limited to whether discovery should be permitted.

Again, how is the court to judge the accuracy of the parties' submissions? Should it, for example, consider that the case before it may be one of many similar cases, so that the burden of assembling the information should be compared to the needs of all the similar cases, and the costs spread across all of them?

386, Arthur R. Miller: Moving 26(b)(2)(C)(iii) to become part of the scope of discovery effectively converts it to an independent limitation on the scope of discovery. The five criteria are highly subjective and fact dependent, with a dangerous potential to reduce the scope of discovery. It is likely to produce a wave of defense motions that will be difficult to decide "when the challenge comes before the discovery itself." There is no empiric support for this change, nor is it justified. January Hearing, p. 36 at 38: Proportionality "is a major shift in the balance of discovery." 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Professor Miller extensively with approval. 572, John Kirtley: Adopts Professor Miller's testimony to a Senate Committee, "as edited by me."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Proportionality "is particularly important in litigation where the burden of asymmetrical, i.e., where one side, almost always the defendant, faces far greater expense in responding to discovery." The enormous expense of ESI discovery makes this all the more important.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Moving proportionality up from 26(b)(2)(C)(iii) "is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean in each individual case."

393, Robert Redmond: Proportionality is important. Negligible claims have been settled because a party noticed a Rule 30(b)(6) deposition. A corporate deposition takes a small business owner away from his work for days at a time. Proportionality is the only reasonable means to prevent this type of tactic.

394, Thomas Crane: Proportionality is a concern in representing employees in discrimination bases. The amount in controversy can fluctuate, depending on whether a fired employee finds new work. Employers have the bulk of discoverable material; they resist discovery, I file a motion to compel, and they become cooperative. The system works now.

396, Steven J. Twist: "[T]he civil justice system is dysfunctional." The costs of discovery drive dispute resolution. Proportionality, together with eliminating subject-matter discovery and the "reasonably calculated" provision, is a much-

needed reform. This will not shift the burden – whoever bears the burden on the scope of discovery today will continue to bear it after adopting proportionality. Rule 26(g), further, already imposes the burden of ensuring proportionality on both the requesting and responding parties.

398, Shira A. Scheindlin: (1) Proportionality "invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional \* \* \*." This could become a common practice \* \* \*." That will mean the requesting party must make a motion, at considerable expense. (2) The rule does not specify which party bears the burden of proof. "[I]t would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party." (3) Addressing five factors in every motion will be burdensome and not informative. The requesting party says the case is worth \$1,000,000, the responding party says it is worth \$10,000: how is a court to choose? The responding party says it will cost millions to produce, the requesting party says this is an exaggeration: must the court appoint an expert to determine the true burden? How is a court to balance burden and expense against benefit of producing materials that have been identified only in a very general way, at the beginning of the case? Judge Easterbrook and others have observed that proportionality is doomed judges cannot prevent what they cannot detect, they cannot detect what they cannot define, and they lack essential information to define what is abusive. (4) The current rule works well, as shown by the FJC study. (5) Proportionality has been available for years. It is not often raised. When it is raised, it is at a time in the case when parties and the court have developed significant information about the case that allows intelligent disposition of the objection. Proportionality may be usefully approached early in a mega case, but not in other cases. (6) Rule 26 was amended in 2006., "It is too soon and too often to once again revise this rule and further contract the scope of discovery." This is part of "a continued and systematic effort to respond to a big business complaint that the American system of litigation is somehow bad for American business and reduces our competitive advantage \* \* \*." 0469, Edward B. Cloutman III: Adopts Judge Scheindlin comments by reference. 470, J. Derek Braziel: agrees with Judge Scheindlin's "Careful analysis and comments." 472, Christopher Benoit: Wholeheartedly supports Judge Scheindlin's perspective, as well as those of Professor Arthur Miller and Honorable James C. Francis IV. 476, John Wall: Concurs with Judge Scheindlin. 477, James Jones: Agrees wholeheartedly with Judge Scheindlin. 492, David Wiley: Agrees with Judge Francis and Judge Scheindlin. 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Judge Scheindlin extensively, with approval. Hon. Lois Bloom: Approves Judge Scheindlin's comments. Most problem cases are dealt with by hands-on management.

399, Edward Miller: Moving proportionality to (b)(1) is a modest edit, but will encourage judges and parties to maintain a pragmatic perspective. Proportionality will be an important improvement; the overbroad scope of discovery defined by present (b)(1) "is a fundamental cause of the high costs and burdens of modern discovery." But the rule should be strengthened further by adding a requirement that information be "material" to be discoverable.

400, Gregory P. Stone: Modestly emphasizing the existing authority to insist on proportionality will assist in combating spiraling discovery costs. The ratio between pages produced in discovery and pages used at trial shows that extensive discovery does not aid the parties in preparing their cases. The protests that there is an undue emphasis on the amount in controversy overlook the direction to consider the importance of the issues at stake. "[F]ederal judges and magistrates are well positioned to divine the true stakes in each case – whether important public rights or potential settlement value."

402 Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: Of 78 students, 58 opposed the change. It invites parties to decide for themselves what is proportional; disputes will occur routinely, and a party may decide unilaterally on how extensively to search for discoverable materials based on biased views about what is proportional. The burden of seeking court intervention is moved from the party opposing discovery to the party requesting discovery; "it is better for the truth-seeking function of litigation to err on the side of too much discovery rather than on the side of too little." Parties may take advantage of the subjective nature of the calculus to burden their adversaries with the costs of obtaining court intervention [and because it is subjective, the motions will often be "substantially justified" so as to escape sanctions under Rule 37]. Parties with little pecuniary but substantial non-pecuniary interests at stake, parties with fewer resources, and parties with less ability to obtain information outside of discovery, could be systematically disfavored.

403, Donald H. Slavik for AAJ Products Liability Section: The proportionality factors are subjective and will lead to ancillary issues. Must a plaintiff make a record offer of proof of the amount in controversy? Must there be evidence of the parties' resources? The importance of the issues is highly subjective. The importance of the discovery cannot be known without knowing what the information is. And not knowing that important information actually exists makes it difficult to show that the benefit outweighs the cost. It will almost always be the plaintiff who must carry the burden of showing that these factors justify discovery. February hearing, p 14 at 17: Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar:  
The introductory comments decry the cost of discovery and the use of discovery to gain leverage in litigation and force settlement. The costs seriously undermine the jury trial system. Hourly billing is not to blame – clients demand efficiency, litigation budgets have become the norm, and alternative fee arrangements are used more frequently. Civil defense lawyers often ask courts to limit the use of discovery. "Federal discovery practice, in its current form, is the largest component of the increasing costs and is staggeringly wasteful and inefficient." Thus it is time to look for changes that will not encourage excessive motion practice but will bind practitioners by the rules to narrow the scope of discovery without judicial oversight. The IAALS/ACTL recommendation to adopt proportionality for e-discovery points the way to adopting proportionality generally. The proposal "provides a proportionality requirement that has been completely lacking in modern discovery, and DRI strongly supports" it. Prior efforts to limit the scope of discovery, such as the 2000 amendment, "have not produced a different mindset among the bench and bar. These historically broad notions of discovery and relevance could prevent the proposed amendment from fulfilling its potential." That risk can be avoided by requiring that the matter be "relevant and material" to a claim or defense. The DRI comment "contains an excellent discussion of the associated costs and negative impact e-discovery" has. The 2006 amendments did not go far enough.

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) The "drastic change" adding proportionality "would have severe consequences." A party could refuse to provide discovery by deciding the request is no proportional. This would enable defendants to avoid producing critical information plaintiffs need. It will be especially detrimental in civil rights, constitutional, and discrimination cases in which information is asymmetrical. Plaintiffs would be forced to use limited time and resources on unnecessary motions and appeals. The five factors would be litigated for each piece of information.

406, Troy A. Tessier: Clarifying the proper scope of discovery is an important improvement to the current rules.

407, David J. Kessler: (1) "While courts, responding parties, and requesting parties will always value cases differently, proportionality should still be a limiting factor." (2) The five factors will incentivize counsel to carefully consider their discovery requests. (3) The fear that proportionality will stimulate motions is unfounded. Parties can and do attempt to limit discovery under Rule 26(b)(2)(C) now. This mirrors counsel's obligations under Rule 26(g). Bad actors will always seek to lengthen and complicate discovery by motion practice, but moving proportionality to the scope of discovery will give them



less ground to stand on. (4) Rule 26(b)(2)(C)(iii) should be eliminated as redundant; retaining it "could lead to mischief and confusion" in implementing Rule 26(b)(1). (5) The Committee has been requested to encourage the use of advanced analytical software in the Committee Note. "I regularly use such technology." But the decision on how to respond to discovery requests should be left to the parties. How they meet their discovery responsibilities is their responsibility. They should not be pressed to use technology they do not want to use, nor need to use. Nor is there any need for encouragement. "The logic and reasonableness of advanced analytical software is winning the day."

408, Elliot A. Glicksman for Arizona Association for Justice: "A plaintiff seeking discovery will have the burden of proof on proportionality." Defendants will resist even clearly relevant discovery. Application of the five factors will lead to inconsistent rulings, endless delays, and collateral litigation. The change will transform federal courts from notice pleading to fact pleading, undercutting a plaintiff's ability to discover facts needed to prove a claim.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Proportionality will increase discovery disputes and the time required to resolve them. The factors are so vague that defendants will invoke them in every case. (1) Looking to the amount in controversy will require evidentiary hearings, or at least extensive presentations, on the injuries in the case (with multiple examples, including such matters as axonal shearing in traumatic brain injury cases, leading to the need to understand secondary biochemical cascades, all involving differing expert interpretations of neuropsychological testing). And should the amount in controversy focus on each case in isolation, or is the determination affected by a showing of numerous injuries or by the consolidation of cases? Is the value of a case affected when there are catastrophic injuries but "difficult liability"? (2) The importance of the issues is hopelessly vague. Importance to whom – plaintiff? defendant? society? How many defendants? How severe the injuries? If some defendants settle, do the issues become less important? (3) How can the plaintiff show the importance of the discovery before it has the discovery? And discovery that does not establish an essential element of the claim still may be important to present the full context, the big picture, as part of persuasion. (4) Burden or expense also is undefined. The plaintiff will not have access to information about the defendant's financial health, and will need discovery on that.

448, Robert D. Curran, tracks 410.

414, John R. Scott: Proportionality should help reduce overreaching discovery demands.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: NASCAT members are involved in the complex, high stakes, contentious cases described by the Advisory Committee and FJC as leading to expensive discovery. But that shows only that discovery is expensive, not that it is disproportionate. Before 2000, except in districts that opted out (?), discovery proceeded apace. But in districts that opted out of mandatory discovery (? disclosure?), defense counsel were essentially encouraged to challenge and defensively parse virtually every request. Such behavior required court involvement. Rule 26(b)(1) proportionality will fundamentally change the very nature of discovery, inviting litigation of "each of these seven factors in every single federal civil case." The rules already provide means to rein in abuses; Rule 26(b)(2)(C)(iii) already enforces proportionality. Moving proportionality into the scope of discovery will require a plaintiff to justify its requests in advanced, without the benefit of knowing what relevant information is in a defendant's possession. The defendant, who knows where the requested information resides, can tailor its objections based on cost. Defendants often are not looking for ways to reduce costs of producing, but to avoid producing. Plaintiffs need discovery to reveal the sources of information not previously known to exist.

420, Daniel A. Edelman: Blends protests about deleting "reasonably calculated" and "subject-matter" discovery into the protest about proportionality. Proportionality will shift the burden to the plaintiff to prove the information they seek outweighs the burden. That cannot work when the information is almost exclusively controlled by the defendant, so the plaintiff cannot show the benefit. Defendants will take even more aggressive positions than they take now, and will abuse the standard. The result will be greatly increased motion practice. "At a minimum, the defendant shall bear the burden of proof and be required to apply to the court for avoiding discovery on this ground."

421, Louis A. Jacobs: (Writing as a retired professor and long-time employment law practitioner:) The present rules encourage the common practice of cooperative discovery in employment cases. (1) But relocating proportionality to become part of the scope of discovery frontloads it. "[T]he fact that the language is relocated matters." That is why relocation is proposed. The Committee should say so if it means to preserve the law that shifts to the party resisting discovery the burden of adducing specific facts to demonstrate the discovery is beyond the proper scope. If it means to change that approach, it should say so. But still "[t]he proportionality factors tilt against plaintiffs in most employment litigation." Leaving it in Rule 26(b)(2)(C)(iii) forces a motion by the party resisting discovery, and a motion

must be preceded by informal efforts that will tell the party requesting discovery the facts that bear on the burden of providing it. If the plaintiff has the burden, the employer will not have much incentive to provide as much information.(2) Damages ceilings for federal statutory discrimination and retaliation claims set the amount in controversy too low to justify extensive discovery. (3) "The importance of the issues at stake depends on the value assigned to equal employment opportunity, protecting whistleblowers, or vindicating constitutional rights. Because that value resides in every case, proportionality can hardly assign it high import." Importance is more likely to reside in the number of plaintiffs. "Proportionality has been rejected in the attorneys' fees context precisely because it undervalues the importance of vindicating civil rights." (4) Looking to the parties' resources is another makeweight. Courts are not likely to count it against employers that they invariably have vastly greater resources than former employees suing them. (5) The importance of discovery in resolving the issues in employment litigation cannot be overstated, so this factor is really just a threshold to cost-benefit analysis." Proportionality will come down to this cost-benefit analysis.;

423, Ralph Spooner: "Discovery abuse has grown \* \* \* in the last 15 years. Discovery should be proportional [to] what is at stake in the litigation." Too often the cost of discovery forces parties to resolve a case.

433, Ryan Furgurson: Proportionality "emphasizes the balancing of interests that should take place in any discovery dispute, and is a positive step \* \* \*."

443, Grant Rahmeyer: "Changing the scope of discovery under Rule 26 is an absolute abomination. \* \* Changing the burden of proof on discovery destroys litigation. It allows companies to hide documents then claim that the plaintiff isn't 'hurt enough' for us to bother to look for documents." The result will be "mounds of briefs just to get leave to file discovery," followed by more briefs on motions to compel.

445, Gerald Acker, for Michigan Assn. for Justice: This ambiguous standard will mean that discovery will depend on the luck of the draw of judges. Some judges, for example, have likened employment disputes to the divorce cases of federal courts; they will not be sympathetic to the discovery needs of those cases. Nor can a judge determine the importance of a case, or of proposed discovery, without knowing what the discovery will yield.

446, Stephen Aronson: Discovery should be narrowed "to only that truly necessary to address the complaint."

449, Christopher D. Stombaugh, for Wisconsin Assn. for Justice:

(1) As Professor Miller testified to Congress, the proposals lack any empiric justification. Tort case filings are falling.

(2) Relevance and proportionality are contradictory. "If evidence is relevant, how can it not be proportional"?

(3) The proposal makes it clear that the proponent of discovery must show relevance and proportionality. The effect will fall most heavily on important cases of public policy.

(4) Now, by moving proportionality from (b)(2)(C)(iii), the rule directs that courts must limit discovery.

(5) All of the proportionality factors are subjective. Plaintiffs barred from relevant discovery will have little chance of prevailing on appeal.

(6) Looking to the amount in controversy, "given that there is already a monetary threshold for federal jurisdiction in most cases, \* \* \* raises numerous problems, some of which may rise to the level of constitutional issues." Do punitive damages caps limit discovery? Or, as under Wisconsin law, limits on the amount a family can recover in a death case for loss of companionship and society? Does discovery depend on whether one plaintiff sues, or ten cases are consolidated?

(7) Looking to the importance of the issues invites subjective judgments. These questions should be decided more at the pleading stage, not in limiting discovery.

(8) "There should be no dispute that discovery is important to resolve any dispute." And who is the discovery important to?

(9) The parties' resources raises questions – if the plaintiff is represented on contingency, should the attorney's assets be questioned? Will statements of resources be required? "[T]he lack of resources should never be a factor in determining justice.

(10) "The value of evidence cannot be ascertained until it has been obtained and reviewed." This factor, as the others, will generate, not limit, litigation.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Including a proportionality requirement delineates necessary parameters to discovery and remedies the overbroad scope of discovery as defined in the current rule." But a materiality requirement should be added to force the parties to focus on what they really need.

456, Niels P. Murphy writing for eight lawyers: Proportionality is a good idea, but the historically broad notions of discovery and relevance are a factor that could thwart realization of the purpose to reduce the present overbroad scope of discovery. "and material" should be added.

457, Carl A. Piccarreta: "the proposed rule change will undoubtedly have judges acting as referees in evaluating five factors on a repetitive basis." Leave Rule 26(b)(1) alone.

455, Andrew Knight: Supports the amendments to 26(b)(1) to

"significantly reduce the wasted effort and great expense of responding to discovery served only to harass."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports incorporating proportionality in (b)(1), but with several suggestions to improve clarity and operation. (1) The Committee Note should state explicitly, in suggested language, that moving these considerations to (b)(1) "is not intended to modify the scope of permissible discovery." The factors should be applied just as they have been. (2) A court may place improper or differential weight on specific factors, such as the amount in controversy or the importance of the issues. The importance of the issues may justify broader discovery even when the dollar stakes are low: "This dynamic is implicated by a large swath of the Department' work \* \* \*." It is also affected by asymmetric information cases, in which the quantity of information available to the defendant is far greater than the information the government has. "Federal agencies also have limited resources to apply to individual cases, and such constraints, which include protection of the public fisc, may warrant imposing limits on discovery." (p. 4 recommends specific note language.

460, Jo Anne Deaton: Proportionality will reduce the use of discovery "as a tool for 'economic blackmail.'" This technique is used by plaintiffs in employment matters to increase potential fee recoveries, and in product liability cases "where deposition costs, including expert discovery, is used as a hammer to force settlement."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Changing proportionality to define the scope of discovery "may on occasion generat inequitable results." This is an amorphous standard. Early in the discovery process, it may be difficult to determine how beneficial discovery will be in resolving the issues. The amount in controversy and the importance of the issues at stake "will likely be the predominate factors," and the parties will on occasion significantly disagree about the amount or the importance. The other proposed changes to the discovery rules, further, may make litigants more inclined to invoke present 26(b)(2)(C)(iii). "If parties more freely file motions invoking the existing proportionality standard in light of these changes, then there is less of a need to realign the available scope of discovery." It might be better to amend Rule 26(b)(1) "to specifically refer to proportionality as an important limiting principle that should be invoked in appropriate cases."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The comment on proportionality essentially renews the Rule 16 comment: the proportionality analysis should not be conducted without an in-person conference with counsel to discuss the

court's views.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Proportionality "will foster greater communication among counsel and allow for more effective case management."

468, Karen Lamp: Proportionality will "allow necessary and relevant discovery without requiring the parties to devote substantial resources to producing routinely requested overbroad discovery that in many instances will never even be read."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: The first part of the comment details several pilot projects and state court rules that adopt proportionality as a limit on discovery. Utah Rule 26(b)(2)(F) includes, as one factor bearing on proportionality, whether "The party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information." Utah Rule 26(b)(3) directs that the "party seeking discovery always has the burden of showing proportionality and relevance." In the second part, commenting on the published proposals, the "attempt to bring a proportionality evaluation to document requests" is applauded, with this further observation: "With specific reference to electronic discovery, we recommend that a proportionality determination should 'tak(e0 into account the nature and scope of the case, reloevance, importance to the court's adjudication, expense and burdens.'" "

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: Proportionality is subjective. The five factors "are quite limited in nature." Although the cost of responding can be shown, neither party will be able to objectively describe the value of the proposed discovery, nor can the court make a rational determination, having no idea as to the substance of the evidence. Parties will hide behind expense to avoid producing even relevant and admissible evidence that reasonably should be produced. The results will be catastrophic in cases of asymmetric information.

478, Joseph Goldstein: The proposals "are long overdue." "[T]he rules of discovery are routinely abused for the sole purpose of forcing a settlement of a dubious claim."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: As Professor Miller testified, the proportionality proposal is a threat to the jugular of the discovery regime. The scope would be changed from relevane to proportionality. Defendants would be able to avoid producing relevant information an plaintiff needs to prove the case, especially when the cost of discovery is expensive relative to the amount of damages or requested relief. "Civil rights

litigants will be the ones most hampered." The gap between the party who controls the information and the one who needs it would widen. And there would be "a massive increase in aggressive collateral discovery motions."

480, James Wilson: Strongly supports, which "will potentially provide a much-needed and common-sense improvement" to reduce runaway discovery costs.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Proportionality provoked the most detailed discussion at the conference. (1) Many plaintiffs' attorneys feared a significant and detrimental limitation of discovery. There is a risk that this will become a subjective standard, administered differently by different judges who have different "know-it-when-you-see-it" visions of proportionality. Many also feared this would shift the burden to the party requesting discovery, and that it is difficult for that party to show proportionality when the responding has all the information about the nature, location, and types of requested information. They feared disproportional effects on some kinds of cases, including "civil rights" cases. (One participant from Colorado offered the anecdotal impression that the Colorado pilot project with proportional discovery has not had the effect of limiting the parties' ability to get needed discovery.) (2) Most defense attorneys supported proportionality. It will refocus the court and parties on the importance and usefulness of requested discovery. "'To the extent the changes bring the court into the process \* \* \* this is a good thing.'" This will move away from boilerplate discovery and discovery sought for tactical benefit. And Rule 26(g) already obliges requesting parties to honor proportionality. (3) A judge thought this will encourage and increase judicial involvement. Another suggested that "for judges who are actively managing discovery, this would nto change the equation at all." Plaintiff and defense attorneys agreed that increased judciial engagement is a good thing that changes for the better how the attorneys approach a case. "Unfortunately there was also agreement that active judicial engagement was the exception."

(4) Some participants thought a different phrase should be substituted for proportionality: "relevant to any party's claim or defense and consistent with the needs of the case, considering \* \* \*" (5) There was broad support for moving "the amount in controversy" further down the list; some suggested that if it is removed entirely, "the resources of the parties" also should be removed. (6) A broader proposal was to tie proportionality analysis to the stage of discovery. Discovery could be staged, with initial discovery focused on what is needed for settlement, then on motions for summary judgment and responses.

494, Charles R. Ragan: Participated in the IAALS conference, and proposes the substitution of "consistent with the needs of the

case" for "proportionality."

499, Beth Thornburg: Proportionality, subject-matter discovery, and "reasonably calculated" proposals are addressed together (along with the proposed numerical limits). (1) Empirical studies show that discovery works well in most cases; the problems are confined to 5%, or at most 10% of all cases. High stakes cases, complex cases, and contentious litigators will continue to arise no matter what is done with the rules. If large-firms and hourly billing continue, that impetus to costly discovery also will remain. Nor is it shown that high costs in these "worrisome" cases are too high as a normative matter. (2) Across-the-board changes are not likely to succeed. More focused reform, based on empirical study of the problem cases, is more likely to succeed. Account should be taken of a study indicating that plaintiffs tend to use discovery to explore the fundamentals of a case, while defendants tend to believe in a more retaliatory model. Past attempts to cabin the problems of the atypical cases have failed. So it is quite unlikely that complex cases will be limited to 5 depositions or 15 interrogatories. (3) Forces outside the procedure rules will persist. Reasonable cooperation is "devilishly difficult to mandate." Many common types of cases "are particularly polarized," and lawyers come to identify with their clients and see only one side. There is a "dramatic lack of trust, and even a feeling of entitlement to use whatever strategies might be necessary to thwart opponents. Small wonder that more judicial involvement is what is most requested by lawyers on both sides of the docket. (4) The proposals will create new problems. Eliminating "subject matter" discovery leaves an unclear claim-or-defense scope that may be infected by arguments that, just as for pleading under Twombly and Iqbal, "conclusions" do not count in defining the claims or defenses. The uncertainty will be magnified by eliminating the "reasonably calculated" language and incorporating proportionality. (5) The result of all of this will inappropriately limit the exchange of information. (6) There is a particular risk that moving proportionality into (b)(1) will lead to a result not intended, imposing the burden of justifying discovery on the requesting party. At the least the Committee Note should make it clear that this is not intended. It would be better to cast proportionality as a defense in the rule text: discovery extends to anything relevant to claim or defense "unless the party opposing discovery proves that the requested discovery is not proportional to the needs of the case, considering \* \* \*."

519, J. David Stradley: In a bad-faith settlement claim against an insurer, discovery of the adjuster's personnel file showed he had been promoted for using "the low and slow method of negotiating," the very wrong claimed. That discovery would not be allowed under the proposal.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights



California and Disability Rights Education & Defense Fund: Advances the arguments generally made by civil rights plaintiffs, taking the perspective of disability discrimination actions. In commenting on "the parties' resources," it notes that it often litigates against municipal defendants. What counts as the defendant's resources? The amount budgeted for this action? The amount budgeted for the particular facility or program at issue? The entity's entire budget? These budgets result from political decisions.

524, Joel S. Neckers: Class action plaintiff lawyers have an incentive to propound needless discovery to run up the hours they can claim in attorney fees.

525, Victor M. Glasberg: For plaintiffs' civil rights litigation, proportionality "would have to take into account the life circumstances of the plaintiff and what success would mean to him or her."

528, James Ragan: The problem is that defendants produce thousands of pages of irrelevant documents and either object to producing relevant documents or hide them in the tens of thousands of others.

566, David Addleton: "Proportionality, if considered at all, ought to focus on disparities in power and economic resources between litigants and operate to handicap rich and powerful litigants to level the playing field in our courts \* \* \*."

579, Chet Roberts: To further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefit of the discovery substantially outweighs its burden or expense.

599, Bradford A. Berenson for General Electric Company: The comment provides specific case examples of multi-million dollar discovery expenses. In civil discovery, "boiling the ocean is the norm." The company's adversaries drive up discovery costs to exert settlement pressure; they cast a very broad net in hopes of supporting a claim of spoliation or discovery misconduct, particularly when their case is weak on the merits; and, since requests carry no marginal cost, they hope for an offchance of discovering something that may have some marginal use. The scope contrasts markedly with the scope of inquiry undertaken in internal investigations, where the company does only what it needs to answer an important legal question for its own internal purposes. That is sharply focused, quick, and inexpensive. The proposed Rule 26(b)(1) revisions will not bring a tradeoff of "just" disposition for "speedy and inexpensive" disposition; to the contrary, they will advance just dispositions and reduce cost and delay. The present scope of discovery is counterproductive. In addition, the change will further the purposes of proposed

Rule 37(e) to reduce the pressures to over-preserve.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Similar to the concerns expressed by many comments that fear disadvantages to plaintiffs and advantage to defendants.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proportionality proposal. Making this part of the scope of discovery, not a mere limitation, "is a significant change in theory and practice." "Relocation \* \* \* underscores the obligation on the part of the discovery proponent to tailor its demands to the needs of the case, and squarely places the burden of defending the scope of those demands on the proponent rather than the recipient."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no showing that lawyers or judges fail to read past (b)(1) to find present (b)(2)(C)(iii). The parties are required to observe these requirements now through Rule 26(g); there is no need to highlight them by reolocating them. The amendment creates a risk that the present language will be read more restrictively, and will be misinterpreted to place on the requesting party the burden of showing the request is not unduly burdensome. This risk arises precisely because the factors are already established and familiar; that is why so many of the comments perceive the change as one that makes the overall discovery standard more restrictive than it currently is. An alternative would be to suggest discussion of the proportionality factors at the 26(f) conference.

650, Craig Miller: Proportionality should not apply to oral depositions; it will only lead to stonewalling, refusals to answer questions, and motions.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors narrowing the scope of discovery, including moving the proportionality fators.

677, Noah G. Purcell for Washington State Attorney General's Office: Strongly supports proportionality. "The state is particularly vulnerable to overreaching discovery demands by opponents due to the state's huge ESI repositories. Private parties often erroneously assume the state has unlimited financial resources to respond to discovery."

720, Phillip Robinson: It is unfair to limit discovery by a plaintiff who did not elect a federal forum, but got there by removal. The list of factors should be revised: "considering the amount in controversy and which party sought the federal forum."

729, Stephen B. Burbank: A major change of course is likely from "the proposal to transmogrify proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself – its status since 1983 – into an integral part of the scope definition." The argument that this will not change the burden in discovery disputes is fallacious. Given Rule 26(g), courts now presume the legitimacy of discovery requests and the burden is on the opposing party to demonstrate the opposite. The change will not only increase transaction costs. It also may prevent a party, because of the transaction costs of discovery disputes, from securing discovery necessary to its claims or defenses. Those who discount these risks reflect "inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs." Proportionality will replace burdensomeness as the preferred objection. And this is exacerbated by moving proportionality to the scope of discovery – now it is likely to be faced after discovery is well advanced, so the judge has an informational basis for making the determination. When it is part of the scope of discovery, the judge will be called in at the outset, when there is no sufficient informational basis to make an informed decision.

787, Richard Wynkoop: "Colorado has been under a pilot project for a couple years now that ties proportionality to discovery. It doesn't work. Rather than streamlining litigation it increases it because 'proportionality' has no definition."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes the proposal. It will deny discovery in cases where counsel consciously overreaching under the current rule. (1) The FJC findings that discovery ordinarily is proportional reflects what happens when counsel act in good faith and courts diligently exercise oversight and authority. The rule is addressed only to the uncooperative minority, who might better be controlled by encouraging stricter enforcement of the rule against speaking objections, and by requiring greater clarity in responses to interrogatories and document requests. (2) Much current concern reflects discovery of ESI. It arises from the distrust engendered when a producing party refuses to disclose the means used to search ESI. That problem could be addressed by requiring open discussion prior to production, or disclosure of the means with production, or instructing courts that work-product protection should be narrowly construed in this setting. (3) Summary procedures for resolving discovery disputes are effective – frequent status conferences, pre-motion hearings, submission by brief letters. (4) The small minority of lawyers who create problems should be discouraged by being held to public account; courts should be encouraged to threaten or impose sanctions more frequently than they have in the past. (5) The concept of proportionality is not a standard; it is vague, and will be applied differently by different courts.

1025, Senator Jeff Merkley, Senator Ron Wyden: Proportionality  
"would risk denying \* \* \* harmed persons access to the documentary proof needed to develop their judicial case \* \* \*."  
"Civil rights litigants will be particularly hampered by these changes," given the "severe imbalances in access to relevant information. A proportionality standard would only widen the gap between the party who controls the information and the one who needs access to it to pursue justice." And it shifts the burden of production to plaintiffs, entirely upending the system of discovery. A defendant need only object that a request is proportional to force a plaintiff to show that its request meets the proportionality tests.

1028, J. Brad DeBry: The 2011 Utah move to proportionality "has not accomplished its aims, it has made litigation more difficult and expensive, and it has caused a host of ancillary litigation and disputes \* \* \*. To the fullest extent possible, we try and stipulate around the new rule changes because of the burden and lack of effective discovery." Any adoption of proportionality for the federal rules should be postponed for a few years to study the effects in other jurisdictions that have tried similar schemes.

1054, Assn. of Bar of the City of New York: A majority approves adding proportionality and moving the factors to (b)(1). This change is appropriate in light of the substantial increases in discovery, both of ESI and of other forms of information. Properly applied, the principle can aid individual and small-firm litigants as well as large entities. The move from (b)(2)(C)(iii) will make it clear that proportionality applies to initial demands. But the Committee Note should make clear that the amendment does not shift the burden of proving proportionality; that the rule is not intended to shift the playing field in favor of one set of parties or against others; that it is not intended to effect an across-the-board reduction in the scope of discovery, and that in many cases the amendment will have no effect at all; that the amendment is designed for the distinct minority of cases where proportionality is not already being applied in practice. It also should be made clear that all factors must be considered, not only the amount in controversy, and that initial proportionality calculations are subject to recalculation as the case progresses.

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions, and a board member of DRI.) Discovery costs drive settlement. Adopting proportionality will help to reduce discovery costs; although the concept is in the rules now, courts continue to issue orders that are too broad. It is important to also revise the "reasonably calculated" provision.

November Hearing, Jeana M. Littrell: p. 15 ff: The criteria of

proportionality are embodied in present Rule 26(b)(2)(C)(iii) and (g). The requesting party now has the burden to ensure and certify that requests are proportional. Moving this to the most prominent part of the rule is the best way to educate judges and litigants. The emphasis on proportionality will become increasingly important as there is more and more "discovery on discovery" – even before beginning discovery on the merits, parties seek extensive information about information systems and details of preservation capabilities and efforts. Typically this discovery is disproportionate. Nor will this disadvantage plaintiffs in employment discrimination cases – they must first take a claim to the EEOC, which has investigative powers and subpoena powers far broader than civil discovery. The argument that the change will shift the burden of showing proportionality to the requesting party misses the mark – Rule 26(g) imposes that responsibility now.

November hearing, John C.S. Pierce p. 22, ff: As chair of DRI trial tactics committee, favors the right to jury trial. Expensive discovery often forces settlement of cases that should go to trial. Proportionality is a good concept. "How much are we willing to spend to find needles in haystacks, these peripheral, marginal facts that really don't bear on the substance of a case"?

November Hearing, Altom M. Maglio: p 29 "Almost every discovery request will require a hearing on proportionality." Defendants make proportionality objections now by the often default response that a request is overly burdensome. The defendant has to explain why it is burdensome. By shifting the proportionality calculation from a limit on discovery to the scope of discovery, the new rule will require the plaintiff to explain why the request is not overly burdensome to the defendant – and the plaintiff can do that only by having discovery on discovery. This process will create a perverse incentive for a defendant to make it as burdensome as possible to locate and collect potentially incriminating information.

November Hearing, David R. Cohen: p 32 Trials are disappearing. "[T]he main reason is the expense, and the main driver of expense is the cost of discovery." Cases settle "because the discovery costs are out of proportion. It's not about the merits anymore." My practice group has 65 attorneys devoted to discovery. Our experience reflects the surveys – less than 0.1% of the documents we produce are typically used as exhibits in depositions or trials. My firm has invested in predictive coding technology, but "we frequently can't use it because we can't get the other side to agree." When there are many related cases pending in different courts, we often do not try to get agreement because we know we cannot get it from that many counsel and judges. "Plaintiffs have very little incentive to agree to that technology if it's going to reduce the burden on the defendant because they know that this

is great leverage for them \* \* \* and that leads to settlements." Proportionality is already there in Rule 26(g), "but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks' attention."

November Hearing, Paul D. Carrington: p 56 The Competitiveness Commission wanted to get rid of Rules 26 through 37 "because it costs a whole lot of money, and it makes American business less profitable, and consequently we can't compete as well in the international global market." p 63: the underlying purpose seemed to be "to make American business more competitive by protecting it from liability."

The Enabling Act has its roots in the deep troubles of the American legal system at the end of the Nineteenth Century. Roscoe Pound identified the need to convince everyone their rights would be enforced. That was the purpose of the Civil Rules. Efforts to economize can jeopardize someone's interests. The cases where it seems obvious that a lot of money is wasted on discovery tend to be big cases with big enterprises on both sides. Hourly billing has contributed to this. "So the proportionality question is less of a problem than it is sometimes presented to be." We should be cautious about trying to save on discovery costs at the expense of making individual rights harder to enforce. The concern that individual plaintiffs are being denied access to federal court because of the costs of litigating, as compared to being denied access by limitations on discovery, meets "my sense \* \* \* that the individual plaintiffs are not the ones who are complaining very much about the cost of presenting their cases or defending themselves." Apart from episodic cases, the FJC data suggest there is not a serious problem with excessive costs in civil rights cases.

The often lamented costs of discovering electronically stored information may be balanced by "the fact that the same engineering that produces the technology also produces ways of tracing and tracking and getting information out of a huge pile of documents." And document review can be outsourced overseas.

Countries succeed when ordinary citizens have a sense that they have some role, some participation, some sense of mutual commitment. The Civil Rules were designed to do precisely that.

366, Paul D. Carrington: Proportionality will weaken private enforcement of many public laws and further diminish the transparency of the judicial process.

November Hearing, Jonathan M. Redgrave: p 70 The proportionality test is present now in Rule 26(b)(2)(C)(iii) and 26(g). The current proposal "gives meaningful life to the promise of proportionality envisioned by the 1983 amendments." The 1983 effort failed for three reasons. "[P]artisan courts quite frankly ignore the proportionality factors altogether." When parties argue proportionality, they miss the point by failing to focus on the discovery device and whether it's worth the candle - they just cite to a factor. And, since there is no consistent

approach, courts tend to default to the view that reversal does not follow for allowing too much discovery. The proposed changes reinforce the need to consider proportionality in every case. Proportionality is "party and position neutral. Proportionality helps those seeking discovery as much as those seeking to limit discovery. What the rule does is require lawyers to do their jobs better." It is not a new tool given to large corporations to beat down individuals. It "will help those requesting parties better translate what they need for their claims to articulate why the discovery they seek from a large entity is proportional." I agree with Professor Carrington that we need a rule set that everyone believes gives them a fair shake in court. Proportionality is consistent with this. It is infinitely elastic. If you can justify enormous discovery, you can have it.

November Hearing, Paul J. Stancil: There are two core problems with proportionality. "[I]t's unlikely in the extreme that \* \* \* judges will be able to make any meaningful assessment of the likely value of the proposed discovery." Typically the problem will arise in cases that involve "significant informational asymmetry." The proponent of discovery will be least likely to demonstrate the likely benefit. Judges will rely on their own prior views of categories of litigation, and that is dangerous because those views are likely to be unreliable. To be sure, proportionality is required by Rule 26 now. But "it turns out to be very difficult to move judges to change behavior." The proposal "very deliberately in a very high profile way make[s] this issue of proportionality much more salient to judges and to litigants to some degree."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 (The statements about proportionality also apply to revising the "reasonably calculated" sentence and reducing the presumptive limits in Rules 30 and 33.) These proposals increase costs and the burden of litigation, impairing the ability of litigants to gather evidence from defendants and third parties. Plaintiffs in antitrust cases face information asymmetry. Others control information about the product, market, and alleged conduct – particularly pricefixing. This evidence is dispersed among far-flung third parties. The need for discovery is exacerbated by recent decisions that raise the barriers to class certification, requiring discovery on certification issues. And the Class Action Fairness Act brings into federal court cases that involve the laws of multiple states.

Under the present rule, a party resisting discovery as too burdensome must bear the burden of showing the burden. The proposed rule imposes a multifactor proportionality standard that will place a heavy burden on the party seeking discovery to satisfy proportionality. And proportionality is unworkable at the outset of a complex case – a party who lacks information needs discovery to show that discovery is proportional. The result is to protect larger parties who have a monopoly on information.

November Hearing, Peter E. Strand on behalf of the Defense Research Institute: p 119 Addresses 26(b)(1) in general terms, and also by applauding revision of the "reasonably calculated" provision. The proposals should be adopted, with the modifications suggested by Lawyers for Civil Justice. We have lost focus on jury trial; today we focus on trial by litigation and trial by discovery. In patent cases, a troll comes in. They demand all documents for all time over everything you have ever done related to all your products. "[I]t will cost \$10 million to produce 100 million documents. And the first thing your client says is how fast can we settle this." "By eliminating that reasonably calculated language, you are focusing the issue on what is the claim about." Another example: a Rule 30(b)(6) deposition notice regarding ESI processes. "[W]e're going to spend \$100,000 fighting about ESI discovery right off the bat."

November Hearing, Dan Troy: p 123: (General Counsel, GlaxoSmithKline): "[T]he U.S. legal system harms the U.S. competitiveness in the world marketplace." "[O]ur annual U.S. external litigation case costs have been as much as 50 times higher than our non-U.S. costs." If we can opt out of courts by ADR clauses, we do so. Courts are too expensive, too burdensome. But if we cannot get an ADR clause, we often litigate in the United Kingdom, because it is less burdensome, less costly. "[O]ften in certain kinds of complex cases, I'm a lot better off in front of a judge than I am in front of a judge and a jury." "[O]ur system is the ridicule of the world."

"The current overly broad scope of discovery \* \* \* creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at trial." In one recent federal MDL we produced 1.2 million documents; 646 were included on the plaintiffs' exhibits list. The proposed changes are good, but should be strengthened by adding a materiality requirement. It is difficult to define materiality, but "we know it when we see it. \* \* \* [I]t does have a sense of there's something important as opposed to being trivial." Present Rule 26(b)(1) is interpreted to reach anything that could potentially be relevant. Would this simply make document review more costly, by adding a further layer after identifying everything that is relevant and responsive? Well, it could work by shrinking the massive amounts of information that each side is dumping on the other. Plaintiffs' lawyers do not want that much information dumped on them. It becomes a needle-in-the-haystack problem.

(In response to a question whether it would help to expand initial disclosures to require identification of information harmful to a party's position, refused to endorse any specific approach. But did urge "a much more focused approach to discovery.")

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: The proposals give defendants more tools to avoid discovery. Proportionality "shifts the discovery process



from a focus on relevancy to an economic calculation." Each of the five factors will become the focus of collateral litigation. Defendants already argue burden and expense in almost every case, but codifying this factor gives the argument added credibility. And it upends incentives for defendants to preserve documents in an easily accessible format. An example is provided by a recent 6-year qui tam litigation that involved 25 fact depositions, 5 expert depositions, and the files of 350 nursing home patients to prove fraud by billing for services so deficient as to be essentially worthless. That was expensive and a burden for the defendants, but essential to prove the case. Relocating this factor will make it more complicated and challenging for plaintiffs to meet. It works to discuss proportionality in a Rule 16 conference, but it should not be emphasized by codifying it at the beginning of Rule 26.

November Hearing, Wayne B. Mason: p 142 Focuses mainly on eliminating the "reasonably calculated" language, but ties the same arguments to approving proportionality as a way of restraining massive discovery. "The proportionality, those five factors, I don't see how that increases the burden and expense to plaintiffs."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 Proportionality will increase disputes and litigation. IT depends on "five subjective and very fact-dependent criteria." Adding materiality would make it even worse. The Institute litigates constitutional claims against governments. The government defendant will resist discovery "based on its own subjective belief that the request is not proportional to the action." Relocating proportionality shifts the burden – under the existing rule a defendant must prove a request is disproportional, while under the proposed rule a plaintiff must prove the request in fact is proportional. Although Rule 26(g) requires a requesting party to consider burden and expense, it "comes into effect where the signing the discovery requests indicates that you are aware of all these factors and you're considering them." This means you have determined that the requests are relevant to the claims or defenses and do not trespass into discovery of the subject-matter of the litigation that is available only on court order. The revisions will invite more disputes, requiring judicial intervention. It is not clear how Rule 56(d), allowing time for more discovery before disposition of a motion for summary judgment, would work with the proposed rules – now, summary-judgment motions usually happen after discovery is closed. But it does not seem that Rule 56(d) would be an adequate safeguard, or it would come into play a lot more often.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: By moving proportionality up, "make[s] it so that that burden is placed on the proponent of the discovery at the

outset."

November Hearing, Andrea Vaughn: p 173: Defining proportionality by the amount in controversy will put low-wage litigants at a distinct disadvantage in litigation for nonpayment of wages. This is in direct conflict with the remedial purpose of the Fair Labor Standards Act. Although this is in the present rules, moving it into the scope of discovery enables parties to resist discovery, "whereas now it would be a question for the court." Yes, litigators would agree that discovery is a collaborative process. In the District of Maryland a discovery motion must be preceded by very extensive discussion among the lawyers, and by an exchange of briefing. But the change allows defendants to resist discovery from the onset. They can do that now, but the difference is that this will make it easier to resist discovery.

November Hearing, Alexander R. Dahl (Lawyers for Civil Justice): p 191 Discovery costs too much. It is abused. Those who say they oppose proportionality are really afraid of not having proportionality. The point of proportionality is that in each case, a party requesting discovery give thought to the case and claims and confine discovery to what is related to the claims and defenses. The concern that somehow the burdens are changed by bringing proportionality into the scope of discovery is surprising. What will happen is what happens now: requests are made, they are resisted, and a motion is made either to compel or for a protective order. As a practical matter, there will be no difference.

November Hearing, Lily Fu Claffee – U.S. Chamber of Commerce: p 198 See the general discovery summary. Favors the proposed changes.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 The risk of proportionality is that discovery will be more limited in employment cases involving low-wage plaintiffs than in cases involving high earners. Much less discovery will translate into a higher rate of dismissal on summary judgment. And the Committee relies on statistics that show that at least 80% of all cases involve five or fewer depositions; that shows there is no serious problem with disproportionate discovery.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 Moving proportionality up to the scope of discovery will allow courts and lawyers to focus on the issue early in the case. Proportionality will not eliminate meritorious claims. It will address problems of expensive and extensive discovery at the beginning as lawyers, or lawyers and a judge, craft a discovery plan. It will reduce the use of discovery for leverage, encouraging discovery as a search for truth. This will not provide a new range of tools for objections and satellite

litigation. Now, and under the rule as proposed, an objecting party is responsible to show why a request is burdensome or not proportional to the needs of the case. Ultimately, the objections will narrow the focus of the discovery, much as we do now in, for example, negotiating the scope of topics to be covered by a Rule 30(b)(6) deposition.

November Hearing, John P. Relman: p 253 Typical individual discrimination claims – housing, lending, disability, employment – involve damages of \$50-60,000. The defendant will almost always say it costs more to search the e-mails, to examine the loan files, than the amount of the claim. But the discovery is essential. (An example was offered of a housing discrimination claim in which the plaintiff offered a cosigner, to prepay a second month's rent as security, then to prepay a whole year's rent. The offered reason was that they did not do that. After the court ordered discovery the files proved this was pretext – they did do that.) Moving proportionality puts the plaintiff at the mercy of the defendant – in every case the plaintiff will have to fight for the discovery, and will have the burden to show the value outweighs to cost. "I think this sets civil rights back."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Relevance now defines the scope of discovery. Limiting it by proportionality will lead to a dramatic reduction that will be particularly harmful to civil rights plaintiffs. Discrimination has become more subtle and sophisticated, so that plaintiffs face an even higher burden in relying on circumstantial evidence. Focus on the amount in controversy is particularly troubling because it will be used to minimize the significance of the civil rights cases that often do not involve large sums of money. The present rule places review for proportionality squarely in the hands of the judge, and federal judges do this job well. There are no empirical data or research showing that civil rights cases are categorically prone to exorbitant discovery costs. Nor has that been our experience. The proposal, indeed, is likely to have the unintended consequence of making discovery processes longer and more costly through greater motion practice. We rely on individual plaintiffs to enforce the civil rights laws as private attorneys general. We should not undermine that function.

November Hearing, Patrick M. Regan: p 278 Concerns with proportionality are explained by discussing the proposal to reduce the presumptive number of depositions to five. The summary appears with Rule 30(a).

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: Proportionality, and the numerical limits on the numbers of requests under Rules 30, 31, 33, and 36 will have a disproportionate and unfair impact on private civil-rights plaintiffs. Congress counts on private attorneys-general to

enforce the civil rights statutes. The overwhelming majority of civil-rights actions are brought by private plaintiffs. The Supreme Court has limited access to courts by recent substantive and procedural rulings. "[I]nformation asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." The crisis facing the federal judiciary would be better approached by confirming pending judicial nominees.

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Includes Rule 26(b)(1) in lamenting the unfair burdens the proposals will place on civil-rights plaintiffs, joining it with a more detailed statement opposing the numerical limitations in Rules 30, 31, 33, and 36.

January Hearing, Joseph D. Garrison (NELA): (1) Moving up proportionality will mean that the rote objection becomes "proportionality." It may be administered by requiring the requesting party to show proportionality. That is wrong. The requester should have to show relevance; the objector should have to show lack of proportionality. It will work only if administered that way. (2) The factor looking to the amount in controversy should be stricken, or at least put last in the list. To be sure, this is an appropriate consideration in cases that involve only money. But employment cases involve much more. Suppose similarly wrongful discharges of an employee making \$500,000 a year and one making \$30,000 a year. The case may be more important to the one making \$30,000 who faces disclosure, losing a car, going on food stamps, and embarrassment. Those of us who know what we are doing look to the value of a case before taking it. Doing \$60,000 of discovery in a \$30,000 case is six times as much as should be. We can be effective for a client only if the case is effective for us as well.

January Hearing, Timothy A. Pratt for Federation of Defense and Corporate Counsel: p. 26 Moving proportionality to the scope of discovery is "critically important." Administering it will not be a question of burden of proof. p. 34: "This is a balancing of the interests with both parties contributing information that will allow the court, if they can't reach an accommodation mutually, to decide what the level of discovery ought to be allowed."

January Hearing, Jon L. Kyl: p. 45, at 48: "[M]oving the proportionality language \* \* \* will be very helpful."

January Hearing, P. David Lopez (EEOC): p 68 The EEOC often seeks nonmonetary relief. "This is a law enforcement function and it is something that cannot be monetized."

January Hearing, Kaspar J. Stoffelmayr: p 88: Discovery is proportional now in many simple cases. It is not in a very important group of large cases where the disputes are asymmetrical. But in other large cases, where the discovery

burdens will be symmetrical, large corporate parties tend to get by with far less discovery.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery. Elevating proportionality "could give them another tool to engage in resistance to legitimate discovery requests."

January Hearing, Michael R. Arkfeld: p. 104 Very few cases even discuss proportionality. Litigants do not realize it's there. Moving it up will generate more motions, raising the costs for requesting parties and decreasing access to justice.

January Hearing, Jocelyn D. Larkin: p. 125 Proportionality will impede institutional reform litigation. The important relief is injunctive, not monetary. The amount in controversy is not relevant. And the importance of the issues at stake lies in the eye of the beholder.

January Hearing, Quentin F. Urquhart for IADC: p 133 Adding proportional as a word, and moving up the factors to become more prominent will "bring a needed degree of pragmatism." Proportionality "isn't just dollars." The inquiry should not "front-load" examination of the merits. Who is right, who wrong, should not be explored at that stage. Lawyers can rationally discuss the importance of a civil rights case, or a purely economic case, in terms of what they are arguing, not who will prevail.

January Hearing, Elise R. Sanguinetti: p. 151 Representing individuals in wrongful death and catastrophic injury cases, proportionality is a radical change. The amount in controversy in a wrongful death action may be limited. Now we generally can reach agreement with defense counsel on the discovery we need. Proportionality will require us to negotiate through the factors; defendants will claim retrieval from storage is costly. The same is true for the importance of the issues, and the burden-benefit analysis. I prefer California courts now because discovery is so open. If proportionality is added, "I'm very concerned about what's going to happen in the future."

January Hearing, Kathryn Burkett Dickson: p 160 Think of proportionality in terms of employment plaintiffs. "I represent female farm workers who are sexually assaulted in the fields, all the way up to corporate executives." The executives "can give me informal discovery" – the names of people, how things are organized. Farm workers generally do not know even the last name of their supervisors. "[I]t's the people at the bottom sometimes who need the most discovery."

January Hearing, Larry E. Coben, Attorneys Information Exchange Group (AAJ Sub group): p 169 Moving up proportionality will change the burden of proof. The plaintiff will have to show the importance of something it does not know, and the court will have to rule in equal ignorance. Consider the design of an automobile fuel system. You need information about system designs for other models, and often generic design guidelines that apply to all vehicles. Suppose, for example, you had a client with a minor burn injury; proportionality could foreclose discovery of information supporting the claims of many victims, many seriously injured or killed.

January Hearing, Paul D. Weiner: p 177 Proportionality is the bedrock principle of any contemporary system of justice. It should apply to preservation not only in proposed Rule 37(e), but also in Rule 26(b)(2)(C): "the court must limit the frequency or extent of preservation and discovery"; "the discovery or preservation sought is unreasonably cumulative," etc.; "the burden or expense of the proposed discovery or preservation," etc.

January Hearing, Hon. Derek P. Pullan: p. 205 (1) None of the factors in the proportionality calculus is primary. (2) Utah Rule 26 was amended two years ago to require that all discovery meet the standards of proportionality, and at the same time beefed up initial disclosures to include a summary of the testimony of each witness a party may call and a copy of each document it may use. In addition to the factors in Federal Rule 26(b)(2)(C)(iii), Utah adds the "opportunity to obtain the information, taking into account the parties' relative access to the information." This factor is intended to address the problem of asymmetric information. (3) The Utah Rule also expressly provides that the party seeking information has the burden of showing proportionality and relevance, no matter whether it is a motion to compel, a motion to strike, or a motion for a protective order. But it is a "burden of proof soft" – some information bearing on the factors may be more readily available to the responding party. (4) Cost-shifting orders may be entered to ensure proportionality. (5) Beyond that, Utah has divided discovery into three tiers, with presumptive limits that are deemed proportional. Anything beyond these limits is called "extraordinary discovery." Some federal courts have adopted pilot projects or local rules that require proportionality. (6) Without proportionality, "[p]arties with meritorious claims but modest means are denied access to the courts. Specious claims settle to avoid the discovery bill." (7) The IAALS is undertaking a survey of experience with the new rules: younger lawyers really like the changes; many are reserving judgment; a high percentage "have not realized their fears"; a lawyer recently told me he is more and more advising clients to file in state court because discovery costs are more predictable. (8) This is a cultural shift; continuing efforts are made to educate judges.

January Hearing, Richard B. Benenson: p 316 A pilot program in Colorado State courts requires court and parties to address proportionality at all times, beginning with the first meet-and-confer and the initial case management conference, and continuing. "[T]he process is working." Requiring discussion facilitates proportionality, and continuing conversations. This is not one-size-fits all; in asymmetric information cases, the side without much information may need more discovery than the other side. In medium-size business cases, both plaintiffs and defendants benefit. Access to courts actually increases by reducing the need to resolve cases to avoid discovery costs rather than on the merits. (A survey of the program has started.)

February Hearing, Ralph Dewsnup, for Utah Association for Justice: Utah has had an express proportionality rule for two years. The rule goes far beyond the federal proposal. It lists 11 factors, without standards. Counsel often recognize the impracticality of the specific numerical limits, measured by tracks and the amount in controversy, and agree among themselves on more depositions or interrogatories. All a party has to do to halt discovery is to object on proportionality; then the plaintiff has the burden to show compliance with all 11 factors. The federal rules already have sufficient proportionality standards. People are not using the opportunities that exist. The problem is not so much proportionality as the lack of guidance on who has the burdens.

February Hearing, Maja C. Eaton: p 29 (1) Proportionality is important. It would be helpful to add a statement in the Committee Note that an MDL proceeding does not, without more, justify greater discovery on the common issues of liability simply because many cases are combined. What happens today is that MDL proceedings are seen as a carte blanche for unfettered discovery and a "gotcha mentality." (2) The proposal does not change a burden of "proof." Discovery disputes are more a matter of persuasion.

February Hearing, Michael O' Cowles: p. 47 Violations of Title VII and the FLSA are "often done through informal means and off the books." Discovery enables plaintiffs to pursue ancillary documents that color in the full extent of their claims. The burden of proving proportionality undoubtedly will fall on the requesting party. Often we do not know what it is we are looking for. The change will lead to greater discovery conflict.

February Hearing, John W. Griffin: p 57 In litigation on behalf of court security officers deemed unsuitable because they used hearing aids, and FBI agents deemed unsuitable because they had diabetes, we did not know at the beginning that the defendants acted under general policies. There were no written statements. It was only through extensive discovery that we uncovered de facto general policies. It was the discovery that made itself proportional. The defendants did not question proportionality. If

they had, we would have been hard-put to get the necessary discovery.

February Hearing, Mary Nold Larimore: p 68 Although it is true that proportionality is not getting enough attention because it is buried in 26(b)(2), the best reason for moving it to rule 26(b)(1) is that it is not simply something a party should invoke after discovery has gotten out of hand. It is an important part of the process that should be made part of the initial plan for appropriate discovery.

February Hearing, J. Michael Weston: p 87 The discovery process now is very contentious. The Rule 26(f) conference often is no more than a step on the way to a motion to compel. Good practice is illustrated by a recent class action in which the magistrate judge managed discovery, with limited initial discovery, a conference, another level of discovery, and so on until both sides understood the merits and settled. That is how it should work. Moving up proportionality, and eliminating "reasonably calculated," will be "an opportunity to get involved early on at the Rule 167 conference. I think more of them will be held." Magistrate judges will become more involved. And it gives criteria for resolving disputes.

February Hearing, Suja A. Thomas: p 93 The Committee recognizes that discovery is proportional in at least 85% of federal cases. It is a mistake to adopt a rule for atypical cases when the rule also will have an impact on typical cases. It would be better to move away from transsubstantivity and craft a special rule for the atypical cases that create the problems. But if a general rule is devised, Rule 37(a)(1) should be amended to state that the party requested to produce bears the burden of showing the request is not proportionate. And Rule 26(b)(5) should be amended to require a proportionality log. Adding something to the Committee Note is not adequate protection. The surveys that show greater lawyer dissatisfaction with proportionality seek opinions divorced from actual cases; the FJC closed-case survey is stronger research.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 Proportionality gives another battleground, another reason to withhold relevant evidence. Boilerplate objections are made to almost every request. This will add one more threshold motion. And it is unclear where the burden lies.

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 "Proportionality is not the standard right now. It's something I have to raise \* \* \*." Under the proposal, lawyers will bury the courts with motions. Under the proposal, I can force the other side to file a motion to compel. "I would not just object. I would unilaterally withhold relevant documents based on my client's subjective evaluation of whether the



documents are proportional to the kind of case we're in." So if the plaintiff's patent seems weak, I will say there are problems with the case and at this point only limited discovery is proportional. If the case comes to seem stronger after initial discovery, more will be proportional. "I like phased discovery like that." As an alternative to the proportionality language, consider E.D.Texas Rule CV-26(d): "what reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Moving proportionality up is desirable to make it part of the scope of discovery, not merely a limitation, and to provide clarity about what the scope of appropriate discovery is. "[I]t will not shift the burdens that are available right now."

February Hearing, John H. Martin: p 172 In the late 1990s Texas adopted as a limitation on discovery the proportionality language that then appeared in Federal Rule 26(b)(2), and placed it up front. Texas requires a party invoking proportionality to file a motion. This practice has not generated a lot of motions. It is discussed far more often in negotiations with opposing lawyers – and those negotiations work better with "the gray-haired lawyers" "than if we had somebody younger."

February Hearing, Michael M. Slack: p 193 Proportionality functions differently in the Texas rules. First, it does not have the primacy it does in the present proposal. Discovery works best by agreement, and by and large that happens. But the proportionality limit is there "for the parties and the court when agreement escapes reason." It facilitates collaboration among the parties and court; Texas courts provide status conferences every 30 days, and informal discussions. "I like phased discovery."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 We will need discovery to determine what is proportional. There will be fights to determine what is the amount in controversy, what is the importance of the discovery, and so on. "[E]very discovery request becomes a mini trial on the merits or class certification." And objections will be made when I attempt to get discovery of the IT structure when I need to show prejudice from the loss of ESI.

February Hearing, Donald J. Lough: p 248 The comments opposing proportionality show the need to reinvigorate this concept to the role that has been intended since 1983. "The burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof." Courts require both parties to discuss proportionality. There may be more motions during the break-in period, but the incentive to make motions will disappear "once it becomes clear what the rules are, and that they will be enforced."

February Hearing, Gilbert S. Keteltas: p 254 (1) Proportionality should not be raised for the first time in an objection. Proportionality is achieved by talking with your adversaries about what matters, who matters, what are the topics in dispute. When adversaries fail to cooperate, I walk them through the rules. "BUt it's harder work than it should have to be." It works by leaving room to reconsider proportionality as discovery proceeds. "In reality a lot of proportionality issues and objections will be addressed iteratively. Why don't we start small and get bigger? Maybe we don't know the answer today. We can work through it." (2) "The resources of the parties" should be omitted from the list of factors. "Litigants shouldn't be deprived of the benefits of proportionality simply because they have resources." (3) The fear of routine proportionality objections is countered by the need to meet and confer before making a motion, and by Rule 26(g) – the objection cannot be made unless it is reasonable.

February Hearing, David A. Rosen: p 262 The proportionality proposal, along with Rule 37(e), "would create \* \* \* a path for protection of corporate interest at the expense of the rights of individuals damaged by corporate malfeasance."

February Hearing, Stuart A. Ollanik: p 266 "Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery." When we overcome the resistance and get the documents, we find that the reason for invoking cost was that the documents prove our case. "Proportionality is too subject to manipulation." And if the burden is on the plaintiff, the plaintiff lacks information on the burden of producing. "It's too easy for defendants to manipulate, misrepresent, inflate those costs, and hide very important relevant truths."

February Hearing, J. Bernard Alexander, III: p 272 Moving proportionality to the front will let the defendant say this is a big deal. "In my [employment] cases, at the beinning of the case I don't know enough information oftentimes to be able to address why I need this information in detail." "Proportionality is just another arrow on the defense side \* \* \*."

February Hearing, Susan M. Rotkis: p 296 Plaintiffs uniformly oppose the proportionality proposal. From the perspective of consumer credit-statutes cases, the proposal is one-sided. All five factors will establish a threshold that plaintiffs will have to fight to cross at the very front end. Congress created statutory damages and fee shifting to facilitate private enforcement; this proposal will impede it. Our judges and jurists can implement proportionality when it is raised on a motion to compel.

February Hearing, Ariana Tadler: p 325 Proportionality is unfair  
It increases burdens on those who already have stringent

pleadings and burdens of proof. It will inevitably lead to increased motions practice that actually thwarts effective case management because judicial resources are already stressed.

February Hearing, Brian P. Sanford: p. 356 The proportionality proposal assumes the problem lies in the requests made by plaintiffs. The problem lies instead in obstructive discovery tactics by defendants that force plaintiffs to settle for inadequate sums.

RULE 26(B)(1): ELIMINATE EXAMPLES

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees, but with caution. Some litigants will argue that deletion of these examples means that such matters are no longer discoverable. The Committee Note should reflect the Committee's view that discovery of such matters is deeply entrenched and that it continues to be available.

398, Shira A. Scheindlin: The examples are useful to encourage early identification of sources and persons with knowledge. It has governed since 1970, without causing difficulty. Eliminating it will lead lawyers to argue that the elimination means a difference. There is no harm in leaving it in.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The rule text illustrating examples of discoverable matter should be restored, or at least the Committee Note should include the advice in the Transmittal Memo stating that discovery of such matters "is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples."

487, Peter J. Mancuso for Nassau County Bar Assn.: "Since the concept is still recognized and supported, there is no reason to delete it." Removing it will incorrectly imply it is no longer valid.

494, Charles R. Ragan: It is imperative that the Committee Note explain the Committee's view that discovery of these matters remains proper. The proposal already has led to statements that it would eliminate "discovery about discovery," a grave mistake with respect to the need to identify potential avenues for eDiscovery.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": The Note should say that this is not a substantive change. It is only a measure to remove clutter.

995, William P. Fedullo for Philadelphia Bar Assn.: Agrees that discovery of these materials is so well entrenched there is no remaining need to list them in the rule.

1054, Assn. of Bar of the City of New York: Agrees, but urges the Committee Note should state that all of these things remain discoverable.

January Hearing, Lea Malani Bays: p 283 (Represents investors in securities class actions.) Sets the importance of rule language allowing discovery of the existence, description, nature, custody, condition, and location of any documents against Rule

26(f) conferences discussing ESI. This language facilitates effective conference discussions. It is important to tailor discovery by exchanging clear, transparent information about the nature and capacities of ESI systems. What sources? Has deduplication been done? What about e-mail threading, concept searching, clustering, predictive coding? Is useful to sample sources that are expensive to access? Remove this language, and responding parties will argue that none of this information is relevant to the claims or defenses in the action. Already panelists at eDiscovery conferences are saying that after this rule change, they will not have to provide any information about ESI systems. Information about the systems is essential to evaluate the proportionality of discovery. It would help, further, to expand the list of topics for discussion in Rule 26(f), a broader checklist of subjects that must be discussed. The specific-objection requirement proposed for Rule 34 will not do the job alone.

RULE 26(B)(1): ELIMINATE SUBJECT-MATTER DISCOVERY

267, Lawyers for Civil Justice, by Alex Dahl: It is good to eliminate discovery relevant to the "subject matter involved in the action. The parties' claims and defenses provide a clear anchor, and a tie to what is potentially discoverable.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Eliminating the provision for extending discovery to the subject-matter involved in the action is good; it clarifies that discovery is delimited by the claims and defenses found in the pleadings.

289, Craig B. Shaffer & Ryan T. Shaffer: "As a practical matter, eliminating 'court-managed' discovery under Rule 26(b)(1) may have little effect on a party's ability to pursue reasonable discovery." This ties to the broad interpretation given to determining whether information is "relevant" to a claim or defense – relevance is found unless the information can have no possible bearing on a claim or defense," if it reasonably could lead to other matter that could bear on any issue that is, or may be, in the case." The current proposals do not suggest a narrower or different standard for measuring relevance. But eliminating subject-matter discovery, along with the newly explicit focus on proportionality, may have not undesirable consequences in lawyer behavior in drafting and responding to discovery requests, as summarized with the discussion of proportionality. Removing subject-matter discovery eliminates a safety net that might be invoked to justify over-broad requests.

292, Lyndsey Marcelino for The National Center for Youth Law: Discovery of the subject matter should remain available as a discretionary tool "to retain the ability, upon a showing of good cause, without a consideration of proportionality." [This may mean to say that proportionality should be measured against the subject matter, rather than only the pleaded claims and defenses. Present Rule 26(b)(2)(C)(iii) limits subject-matter discovery.]

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees with the proposal. "There is no justification for the current system of two-tiered discovery – one tier party-controlled, and the other tier court-controlled."

328, U.S. Chamber Institute for Legal Reform: Supports elimination of the "subject-matter" provision. But one further step should be taken: discovery should be limited to information "not only \* \* \* relevant, but also material to a party's claim or defense."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Redefining discovery to focus on claims and defenses

will help reduce the excessive costs of discovery. It would help to further limit discovery by requiring that the information be material to any party's claim or defense. January Hearing, p 26: Again approves removal of "subject matter" discovery.

345, Kim Stone for Civil Justice Association of California: Applauds limiting discovery to claims and defenses, "and not to 'any matter relevant to the subject matter involved in the action.'

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses deletion of discovery relevant to the subject-matter involved in the litigation. This will help cabin excessive discovery, and may have a marginal benefit in reducing over-preservation.

349, Valerie Shands: Eliminating subject-matter discovery may reduce the number of "fishing expeditions," but this will be another bar to effective discovery of the information plaintiffs need.

353, Kenneth D. Peters, John T. Wagener: Substituting proportionality for "any matter relevant to the subject matter" is will reduce costs and burdens.

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: There is no evidence that the discretion to extend discovery to the subject-matter of the litigation has been abused. Although it is difficult to foresee many circumstances in which distinguishing between claims and defenses and subject matter will be decisive, discretion should not be restricted absent strong reason.

356, Richard McCormack: It is good to make clear that discovery is defined by the claims and defenses identified in the pleadings. Discovery should be further limited by requiring materiality.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Protests deletion of the court's authority to order discovery of any relevant matter. This may mean to address deletion of the provision for discovery relevant to the subject matter of the action beyond the parties' claims or defenses.

381, John H. Beisner: "Limiting the scope of discovery to matters relevant to a party's claim or defenses is an important step to curtailing abusive discovery." Litigants too often seek information only tangentially related to the claims or defenses at issue.

383, Alan B. Morrison: Courts have been able to use "subject matter" discovery to avoid the need to decide on relevance. With

the change, defendants will press the relevance point much harder and judges will be forced to decide it in the early stages when little is known about claims or defenses. Defendants will have an incentive to decline to produce on grounds of relevance. This can be fixed by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: Deletion of this language is not justified. Subject-matter discovery has been a safety valve that reduces the need to address relevance. Defendants will be motivated to contest relevance more aggressively. January Hearing, p. 36 at 40: the same.

390, J. Mitchell Smith for International Assn. of Defense Counsel: It is a meaningful improvement to limit discovery to what is relevant to the parties' claims and defenses. But historically broad notions of relevance counsel that this should be tightened further by limiting discovery to matter that is relevant and material.

391, Paul K. Stecker: The 2000 Committee Note says that discovery relevant to the subject matter was not intended to be an entitlement to develop new claims or defenses not already identified in the pleadings. But the distinction has proved unworkable. Defendants are often dissuaded from arguing that proposed discovery is not relevant to the claims or defenses because the plaintiff will argue there is good cause to explore matter relevant to the subject matter. Discovery is frequently ordered on matters far beyond the scope of the pleadings. The Colorado Supreme Court interpreted the identical Colorado Rule in DCP Midstream v. Anadarko Petrol. Corp., 303 P.3d 1187 (Co. 2013), noting that courts seem to apply broad relevancy principles that appear unchanged from pre-amendment practice. Rather than attempt to define the distinction, it took a practical approach, ruling that when judicial intervention is invoked the actual scope of discovery should be determined by the reasonable needs of the action. That is similar to proportionality, and the right approach.

396, Steven J. Twist: Eliminating subject-matter discovery as part of the proportionality revision, is good.

398, Shira A. Scheindlin: "I have not heard any disputes regarding the scope of permissible discovery" since the distinction between claims and defenses and subject matter was adopted. "I suspect the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not." Eliminating this distinction will send a signal that the scope of discovery is being narrowed. There is no reason to do that. And some experts have claimed that restricting discovery to what is relevant to a claim or defense "might preclude discovery of significant metadata accompanying electronic records that is



necessary to permit the use of technology assisted review."

402, Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: This change "will prevent legitimate claims and defenses from being raised." The claim or defense may never come to light, or it may come to light too late and either be precluded or become the subject of a costly second action. And it ignores the plight of parties who reasonably they have a claim but lack the information needed to plead it to the standards required by Twombly and Iqbal. It systematically favors parties who have better access to information outside the discovery process.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: It is better to require proportionality and relevance to the parties' claims or defenses "than being guided by the amorphous standard of 'relevant to the subject matter involved in the action."

407, David J. Kessler: Eliminating subject-matter discovery is appropriate. "[C]urrent Rule 26(b)(1) is often abused and discovery is allowed into tertiary issues of only marginal relevance \* \* \*." Reducing the scope is necessary; a reactive approach that tries to find cheaper ways to produce is doomed to failure because the exponential increase in the amount of information defeats any ability to control costs once the data is discoverable.

408, Elliot A. Glicksman for Arizona Association for Justice: The proposal turns the focus of discovery from the subject matter of the litigation "to the specifics of often yet unknown but relevant and discoverable facts."

414, John R. Scott: Substituting proportionality for any matter relevant to the subject matter should help reduce costs and ease discovery burdens.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: "This deletion removes from a court's discretion the power to order discovery it deems relevant while not expressly connected to the four corners of a complaint." There is no clear dividing line to separate information relevant to the claims or defenses. In securities cases, for example, pre-class period discovery is often permitted to help establish a defendant's state of mind: that seems to bear on the claims or defenses, but why require that the line be drawn? Or in an action based on a false or misleading audit opinion, discovery of audit manuals is allowed: will that still be? One result will be that plaintiffs will draft still longer and more detailed complaints.

418, Harlan I. Prater, IV: Eliminating subject-matter discovery  
"would reduce the unnecessarily high costs and burdens of modern discovery."

427, John F. Schultz for Hewlett-Packard Co.: It is good to ensure that discovery is limited to the claims and defenses set forth in the pleadings. But this should be tightened further by requiring that the matter be "relevant and material" to the claims or defenses.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports elimination of "subject matter" discovery. "Creating a unitary standard for the scope of permissible discovery will simplify the discovery practice." (p. 4, n. 1, recognizes that the Department opposed separating out subject-matter discovery for a good cause showing in the 2000 amendments, but has concluded that intervening developments warrant the proposed amendment.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Limiting discovery to the claims and defenses, as opposed to the subject matter, "should help to reduce costs and discovery burdens."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: This comment provides a detailed opposition to the change, strongly recommending that it be abandoned.. Very few discovery disputes now focus on the distinction between what is relevant to the claims or defenses and what is relevant to the subject matter. The parties know the court will decide what discovery is appropriate without paying attention to the distinction, and if pushed will decide that what is appropriate relates at least to the subject matter. In most cases, the present rule establishes a "distinction without a difference." But eliminating it will encourage litigious parties to make objections they do not make now. It also will encourage parties to plead broad claims that will become subjects of motions to dismiss on the pleadings. And it will work to the disadvantage of an inarticulate party who cannot explain why requests are relevant to a claim or defense. The 2000 Committee Note offered impeachment information as something properly discoverable "although not otherwise relevant to the claims or defenses"; the change may have the unintended consequence of curtailing such discovery. Time should be allowed to develop experience with the proposed proportionality provision before considering whether to abandon subject-matter discovery.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) Decisions applying the provision allowing discovery relevant to the subject matter of the litigation for good-cause "suggest that courts have exercised their discretion sparingly and appropriately." (2) "It is unclear how discovery limited to what

is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims." In an action against an individual government official, for example, is discovery that would enable the plaintiff to find the facts necessary to impose liability on the governmental employer relevant to the plaintiff's claim?

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports limiting discovery to what is relevant to a party's claims or defenses.

729, Stephen B. Burbank: "The elimination of subject matter discovery (upon a demonstration of good cause) can only seem 'modest' or 'moderate' if one neglects the history \* \* \* and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination would have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so."

785, J. Bernard Alexander III, Wendy Musell, for California Employment Lawyers Assn.: It is quite normal and necessary to discover information relevant to the subject matter, although not to a claim or defense. Discovery may be needed of a defendant's computer systems or information hierarchies, though this is never relevant at trial. Information may be needed to test a claimed privilege.

797, Michael Murphy: Decries "attempts to discover information in a filed action that is not relevant to the filed action but may be relevant to some other matter being handled or considered by the same plaintiff's attorney in a different venue."

995, William P. Fedullo for Philadelphia Bar Assn.: "[T]he proposed amendment will not impair a party's right to obtain the discovery it actually needs, and it will protect the responding party or nonparty from the burdens imposed by discovery that, in the end, provides no benefit to anyone." Many courts and commentators have observed that the separation of subject-matter discovery from claim-or-defense discovery in 2000 "did not bring about a major shift in the scope of party-managed discovery."

1054, Assn. of Bar of the City of New York: A majority favors the proposal. "It is rare that a party expressly seeks discovery of matters that cannot reasonably be tied to the claims or defenses already presented in the case, and rarer still for the court to grant such discovery." Discovery "was never intended to provide an opportunity to seek evidence to support other claims that have not been alleged." But the Committee Note should say that leave to amend should be freely granted.

November Hearing, Lily Fu Claffee – U.S. Chamber of Commerce: p 198 "The big change is moving away from being able to ask a judge for evidence that's relevant just to subject matter \* \* \*." But "I've never sat down and argued with somebody about whether or not something is discoverable because it's related to subject matter. They always argue that it's relevant, and relevance is a very, very broad concept."

January Hearing, Jocelyn D. Larkin: p. 125 In litigation seeking reform of governmental and corporate conduct, discovery of the subject matter beyond the pleaded claims and defenses can be important. When the object is systemic institutional reform, "it may go beyond the specific facts of that person" who appears as plaintiff claiming one specific form and incident of discrimination. The Committee may contemplate a generous interpretation of what is relevant to claim or defense – a systematic practice of discrimination may help prove the individual claim. But the change will be read to narrow the scope of discovery.

February Hearing, Mary Nold Larimore: p 68 This change will go a long way to culling out the irrelevant custodians whose hundreds of thousands of documents are currently being collected and produced and reviewed.

RULE 26(B)(1): NEED NOT BE ADMISSIBLE

270, Ohio Association for Justice, by John Van Doorn: It is a mistake to delete the present provision for discovering relevant information that may lead to admissible evidence. Rule 11(b) recognizes the legitimacy of claims founded on a reasonable belief that reasonable opportunity for discovery will provide evidentiary support. The 1946 Committee Note recognizes that discovery that yields useful information is successful, even if it does not produce testimony directly admissible.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Striking the sentence allowing discovery of information reasonably calculated, etc., is welcome. "[B]oth practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material." The sooner it is deleted, the better.

290, Randall E. Hart: The premise in discussing the proportionality factor is that the "reasonably calculated" provision "creates a presumption of discoverability" that make discovery flow smoothly. The multifactor proportionality test will undercut this.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The "reasonably calculated" provision "has been misapplied by courts and litigants to expand the scope of permissible discovery \* \* \*." The Committee Note "should clarify that the deleted language was misconstrued and that is the reason for the deletion." The substitute language, focusing on information within the scope of discovery as defined by Rule 26(b)(1) is proper.

307, Hon. J. Leon Holmes: See the summary on proportionality. Opposes the change, in terms that seem to rely on the "reasonably calculated" provision to define the scope of discovery as Rule 26(b)(1) stands now.

309, Kaspar Stoffelmayr: Everyone understands that hearsay should be discoverable. But the "reasonably calculated" provision is repeatedly taken by courts "to articulate an extremely broad standard for the scope of discovery." Relevance is interpreted to allow discovery of anything except information that "has no possible bearing on the subject matter of the action." Materiality should be required.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): This proposal "helps focus discovery on relevant information and can stem the tide of overly broad document production."

327, Malini Moorthy for Pfizer, Inc.: Endorses eliminating the "reasonably calculated" language.

328, U.S. Chamber Institute for Legal Reform: This change is important. "[S]ome courts have found that information is presumptively discoverable as long as there is 'any possibility' that the information relates to the 'general subject matter of the case,' and that resisting discovery is only appropriate where the information sought has 'no possible bearing' on the issues pled in the complaint or those that may arise during the litigation."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: The "reasonably calculated" standard is vague and overly broad. It has driven up the costs and time of discovery.

338, Steven D. Jacobs: Discovery works well now in civil rights and employment discrimination cases. Substituting "a proportionality rule for the broad and eminently workable 'reasonably calculated' standard[] will only serve to make the courts essential referees in the discovery process." There are no empirical data showing widespread abuse.

343, Doug Lampe for Ford Motor Company: "[P]arties justify their discovery requests by stating that such requests may 'lead to the discovery of admissible evidence' – all but ignoring the rule's express invocation of a relevance standard – and by identifying a policy expressed nowhere in the rules themselves – that discovery should be 'liberal and broad.'" Removing this troublesome phrase will require the parties to focus on discovery necessary to assert a claim or present a defense.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The Reasonably calculated standard is well understood. "It does not permit limitless discovery." Lawyers understand this as the scope of discovery standard. Changing it will cause more problems than will be solved. Proportionality will become a boilerplate objection. "The reason that our present Rule works so well is that it recognizes the importance of permitting all potentially relevant information to be uncovered."

345, Kim Stone for Civil Justice Association of California: Applauds deletion of the "reasonably calculated" sentence.

351, Eric Hemmendinger for Shawe Rosenthal LLP: The "reasonably calculated" provision "is commonly misread as allowing virtually unsupervised discovery." The rule should be strengthened by requiring that requested information be material, not only relevant.

353, Kenneth D. Peters, John T. Wagener: Deletion of "reasonably

calculated" "should further streamline the discovery process."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: The present standard is well understood and workable. Removing "reasonably calculated" "significantly narrows the scope of discoverable information," severely impacting the ability of those who most need discovery, typically plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: Removing the "reasonably calculated" phrase broadens the scope of discovery. The new language contains no limits. Proportionality does not provide any guide to what is relevant. And it will become the primary focus, with its five factors.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as the present definition of the scope of discovery. Substituting proportionality is challenged.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope.

381, John H. Beisner: "[B]oth courts and counsel have interpreted the 'reasonably calculated' wording in the rule in a manner" that broadens the scope of discovery beyond relevance and obliterates all limits. It should be deleted.

383, Alan B. Morrison: Couples this with the "subject matter" point: it may be acceptable to delete the "reasonably calculated" part, but this should be ameliorated by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: "What is the purpose of this change"?

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: The "reasonably calculated" language "too often allowed relatively unfettered acceptance of the need for further discovery." It is properly eliminated.

390, J. Mitchell Smith for International Assn. of Defense Counsel: The "reasonably calculated language" "has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery." eliminating it would effect substantial reductions in unwarranted discovery.

396, Steven J. Twist: Eliminating the "reasonably calculated" sentence is good.

398, Shira A. Scheindlin: "There is no empirical evidence that this language has caused any real problems." The rule

specifically requires that the information be relevant, meaning relevant to a claim or defense. "It does not expand the scope of relevance or create an exception that swallows the rule." This will be seen as another signal narrowing the scope of discovery.

399, Edward Miller: The "reasonably calculated" language "has erroneously been used to establish a very broad scope of discovery." This is a necessary and important change.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The "reasonably calculated" language "has become a common justification for discovery 'fishing expeditions.' It also limits what Courts can do to restrict the volume of information sought. However, the use of this language in this fashion is erroneous. But "both practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material."

407, David J. Kessler: The Committee is right. "The current formulation of this rule has confused courts and parties, expanding discovery beyond what was intended" by the "reasonably calculated" sentence. "The fact that a party is seeking information that would not be admissible at trial should not prevent it from seeking discovery, but neither should it expand the scope of discovery beyond its defined limits." Indeed the case law reflects a growing pressure "to pressure, or even order, responding parties to produce non-relevant or privileged documents to opponent for the sake of speed or cost-effectiveness." The idea seems to be that the availability of clawback agreements and Evidence Rule 502 mitigate the risks of privilege waiver. But these devices do not bear on the many other reasons for review and nonproduction, including withholding data privacy information, culling irrelevant data, and learning about the documents at issue." The Committee Note should state that documents that are actually privileged or not relevant are outside the scope of discovery, and courts should not compel production.

408, Elliot A. Glicksman for Arizona Association for Justice: The "reasonably calculated" language is "some of the most important language that courts have traditionally used to permit broad discovery." The Rule 26(b)(1) proposal significantly narrows the category of potentially discoverable materials.

412, Mark S. Stewart for Ballard Spahr LLP: "Discovery is not an unfettered right." Relevancy has been construed to encompass any matter that reasonably could lead to other matter that could bear on any issue in the case. That leads to such requests as those for "any and all documents" related to a particular topic. Litigants sometimes seek irrelevant data to expand the scope of the issues or to find evidence for other cases. They share general liability documents - in drug cases, for example, they



seek documents concerning drugs not specifically relevant to their claims to supplement discovery in other cases or to create a basis for pursuing other cases. And the volume of discovery in multidistrict or coordinate proceedings may become a basis for allocating global settlement costs and fees among plaintiffs' firms. Requiring greater specificity in requests will force more fruitful negotiations about the proper scope of discovery. The "reasonably calculated" approach will be deflated. But to make sure, "materiality" should be an added limit on the scope of discovery, at least in the Committee Note.

414, John R. Scott: Supports abandoning the "reasonably calculated" standard.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

418, Harlan I. Prater, IV: The "reasonably calculated" language "is often erroneously used to establish an overly broad and costly scope of discovery." The proposed amendment preserves the original purpose to clarify that inadmissible evidence such as hearsay can be within the scope of discovery so long as it is relevant.

419, William R. Adams: The "reasonably calculated" language is unnecessarily broad, "and allows for improper 'fishing expeditions' by opponents whose theory of the case has either never been fully developed or, through discovery, has proven to be incorrect." Eliminating it will be a significant step toward reducing unnecessary costs.

421, Louis A. Jacobs: First suggests that "The Committee could remedy excessive discovery by removing the 'reasonably calculated' language; relocating proportionality is overkill." But later suggests that removing this language will hamper party negotiations about the scope of discovery. Starting with the view that discovery abuse is rampant would lead to deleting this sentence. But starting with the view that abuse is sporadic would preserve the sentence and the precedent interpreting it.

434, James Moynihan: The volume of material produced in discovery has grown at an almost incomprehensible rate. Elimination of the "reasonably calculated" phrase is particularly welcome, as is proportionality.

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: As both defendant and plaintiff, supports Rule 26(b), endorsing comments by Lawyers for Civil Justice, Bayer Corp., Ford Motor Co., and Pfizer Inc. Rather than repeat those comments, offers several examples of cases in which only a tiny fraction of documents produced in discovery were listed as trial exhibits. In one of the examples, 391,000 documents were produced; the plaintiff listed 805 as trial exhibits, and 146

were admitted.

445, Gerald Acker, for Michigan Assn. for Justice: The "reasonably calculated" standard is relatively objective, calling for discovery "to be directed at possibly locating admissible evidence." It should not be replaced by proportionality.

452, David Hill: Drawing on many years as CFO of various companies, supports focus on the claims and defenses, not any information that might lead to admissible evidence.

454, John Brown: Supports narrowing discovery to focus on the claims and defenses, not "searching for information that might lead to admissible evidence."

455, W. Michael Scott for CrownQuest Operating, LLC: The "reasonably calculated" provision is overly broad. Discovery should be limited to what is actually relevant and material to the claims or defenses.

456, Niels P. Murphy writing for eight lawyers: Eliminating the "reasonably calculated" provision "would help curtail unnecessary discovery and reign [sic] in the very broad scope of discovery erroneously brought about by this language."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Removing the "reasonably calculated" language is "intended to remove awkward if familiar language rather than change substantive standards." Additional language in the Committee Note could avoid the risk of uncertainty among practitioners, some of whom may see this as narrowing the scope of discovery. Suggested Note language: "Although the 'reasonably calculated' language is deleted because it has been misconstrued to permit discovery of non-relevant information without limitation, the scope of what is discoverable under the Rule remains unchanged."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Removing the "reasonably calculated" language "marks a significant change in the manner in which relevance is defined \* \* \* and raises questions regardint the continued validity of numerous cases decided based on the existing standard." It would be better to retain it in some form, perhaps: "This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence." Supports abandoning the "reasonably calculated" standard.

467, Michael Freeman: (Tort counsel for Walgreen Co.): The "reasonably calculated" provision "has been broadly interpreted, resultin gin significant discovery costs - particularly to corporate defendants." It is good to replace it with proportionality, a limitation that "is reasonable, open to fair

interpretation and proper enforcement."

483, Kenneth Wittenauer: The "reasonably calculated" provision "has been broadly interpreted, resulting in significantly increased discovery costs – particularly to corporate defendants." Striking this provision, and inserting proportionality into the scope of discovery, are supported.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Defense lawyers at the conference noted that the "reasonably calculated" language "tended to overshadow the rule and distort the scope of relevancy."

501, Martin D. Stern: In both small- and large-stakes litigation, "reasonably calculated" leads to discovery that does not speak to any case issue; courts are hesitant to deny "since there is a plausible argument that it could somehow lead to admissible evidence."

524, Joel S. Neckers: "Reasonably calculated" "has created immense and unsustainable burdens." But the tradition of overly broad discovery is so well established that the amendments may not be effective.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no "documented problem" with the "reasonably calculated" provision. The Committee's concerns seem to rely on anecdotal impressions. Since 2000, the rule requires that the information be relevant. The amendment will suggest that there is an area of information reasonably calculated to the discovery of admissible evidence but is not relevant to the claims or defenses, hence not discoverable. This in turn will be read to narrow the meaning of what is "relevant."

642, Cal Burnton: "[T]he only constants about company records are that things are not organized, easily found, or even generally known to exist." The "reasonably calculated" standard provokes searches far beyond what is warranted.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports elimination of the "reasonably calculated" formulation.

995, William P. Fedullo for Philadelphia Bar Assn.: The "reasonably calculated" phrase "has led to an overly expansive definition of the scope of discovery." It tends to creep beyond the original purpose to arguably expand the scope of discovery beyond relevant information and documents. (A dissent argues for retaining this well-developed concept.)

1054, Assn. of Bar of the City of New York: Supports "the objective of this change \* \* \* to better express the scope of discovery that has always been intended." The Committee Note should observe that the amendment will not affect the discoverability of metadata relating to particular electronic documents or information about a party's computer system.

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions; a member of DRI board.) Along with adopting proportionality, it is important to revise the "reasonably calculated" provision. It "is too broad to define." It leads to discovery orders that are too broad. An example is provided by a product liability action involving a medical device. FDA approval rested on predicate devices that are comparable in performance, but not in design or type of technology. But the court in such a case ordered discovery as to all of the predicate products as reasonably calculated to lead to discoverable evidence. That included dissimilar products and adverse events. In this case, all the predicate products were made by the defendant. In other cases, nonparties might be afflicted with the burden of such discovery.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 Revising the "reasonably calculated" provision is troubling for all the reasons that make proportionality troubling.

November Hearing, Wayne B. Mason: p 142 The most important proposal is the one that removes the language with respect to "reasonably calculated." Many lawyers mean it believes "you could pretty much have anything you wanted." This happens in state courts and in arbitration as well as in federal courts. Rule 26 has become an issue of leverage. "E-discovery has changed the world." Massive information is available, even from small businesses and individuals who have smartphones and tablets. Once you identify the documents they have to be reviewed for privilege, work-product protection, "and things like that." "Reasonably calculated" means I have to produce 2 million documents, while only two dozen of any significance wind up in trial. The same two dozen would be discovered with a narrower scope of discovery – any lawyer with the intelligence to pass a bar exam can frame requests that will lead to production. Predictive coding is a good idea, "but it is only one step and it is not the answer. \* \* \* You can't get agreement on it. You can't afford to use it. And so, as a practical matter, it's used very little." And you still would have to review a ton of documents.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Taking out the "reasonably calculated" language will increase corollary litigation.

November Hearing, Marc E. Williams, President Lawyers for Civil

Justice: p 244 It is clear that the "reasonably calculated" provision was never intended to define the scope of discovery, but eliminating it and pushing proportionality into the scope of discovery "will allow us then to focus on proportionality as it relates to the discovery that is necessary for the type of case that is being prepared."

January Hearing, Jon L. Kyl: p. 45, at 47: "Many have misunderstood this language as really reflecting the real standard for discovery."

January Hearing, Quentin F. Urquhart for IADC: p 133 "Reasonably calculated \* \* \* has really swallowed the entire rule," allowing discovery "based on the hope that this search might, quote, lead to, closed quote, some other type of information that might be admissible at trial."

February Hearing, Mary Nold Larimore: p 68 This change will go a long way toward focusing on what is important.

February Hearing, Michael J. Harrington: p 121 Offers examples of vastly expensive discovery, and offers support for Rule 26(b)(1) – the greatest benefit "is the changed language to get away from the old standard, which I think is very broad, and leads to excessive discovery." This seems to reflect not so much proportionality as either "reasonably calculated" or "subject-matter" discovery, or all of them.

February Hearing, Leigh Ann Schell: p 179 Moving away from relevance to the subject matter, and especially eliminating the "reasonably calculated" phrase, is important. "Reasonably calculated" was not intended to expand the scope of discovery, but it has been overused and overblown. The proposal is a return back to what was intended in the first place.

February Hearing, John Sullivan: p 231 "Reasonably calculated" generates "the hugely open-ended standard we have always had." Adopting a tighter standard is good.

February Hearing, Donald J. Lough: p 248 "The root of this over discovery problem is the reasonably calculated clause in Rule 26." The comments that oppose removing this language, arguing that it is the core standard of relevance, show that it is misconstrued. Courts too often delay a determination of relevance until it is too late – they punt on the discovery objections, and then at trial time the documents are excluded as not relevant.

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Endorses eliminating "reasonably calculated" because it "has turned into a giant loophole."

RULE 26(B)(2)(A): ALTER NUMERICAL LIMITS, RULE 36

RULE 26(B)(2)(C)(III)

358, Dusti Harvey for AAJ Nursing Home Litigation Group:  
Discovery will be mandatorily narrowed if the court finds an item does not meet the rigors of 26(b)(1). "[O]ther vehicles for discovering those materials will be off-limits."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Endorses.

RULE 26(c)(1)(B): ALLOCATION OF EXPENSES IN DISCOVERY ORDER

267, Lawyers for Civil Justice, by Alex Dahl: This is a small but important step toward the more important goal of revising the default "rule" that a producing party must pay the costs of responding. 540, Alex Dahl for Lawyers for Civil Justice: And the proposal should go further to recognize expressly that a protective order can protect against overly costly preservation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section agrees that this cost-shifting power is implicit in present Rule 26(d). But the rule text, or the Committee Note, should make it clear that allocating expenses does not alter the American Rule and does not authorize allocation of attorney fees incurred in connection with disclosure or discovery. Attorney fees are not the kind of expenses that should be allocated. And notes that "[t]he cases are not uniform on whether courts have authority under the Rule to shift costs associated with the search and review of accessible data." November Hearing: Michael C. Rakower, p 287: The Section does not think the proposal is intended to change the American Rule, but it might be advisable to say so in the Committee Note.

311, James Coogan: Individual plaintiffs may be saddled with immeasurable costs. This creates an incentive for defendants to increase costs.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): "[W]hen our clients have included cost-shifting provisions within their Rule 26(c) protective orders, opposing parties have asked for fewer documents and focused their requests \* \* \*." "[T]he amendment explicitly encourages courts to take an active role in shifting the costs of discovery."

325, Joseph M. Sellers: Present Rule 26(c) authorizes cost allocation. It is a mistake to emphasize it further; if the proposed language is added, "the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources." And as with Comment 303, New York State Bar Association, it should be made clear that attorney fees are not among the expenses to be shifted to the requesting party – that would be an unwarranted departure from the American Rule. And three more points: (1) Cost shifting is unnecessary to deter excessive requests: the requesting party incurs costs to conduct depositions, and to review and analyze responses to interrogatories and documents. This is particularly true with electronically stored information – a party requesting it has ample economic incentive to make narrow requests. (2) The responding party is in the best position to control costs. If it bears the costs, it has every incentive to reduce costs; if it



shifts the costs, it has less incentive to maintain records in readily accessible formats or to employ efficient search strategies. (3) Particularly in civil rights and employment cases, there is an asymmetry in the parties' resources and their access to evidence without formal discovery. If ordered to pay, a plaintiff may forgo discovery and be forced to proceed without the information.

328, U.S. Chamber Institute for Legal Reform: The root cause of our broken discovery system is the rule that generally the producing party bears the costs of producing. "This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself." The problem is exacerbated by electronically stored information. A RAND study found that the median total cost for ESI discovery among the firms who participated totaled \$1.8 million per case. The present practice deprives the producing party of its property – the money spent to produce – without due process of law. There is nothing but the plaintiff's unilateral allegation of liability, no judicial hearing. Even a hearing on a motion to dismiss or for judgment on the pleadings does not provide the required process before inflicting these costs. The costs of discovery should be placed provisionally on the person asking for it, giving incentives for the optimal level of production. A safety valve can be incorporated for the unusual case considering "whether the party from whom information is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies." "This system would also facilitate greater and more direct court involvement in discovery."

Failing that, a more modest "solution would be presumptive cost-shifting for electronic discovery." The result would be narrower requests, reducing the prospect of infringing a defendant's due process rights. Or, failing that, "[t]he Committee might codify the factors articulated by" the ABA Section of Litigation Civil Discovery Standards, 29b.iv.A-P (2004).

343, Doug Lampe for Ford Motor Company: "In Ford's experience, judges are almost uniformly unwilling to consider meaningful cost-allocation proposals even in cases of clear discovery abuse." Defendants sometimes settle meritless claims to avoid the cost of onerous discovery demands. "Making explicit the provision for protective orders that allocate the costs of discovery would deter parties from engaging in abusive discovery tactics." The problem is illustrated by a specific case in which a state court ordered Ford to retrieve records from more than 1,300 other lawsuits and 1,200 witness transcripts, many involving closed cases and off-site archived records maintained by outside law

firms. This effort cost \$2,000,000, and yielded nothing actually admitted in evidence at trial. The court allowed Ford to recover only the few thousand dollars incurred for reasonable copying costs.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: This will have a chilling effect on discovery. Individual plaintiffs have no way of assessing the cost of production. "Permitting cost shifting will encourage efforts to thwart discovery by making it expensive to locate and produce evidence and/or artificially inflating the cost of locating and producing evidence." The rule will discourage development and use of archival systems that reduce the cost of production.

351, Eric Hemmendinger for Shawe Rosenthal LLP: "Cost sharing is the best single method of forcing counsel to ask whether discovery is really necessary." Many employment plaintiffs have limited means, but "even partial cost sharing would cause counsel to engage in a cost-benefit analysis before conducting discovery." And it should be remembered that many collective and class actions "are essentially business ventures organized by plaintiffs' counsel."

353, Kenneth D. Peters, John T. Wagener: "This provision \* \* \* will force parties to think twice before seeking large amounts of discovery which may prove marginally useful."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: The amendment is superfluous because the authority is already there. In nursing home litigation, it is common to be allowed discovery of incident reports documenting injuries only under a protective order. "[T]he proposed change appears to deliberately enumerate the awarding of costs as a formalized duty for the court." [This seems to say that costs must be awarded whenever a protective order is granted for any reason.]

360, Robert Peltz: Practices maritime law in S.D.Fla. A combination of a ruling by a Florida appellate court and forum-selection clauses in cruise ship contracts means that the overwhelming majority of actions by injured passengers must be filed in S.D.Fla. Passengers from around the country can ill afford to litigate there now; adding responsibility for the defendant's costs in responding to discovery would make it economically impossible for many individuals with meritorious cases to bring them.

372, J. Burton LeBlanc, for American Association for Justice: Does not object, but the Committee Note should be expanded to say that these new words do not change the presumption that the responding party should bear the costs of producing discovery. Any more general "requester pays" rule should be limited to litigation between large corporations.

381, John H. Beisner: Writes at length to urge broad expansion of "requester pays." Due process interests are at stake in a system that enables one party to inflict the costs of discovery on another party without any pre-deprivation hearing. One approach would be to establish a general rule that each party pays the costs of discovery it requests, subject to adjustment by the court on considering such factors as whether the responding party preserved information in forms costly to retrieve, failed to provide relevant information during initial disclosures, or drove up the price of discovery through its litigation strategies. Alternatively, the rules might simply mandate that the court consider cost shifting in any case in which discovery of ESI is sought. The need for some such relief will only grow as third-party litigation financing expands. Investors in litigation are almost assured that they can recoup the investment because it is possible to impose such great discovery costs as to coerce settlement on terms that at least cover a plaintiff's litigation expenses.

383, Alan B. Morrison: Allocation of expenses can be a reasonable element of a protective order. But the Committee Note should make it clear that this should not be routine, but used only "where the losing party was unreasonable in either the making of an objection of pursuing the request."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Considering the cost of discovery will have a welcome tempering effect on the desire for additional discovery.

398, Shira A. Scheindlin: "[C]ost-shifting has crept into the rules and the more often it does, the more likely we are to see a change in the American system of litigation." In 2006 the Committee suggested that cost-shifting can be a condition for producing ESI that is difficult to access. The new rule, in combination with Rule 26(b)(2)(B), "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without." That should not become our default position.

414, John R. Scott: This proposal "will offer substantial relief from excessive costs of discovery. The mere existence of this rule will likely cause litigants to be more thoughtful in making their discovery demands."

427, John F. Schultz for Hewlett-Packard Co.: "The ability to allocate the expenses of broad discovery requests to the requesting party would likely reduce the scope of such requests and encourage greater cooperation by the parties agreeing to search terms or custodians and taking other measures to reduce the overall burden of discovery \* \* \*."

428, Dave Stevens: Writes as owner of a small campground to

support "increasing judicial authority to charge the plaintiffs for unreasonable costs they generate on such things as discovery."

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: This may be the most important, and have the greatest impact, of all the proposals. "[I]f properly and routinely applied by courts, the amended rule should focus discovery on information critical to the parties' claims and defenses." "But the key is the application \* \* \*." The authority exists now, and is seldom used. Change must include consistent application.

446, Stephen Aronson: The rules should adopt a requester-pays system to reduce unreasonable time and cost in discovery.

447, Charles Crueger: (This comment may interpret the proposal as a general requester-pays rule:) It is unwise to have the requesting party pay. The requester almost never knows what documents the other side has, and cannot predict whether the discovery will be worth the cost. The producing party has an incentive to maximize the costs of production. In large cases, the parties have an incentive to opt out of cost shifting. Much expense, for that matter, results from persisting in reviewing ESI as if it were paper; computer retrieval and review can be much less expensive.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Holding parties accountable for the cost of excessive requests encourages tempered discovery and reinforces the purpose of the amendments to Rule 26(b)(1)."

452, David Hill: Drawing on many years as CFO of various companies, urges that the requester should pay the costs of discovery, and further that we should switch to a rule that the loser pays the winner's costs.

454, John Brown: Favors confirming authority to allocate the costs of discovery to the requesting party, "because then the requester will decide to pay for information they need."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal. "The authority already exists, but expressing the authority in the Rule will clarify any uncertainty."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In some cases the parties have agreed by contract on who bears the risk of counsel fees and costs. Or a statute allocates the risk. But where there is no contract or statute, this proposal is likely to result in shifting the cost to the more affluent party. (The example is a bit puzzling: a large entity objects to the

burden of a request by an individual plaintiff, but may be left to bear the cost of responding.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: "the mere presence of this rule will likely cause litigants to be more thoughtful in making discovery demands."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: In the first part surveying various state-court practices and pilot projects, it is noted that a New Hampshire pilot project included proportionality in addressing discovery of ESI, and provided that when a request is considered out of proportion, the court may determine the responsibility for the reasonable costs of producing the ESI. The comment on proposed Rule 26(c) observes that the cost of preserving and reviewing ESI generally should be borne by the producing party, but courts should not hesitate to arrive at a different allocation in appropriate cases.

487, Peter J. Mancuso for Nassau County Bar Assn.: The Note should make clear that "expenses" does not include attorney fees; a fee award would violate the American Rule.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference generally divided along party lines – plaintiffs oppose, noting the authority is already in the rule and fearing that the amendment will imply that shifting costs to the requesting party is the preferred outcome. One suggested that at least the Committee Note should state that the authority to allocate costs does not include attorney fees; the "American Rule" should be honored. Defense attorneys suggested the proposal does not go far enough. Attorneys seldom talk about how much it will cost to produce requested discovery and whether the costs make sense for the case. And one observed that the Committee Note does not say "should"; the purpose of the proposal is to facilitate conversation about the need and justification for proposed discovery.

499, Beth Thornburg: Cost-shifting has been limited to a handful of e-discovery cases that raise unique problems. It should be studied further before anything is done to encourage it.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses without further elaboration.

630, Jon Kyl & E. Donald Elliott: The "producer pays" system of discovery creates perverse incentives. Rather than create incentives that require judicial management, the rules should provide direct incentives for appropriate behavior. "Requester pays" for discovery does provide proper incentives, with needed exceptions for the poor and for exceptional cases. The Committee

Note should provide examples that illuminate appropriate requester-pays orders. (1) If an administrative agency has approved the safety of a drug or chemical substance, a party who seeks to second-guess that determination should pay for discovery. (2) When the need for information is in doubt, judges today typically face a choice between allowing discovery and denying it. Requester-pays orders provide an intermediate option – a modicum of free discovery can be allowed, and beyond that allocating the costs to the requesting party creates the proper incentives. (3) When a claim or defense is barely above the pleading and Rule 11 standards, but implausible – unlikely to prevail – requester pays is appropriate.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors the proposal. "Cost sharing is an extremely important issue, and we commend the COMmittee's plan to focus in the future on potential cost sharing in lieu of the current presumption that the responding party should bear the costs imposed by discovery responses."

677, Noah G. Purcell for Washington State Attorney General's Office: "[S]trongly support[s]" the proposal. The possibility of bearing the financial burden of disproportionate demands "hopefully will encourage reasonableness."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal because it does not substantively alter the current rule. Courts have discretion to award expenses in addition to attorney fees. (A dissent urges that this amendment be postponed for consideration in the projected broader study of possible "requester pays" provisions.)

1040, Pamela Davis for Google, Inc.: Many courts and judges have adopted the recommendations for e-discovery created by the Advisory council to the Federal Circuit. They include presumptive limits on the production of custodial e-mail data, coupled with cost-shifting for request exceeding those limits. Google's experience is "that when appropriately employed, such rules reduce the burdens of discovery, without interfering with a party's ability to have its case litigated on the merits."

November Hearing, Jeana M. Littrell: p. 16: This amendment is needed. Experience shows that judges are too reluctant to order the requesting party to bear the cost of discovery in appropriate circumstances.

November hearing, John C.S. Pierce: p. 25: Favors cost allocation.

January Hearing, Jon L. Kyl: p. 45, 48: Allocation "gets the incentives right." "[A] party who determines that he really or

she really needs something should have the ability to get it if that party is willing to pay for it." This is not a general requester-pays rule, nor one that assumes that some core of discovery is free while anything more is requester-pays. But to be effective, the rule should explain how the power is to be used. Examples should be given. One example would be a presumption for requester pays when the litigation advances a position contrary to an administrative determination – for example, a determination that a drug is safe.

February Hearing, Mary Nold Larimore: p 68 The Committee Note in 1970 observed that the court has ample power to protect against undue burden and expense, including by a requirement that the discovering party pay costs. This proposal "is going to give judges the opportunity once again to put sensible cost allocation into place." An example is provided by a case in which we won an order allowing us to make available a document repository created by a co-defendant. The order set a price of 8 cents per page for access. Over more than a year, no one has made any effort to look at anything in the repository. "One of the best ways to find out the marginal value of these document productions is to assess the cost." But cost allocation should be routine.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p. 104 Some courts and litigants think courts already have this power. If the proposal is adopted, it should be made clear that the default rule is the American Rule that each party bears its own costs. One party should be made to pay another party's efforts to collect and analyze information only in extreme and unusual circumstances.

February Hearing, Donald J. Lough: p 248 In cost-sharing jurisdictions, "when we are able to present a bill to our adversaries for their fair share of the cost of discovery, they very quickly can make a decision about what they need, and what they don't."

RULE 26(D)(2): EARLY RULE 34 REQUESTS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems. (The comment is ambiguous as to which part of Rule 26(d) it addresses.)

292, Lyndsey Marcelino. for The National Center for Youth Law: Serving discovery requests before the Rule 26(f) conference is likely to improve discovery for this plaintiffs' advocacy group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports the proposal, agreeing that it would facilitate the Rule 26(f) conference. "The Section also does not believe that initial requests made before the Rule 26(f) conference are likely to be any broader than requests served after the conference, although that is a possibility." And over-broad requests can be appropriately narrowed at the conference or, if necessary, by the court. November Hearing: Michael C. Rakower, p 287: Repeats the support. Early Rule 34 requests will mean the parties can face actual, real-life issues during the Rule 26(f) conference.

381, John Stark: There is a need for much greater control of Rule 34 requests. Encouraging even earlier requests goes the wrong way.

383, Alan B. Morrison: (1) Supports the idea, but asks why it is limited to Rule 34. Rule 33 interrogatories and Rule 36 requests to admit will give a better idea of what the case is about. (2) Rather than include a complicated provision for the date of service, it would be better to provide: (B) Time for Response. The time and place for a response to the request shall be stated in the scheduling order under Rule 16(b).

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ny benefit of the proposal's accelerated schedule likely will be outweighed by a lack of focus in prematurely promulgated discovery requests. Instead, the Department recommends amending Rule 26(f)(3)(B) to clarify that anticipated document requests are to be discussed during the 'meet and confer' process." That will accomplish the goal. The discussions are needed to develop a better understanding of what discovery will be relevant. Pre-Rule 26(f) requests "typically will be less tailored or more burdensome," leading to increased motion practice. The requests may be satisfied or narrowed by agreement as to initial disclosures or the scope of the dispute. And a party who delivers early requests may become committed to them. There is a particular risk with requests formulated before the parties confer on the proper scope of ESI discovery. Finally, the time to respond should be geared to the conclusion of the complete 26(f) conference process, not to the first 26(f) conference.



479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was not much discussion at the conference, but there was support. And some suggested that this approach should be extended to other forms of discovery.

494, Charles R. Ragan: Neutral, but the Committee Note should emphasize that the requests should be tailored to the claims and defenses, not the traditional "any and all re X category."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "[S]trongly opposes. We believe that it would aggravate rather than reduce the adversarial nature and expense of discovery." Requests will be framed without the advantage of initial disclosures or the Rule 26(f) conference. The proposed provision "will devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage. That, in turn, will lead to disputes at the Rule 26(f) conference that will actually impede the progress of the case."

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": This is not likely to streamline the process, but "most of us do not feel strongly about this change."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. This device is already permissible, and "gives the parties the opportunity to address substantive discovery issues concretely at the Rule 26(f) conference and, thereby, promotes a more efficient discovery process."

1054, Assn. of Bar of the City of New York: "This proposed change serves a potentially beneficial purpose with no practical downside." Often additional time will be needed to respond, but the parties and court should continue to be amenable.

November Hearing, Jeana M. Littrell: pp 14-15: (From the perspective of defending employment actions.) The early exchange of discovery requests will support more efficient resolution of cases, with less ancillary litigation. It should be extended beyond requests to produce.

November Hearing, Paul J. Stancil: p. 83,84-85, 90-93 Plaintiffs will want to deliver early Rule 34 requests. But this disturbs the calm that otherwise remains up to the time of the Rule 26(f) conference. Early requests will start the meter running for

defendants, as a way to expand the time available to amass the Rule 34 materials. Work will start immediately. That may stiffen the resolve to resist potentially valid claims or defenses, and may increase the temptation to file frivolous claims or defenses. The proposal will disproportionately advantage plaintiffs over defendants.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 26(D)(3): ORDER OF DISCOVERY – STIPULATIONS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Endorses the proposal.

RULE 26(F): PRESERVATION, RULE 502 ORDERS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

281, Daniel Garrie: (1) There is no need to add preservation of ESI to the discovery plan. And it will not work because the timing of the 26(f) conference is too early to develop a preservation plan. Before that can be done, the parties must determine the universe of ESI that must be preserved, the software and hardware from which it has to be collected, and the form in which it is currently stored.

(2) finds an implication that adding "under Federal Rule of Evidence 502" limits the scope of agreements the parties may reach with respect to privilege and trial-preparation materials. It "forecloses discussions of protection that don't fall under" Rule 502.

287, Lynne Thomas Gordon, for the American Health Information Management Association: The comment seems to focus on all of Rule 26(f)(3)(C). As with the parallel Rule 16 changes, the Rule 26(f) conference "is critically important and should not only involve counsel but also a qualified and credentialed HIM professional."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Adds to the reasons offered for supporting the parallel amendments to Rule 16(b). There are many preservation issues to be discussed. "Because the duty to preserve is triggered when a party reasonably anticipates litigation, it is almost impossible, if not impractical, for a party not to have begun making critical decisions regarding preservation before conferring with its opposing party." There is fertile ground for dispute. The discovery plan should discuss the issues on which the parties agree, and those on which they disagree. When they disagree, the plan should include a brief summary, devoid of argument, a brief statement of each party's position, and a proposed solution designed to foster agreement. This will put the court in a better position to usher the parties toward middle ground.

The reference to Evidence Rule 502 should refer specifically to a Rule 502(d) order, "to emphasize that the parties should specifically ask the court for such an order – as failure to do so will leave them only with the protections of Rule 502(b) and the case law \* \* \*, rather than the more fulsome protections of a Rule 502(d) order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

494, Charles R. Ragan: These proposals are modest. Rule 26(f) is crucial in appropriately shaping ESI discovery. It will work

better if the parties are required to prepare an executive summary stating, without argument, the issues they agree on and the issues that they do not agree on. That will provide a good introduction to the more detailed report.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Endorses the proposal, "and believes that it will encourage the use of Rule 502 orders."

RULE 30(A)(2) NUMBER OF DEPOSITIONS (ALSO RULE 31(A)(2))

(Many comments treat Rule 30, 31, 33, and 36 numerical limits together. Those that pick out Rule 30 as the main focus are summarized here without adding duplicate summaries for the other rules.)

261, David McKelvey: A business can get affidavits from its employees for summary judgment, while the 5-deposition limit will prevent plaintiffs from getting their testimony at all. Five depositions often are not enough even for expert witnesses.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Often it is necessary to take more than 10 depositions in product-liability actions, involving multiple officers in different branches of the defendant corporation. Five "is overly restrictive."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Many civil rights cases involve five or more defendants. Offers an illustration of suit against 8 defendants who placed a child they knew to be a rapist with an adoptive family, and who failed to notify the parents of any of his 12 other victims. 27 depositions were needed to secure the important information.

266, American Association of Justice Aviation Section, by Michael L. Slack: A presumptive limit of 5 depositions is "absurd in aviation cases." The present limit is too restrictive. The limit should be set to allow unlimited depositions of retained experts and unlimited Rule 31 depositions on written questions, and 10 oral depositions of other witnesses. The fear of increased motion practice is exaggerated – as the Note suggests, the parties can be expected to agree in most cases.

267, Lawyers for Civil Justice, by Alex Dahl: The fears expressed by some, particularly those involved in employment litigation, are exaggerated. Rule 30 says the court must grant leave to take more than 5 to the extent consistent with Rule 26(b)(1) and (2). But the Note should be revised by adding the language in the Rule 33 Note: the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery. The fear of increased motion practice is exaggerated – as the Note suggests, the parties can be expected to agree in most cases.

270, Ohio Association for Justice, by John Van Doorn: This provides a general objection to presumptive limits that will increase inefficiencies, impose additional burdens, and encourage plaintiffs to craft broader requests to obtain the same amount of information while keeping within the presumptive limits. This reads on Rules 31, 33, and 36 as well; there is even a reference

to Rule 34.

273, Cameron Cherry: A general statement that limiting the numbers of depositions, interrogatories, and requests for admission, and limiting the duration of depositions, will limit access to full justice.

274, James Jordan: "[W]hen was the last time you had a complex commercial case and could limit it to 5"?

276, John D. Cooney: Mesothelioma cases provide a good example of the need for more than 10 depositions. Reducing it to 5 is overly restrictive. In addition to multiple officers in different branches of a corporate defendant, it may be necessary to depose a plaintiff's coworkers to preserve their testimony.

278, Perry Weitz: Depositions are critically important to gather evidence not only for trial, but as a prelude to settlement. The need for more than five is deposition. (Then a paragraph using mesothelioma cases as an example; it is verbatim the same as a paragraph in 276, noted above.

279, Kyle McNew: For all the limits, Rules 30, 31, 33, and 36, decreasing the number will spawn more litigation. "This proposal exacerbates the problem by making the one-size-fits-all product smaller \* \* \*."

280, Oren P. Noah: In asbestos litigation, there often are more than five defendants. Plaintiffs would have to pick which defendants to depose. And the problem will be vastly increased if the limit is applied to expert witnesses.

282, Susan M. Cremer, Chair, AAJ Federal Tort Liability and Military Advocacy Section: Medical malpractice cases under the Federal Tort Claims act commonly involve multiple health-care personnel and many experts. Examples are given of cases requiring well over 5 depositions per side.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Each of the revised limits in Rules 30, 31, 33, and 36 is welcome. They will help ensure proportionality in discovery. But other presumptive limits should be adopted for document discovery. So Stephen Susman suggests a limit to five custodians for the first round, followed by five more custodians for a second round, and more only for good cause.

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: Depositions and document requests are the most effective means of discovery. "Most rail law cases require more than five depositions, even excluding experts. \* \* \* Responsible lawyers do not use the presumptive 10 if 10 are not warranted by the case." Reducing the number will create problems that do not now exist.

289, Craig B. Shaffer & Ryan T. Shaffer: Ties together the proposed numerical limits in Rules 30, 31, 33, and 36, suggesting that rule text should reflect some of the situations that frequently call for greater numbers of discovery events. (1) Some critics of the proposals seem to be inconsistent – they are willing to retain judicial discretion to expand discovery to the subject-matter of the action, but are unwilling to rely on judicial discretion to determine the number of discovery events. (2) Limiting a litigant to 5 depositions may often be unreasonable. Suppose an adversary identifies more than 5 witnesses in the initial disclosures? Or suppose there are several expert witnesses? What if witnesses necessary for trial are beyond reach of a trial subpoena? It can be argued that *de bene esse* depositions should not count against the limit, or perhaps that expert trial witnesses should be excluded. And the limit may need to be expanded if defendants, heedless of the uncertain impact of *Twombly* and *Iqbal* continue to plead boilerplate defenses in general terms. (3) In seeking relief from numerical limits, counsel should consider the interplay between depositions and interrogatories. Interrogatories are less expensive. But if a party plans a Rule 30(b)(6) deposition of an organization, it may be more difficult to justify an over-limits number of interrogatories. (4) A responding party's patently deficient or obfuscating responses may justify going over the limit, as a mirror of the Rule 26(b)(2)(C)(i) provision for limiting the frequency of discovery where the inquiring party has had ample opportunity to obtain discovery. Similarly, violation of the Rule 26(g) certification requirements may justify an appropriate sanction. [If the "sanction" is discovery above the presumptive limits, it may be wondered whether it need be called a sanction at all.]

292, Lyndsey Marcelino for The National Center for Youth Law: In a class action the Center had 11 plaintiffs who had spent from 10 to 14 years under the care of the State of Nevada. They had multiple caseworkers, doctors, foster parents and therapists. One, for example, had seven caseworkers and seven foster parents. Five depositions are not enough.

295, Andrew Horowitz: Recently completed 9 depositions in a single-plaintiff case under the Age Discrimination in Employment Act. The firm invested substantial time and court reporters' charges – it has an incentive to take only depositions that promise a reasonable chance of securing testimony important to the case. There is a risk that the court would not have granted leave to take 9 depositions, as it would regard the case as a "run of the mill" single-plaintiff case.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Drug manufacturers too often produce corporate representatives for depositions who do not know the information designated in the notice. They can "burn up the five available depositions with no



useable information." Deposition transcripts are attached to illustrate this practice. "Oral discovery games are already too prevalent under the current rules."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: In pharmaceutical cases it is often necessary to take more than 10 Rule 30(b)(6) depositions of as many different departments in a single defendant.

299, Aaron Broussard: In 95% of the cases that meet the \$75,000 jurisdictional amount, each side will exceed 5 depositions.

300, Maria S. Diamond: Follows up pre-publication comments by offering an example of a recent case in which, following responses to requests to produce and to identify fact witnesses, a series of 7 depositions continually revealed information that should have been provided in response to the initial requests but was not. "This example is by no means unusual in my thirty years of practice as a plaintiff's personal injury attorney."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[T]here is no objectively reasonable basis to justify a reduction" from 10 to 5 depositions. (1) The empirical findings of the FJC belie any need. The numbers of depositions, and the median costs of discovery, are reasonable. (2) There is no showing that the present presumptive limit of 10 depositions has caused widespread problems. The FJC figures suggest that only 11% to 18% of the cases in the narrowed data base involved more than 5 but no more than 10 depositions; the change will affect only a small slice of current practice. (3) Deposition costs are almost always considered in deciding whether to take a deposition. (4) Depositions are often needed to ensure the use of testimony by a witness who is beyond the reach of a trial subpoena. (5) The provision in Rule 30(a)(2) directing that leave be granted to exceed the limit is scant comfort. The burden is on the party seeking to exceed the number, and it will be a burden to overcome a lower presumptive limit. This shifts the leverage in any negotiation. And it will be natural for judges to assume that they should be reluctant to grant leave to go above the presumptive limit. (6) The concerns of "some judges" expressed at the Duke Conference seem to rest in part on the comparison to criminal trials. But in criminal trials the government must disclose witness statements and exculpatory material to the defendant, and the government has effective investigatory powers. (7) The argument that ADR is effective without depositions "ignores the fact that depositions are, in fact, often used in arbitration." (8) That depositions are seldom used for effective impeachment overlooks the fact that one purpose of taking the deposition is to lock the witness into the testimony, so it cannot be changed. (9) "[A] single plaintiff suing multiple defendants already is given the presumptive equivalent of the

number of depositions as all defendants combined." {It is not clear what this means.} (10) The new proportionality requirement will provide sufficient new restrictions on discovery. Any further restrictions should be implemented by the court during the Rule 16 conference.

The Section separately notes that the Rule 30 revisions do not attempt to address unanswered questions that now arise. How to count Rule 30(b)(6) witnesses? Is it one deposition, or two, if the same person both appears as a corporate witness under Rule 30(b)(6) and is deposed in a personal capacity? Must leave be obtained to take a second Rule 30(b)(6) deposition of the same entity, and does it count against the limit? "[A]gainst whose side [should] third-party defendant depositions" be counted?

November Hearing: Michael C. Rakower, p 287: Renews the Section's questions. The data do not seem to support a reduction in the numbers of discovery requests in any of the rules. The problem of cost is not so much that any side is abusing the system, but rather that costs run up when "parties each take their fair share of depositions collectively." The Section has a cross-section of lawyers, who do not see an extensive amount of abuse.

307, Judge A. Leon Holmes: Opposes all the proposed numerical reductions. The present limits are sufficiently generous that E.D.Arkansas sees few disputes. But many cases cannot be adequately prepared for trial with 5 depositions and 15 interrogatories; those limits will give an advantage to the party with the information, and will generate discovery disputes.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Offers two generic examples of civil rights claims that require several depositions. Section 1983 claims challenging municipal policies and practices require several depositions to fully understand the issues. And claims brought under statutes with a burden-shifting practice require depositions not only to establish the prima facie case but also to rebut asserted justifications for the challenged conduct. Lowering the presumptive numerical limits will make a difference. Courts "impose a heavy burden on parties seeking to go beyond those limits," and parties will increase their resistance.

311, James Coogan: Many depositions are often needed because "[t]he complexity of modern corporate structures results in widely divided responsibilities for corporate functions." Increased disputes, costs, and delay will result.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases a plaintiff always faces a need to take more than 5 depositions. Motions to take more will increase.

317, Steven Banks for the Legal Aid Society in New York City: (Background is sketched with Rule 26(b)(1) above.) Examples are given of a case challenging discriminatory enforcement of criminal trespass laws that required 35 depositions, and a case involving excessive force by correction staff that required some 140 depositions – and the number of depositions was accorded favorable consideration as helping support the class-action settlement. And employment cases often involve several individual defendants and several corporate defendants. Even in smaller employment cases, more than 5 depositions are needed – a particular example is cases involving trafficking of domestic servants, which often involve multiple defendants.

318, Brian Sanford: Increased summary-judgment practice makes it necessary to depose a witness for the summary-judgment record, when otherwise the witness would just be called at trial. Reducing the numerical limit is unwise. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: Usually 10 depositions are not enough in products liability actions. Mesothelioma cases are an example. Plaintiffs must depose multiple officers in different branches of the corporate defendant. Because of the long latency, retired officers and employees must be deposed. Coworkers must be deposed to preserve their testimony, lest they be too ill by the time of trial to testify. This concern applies to Rule 31 limits as well.

322, Michelle D. Schwartz, for Alliance for Justice: The changes in the limits in Rules 30, 31, and 33 "will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants." Frequently the evidence is in the defendant's hands. More cases will be dismissed before trial because plaintiffs cannot procure the evidence needed to proceed to trial.

323, Jonathan Scruggs, Alliance Defending Freedom: Opposes all of the numerical limitation changes, including the 6-hour time limit for oral depositions. The limits "will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations." The Alliance advocates primarily for First Amendment rights. It must identify a government policy, and prove that a particular official was personally involved, and in some case prove a required level of intent. "But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork." Plaintiffs need extensive discovery to cut through the bureaucracy.

324, Jonathan J. Margolis: Reducing the number of depositions is the most questionable of all the proposed changes. Some courts will begin by refusing leave to take more than 5. They will be affirmed because there is no abuse of discretion. The practice

will spread. Most defense attorneys will come to resist any increase beyond 5, in part because they believe that adequate representation requires this course. There is no significant evidence that depositions are often so numerous as to be abusive.

325, Joseph M. Sellers: Lawyers engage in cost-benefit analysis now. It costs money to take a deposition. Adopting a one-size-fits-all limit is unwise. "In my civil rights and employment practice, I cannot recall a case against an employer in which depositions were conducted and we took fewer than six." We typically represent plaintiffs on contingency, and advance costs; we engage in only the discovery that is important. And employment cases typically involve plaintiffs who have little discoverable information, while defendants have most of the information necessary to prove the case. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

327, Malini Moorthy for Pfizer, Inc.: Endorses the limits in Rules 30, 31, 33, and 36. "Viewed through the lens of proportionality, we believe that parties will mutually agree on reasonable discovery limits \* \* \*."

328, U.S. Chamber Institute for Legal Reform: Supports all the numerical limitations, and the 6-hour deposition that will streamline discovery without denying any party the ability to gather information for its claims or defenses.

333, Racine Miller: Addressing police misconduct and prisoner rights cases: there is no problem with excessive discovery. There are incentives to limit it. But there are cases that, in part due to information asymmetry and often due to the sheer numbers of witnesses, require more depositions, and "I have concerns about either getting consent from defendants or an order to enlarge discovery in every case where it would be necessary under the new rules." Ordinary citizens can get to court only through contingent-fee attorneys, and by making discovery harder the proposals will make representation less accessible. They are completely one-sided; they "do not do much of anything to penalize obstruction in discovery."

334, Rose Weber: "[T]here are often numerous defendants in police misconduct cases and of course all must be deposed. Essentially these rules 'solve' a problem that doesn't exist, and by giving an unfair advantage to one side."

335, Rebecca Heinegg: "Regarding the proposed limitations on depositions, parties already have an incentive to minimize the number and length of depositions, as each side must bear the costs of each deposition[] taken. The new limits are also too low for many serious or complicated cases, and will have a disproportionately negative impact on Section 1983 plaintiffs [as

in police misconduct cases], due to the inherent information asymmetry in these cases, and the high burden of proof that such plaintiffs must meet."

336, William York: Excessive discovery is not a problem. No worthwhile practitioner uses every single deposition, interrogatory, or request to admit "just because they are permitted." Some cases – including civil rights and immigration cases – require many discovery devices. Current incentives for self-limiting discovery are adequate. The lower presumptive limits are far too low for many serious or complicated cases. Government works in complex bureaucracies, "and getting to the truth of the matter in five, shortened depositions and only 15 interrogatories \* \* \* would severely limit my effectiveness to litigate." Far from making litigation more accessible to everyday citizens, many clients seek attorneys on a contingent-fee basis; the changes will make representation less available. And the result will be more contentious motion practice.

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: All of the proposed numerical limits are welcome. "We fully expect \* \* \* that parties will routinely agree to additional discovery where necessary and motion practice will not be needed." January Hearing: p. 26, at 31-32: Similar.

338, Steven D. Jacobs: The present numerical limits work. The presumption is that the initial disclosure avoids the need for more extensive discovery. The parties resolve most discovery disputes on their own.

342, Stephen C. Yeazell: Reducing discovery "in a number of cases would be a regrettable and unjust result." The reduced limits "will not work injustice in the hands of wise and impartial judges who are also skilled at managing litigation." But other parts of the proposed amendments "express implicit skepticism about how wise, impartial, and skillful these judges are. The asymmetrical limits will be most likely to have an adverse effect on cases involving claims against large institutions – public and private." Although not all cases have merit, it is important not to stack the deck against such claimants, as many of the proposed amendments do.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Less discovery will mean more trials in cases that should settle. It will have a disproportionate impact on the party with the burden of proof. Reducing the number of depositions sends an implied message that there are too many depositions – it will become more difficult than it is now to get permission to take 12 depositions in a case that needs that many. The Committee relies on data showing that 5 depositions are inadequate for as many as 23% of cases. The suggestion that the parties can be expected to agree when more than 5 depositions are needed "relies upon the

faulty assumption that both sides will need more than 5 depositions."

In addition, account should be taken of the cumulative effect of all the reduced limits. Deposition time is effectively reduced from 70 hours (10 depositions of 7 hours) to 30 hours (5 depositions of 6 hours). But the limits on the less expensive modes of discovery – interrogatories and requests to admit – will leave more work to be done by depositions.

347, Genie Harrison: The proposed limits will make it impossible for government employees victimized by first amendment retaliation, whistleblower retaliation, and other unlawful harms. "The illegal acts of governmental employers uniformly involve dozens of actors and witnesses \* \* \*." In a current case a fight was necessary to get leave to take more than 10 depositions. The 20 depositions establish a slam-dunk case. Employers keep people quiet by implied threats of retaliation.

348, Stephanie Bradshaw: The proposed reductions in numerical limits in Rules 30, 31, and 33, together with the new limits in Rule 36, "are minimal, and would not result in a huge savings of time," but they "could be devastating to an information-starved plaintiff hungry for evidence to support his claim."

349, Valerie Shands: The upfront and incidental costs of depositions "ensures that their number almost always remains as low as necessary." The need to seek court permission to take more than five will spawn delay and additional costs.

350, Pennsylvania Bar Association: The default number of depositions should be 7 or 8. And for all the proposed default limits, there is a risk of "a new hesitancy among some judges to alter those limits." A "blind, unreasoned one-size-fits-all discovery plan" is inappropriate. The Committee Note should instruct that each case must be approached with an open mind, allowing more discovery where appropriate.

351, Eric Hemmendinger for Shawe Rosenthal LLP: (From the perspective of defending employment cases.) Five may not be sufficient in all cases, but it is the correct starting place for discussion. (The preface adds that attorney-fee provisions for most employment and employment litigation provide an incentive for plaintiffs to expand the amount of discovery.)

353, Kenneth D. Peters, John T. Wagener: The proposed reductions in time and length of depositions, and in numbers of interrogatories and requests to admit "will \* \* \* cause litigants to carefully think about the evidence they need and go about obtaining it in the least intrusive manner."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Without specific comment, notes that the narrowing

of presumptive limits "has the potential to increase satellite litigation about the scope of discovery."

356, Richard McCormack: Treating Rules 30, 31, 33, and 36 together, "It's about time this was done."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Litigation involving nursing home abuse or neglect often requires more than 5 depositions. Deponents often disclaim knowledge and imply that another potential witness is the one to ask.

359, Andrew B. Downs: "While I often take more than five depositions in my cases, I can justify" them. If I cannot justify them, they should not be permitted.

360, Robert Peltz: Five depositions are not enough even in a routine automobile negligence action – the limit is exhausted by deposing the other party, the investigating police officer, two eye witnesses, and a single doctor. The problem is exacerbated when the limit has to be allocated between multiple parties plaintiff, defendant, or other. It is further exacerbated in courts that count each witness in a Rule 30(b)(6) deposition as a separate deposition. And the frequent circumstance that one party has almost all the necessary information is a further problem. The general provision for protective orders provides all the protection we need.

361, Caryn Groedel: The limit will adversely impact plaintiffs (in employment actions).

362, Edward Hawkins: Even routine cases require more than 5 depositions.

363, Dean Fuchs, at request of NELE-Georgia Board: In employment cases defendants need to depose only the plaintiff. The plaintiff needs to depose decision-makers, human resources personnel, currently employed witnesses who observed the discriminatory conduct, the corporation itself, and medical providers to the employee. In wage and hour cases plaintiffs need to depose payroll personnel, supervisors and coworkers who observed when the plaintiff was working, and IT personnel or records custodians. Five is too few.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Generally suggests that experience may not bear out the belief that judges will exercise sufficient flexibility to ensure fairness in discovery. Offers an example of a case that required depositions of 33 fact witnesses in addition to experts and Rule 30(b)(6) depositions to support a claim that the defendant's 2,500 miles of sidewalks lacked accessibility to persons with visual or mobility disabilities. And another case with more than 30 depositions to support discrimination claims arising from

"property flipping."

367, Edward P. Rowan: "In even the most simple cases, fact witness depositions can exceed five depositions. This will violate Plaintiff's right to due process if he cannot bring testimony because of a deposition limit."

368, William G. Jungbauer: In FELA actions, 5 depositions are nowhere near sufficient to prove the negligence of a corporate entity such as a railroad. The defendant may identify multiple witnesses for a Rule 30(b)(6) deposition, "exhausting the plaintiff's deposition limit even faster." Defendants also may be disadvantaged. There may be multiple defendants – not only the railroad, but also the entity that controls a crossing. In an FELA case it would be rare to have five defendants, but when that happens there would be one deposition each. Relief will have to be sought from the court in virtually every case.

370, Thomas D'Amore: Addressing Rule 30, 31, 33, and 36 numerical limitations, says that often he cannot reach agreement with defendants on additional discovery. "The judge, when faced with reduced presumptive discovery limits, may be unlikely to grant me as much discovery as I need." "Depositions are often the most efficient and effective way to gather the evidence \* \* \*." Many more than five are likely to be needed in, for example, a wrongful death case (the victim is deceased), or product liability cases. And restricting the number of depositions may make it impossible to survive the almost certain motion for summary judgment.

372, J. Burton LeBlanc, for American Association for Justice: FJC data do not support the proposed limits, as shown by the reexamination looking for cases involving more than 5, or more than 10, depositions per side. The reduction will have a particularly negative impact in civil rights, employment discrimination, qui tam, and intellectual property cases. Frequently a plaintiff does not even learn who the critical deponents should be until later depositions. Experience with cross-examinations in criminal trials of witnesses who have not been deposed cannot illuminate the needs for civil trials. Depositions, moreover, serve to gather facts and prepare for trial, not merely to support cross-examination. Introducing the proportionality test will aggravate the consequences of reducing the number – the other side will always object that it is too burdensome or expensive to provide more discovery. This alone will make it much harder to get more than five depositions. The belief that more will be allowed when appropriate ignores the clear demonstration of "anchoring" effects: the rule presumption will become the received standard. The result will incentivize defendants to hide information.

Later, p. 24, adds an observation addressed to all the numerical limits: "most of the proposed amendments would essentially let



judges off the hook for having to actively manage cases; when faced with such a marked increase in discovery disputes, judges who do not now manage will simply use the shorthand of the new Rules to limit discovery in most cases to the new limits."

373, Michael L. Murphy for AAJ Business Torts Section: "[T]en depositions would be barely adequate in many, if not most, civil matters." Speaking with practitioners, not a single one took fewer than 5 depositions in any of their cases, nor did any think those cases could have been adequately with fewer than 5. There is no evidence that parties are intentionally taking unwarranted depositions; to the contrary, the incentive is to avoid unnecessary cost. And "there have been numerous reports of plaintiffs having a difficult time securing such an agreement [to exceed the rule number] from the defendants."

374, Christopher Placitella for AAJ Asbestos Litigation Group: "Depositions are the cornerstone of litigation." More than 5 are routinely needed for plaintiffs in personal injury litigation; defendants typically need fewer. "[D]efendants have the ready ability to refuse to stipulate or cooperate in allowing additional depositions," forcing plaintiffs to seek relief from the court. And without sufficient deposition discovery, both plaintiff and defendant are less likely to understand the strengths and weaknesses of their positions. That will deter settlement, leading to more trials.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: As plaintiffs' attorneys, there is no incentive to spend money on meaningless depositions. But depositions are used as an extremely effective and efficient way of gathering necessary information. Corporate depositions explain the reporting structure, identify core individuals who made the key decisions, and show how ESI is maintained and stored. A limit to 5 depositions would, in many instances, prevent plaintiffs from obtaining the information needed even to certify a class. At the least, the limit should not apply to complex, class action, multidistrict, or other aggregate litigation.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): 5 is too few.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: Treats Rules 30, 31, 33, and 36 together.

"Lowering the presumptive limits on discovery has the potential to severely hamper our ability to litigate to redress violations of federal laws. \* \* \* [O]ur experience is that judges consider the current limits \* \* \* as a fairly firm baseline when considering requests to expand the scope of discovery. We fully expect that the proposed limits would increase judicial resistance to increasing discovery."

381, John H. Beisner: Supports all the numerical limits. They will streamline discovery but still enable a party to gather information. The court can modify or alter the limits.

383, Alan B. Morrison: The reduction to 5 may be justified on its own, but not as a cumulative matter of reducing the ability to gather needed information.

384, Larry E. Coben for The Attorneys Information Exchange Group: Although the parties can agree on, or the court can order, more than 5 depositions, "why propose a rule which will be applied as the exception rather than the rule"? Most cases require more than 5. Strict application will foster motion practice. The better approach is to allow the court to manage each case under Rule 16.

386, Arthur R. Miller: Plaintiffs have learned to live with 10, but they tell us both that they have no incentive to take unnecessary depositions and that 5 is not enough. Relying on court permission to take more simply generates motion practice, and permission will be made difficult because the proposal sends "a restrictive message regarding discovery to the Bench" that defendants will exploit.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Addressing Rules 30, 31, 33, and 36 together, welcomes the changes in the belief that in MDL and other complex litigation the parties will think harder about the "wish list" of discovery "and will tilt courts and special masters in the direction of imposing less onerous discovery."

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 30, 31, 33, and 36 proposals without further comment.

398, Shira A. Scheindlin: Disputes are rare with the 10-deposition limit. Parties in large cases routinely agree. The cost of resolving objections to the number will fall disproportionately on parties on smaller cases. Most lawyers believe the amount of discovery in their cases is just about right. This is a mistake.

399, Edward Miller: Addresses all the limits proposed for Rules 30, 31, 33, and 36 together. They will have a beneficial effect, encouraging parties to make discovery proportional to the true needs of each case.

400, Gregory P. Stone: The reduction will adjust litigant expectations, in line with the renewed emphasis on proportionality. Those who fear courts will become reluctant to increase the number overlook the direction that the court must grant leave when consistent with the scope of discovery. "[T]here is no reason to believe that litigants' general ability to reach

agreement on an appropriate number of discovery requests will dissolve in the event that the Committee adjusts the presumptive number of interrogatories." Moreover, "it is in my experience uncommon for parties to agree to a downward adjustment"; better to start at 5, with room to move up.

403, Donald H. Slavik for AAJ Products Liability Section: Most product liability cases require four groups, often with more than 5 witnesses in each group: fact witnesses; a manufacturer's employees; experts; and damages witnesses. In dealing with large international defendants, it often is not possible to get agreement to go beyond 10. It will be at least as difficult to get agreement to go beyond 5, "given the clear message to judges \* \* \* that even less than ten depositions are needed \* \* \*."  
February Hearing: p. 14 Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: Treats all of the presumptive limits proposals together. They are "a welcome step in helping to reduce the overall costs and burdens of discovery in many cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Depositions are the cornerstone of litigation. A plaintiff may join five or more defendants, and the defendants could refuse to permit more than five depositions, forcing recourse to the court.

408, Elliot A. Glicksman for Arizona Association for Justice: Addresses the proposed limits in Rules 30, 31, 33, and 36 together. "[P]resumptive limits, regardless of the number, often are the starting point for the maximum number a defendant will consider." The proposals will cause the greatest harm in cases that "are fact intensive, including civil rights, aviation, employment cases, commercial trucking, product liability and bad faith insurance cases."

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]here is no need to change the presumptive limit on the number or duration of depositions."

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The problem addressed by reducing to 5 depositions is not clear. More than 5 are routinely required in personal injury cases. More than 5 may be required on initial matters such as personal jurisdiction and forum non conveniens. There may be several witnesses on a Rule 30(b)(6) deposition; several fact-occurrence witnesses; experts on many subjects including the cause of the accident, the cause of injuries, the extent of injuries, "before and after" witnesses on such matters as loss of the enjoyment of life, the actual cost of future

medical care, and so on. Expert witnesses commonly base their testimony on other depositions. The presumptive number should be increased to 15. 448, RobgertD. Curran, tracks 410.

411, Richard Smith: Representing plaintiffs of limited financial means in environmental and environmental justice cases, it is common to involve numerous depositions on both sides, to make extensive use of requests to admit, and to use interrogatories up to the limit of 25. Reducing the numbers, and the length of depositions, will interfere with plaintiffs' ability to prosecute their cases, and will increase costs.

414, John R. Scott: Supports the presumptive numbers in Rules 30, 31, 33, and 36, and the 6-hour time for depositions. Counsel will be forced to focus discovery efforts. Abuse for tactical advantage will be avoided. In appropriate cases the parties can agree on more, or the court can so order.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing from 10 to 5 will have no benefit in complex litigation, but will require more court involvement. The real impact will be in the cases that now involve between 5 and 10 depositions – the FJC shows a considerable number. In complex cases today, negotiations up from 10 often fail, and plaintiffs are disadvantaged by the 10 limit.

419, William R. Adams: The presumptive numerical limits in Rules 30, 31, 33, and 36 are welcome. "It has been my experience that the limits currently in place are slightly excessive." If more are needed, a simple application to the court will get them.

420, Daniel A. Edelman: "In complex litigation involving multiple, obstructionist, corporate defendants, depositions are by far the most effective discovery tool [for] over-matched plaintiffs." Cutting the number will in many cases preclude the plaintiff from deposing witnesses with relevant and admissible testimony. "We suggest that five hour depositions be permitted for each corporate party and its officers and employees."

442, Christopher Wright: Treats Rules 30, 31, 33, and 36 together, including the 6-hour time for depositions. "These proposed changes seek only to hamstring a plaintiff's capability to prove his or her case." "I have yet to prosecute a medical malpractice case where discovery of fact witnesses included 5 or fewer witnesses."

445, Gerald Acker, for Michigan Assn. for Justice: Witness lists are almost never limited to 4 or 5. "Counsel should not be in a position of guessing which of a dozen witnesses" to depose.

455, W. Michael Scott for CrownQuest Operating, LLC: Treats all the proposed numerical limits, and deposition time, together. When more discovery is needed, the parties will routinely agree. The court can order it if the parties do not agree.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Begins with a general statement on presumptive limits. The proposed limits are "insufficient as a general matter for the type of cases in which the Department is involved." The current rules strike the right balance. The Committee should encourage the use of case-specific limits in implementing the proportionality principle.

Turning to depositions, many cases brought by the government involve nationwide investigations, scores of fact witnesses, large corporate defendants, many actors, and a need for fact-intensive showings. Cases brought against the government often share these characteristics. More than 10 depositions are often needed. Department attorneys generally do not encounter difficulty in obtaining leave of court, but there have been situations where courts have refused such requests or granted them reluctantly. These difficulties will become more frequent if the number is reduced to 5. Adversaries now often oppose an increase to 20 by arguing it doubles the limit. Reducing it to 5 will change the argument to opposing an increase that trebles or quadruples the limit. If the reduction goes forward, the rule text should be amended to state that exceptions should be freely allowed when appropriate. The Committee Note could offer examples "including public interest cases in which the government enforces statutory rights or obligations and other similar complex litigation," as well as cases involving multiple parties or expert witnesses.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "Lawyers may wonder whether it will be difficult for a party to secure a court order allowing depositions beyond the presumptive number." Courts may view the new presumptive limit as a screening device of an inflexible barrier. And one side may use the limit as a tactical device to stall and constrict discovery. It would be better to amend Rules 30 and 31 to expressly allow motions to limit the number based on the proportionality principle in Rule 26(b)(1).

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The limit to 5 depositions is the most troubling of all the proposals. (1) The Committee observations about criminal trials are inapposite. The government has vast investigative resources; the dense has Brady, the Jencks Act, and similar statutes. (2) Of course few witnesses are impeached at trial by depositions – very few cases go to trial, and at trial a witness is careful not to contradict the deposition. (3) Deposition testimony may conduce to settlement. (4) A deposition may be needed for a dispositive

motion because the witness may be reluctant to provide a declaration. (5) A deposition may be needed to secure testimony at trial when the witness is outside the jurisdiction. (6) The limit "might become enshrined in practice as a ceiling rather than as a starting point." We often need more than 5. Our cases are often complex, involve multiple parties, and transcend state lines.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Treating all the limits, including the 6-hour deposition together, they "will force counsel to be more focused in their discovery." "We are confident that in an appropriate case, the parties will be able to agree to an appropriate number and/or that the court will properly decide applications for relief."

464, Douglas A. Spencer: Describes recent litigation that consolidated a wrongful death claim with two personal injury claimants. Initially there were ten defendants; discovery revealed more defendants the plaintiffs had not known of. The plaintiffs alone identified 12 expert witnesses. It is not uncommon to have ten or more experts even when there is only one defendant. Limiting the number of depositions and other discovery devices "would have tied our hands."

465, Neil T. O'Donnell: Frequently there are more than five defendants. And there are numerous witnesses of various kinds - eyewitnesses, witnesses as to an organization's supervision or policies, information technology providers, damages witnesses, and yet others.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The limit to 5 depositions, and the reduction to 6 hours, will simply lead to a great deal more law and motion time. The FJC study did not specifically identify depositions as a current and general problem. The same concern applies to Rule 31.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Treats the proposals for Rules 30, 31, 33, and 36 together. Plaintiffs "will have to waste limited judicial resources asking for additional" discovery.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support among the participants for decreasing the numerical limits on depositions. There is no problem with current limits. Decreasing the limit may be less efficient.

499, Beth Thornburg: The numerical limits will have an anchoring effect, inappropriately limiting discovery.

531, W Michael Wimer: The proposed limits would have defeated my successful discovery from a third party of documents the

defendant intentionally hid.

588, Veronica Richards: Defendants commonly provide witnesses with limited information for a Rule 30(b)(6) deposition, necessitating "multiple depositions." (This is one of many comments that seem to overlook the statement in the 1993 Committee Note that a Rule 30(b)(6) deposition counts as one "even though more than one person may be designated to testify. The alternative explanation is that the party noticing the 30(b)(6) deposition gives up and relies on deposing persons designated in the notice.)

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Ten depositions commonly are not enough in catastrophic injury cases; indeed ten Rule 30(b)(6) depositions may be needed.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The ten-deposition limit works well. Reducing the limit will lead to more motion in practice in cases where one party needs more than 5 and the other party sees a tactical advantage in attempting to limit the number. The number of depositions can be addressed in the initial scheduling order.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: All of the proposed numerical limit reductions are ill-advised. Rules 33 and 36 are efficient, low-cost modes of discovery. The reduction in the number of depositions is the most ill-advised of the lot. No attempt has been made to show empirical justification – the reanalysis of the FJC study data shows that there is none. Nor is it safe to rely on gaining permission to exceed the limit. An express limit in a rule has an anchoring effect. Suppose a case legitimately needs 12 depositions. That is a 20% increase on the present limit of 10. It is a 140% increase on a limit of 5. Judges will naturally require a far stronger showing if the limit is reduced to 5. And if a party confronting the 5-deposition limit guesses wrong in choosing the first 5 deponents, an attempt to show that other deponents are more important to the case will encounter resistance from the appearance that the first 5 were not used wisely.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports the limits proposed for Rule 33 and Rule 36, but opposes reducing the presumptive number of depositions. There is no need for the limit; in cases where more than 5 depositions are taken, they are rarely taken for frivolous or improper purposes. A too-low cap "would risk giving one side a powerful tool for limiting discovery unfairly," and will increase contested applications.

729, Stephen B. Burbank: Addresses the number of depositions and

interrogatories pretty much together. "[T]he complex, high-stakes cases that, as empirical evidence consistently demonstrates, are most likely to occasion disproportionate discovery, will usually not be affected, because the parties will stipulate out of the limit. No, here the effects will be felt most often in cases with parties that have asymmetric discovery demands and asymmetric resources." "The need to manage down under the current Rules has not been demonstrated in enough cases to cause concern; District Court judges should not be given still more dubious management tasks that keep them out of the courtroom \* \* \*."

786, Frederick B. Goldsmith & E. Richard Ogradowski: In Jones Act cases we cannot wait for trial to cross-examine the key fact witnesses. Crew members are itinerant – we videotape most crew member depositions. And our expert witnesses rely on the deposition testimony to establish the fact basis for their opinions. (Further, initial disclosures do little to obviate the need for full-on discovery.)

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. Many cases need more than 5 depositions. Full discovery enhances settlement. The reduced limit may encourage one party to refuse to stipulate to more. And there is a risk that the court may refuse to approve a stipulation (a footnote decries the use of discovery cutoffs far too short for the case, increasing costs by the need to go full-bore to meet the deadline). Encouraging case management is often beneficial, but judicial resources must be spared for substantive issues.

1025, Senator Jeff Merkley, Senator Ron Wyden: Addressing all the limitations, observes: "A plaintiff in an employment discrimination, product liability, or simple personal injury case must often conduct many depositions in order to fully understand an employer's policies, a product's makeup, or the cause of an accident."

1054, Assn. of Bar of the City of New York: Generally more than 5 depositions per side are needed, "and a party should not be dependent upon the reasonableness of its opponent or its ability to persuade a judge in order to be entitled to do the discovery it believes necessary." Criminal cases are different – and defendants have the benefit of Brady and Giglio rules. Assuming that witnesses are rarely impeached by deposition testimony, depositions are vitally important in pre-trial preparation. If a party seeks an unreasonable number of depositions, relief is available. And if a 5-deposition limit is adopted, it should apply only to fact witnesses; a party may take 3 or 4 fact-witness depositions, only to have another party disclose several expert witnesses.

1205, Robert J. Anello for Federal Bar Council (2d Cir.): Opposes. "Depositions are critical for both summary judgment and



settlement purposes," and these are the chief ways of resolving federal litigation. There is no showing that the limit set at 10 creates any problems.

November hearing, John C.S. Pierce: The numerical limits are desirable "to make lawyers sit and think about their cases at the very outset."

November Hearing, Altom M. Maglio: p.28 ff As a contingent-fee attorney in medical product cases "I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions." The first five depositions usually are used to show that the people identified as knowledgeable in response to interrogatories do not know about anything but marketing, and to identify the people who do have the appropriate knowledge and should be deposed. I often need more than ten depositions. I get permission, but it is a fight. The present limit of 10 is taken as a yardstick of what is supposed to be done in a typical case.

November Hearing, David R. Cohen: p 41 Most of the cases my firm handles – mostly for defendants – tend to be bigger cases. Very often there are more than 10 depositions. When shown good cause, most judges allow more than 10. Indeed, the parties usually agree when they know there is good reason. But it is useful to have a numerical limit because it gets people thinking. Contingent-fee attorneys do have an incentive to take only necessary depositions, but all kinds of commercial cases do not involve contingent-fee attorneys; "most cases that have 20 depositions can use far fewer."

November Hearing, Mary Massaron Ross – Immediate Past President, for DRI: p 49 In § 1983 litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 As contingent-fee attorneys, we have an incentive to hold down the cost of discovery. In antitrust cases, which almost always are MDL cases, "dozens of depositions are often required to gather evidence from far-flung witnesses and to preserve testimony of witnesses that will not be available for trial." Experts play a very large role – one side may have more than five experts. At a minimum, experts should be excluded from the proposed limit. Third-party depositions also should be excluded. And reducing the limit from ten to five "significantly alters the bargaining position of the parties." We get more than

ten now, often far more. But if we are allowed 60 now, six times the presumptive limit, there may be a tendency to think that 30 is an appropriate number as six times a presumptive limit of five. And there are litigants who do not have the knowledge they need to rise above the presumptive limit. At the very least, the Committee Note should observe that courts should be expected to vary the presumptive limits in complex and large cases.

Finally, the rule "could include a clarification that the presumptive limit on depositions is per party and not per side."

November Hearing, Anna Benvenuti Hoffman: p 110 From the perspective of "serious police misconduct" and other civil rights cases – offering two examples of actions that followed DNA exoneration of wrongly convicted plaintiffs. One case led to an agreement to videorecord police interrogations, and the other to an audit of a crime lab. There is a strong incentive to keep costs down – the attorney has to carry them for years, and may never recover them. The cases often have to be proved through circumstantial evidence, elicited from "witnesses who generally will not talk to us outside of a deposition, defendants, other police employees, prosecutors, and witnesses who testified against our clients at their criminal trials." Although the needs that require many depositions will remain unchanged – judges will be looking at the same cases – the reduction to five "send[s] a strong signal that you think there's too much discovery." Judges will respond to that." 15 depositions would become three times the presumptive limit, not one and a half. And some judges are hostile to the plaintiffs we represent. Yes, five depositions may be sufficient for the simpler actions that involve less dramatic wrongdoing, but that does not help in the more complex cases.

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: In toxic tort and environment cases, there once were problems in getting the numbers of depositions needed to prove the case. But practice has matured; "we now generally enter into consent arrangements with the defendants concerning depositions." The concern is that reducing the number will make five the new normal, and it will be much more difficult to get the 25 that are the norm in these kinds of cases.

November Hearing, Wayne B. Mason: p 142 "I'm not here to talk about limits because I'm not exercised about whatever you decide on that \* \* \*."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 The Institute litigates constitutional claims of plaintiffs and defendants that "are moderate in size." Typically they are resolved by summary judgment. Trials last one to five days. "Routinely they require more than five depositions, although rarely more than 10."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment

of wages, we often litigate around labor broker arrangements or rental worker schemes. "These all have multiple employers, which often require several 30(b)(6) depositions" "to take out the facts around control that is required to show joint employment under the federal employment laws." Employers typically control the facts. The only way to get them is through depositions and interrogatories. Decreasing the numbers will leave numbers inadequate to generate the evidence a plaintiff needs to prevail.

November Hearing, Barry H. Dyller: p 183 "[A] limit of five depositions is a disaster." In government wrong cases we have to depose parties, eyewitnesses, supervisors, people involved in making government policy, document custodians, medical providers, and countless others. This is necessary not only to survive summary judgment, but also to make a convincing case to a jury. And I want defendants to take as many depositions as they want so they can evaluate my case and decide whether to go to trial or to try to resolve it. I do not have empirical studies of how many depositions are needed, but personal experience suggests it is generally more than five. Federal judges are more than capable of stemming abuses. I have never had a problem in getting permission to exceed the limit, but I may encounter a problem – and changing from 10 to 5 "is a message to judges. You know, we want you to limit this."

November Hearing, John F. Karl: p. 208 Employment cases commonly require proof of intent. It is not possible to prepare for summary judgment and trial with only 5 depositions. In some cases, many depositions are required simply to identify the person who made the decision that is being challenged. You need to find corroborating testimony, and also conflicting testimony. Employment plaintiffs cannot afford the extra costs in seeking agreement for more depositions, or for asking court permission. When counsel is experienced, there is no trouble in getting agreement. But a case may be staffed with young attorneys who do not have authority to agree. "I hate to bother the judges." The fear that reducing the number will create problems arises from dealing "with a number of obstreperous attorneys who have given me a hard time on behalf of the institution that they represent." And some employment cases are document-intensive, increasing the number of people who must be deposed.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 Plaintiffs are interested in getting in front of a jury as quickly and efficiently as possible. "Running up the clock and running up the bill are classic defense tactics, not the plaintiffs' bar." The employer controls access to documents and people, and makes broad claims that every employee is represented so as to prevent the plaintiff from talking even with those who are willing. And gag orders in settlement agreements and severance agreements are common, as are broad confidentiality agreements covering even personnel policies

and internal evaluation forms. Yes, it is possible to examine a witness at trial without a prior deposition, but to get to trial we have to survive summary judgment. "[S]o we practice defensive lawyering," taking many depositions to prepare for summary judgment.

One common problem is to identify who made the challenged decision. In one case we had to depose nine people to get the first clues – and many depositions remained for other matters.

"[Y]ou never get agreement to exceed the number of depositions in the rules from opposing counsel." They assert the client forbids agreement. And they pay no cost when they lose the motion to take more.

Judges who manage actively under the present rules address these problems. The proposed rules will not prod the other judges to take prompt actions on motions for more depositions. The motions will languish for months. Meanwhile, "we're afraid to use up our five, not knowing if we're going to get seven or eight or 12."

Motions for summary judgment often are supported by the affidavits of people who have not been deposed. A good rule would require advance production of affidavits a party plans to use on summary judgment, paving the way to depose the affiants. Or Rule 56(d) should be revised to when the defendant has refused to agree to more than the rule number of depositions "you should almost presumptively get more discovery once you see what they put in their summary judgment motion, the people you haven't talked to, people haven't examined yet."

November Hearing, Jennifer I. Klar: p 227 In a recent employment case the initial disclosures listed many witnesses. I had to fight for permission to depose them – the judge "pushed very hard on why is your case so different" that you need extra depositions. The order limited the depositions to two hours, and required me to pay for my transcript and the transcript for the other side. The defendant called the witnesses at trial – obviously they opposed the depositions while they intended to call them, "which is a gotcha that will happen more and more often if the number is reduced."

November Hearing, Robert C. Seldon: p 240 Describes two cases that manifestly required more than the five that would be allowed if "this awful rule were put in place." One involved retaliation against a whistleblower in the corrections department by generating a phony report that he beat up a first degree murderer. The other involved an employee who "was intentionally exposed to asbestos in the workplace by the Department of Commerce."

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 The five deposition limit is appropriate. Most cases will fit within it. In 20 years of handling hundreds and hundreds of cases, only once was it necessary to go to the judge

to get permission to exceed the present limit; in all other cases, the question was resolved by agreement. There is no problem with the 10-deposition limit. But lowering it to five will encourage lawyers to think more carefully at the beginning of the case about how many depositions they need.

November Hearing, John P. Relman: p 253 For fair housing, fair lending, disability, employment discrimination, the limit will make it much more difficult for plaintiffs and will not affect defendants. The key to individual discrimination cases is to show pretext by showing surrounding circumstances. You have to show how similarly situated people are treated. Ethically, plaintiffs' attorneys are often barred from speaking with employees of companies. When multiple reasons are given for the adverse action, the number of similarly situated people increases. It even make a deposition or two to find out who was the actual decision-maker. The defendant has access to all of its employees and can conduct informal discovery without restriction – one deposition of the plaintiff is enough. So the defendant has every incentive to insist on observing the presumptive limit. The fear of misuse by plaintiffs is misplaced – contingent-fee attorneys front the costs of litigation, and have no incentive to take unnecessary depositions. If there is to be any limit, it would work better as a limit on the total number of hours of deposition time. That would be more flexible.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Lowering the limit will make it harder for civil rights plaintiffs to get access to the discovery they need.

November Hearing, Wendy R. Fleishman: p 273 (Speaking for New York State trial lawyers, and AAJ members involved with toxic tort, environmental tort, and product liability litigation.) There is no evidence that the proportionality mechanism in Rule 26(b)(2)(C)(iii) is ineffective. In many instances a Rule 16 conference addresses any issues of abuse of discovery. Moving proportionality into the scope of discovery will, like *Daubert*, generate a plethora of new motions and discovery disputes by encouraging defendants to make more objections. Defendants have huge amounts of money. Individual and small-business plaintiffs do not. "We cannot know the value of a piece of information until we get the information." We got the critical information in the Vioxx litigation only because the judge "used Rule 26(b)(2)(C) to control that discovery." If this becomes part of the scope of limitation, not a judge-managed device, "the plaintiffs would have to show that the information was available, that the information existed. And without doing the discovery, they couldn't show that \* \* \*." Defendants will say it is not proportional. If such cases are aggregated through the MDL process, then "the position of power changes." But the Vioxx cases were not aggregated, and there were many small claims.

November Hearing, Patrick M. Regan: p 278 Rests on experience with between 300 and 400 federal-court cases, and trying more than 50 jury trials. Representing the estate of a young construction worker killed by a nail gun, with damages capped at roughly \$750,000, the first dozen deponents all said the gun was appropriate for use on construction sites. The 13th or 14th deponent testified that the manufacturer had recommended that the gun be used only in shipyards, where it is used to attach two-inch thick steel plates to each other. The case was resolved, with the great benefit that the guns were taken off construction sites throughout the country. "I would have failed the proportionality test." And if there were a presumptive five-deposition limit, the judge might have allowed seven; I would not have got to the 13th or 14th critical witness. There is no problem with the current limit of ten. Most of my cases involve more than five but fewer than ten. Defense counsel will not agree to go beyond five, because that would make trouble with their clients. So there will be work-making motions. Yes, I have lost cases, but that does not mean that the claims were nonmeritorious or that discovery would better have been curtailed. The current rules provide more than enough tools to curtail abusive practices. There is no incentive for contingent-fee plaintiffs' attorneys to take unnecessary depositions. Yes, it would help to have the Committee Note explain that five is the norm, and that the rule is not intended to create a presumption that more than five are inappropriate. But it is better not to be subject to even discretionary limits when there is no need for them.

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: p. 293 Lists Rules 30, 31, 33, and 36 along with Rule 26(b)(1) in opposing further restrictions on discovery that will have a disproportionate impact on civil-rights plaintiffs, who commonly litigate in the face of information asymmetry. A more extensive summary is provided by Rule 26(b)(1).

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Most of the focus is on the proposed numerical limits in Rules 30, 31, 33, and 36. Federal courts are the last bastion of the disenfranchised. "There should be a compelling reason to roll back the protection," and there are none. The data show that across the board in federal court, most cases conclude with fewer than 5 depositions per side. But there are complex civil rights cases. An informal poll at the Committee found that in recent years no one had litigated a case through most of the discovery process that involved fewer than 10 depositions. Most of these were class actions. The debate over the efficiency of discovery appears intractable. The volume of criticism by corporate defendants has not diminished. Repeated changes in the rules, particularly the 1993 changes, have had a particularly significant impact on civil rights cases. "[C]ontentious litigation is in fact a good part of the reason that there are unnecessary costs in discovery." Early and active

case management is a better solution. Letter motions, and hearings by phone, are being used to good effect.

January Hearing, Joseph D. Garrison (NELA): Keep the 10 limit.

January Hearing, P. David Lopez (EEOC): p 68 The numerical limitations are a blunt instrument, particularly in cases with asymmetric information. Over the past three years the EEOC took more than 5 depositions in over 40 percent of systemic cases, and more than 25 requests to admit. Many judges are flexible about the limits, "but not all judges." Cooperation among the parties is more likely in systemic cases because defendants also want to take many depositions. It is a greater problem in a case involving one or two workers and a great asymmetry of information.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery, even when they would prefer to be more cooperative. The presumptive limits may exacerbate these problems. Voting rights cases under § 2 rely on a totality of the circumstances test; successful litigation requires a great deal of evidence. Local laws governing immigration rights often are subject to facial attack, but an as-applied challenge looking at specific practices and policies used to implement a law that is unclear on its fact again requires much discovery. Some judges, familiar with § 2 litigation, understand the needs for extensive discovery. "In other cases, it's a lot of education. It's a lot of argumentation that's required."

January Hearing, Jocelyn D. Larkin: p. 125 From the perspective of institutional reform litigation, 5 depositions are insufficient. Lowering the limit creates a new first-line defense that will impose transaction costs even if the limit is expanded. And it is much more difficult to plan discovery at the outset when you do not know whether the limit will remain fixed at five.

January Hearing, Quentin F. Urquhart for IADC: p 133 Supports presumptive numerical limits. The reduced number will add support to a lawyer in discussion with a client about discovery limitations. It is "atmospheric." "It sets a tone for the parties to have discussions with their clients about do we really need all of this"?

January Hearing, William P. Butterfield: p. 142, 149: "When I have 40 parties in a case and when it says I can take five depositions, that is not a meaningful rule anymore."

January Hearing, Elise R. Sanguinetti: p. 151 The lower limit is a big problem in representing single plaintiffs in wrongful death and catastrophic injury cases. Now we attempt to work with the

other side, "but I've run across roadblocks many, many times." We seek to hold depositions to a minimum because it is difficult to explain to contingent-fee clients that their recovery is reduced by the cost of the depositions.

January Hearing, Kathryn Burkett Dickson: p 160 The proposed numbers would work if discovery is phased – they are much like the agreements with defense counsel in employment cases, planning an initial phase of discovery to prepare for early mediation. They are not sufficient to prepare to defeat summary judgment or go to trial. Defendants always put on more than 5 witnesses, and they are beautifully scripted witnesses. Cross-examining them without a deposition will be wasteful; limiting discovery will not improve trial advocacy. Counting my cases over the last five years, the number of combined depositions [for both parties?] ranged from 22 to 28 for the cases that went to trial. Employers typically propose 18 to 38 trial witnesses, although they call fewer, usually between 10 and 15. And videotaped depositions are used for trial testimony: "It's not just discovery." And I have had difficulty getting permission for more than 10; indeed, in a recent case in which the defendant agreed that it was appropriate to have 10 to 15 depositions, the judge rejected the stipulation and set the limit at seven.

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section p 1 28: The problem with reducing the number from 10 to 5 is that it creates a mindset "where the young insecure litigator on the other side is going to get locked in and say you got your five and that's it."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Most routine employment cases today are resolved with fewer than 5 depositions. But it is good to reduce the presumptive limit because that will force the parties to have a discussion about proportionality.

February Hearing, Michael M. Slack: p 193 I just made a deal for 15 depositions. Drop the limit, and "I just don't get that deal. I get six or seven on the best day."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Practice has come a long way in cooperation. Lowering the presumptive limits could have a deterrent effect on cooperation.

February Hearing, J. Bernard Alexander, III: p 272 In a typical employment case that goes to trial, at least a dozen depositions are necessary. With a base at 10, there is little difficulty in getting them. If the base is reduced to 5, "it means that there are other things that we have to horse trade in order to get what we need." The rules are no problem when the other attorney is cooperating. They are a problem when there is no cooperation. Often you have to take depositions to get the proper witnesses –



"I have oftentimes taken ten depositions in a day, one hour at a time, to get to 20, 25 deponents \* \* \*."

February Hearing, Jennifer Henry: p 334 Five depositions should not be problem. The lower limit will cause people to be more selective. If they want more than 5, that will happen by agreement - I have been able to reach agreement in every case in which I have needed more than 10.

February Hearing, Brian P. Sanford: p. 356 In individual employment cases I always bump up against the 10-deposition limit. Many times the other side agrees to go over, but most of the time they do not. The last time I asked, the court court denied permission to take more than 10. This is a real problem for employment cases.

RULE 30(D)(1): 6-HOUR DEPOSITIONS

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: A deponent's "custodial file" may contain 10,000 to 50,000 documents. Reducing the time for a deposition will eliminate questions on many documents "with discovery value." Often it is necessary to secure agreement to exceed the present 7-hour limit. And time limits encourage evasiveness, failure to cooperate, and failure to give straightforward answers.

266, American Association of Justice Aviation Section, by Michael L. Slack: Reducing it to 6 hours "probably will not make much of a difference in fact witness depositions." But it will make it easier for cagey expert witnesses to run out the clock, avoiding answers to crucial, case-dispositive questions.

274, James Jordan: "7 hours is often not enough in a complex commercial case; and lawyers tell their clients to drag it out so you get less info."

292, Lyndsey Marcelino for The National Center for Youth Law: The reduction in the amount of time, joined with the reduction in the number of depositions, may hurt the chance of getting beyond summary judgment and prejudice the outcome of trial.

296, William B. Curtis, for Reglan Litigation Group, AAJ: "[T]he typical deposition is filled with repeated and unnecessary speaking objections, questions being re-read, and other clock-burning delay tactics. If the deposition is artificially shortened by an hour, the manufacturer's lawyer will have an easier time 'running out the clock.'"

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Reducing the limit to 6 hours "would make it much more difficult to discuss documents in a deposition." And echoes 264, the AAJ Transvaginal Mesh Litigation Group.

299, Aaron Broussard: "I see no problem in decreasing the number of hours \* \* \*, although this is not a major change." (Reducing it to 5 depositions is a major change.)

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "There are no facts cited to demonstrate what percentage of federal depositions extend past normal business hours, nor whether any parties or litigants cite such 'after hours' work as a major problem in litigation." Anecdotes about lunch breaks and comfort breaks do not mean much. Analogy to the 4-hour limit in Arizona overlooks the strictly enforced disclosure rules in Arizona. And the rule does not address the question whether excessive delays by counsel or by a witness to run out the clock should be counted

toward the overall time limit.

317, Steven Banks for the Legal Aid Society in New York City: Seven hours are often needed in many of complex cases. And "[a] six-hour time limit would be especially onerous in our cases in which either or both of the parties need translation." In employment cases, "we have deposed non-English speaking corporate officers or managers \* \* \*.

338, Steven D. Jacobs: Depositions rarely last 7 hours. "I'm curious to know the salutary effect that reducing that time by one hour is thought to have."

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Artificial time limits accomplish little. The time is not solely controlled by the questioner. "An evasive or long-winded witness and/or obstructive lawyer can easily turn a four-hour deposition into an 8 hour deposition. \* \* \* Time limitations on depositions can actually make depositions longer and more expensive by creating the incentive to cause mischief in order to 'run out the clock.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Depositions of corporate or management personnel in nursing home litigation are often detailed and slow-moving. Witnesses often respond with "I don't know" and "that depends" answers that must be unpackaged. Shortening the time limit will encourage such time-killing tactics.

362, Edward Hawkins: Depositions routinely last more than 6 hours, even in routine case.

363, Dean Fuchs, at request of NELA-Georgia Board: The reduction is unnecessary and will spawn more motion practice.

372, J. Burton LeBlanc, for American Association for Justice: Notes that the reduction to 6 hours is not as dramatic as the reduction to 5 depositions, but that in combination these changes would provide less than half the current time for depositions.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): Six hours does nothing to address the obstructionist tactics of defense attorneys to use up the limited time allowed now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive. or vague and ambiguous such that they require multiple follow-up questions." And counsel improperly inject themselves into the deposition. They engage in lengthy speaking objections or instigate lengthy discussions regarding discoverability, relevance, and admissibility. They commonly instruct witnesses

not to answer based on relevance or admissibility, "which is improper."<sup>1</sup>

383, Alan B. Morrison: (1) Reducing it to 6 hours is appropriate. This works in many states. An extra hour at the end of the day is not likely to matter. (2) The cross-reference, here and in the other rules should be to 26(b)(1) alone; (b)(2) adds nothing.

374, Larry E. Coben for The Attorneys Information Exchange Group: 6 hours is a step in the right direction. Limiting the time for expert depositions to 4 or 5 hours would provide a significant saving for all concerned.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: A 7-hour day is quite lengthy, "causing even resilient witnesses to tire in the final hour." "Argumentative questioning" is still common - limiting the time will reduce the practice.

398, Shira A. Scheindlin: Reducing the time limit is worse than reducing the number of depositions. It will lead to disputes that must be resolved by a phone call to chambers. Lawyers will try to run the clock to protect a witness. This is an invitation to mischief and gamesmanship.

400, Gregory P. Stone: "Adequate preparation and skillful questioning" is more important than an extra 60 minutes. Six hours will almost always be sufficient, and enable a deposition to be completed in single day, saving time and travel costs. This is true even for Rule 30(b)(6) depositions.

403, Donald H. Slavik for AAJ Products Liability Section: The need for more than 6 hours is graphically illustrated by products cases involving foreign defendants, whose witnesses often require translators. It takes at least three times as long as with witnesses that testify in English.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The duration should be extended to 8 hours. Depositions can be especially lengthy in document-intensive actions. In a Rule 30(b)(6) deposition, which can be used at trial, it is important to establish the authenticity,

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<sup>1</sup> Many lawyers in the Cohen & Malad firm wrote apparently identical letters (examined by comparing the first and last lines on each page). They are noted here only: Scott D. Gilchrist; Irwin B. Levin; TaKeena M. Thompson; Arend J. Abel; Brian K. Zoeller; Greg L. Laker; Melissa L. Keyes; Richard M. Malad; Jeff A. Hammond; Kelly J. Johnson; Julie M. Andrews; Michael W. McBride; Richard E. Shevitz; Lynn A. Toops; Edward B. Mulligan; Maggie L. Sadler; Jonathan A. Knoll; Gabe A. Hawkins; Vess A. Miller; and David Cutshaw.

best evidence, lack of hearsay, and explanation of documents in order to get them into evidence. "In cruise line cases, for example, the corporate representatives provided are the same every time and are in-house lawyers in the claims department \* \* \*. These representatives are experienced, skilled witnesses who are experts at avoiding and evading answers." 448, Robert D. Curran, tracks 410.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing to 6 hours "simply invites more gamesmanship than currently exists." (With an example.) Courts resolve these disputes, but reducing the length will only lead to more disputes.

420, Daniel A. Edelman: A general reduction in the time is ill-advised. Evasive witnesses and delay tactics by defense counsel abound now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions. And counsel inject themselves by lengthy speaking objections, or lengthy discussions of discoverability, relevance, and admissibility. And they commonly instruct witnesses not to answer on the basis of relevance or admissibility objections, "which is improper." (But concludes by suggesting that 5-hour depositions be permitted of each corporate party and its officers and employees.)

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Reducing it to 6 hours will not be an appreciable time saving. A protective order can be used when necessary to avoid undue inconvenience for the deponent. The full 7 hours are often needed to depose expert witnesses, party representatives, or key witnesses. And "disputes occur over the number of hours that other parties' counsel can question the witness." But if the reduction goes forward, the Committee Note should recognize that extensions often will be needed for such witnesses.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In multiparty cases, each party needs to interrogate the witness, "if only for a short time." As the time draws down, there will be disputes where one or more parties did not have time to examine the witness.

465, Neil T. O'Donnell: (Addressing a 4-hour limit) "[I]t will be very easy for intransigent witnesses to frustrate legitimate efforts to obtain information."

487, Peter J. Mancuso for Nassau County Bar Assn.: Little good is accomplished by reducing it to 6 hours. In commercial litigation,

written exhibits are submitted to the deponent and are the subject of much questioning. The deponent's review of an exhibit is itself time consuming.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support at the conference for decreasing the hourly limits. This may make discovery less efficient.

607, Christopher Carmichael: Illinois state courts limit depositions to 3 hours "and that is generally considered to be enough time even in the most complex and high-stakes cases."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the 6-hour limit. "[S]ix hours of actual deposition time easily consumes a full day. The limitation should especially benefit non-parties who are being deposed."

635, Matthew D. Lango for NELA/Illinois: The 6-hour limit is a hardship for employees, who typically cannot interview the witnesses informally. And the limit will force the parties to spend more time preparing for the deposition in order to ensure retrieval of the needed information.

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position, unless the Committee Note is revised to encourage courts to reopen depositions plagued by speaking objections and other common delay tactics. Absent such supervision, the potential for running out the clock is unacceptably high.

1054, Assn. of Bar of the City of New York: "We do not believe that reducing the time limit by 1 hour will promote efficiency, nor do we see a demonstrated need for this limitation."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): "Under the current 7 hour limit, it frequently is difficult to complete the examination, including affording sufficient time for cross-examination, especially in multi-party cases." Experience with 4-hour depositions in Arizona affords little guidance, given the extensive initial disclosures required in Arizona, which "provide a framework for completing the depositions within the 4 hour limit."

November Hearing, Altom M. Maglio: p. 29 As a contingent-fee attorney in medical product cases, I bear the expense of depositions. "[O]nce I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours." p 31: When I find out a deponent is not the person with knowledge, the deposition is "fairly quick once you realize you've got the wrong guy."

November Hearing, David R. Cohen: p 41 "I think most depositions

that take seven hours can be done in six \* \* \*."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p 101 "[O]ftentimes seven hours needs to be split between multiple parties." We have shared time with the Department of Justice, or state attorneys-general, or with opt-outs.

November Hearing, Anna Benvenuto Hoffman: p 110 Most of the witnesses in our police-misconduct civil rights actions are hostile to us. "[T]he depositions are slow-going, with even basic facts conceded only begrudgingly." With lead defendants we often have to take more than 7 hours. "And frankly, a lot of that is because of the obstruction by both the defendants and the defense lawyers. They say they don't remember anything, they won't admit anything. There's lots of speaking objections, all kinds of things which are not permitted by the rules but which everyone does and you don't want to run to the court every single time \* \* \*."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, an interpreter is often needed for non-English speakers at deposition. That doubles the time needed. The need to argue for exceptions could deter reliance on such witnesses at all. We have not actually had a judge deny a request for more time to meet this need. Typically we are able to come to agreement with defendants on the number of hours when an interpreter is needed.

November Hearing, Barry H. Dyller: p 183 Most of my depositions are less than 4 hours. But many are more. And reducing the time invites abuse. A deponent who was a corporate president paused 25 to 30 seconds after every question. "What is your name"? "and we would wait and we would wait and we would wait." "I think it's a waste of the judge's time for me to go and say, you know, Mr. Smith, you know, paused a lot, please, judge, make him come back."

November Hearing, John F. Karl: p. 208 The time limit is already severe, but we have learned to live with it. There is an incentive to run out the clock. In document-intensive employment cases you have to go over the documents with the witnesses, asking specific and precise questions. "And sometimes there's just obstreperous conduct on the other side." In one whistleblower case counsel made an average of 3.2 objections per transcript page, taking up time. Shortening it to 6 hours "runs the risk of encouraging this sort of conduct in other cases."

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section: p 128 Supports the reduction to 6 hours. "[A]t 7:00 at night a witness is really tired."

February Hearing, Megan Jones for COSAL (class-action law firms):

p 212 7 hours is not enough for a foreign language deposition – and usually the greatest extension we get is 2 hours. Then there may be three groups of plaintiffs fighting for the 7 or 9 hours.

February Hearing, Jennifer Henry: p 334 Texas has a 6-hour limit. Only once have I needed more than 6 hours, and then the parties agreed. The saying is that a good trial lawyer does not need more than 6 hours.



RULE 31: NUMBER OF DEPOSITIONS

266, American Association of Justice Aviation Section, by Michael L. Slack: There should be no limit on the number of depositions on written questions. They are useful to put records in admissible form, and dealing with other matters more efficiently than oral depositions. At the least, there should be a separate 10-deposition limit for Rule 31 that does not count any Rule 30 oral depositions against the limit.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30. A worthy idea. Amend the Note to add the Rule 33 Note encouragement to think carefully.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Written depositions are seldom used in nursing home abuse and neglect litigation, but they may be used to substitute for Rule 30(b)(6) corporate depositions. The reduced limit could be exhausted without gaining substantive information.

604, Lawrence Marraffino: "Not relevant as written depositions are rarely used."

RULE 33: 15 INTERROGATORIES

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: The present limit "isn't broken." Interrogatories help identify potential witnesses, theories, documents, and even additional defendants.

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Reducing the number of interrogatories will be wasteful because lawyers, now careful to frame narrow interrogatories, will be forced to write their questions more broadly, leading to more objections.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of interrogatories.

274, James Jordan: "# of rogs - again, in a simple case maybe that would work. not in a complex commercial case"

276, John D. Cooney: Reducing the number "will lead to overly broad and compound questions." They are needed to discover additional defendants and, as an example, additional asbestos-containing products that plaintiffs do not recall forty years later.

278, Perry Weitz: All but the final sentence is, with one word change, verbatim the same as 276, noted above. The final sentence predicts that the effect "will be to cause extraordinary and systemic delays and motion practice."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The reduction is unnecessary and counterproductive, as with reducing the number of depositions.

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

296, William B. Curtis, for Reglan Litigation Group, AAJ: Typical pharmaceutical cases are complex. "If only 15 interrogatories were allowed, there would be no practical way to discover the basic information needed to intelligently learn how the company makes and sells its drugs." An illustrative first set of interrogatories for Reglan litigation is attached, showing that a reasonable set of questions would exceed the limit.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group,

AAJ: Echoes 264, the AAJ Transvaginal Mesh Litigation Group, adding that Darvocet litigation involves a product "marketed for decades by numerous pharmaceutical companies." The universe of discoverable information is massive.

299, Aaron Broussard: This is a Catch-22. "If you make your request too detailed, you can use up half of your interrogatories in one request. If you make your request too wide-open, so that it encompasses everything with fewer words, the opposing party will object to it as vague and you will never know whether you have all of the requested information." It would be more effective to provide that a party answering an interrogatory "shall include all information, including documents, that the language of the request encompasses under all reasonable interpretations." And a party who objects must explain what tasks are not being performed because are too burdensome, or what terms require further explanation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No data are offered to show the need to reduce the number of interrogatories. No attempt is made to address disputes about whether subparts are discrete or logically related. Reducing the number will encourage more broadly worded and burdensome interrogatories. And the problem will be aggravated by the parallel reductions in other discovery devices.

307, Hon. A. Leon Holmes: Opposes the reduction. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

311, James Coogan: "This rule change is particularly disturbing." Issues often appear that can be resolved only by written answers to written questions. Twenty-five, the present limit, at least has a rational relation to these needs.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases many areas of discovery are inexpensively accomplished by interrogatories. Reducing the number will increase motions for leave to ask more. (Also opposes the new proposed rules' limits on the number of requests for production.)

317, Steven Banks for the Legal Aid Society in New York City: "Interrogatories, used properly, are an efficient means of eliciting factual information (such as the identity of witnesses and involved persons \* \* \* ) which would be considerably more

burdensome to elicit through depositions." Improper use, as to seek extensive narrative answers that can be got more efficiently through depositions, can be controlled directly.

321, Timothy M. Whiting: Reducing the number "will lead to overly broad and compound questions." In mesothelioma cases interrogatories have led to discovering additional defendants and additional asbestos-containing products.

324, Jonathan J. Margolis: "In employment cases \* \* \* it is far more efficient for a plaintiff to ask the defendant to identify those who made the decision to fire or demote the plaintiff in an interrogatory than to parse out perhaps thousands of documents or to ask multiple deposition witnesses." And interrogatories can be useful to determine whether affirmative defenses are real or mere boiler-plate. Interrogatories also can be an efficient way to identify witnesses. There is no empirical evidence of a need to reduce the number.

325, Joseph M. Sellers: Presumptive limits that are too high for some cases may encourage over-discovery. When too low, they encourage broader requests in lieu of a higher number of more tailored requests, and engender collateral disputes. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: "Well-crafted written discovery has always been the cheapest, most reliable and efficient means to obtain information." The severely limited numbers for Rules 33 and 36 will force litigants to ask broader questions, further limiting the usefulness of written discovery.

350, Pennsylvania Bar Association: The default number of interrogatories should be left at 25.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Fifteen is more than sufficient for employment and labor cases (from a defending perspective).

357, Joanne S. Faulkner: "For low income consumers, often written discovery is all they can afford." Interrogatories and requests to admit are often the only way to get beyond evasive answers to the complaint. The number should not be reduced.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing home litigation often covers a number of different events and circumstances. That requires many interrogatories. And interrogatories often help shape other discovery, including depositions. The reduced limits is a mistake.

359, Andrew B. Downs: "As a general proposition, interrogatories

are useless." The questions are cumbersome. The answers are evasive, opaque, "jello-like." They should be abolished. Reducing the number is but a step in the right direction.

360, Robert Peltz: The impracticality of the proposed reduction is illustrated by attaching standard interrogatories approved by the Supreme Court for general negligence, automobile, and medical malpractice actions. For plaintiffs they run in the 20s, up to 29 in medical malpractice cases.

361, Caryn Groedel: Reducing interrogatories will require plaintiffs to spend more money on depositions.

362, Edward Hawkins: The 15 interrogatory limit "is simply unrealistic."

363, Dean Fuchs, at request of NELA-Georgia Board: Written discovery through Rule 33 and 36 "can be an extremely effective tool to not only discover information \* \* \* about [] claims and defenses, but also \* \* \* to frame cases for a ruling on summary judgment and to narrow issues for trial." The misuse of marginally relevant boilerplate interrogatories should not distract from the importance of carefully drafted interrogatories and requests to admit. Limiting the number will increase satellite litigation in counting disputes and in requests to exceed the limit.

365, Edward P. Rowan: "Interrogatories cut down the complexity of depositions, and even eliminate the need for some depositions." The restriction is unwise.

368, William G. Jungbauer: "Interrogatories allow a party to identify witnesses, additional and relevant facts, and documents." Reducing the limit will lead to overly broad and compound questions.

369, Michael E. Larkin: Interrogatories are efficient. They reduce the likelihood of unnecessary depositions and other discovery. The proposal is unnecessary, and will lead to more work for the court.

370, Thomas D'Amore: "Interrogatories are an unobtrusive way to identify witnesses, additional and relevant facts and documents." Defendants often do not agree to discovery beyond the presumptive limit, and judges may grant fewer if the presumptive limit is lowered.

372, J. Burton LeBlanc, for American Association for Justice: "Interrogatories are a useful, inexpensive and unobtrusive way to obtain basic background information." They are a critical information-gathering tool. Many comments made in March 2013, several of them by government agencies, protested. There is no

evidence supporting a presumptive limit at 15.

373, Michael L. Murphy for AAJ Business Torts Section: Do not lower the limit. Interrogatories are used "for many purposes, including identifying witnesses, gaining an understanding of the organizational structure and lines of responsibility, narrowing or ruling out potential claims and theories, and identifying potentially relevant evidence." A reduction is likely to lead to an increased number of requests for documents.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Interrogatories are used "to inexpensively identify witnesses, obtain information relating to damages, and even identify the size of the class for numerosity purposes." They should not be further limited.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): For both Rules 33 and 36, the Committee should "put more teeth into enforcement, as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection.

379, John M. Gallagher: There is no good reason to reduce the number of interrogatories, nor to limit requests to admit.

383, Alan B. Morrison: Opposes the reduction. Answering interrogatories is rarely burdensome in the way that responding to Rule 34 requests can be. They are an inexpensive way of obtaining information, "and often reveal something about the requester's thinking about the case, from both a legal and factual perspective." There are few cases where requests for interrogatories are the culprit in claims of discovery abuse. And this reduction seems incongruous with the proposed limit to 25 requests to admit - "the burdens of investigating and properly answering these Requests seem very similar to the burdens under Rule 33."

374, Larry E. Coben for The Attorneys Information Exchange Group: Interrogatories and requests to admit are a simple and inexpensive means of acquiring information. Responses often focus and drive oral discovery. Limiting them will force attorneys to cast a wider net. Consider a product liability case. More than 25 interrogatories may be needed on each of five different topics -- the identity of the employees responsible for design, assembly, or manufacture; the design history, including component part suppliers or manufacturers and other models using the same component or system; computer modeling and physical testing methods used to judge safety of the product before its sale; field performance of the product and claims and lawsuits similar to the instant litigation; alternative designs studied before the product was released for sale.

394, Thomas Crane: In employment discrimination cases, 15 interrogatories are not enough. Interrogatories are an efficient way to obtain critical information. Depositions by written questions tend to be costly.

398, Shira A. Scheindlin: "There is no empirical evidence that 25 interrogatories has caused any problems \* \* \* It is a change only for the purpose of signaling a narrowing of the scope of discovery." It will increase cost and delay in resolving disputes.

400, Gregory P. Stone: Interrogatories are important and cost effective. The information exchanged is important in determining whether to go to trial, and – if trial is had – in avoiding the need to approach a trial "blind."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Limiting the parties to fewer interrogatories will force them to write their questions broadly, leading to litigation over the propriety of the questions.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The present limit of 25 is severe and unwarranted. The model interrogatories for personal injury actions in Florida list 23 questions. Nor is there any clear problem that warrants a reduction. Interrogatories establish simple facts and stances of the parties, and obtain basic information such as the identity of witnesses, ownership of vehicles, and other important matters. Further limits will require extremely broad interrogatories, eliciting objections and motions. 448, Robert D. Curran, tracks 410 without the Florida interrogatories.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. They seek very basic information at the beginning of a case, and help prepare the case in late discovery for summary judgment and trial. Often in securities fraud cases the defendant will request that the plaintiff use interrogatories instead of a Rule 30(b)(6) deposition; limiting the number will impede this efficiency. Interrogatories, including contention interrogatories, may lead to elimination of claims and defenses.

420, Daniel A. Edelman: Combines Rules 33 and 36. Do not reduce the numbers. Instead, find ways to put teeth into enforcement, "as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

421, Louis A. Jacobs: "As for whether Judges should 'manage up' discovery by starting with limits, rather than 'manage down' discovery by starting with liberal discovery, the Committee

should not drink this law-and-economics flavor of Kook-Aid." Limiting the number of interrogatories is "yet another recipe for more judicial involvement \* \* \*. From my perspective, counting as a discrete interrogatory the subparts of a single interrogatory dooms discovery in employment litigation. "For example, we always ask in a single interrogatory for the identity of the decisionmaker, as well as each individual who provided input on which any decisionmaker relied, for specific employment decisions, ranging from termination and discipline, through evaluating performance or investigating misconduct, to assignments and opportunities." "If each employment decision is deemed a discrete interrogatory, the ceiling is in many cases bumped on the first one."

445, Gerald Acker, for Michigan Assn. for Justice: "[P]arties simply do not produce relevant documents during initial disclosures, as a matter of course." Interrogatories are needed to flesh out the case. And they are efficient.

457, Carl A. Piccarreta: There is no need to reduce the limit. The system is not broken.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Interrogatories are useful to narrow the range of disputed issues and as an efficient, low-cost form of discovery. Government cases regularly see the full use of the 25 limit.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "In all but the most straightforward cases, 15 interrogatories may not suffice." Either the rule text or the Committee Note should emphasize the need for flexible application.

464, Douglas A. Spencer: Limiting the number of interrogatories would make prosecuting or defending cases next to impossible.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "This proposal will only encourage more aggressive law and motion practice."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference agreed that interrogatories are useful, and that there is no general problem with the limits set at 25.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights Californiat and Disability Rights Education & Defense Fund: Offering a not complex disability discrimination example: "15 questions, even if consisting solely of contention interrogatories, would be insufficient."

609, Stephen D. Phillips and John D. Cooney for Illinois Trial



Lawyers Assn.: Reducing it to 15 interrogatories "will lead to overly broad and compound questions."

614, Lars A. Lundeen: "I have honed my initial set of interrogatories in the typical auto collision court case, filed in State court, to 33." Setting a limit of 15 for more complex cases is unworkable.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes the proposal, which "will produce more motion practice without meaningful benefit."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes.

1054, Assn. of Bar of the City of New York: Supports, on condition the proposal is revised to direct that the court must increase the limit consistent with Rule 26(b)(1) and (2). But notes that "interrogatories can (and often do) impose great burdens on litigants, because they can require searching reviews of documents and factual investigation in order to respond, even though the same work could be done by the requesting party based on the documents produced in discovery."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 The proposed reduction to 15 interrogatories is problematic for the same reasons as the reduction in the number of depositions.

November Hearing, Andrea Vaughn: p 173: For the reasons that reducing the number of depositions will impede actions for unpaid wages, reducing the number of interrogatories will also be an impediment.

November Hearing, Barry H. Dyller: p 183 In litigating constitutional violations by government employees or actors "I rarely use interrogatories, so I don't care how many there are personally."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Increasing the number should be considered.

January Hearing, Elise R. Sanguinetti: p. 151 For contingent-fee plaintiffs in wrongful-death and catastrophic-injury cases, interrogatories are an inexpensive, "really critical" way to obtain necessary information while holding costs down.

February Hearing, J. Bernard Alexander, III: p 272 Although answers to interrogatories are filtered through counsel, they provide some information, narrow the scope, narrow the issues.

RULE 34(B)(2)(A): EARLY SERVED REQUESTS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Opposes because it opposes the proposal to permit requests to  
produce before the Rule 26(f) conference.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 34: SPECIFIC OBJECTIONS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that by adding a "specificity" requirement "the Committee may finally eradicate" the practice of boilerplate objections.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The proposal "appear[s] reasonably calculated to address the goal of requiring greater specificity in parties' responses to document requests \* \* \*."

372, J. Burton LeBlanc, for American Association for Justice: Requiring specific objections is a positive step toward preventing parties from evading discovery requests.

November Hearing, Burton LeBlanc, President, American Association for Justice: p 139, 141: In general terms, "we support the [Rule 34] proposals as written."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: It is common for defendants to assert undue burden without articulating what that means, or to assert a general privilege objection. Information is withheld until the court, usually in response to a motion to compel, orders the defendant to provide evidence estimating the costs. "A responding party's inability to back up their vaguely stated objections has, in many cases, led to the production of highly relevant information." Requiring specific objections is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: "It should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart" when there is a general objection applicable to all of a counterparty's requests. The Committee Note should make this clear.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

386, Arthur R. Miller: The reduction to 15 "is particularly questionable." Interrogatories are not burdensome and are inexpensive. "There are very few cases, if any, in which interrogatories are the source of discovery abuse." If a question seems onerous, a party can respond as best seem reasonable, and allow the judge to decide whether anything else should be required.

407, David J. Kessler: (This comment makes many suggestions for the Rule 34 proposals that are difficult to compress into a summary. Detailed rereading is well worthwhile.) The proposed obligation to state objections with specificity should be linked

to the particularity of the request. Rule 34 works well only when there is communication between the parties that crystallizes and clarifies the scope of the responding party's search and production. Problems become acute when the parties are not even aware that they disagree about the scope of the requests. The lack of consequences for overbroad requests creates an incentive to make overbroad requests. (1) Many courts have already instituted the specific-objection requirement. (2) The Committee Note might usefully say that when a request on its face violates Rule 26(g) it is enough to make that objection without making any other objections or any obligation to respond. (3) The obligation to object with reasonable particularity should be tied to the specificity of the request.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Requiring more specific objections is helpful.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 34(b) proposals.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: The Rule 34 proposals were generally supported by the conference participants.

499, Beth Thornburg: This extremely limited proposal will not prohibit laundry-list objections, nor deter or raise the cost of objecting, nor ease the burdens on the discovering party.

581, James Robson: Eliminating boilerplate objections and baseless assertions of privilege "is an excellent idea."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. It corrects a gap between Rule 33 and Rule 34.

635, Matthew D. Lango for NELA/Illinois: Supports "the proposal to bar generalized discovery objections."

1054, Assn. of Bar of the City of New York: Supports. Particularized objections support reasoned negotiations and the court's assessment of objections. The Committee Note should state that an objection is sufficiently specific if it states the limits that have controlled the search for responsive and relevant materials.

January Hearing, P. David Lopez (EEOC): p 68 Agrees with the proposal.

January Hearing, Jennie Lee Anderson: p 271 Many inflated discovery costs are inflicted by defendants on themselves. Rule 34 requests to produce are often met with two or three pages of objections to each request, and no production at all. Extended negotiations follow. Defendants refuse to make specific objections, and give no real information on the cost of responding. Then defendants are unable to prove the claimed burden and production is ordered. Requiring specific objections will encourage more candid exchange of information, earlier.

February Hearing, William B. Curtis: p. 77 "[T]he proposals to Rule 34 are a very good start, because what they do is they eliminate prophylactic objections."

February Hearing, Ariana Tadler: p 325 Supports the "(b)(2)(B)" proposals.

RULE 34: PRODUCTION — TIME FOR PRODUCING

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this provision "should ultimately provide greater clarity and increased understanding surrounding productions of ESI."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section supports, but believes the Committee Note language should be transferred to rule text stating that when production is made in stages, the response should specify the beginning and end dates of production.

372, J. Burton LeBlanc, for American Association for Justice: Codifying the general practice of producing, and requiring the producing party to disclose when production will occur, will streamline production of documents. And it will allow parties to anticipate when production will occur, particularly when production takes place in stages.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has become standard practice for responding parties to refuse to produce any documents until all discovery disputes have been resolved," and the to start producing on a "rolling" basis without estimating a time to complete production "or, in some cases, even confirm when a production is complete." The proposal is desirable.

374, Larry . Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).t

407, David J. Kessler: (This comment addresses the choice to produce, and timing, in great detail.) (1) Producing, rather than permitting inspection, is a well-established practice. But there is a growing tendency in courts to defeat a party's choice whether to produce or permit inspection by too readily providing direct access to documents or computers in an attempt to reduce the overall cost of discovery. "Even if no privileged documents are at stake, this solution is too great an intrusion into a responding party's private affairs." "[A] court should not compel inspection over a responding party's choice to produce except where production is technically impossible or there is evidence of discovery abuse that mandates inspection." The Committee Note should say that "absent abuse, it is the responding party's choice to either produce \* \* \* or permit inspection."

(2) There is an "iron triangle" that joins cost, schedule, and scope. Reducing cost and accelerating the schedule reduces the quality of the production. A large discovery can be done quickly, but that will be expensive. It can be done quickly and inexpensively, but it will not be very good. "[W]hat can be reasonably accomplished in discovery is a question of both time

and money." [A] There is little case law on what it means for a requesting party to specify a reasonable time for inspection or production. Nor is it clear how the requesting party's specification bears on a responding party's choice of a time to produce. Because a party does not review documents provided for inspection [?], production takes longer than inspection. [B] It is difficult to determine how long it will take to produce, and the time is controlled by factors that may not be known when the initial response is made. These factors include volume, format, location (both geographically and technically); various languages; the nature of the requests; requirements to issue code or compartmentalize electronic data; whether data is searchable; the amount of privileged information; the complexity of the litigation of review; the amount of redaction; and "etc." These factors may be understood only as discovery unfolds. [C] The time to produce will be affected by changes in the scope of the request in response to negotiations or motions to compel. The proposal may create an incentive for responding parties to make aggressive objections, hoping to narrow the scope of discovery so they can state a shorter time for production. [D] It is not clear how stating a proposed time to produce "would interact with contingent productions like phased discovery or production from not reasonably accessible data sources under 26(b)(2)(B). Sources not reasonably accessible should be searched only after reasonably accessible sources have been searched and produced. [E] So it is not clear how the stated time to produce would be integrated with the Rule 26(e) duty to supplement – would a party be chastised for supplementing after the stated time to produce?

"Given these concerns, it does not seem practical to include this proposed amendment in the Rules." But if it is, "I would make it clear in the Notes that it is reasonable and expected that responding parties may need to update or supplement the date by which their production will be completed.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice:  
Often it will not be feasible to produce at the time for inspection stated in the request. But referring to a later "reasonable" time "will engender disputes about whether a production has been unreasonably delayed." "Reasonable" should be deleted. "[T]he parties frequently negotiate that productions will be made on a rolling basis." Difficulties arise where there is little or no negotiation, "not because of the terms of the current Rule."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Strongly endorses the proposal. A response may state that documents will be produced, without specifying a time for production. "That practice is a frequent source of frustration, disputes and motions."

1054, Assn. of Bar of the City of New York: Supports. But the Note should observe that it suffices to state a time when it is

anticipated that production will be complete. Precise predictions may be difficult in undertaking large-scale productions.



RULE 34: STATEMENT OF WITHHELD ITEMS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this requirement "could make Rule 34 responses more straightforward and less evasive."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The goal is desirable, but there may be unintended consequences. The proposal "would seemingly require a responding party to obtain extensions of time to respond until it knows whether documents [responsive] to a particular request are being withheld. Such a response can only be accurately made after there has been a sufficient document review to enable an accurate response. Yet, it does not appear to be desirable written response for that reason. This problem could be cured by making it clear in the proposed rules that a party can respond by saying in effect, that it has not yet determined whether responsive documents are being withheld to the request, but it will supplement its response to provide that information within a reasonable time."

357, Joanne S. Faulkner: This "is salutary, and a similar provision should be added to Rule 33." Indeed, written discovery should be governed by the same principle as Rule 30(c)(2) applies at depositions – the requested information should be provided along with the objection. Nervous lawyers could be reassured by adding a provision that production does not waive objections to admissibility and relevance.

372, J. Burton LeBlanc, for American Association for Justice: The practice of stating objections and then producing subject to the objections makes it difficult to assess what has not been produced and which objections go to whatever has not been produced. The proposed change will discourage parties from evading discovery on procedural grounds and enable the requesting party to assess whether further discovery will produce evidence to support its claims.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has \* \* \* become commonplace for parties to respond to discovery with a litany of boilerplate objections without revealing whether they are actually being relied upon to withhold information." It is impossible to determine whether anything has been withheld, and if so on what grounds. Countless hours of meeting and conferring are required. This proposal is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: Refers to 26(b)(2)(C), but means 34. The idea is good. But if a party objects to making a search at all, either because unduly burdensome or vague, it cannot know whether it is withholding responsive documents. The statement in the Committee Note that a party can state the limits that have controlled the search is

adequate to the task, but should be moved into rule text.

381, John Stark: The proposals place greater emphasis on document requests, restricting other modes of discovery. This is mistaken, for the reasons described with the suggestion that numerical limits and many other limits should be placed on Rule 34. So requiring a statement whether responsive materials are withheld goes in the opposite direction.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: This proposal is undesirable. A producing party does not "withhold" a document it believes is not discoverable. The result will approach a need to produce a "log" of "withheld" material. A typical Rule 34 request is broad - "every document that mentions widget X." The responding party may believe that is too broad, and produce a set of documents it has identified. It should not be required to search for every document mentioning X so as to be able to describe those it is not producing. Such a duty would only encourage broad requests.

407, David J. Kessler: (This the third part of this detailed comment on the Rule 34 proposals). (1) "Withhold" is not an appropriate term. "As a general matter, we have not historically required parties to identify the documents they are not producing or that did not fall within the document request, properly construed." "Requiring responding parties to establish why they did not search in a specific location or product a specific document turns discovery on its head"; all they need to is object. For example, it is common to use search terms, "but a party is not withholding documents that are not identified by its search terms." Nor should it be required to disclose the search terms, which by all the better authority are protected as work product.

(2) As a practical matter, even responding parties who take their Rule 26(g) responsibilities seriously "may not know exactly how they will search for the documents they agree to produce. Nor may they be award if any documents are going to be excluded from the production that would otherwise be responsible but for the objections."

(3) The rule should instead focus "on what [the] responding party is agreeing to search for and produce. \* \* \* [T]he court should ask whether the scope of what the responding party has agreed to search for and produce is reasonable and whether the requesting party and the court can clearly understand what the responding party is agreeing to produce. Too often responding parties provide a series of objections and responses, but never describe what they actually agree to search for and produce."

(4) Rule 34(b)(2)(C) should instead be amended:

(C) *Objections*. An objection to part of a request must

specify the part and ~~permit inspection of the rest.~~  
state with reasonable clarity what information the  
party will either produce or for which it will allow  
inspection. Where a party objects to a request in its  
entirety and does not plan to produce any documents in  
response to the request, the party should so state.

The Committee Note would be revised in parallel, see p. 11 of the comment. February Hearing, David Kessler: p 342 "Many objections to discovery requests do not withhold any documents whatsoever, but rather limit those stems [sic] of proper scope fo discovery under the rules." A party is not withholding anything when it states the limit of the inquiry. It would be better to direct that the responding party state what it is looking for.

421, Louis A. Jacobs: "[E]mployers regularly \* \* \* raise boilerplate general and 'to the extent' objections, and the Committee's effort to eradicate this abuse is wonderful. Conditionally couched discovery responses leave us wondering what information or documents have been withheld, and requiring an indication of that shortfall facilitates resolution of disputes."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department agrees that some litigants do not disclose whether anything has been withheld. It "supports the proposed amendment insofar as it does not create a detailed disclosure requirement, which would be unworkable." Responses often are due while still gathering information about the categories of documents that will or will not be provided by the agency. The Department supports the proviso in the Committee Note that a statement of the limits that have controlled the search qualifies as a statement that the materials have been withheld.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: This "will increase transpaerncy,r equiring parties to communicate whether otherwise discoverable information is being withheld."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: This proposal is long overdue. Often the first question at the meet-and-confer after a Rule 34 response asks whether anything has been withheld under the objections. "Usually the response is that nothing has been withheld. Now that information will be in the response." But in cases where production occurs over time, counsel may not yet know whether anything will be withheld. The producing party ought to be able to make the objection, and be required to amend the response to state whether documents have been withheld.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

540, Alex Dahl for Lawyers for Civil Justice: This proposal imposes an added and unnecessary burden. Any confusion typically is resolved at a meet-and-confer. "The root cause is often a failure to object with specificity." "The requesting party also has a duty to propound specific demands."

558, Richard Alembik: Proposed 34(b)(2)(B) and (C), to eliminate boilerplate discovery objections and baseless privilege assertions, is a very good idea.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. "The magistrate judges have seen many motions addressed to the ambiguity" of responses that state objections, and then state that without waiving the objections, certain documents will be produced, but do not state whether other responsive documents will be produced.

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": (Probably fits here:) "We strongly support the amendments of Rule 34 to prevent evasive answers to document requests."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, along with the specific objections proposal. This is workable because the Note recognizes that a statement on the scope of the search functions as a statement that anything outside the scope is "withheld."

1054, Assn. of Bar of the City of New York: Sort of supports the proposal. A better method for curbing evasive responses would be to prohibit conditional responses – "subject to, and without waiving" objections. Coupled with the requirement that objections be specific, this could go a long way. The practical difficulty is that objections typically are prepared early on, in the early stages of searching for responsive documents or even before the search has begun. You cannot know then whether anything will be withheld. If the proposal goes forward, it should be modified to require notification of withholding only at the conclusion of the document production.

November Hearing, Jeana M. Littrell: p. 17-18, 20-22: Opposes this proposal. An affirmative statement that documents are being withheld will undoubtedly lead to follow-on discovery asking what has been withheld, and why. We do not now get such follow-on discovery, even though we do make the common boilerplate objections that a request is overbroad, unduly burdensome, and that subject to these objections we are producing. We should not do that, but we do. What happens next is that the requesting party calls, and we work it out.

January Hearing, Janell M. Adams: "Withheld" creates difficulties when TAR is used – you do not know what documents you have not produced when you have not identified them. We use TAR now only on agreement with the other parties. So they know we may not have identified every relevant document. But we use other methods to sort out responsive documents from the set of relevant documents, and we do not tell other parties "which word searches, which particular methodologies, analytics, whatever" guided the choice of responsive documents. We should not have to provide that information to identify what has been "withheld."

February Hearing, John H. Martin: p 172 Texas requires a statement of withheld items only for privileged items. That has worked well, and should be considered with this proposal.

February Hearing, Stuart A. Ollanik: p 266 Supports the proposal.

RULE 34: NUMERICAL LIMIT

After prolonged discussion, the Advisory Committee decided to abandon drafts that would have amended Rule 34 by imposing a presumptive numerical limit on the number of requests to produce. Many of the prepublication comments addressed this proposal. It is addressed in some post-publication comments as well.

257, Todd Croftchik: "Even a reasonable limit of 50 requests would significantly reduce the attorneys' fees and costs expended in responding to hundreds of requests for production in a single product liability case."

258, Peter Sturmfels: Verbatim the same as 257 above.

260, William LeMire: Verbatim the same as 257 above.

269, Mary Novacheck: Verbatim the same as 257 above.

307, Hon. A. Leon Holmes: the limitations presently in place on requests for production are sufficiently generous that there are few disputes. (This is combined with Rules 30, 31, 33, and 36; it may reflect a local rule.)

318, Brian Sanford: "Rule 34 should not contain a limit on requests."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Carries forward a pre-publication comment protesting the adoption of a limit on the number of Rule 34 requests.

372, J. Burton LeBlanc, for American Association for Justice: Calls to reinstate the abandoned proposal to impose a numerical limit on Rule 34 requests "are ill-advised."

381, John Stark: Makes a number of suggestions for Rule 34, collected here. Both the number and scope of requests should be limited at the outset of litigation. Indeed, the rules should identify categories of cases – for examples, administrative record cases, absolute or qualified immunity cases, time-barred cases – where discovery planning and discovery requests are presumptively prohibited. It is a mistake to limit the numbers of depositions, interrogatories, and requests to admit; the result will be to force ever more discovery into the costlier Rule 34 requests. Amendments should require "more focused and limited questioning," and allow more than 30 days to respond. Rather than allowing requests for any relevant information, the focus should be on "getting 'just enough' to understand the case." And the requesting party should be made to bear some of the burden of production if there is to be true proportionality.

404, J. Michael Weston for DRI - The Voice of the Defense Bar:

"[P]resumptive limits on document discovery should be considered." "Susman's Checklist," for example is an agreement among the parties that discovery be limited to five custodians in the first instance, to be followed by five more custodians in a second round. The requesting party identifies the custodians. After the second round, further custodians can be discovered only on showing good cause.

465, Neil T. O'Donnell: Opposes the abandoned proposal to add a presumptive limit of 25 requests to Rule 34.

635, Matthew D. Lango for NELA/Illinois: Any presumptive limits would lead to broader requests and more discovery disputes.

637, Louis Lehr for Trial Attorneys of America: Recommends a limit setting a presumptive number of Rule 34 requests.

RULE 36: NUMERICAL LIMITS ON REQUESTS TO ADMIT

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of requests.

274, James Jordan: "If you limit everything else and then limit RFAs???"

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The limit is shortsighted. In railroad litigation, requests to admit are frequently used to eliminate the need for fact witnesses and additional expert witnesses. They eliminate the need to prove facts that are truly not in controversy.

289, Craig B. Shaffer & Ryan T. Shaffer: Rule 36 requests are not "discovery" tools. As a practical matter, a motion for summary judgment provides an alternative means to obtain admissions when the nonmovant fails to identify evidence creating a genuine dispute. And if a lawyer raises issues of authentication – most logically at a Rule 26(f) conference – and is rebuffed, that should be a basis for exceeding the limit. [It is not clear whether "authentication" is used in a sense that expands beyond documents, which are not included in the presumptive limit.]

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

299, Aaron Broussard: Combines Rule 36 limits with Rule 33 limits: the problem is that a smaller number of broad requests will support disingenuous responses.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No empirical data are cited to support the proposal. The presumptive limit to 25 requests "will create more issues than any it purports to solve." A with Rule 33, parties will dispute what are discrete subparts. There will be disputes whether a request is truly directed at admitting the genuineness of a document as opposed to some other purpose. Consider, for example, a forgery case: will a request to admit genuineness count against the limit? There is no demonstrated need. Do not make the change.

307, Hon. Leon Holmes: Opposes. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor



expense in answering. Reform should seek to increase use of these devices, not to restrict them.

317, Steven Banks for the Legal Aid Society in New York City: Admissions are particularly useful for establishing uncontested background facts such as the staffing of a government agency and the allocation of staff to different locations and functions." In employment cases, requests can be critical where the employer's records show violations on their face. More than 25 requests have proved useful in streamlining important evidentiary disputes. And courts can readily evaluate requests against arguments of burden or other impropriety.

322, Michelle D. Schwartz, for Alliance for Justice: The limits pose a threat to plaintiffs with limited resources. "High-quality requests for admission serve to reduce the number of issues that must be decided at trial." Limiting the number will force plaintiffs to devote more resources to trial proofs that could have been avoided.

324, Jonathan J. Margolis: Failures to admit can be followed up by interrogatories seeking the supporting facts; that may make lawyers less likely to deny anything they think the other side cannot prove. There is no empirical evidence that abusive numbers of requests are made so often as to warrant a new restriction.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Written discovery requests are more efficient. Reducing the number will diminish the utility, and force broader requests. And this will increase the need for deposition discovery.

349, Valerie Shands: "Why on Earth would one want to *reduce* the number of things the parties can agree upon before trial?" And if a judge unjustifiably denies an increase, there will be further cost and delay "while one is forced to appeal an issue \* \* \*."

350, Pennsylvania Bar Association: Supports the 25-request limit.

357, Joanne S. Faulkner: Interrogatories and requests to admit are often all that a consumer can afford. A request for admissions can be a poor person's deposition. Do not impose numerical limits.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Requests to admit are seldom used in nursing home litigation. But they are used to request an admission that documents are admissible. This use should be protected by amending Rule 36(a)(1)(B) to provide for requests to admit the genuineness and admissibility of any described document. (The proposed numerical limit does not apply to requests under 36(a)(1)(B).)

361, Caryn Groedel: Limiting the number of requests will result

in plaintiffs having to spend more on depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: Imposing limits on Rule 36 is even worse than reducing the number of interrogatories, "given their great effectiveness in narrowing issues for trial, framing summary judgment motions, and the relative ease to which Requests for Admissions are responded." This should be a non-issue; "I have never heard or experienced any complaint about the abuse of Rule 36."

365, Edward P. Rowan: Limiting requests to admit will increase time and cost, because they are efficient and inexpensive.

369, Michael E. Larkin: Requests to admit are valuable, allowing the parties to resolve issues in an efficient manner and to determine the issues the opposition asserts.

370, Thomas D'Amore: "I often use requests for admission to limit the number of issues in the case so that I don't have to do discovery on issues." Why impose a limit "[i]f efficiency and cost savings is the goal"? "I would question the motives of the proponents."

372, J. Burton LeBlanc, for American Association for Justice: Requests to admit "are cheap but essential discovery tools" that enable smaller plaintiffs to establish critical information and are almost cost-free. Imposing a numerical limit will encourage broader requests, making it even easier than it is now for defendants to deny. There is no evidence to support the limit. And the exemption of requests to admit the genuineness of documents favors defendants and large corporate interests – most document-heavy cases involve large corporations on both sides, so they do not face the same limits on requests to admit as plaintiffs with smaller cases.

373, Michael L. Murphy for AAJ Business Torts Section: Do not impose a limit. Requests to admit "are used for a host of reasons, including authenticating evidence, establishing the basis for stipulation, and narrowing the fact issues for trial." A limit will lead to an increased number of requests for documents.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Requests to admit generally are used sparingly to achieve efficiencies by streamlining issues and focusing discovery, and by establishing undisputed facts related to liability. Limits need not be imposed.

374, Larry E. Coben for The Attorneys Information Exchange Group: The reasons to abandon the proposed limit are advanced in opposing the reduction to 15 interrogatories under Rule 33.

394, Thomas Crane: Requests to admit "are a fairly efficient way to obtain pointed information efficiently." There is no need to create a limit - "I have personally never seen more than perhaps 35."

400, Gregory P. Stone: "I've been able to use fifty to sixty requests to admit to save days of trial testimony in vehicle defect cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) "Plaintiffs rely on requests for admission to eliminate the need to produce at trial proof of facts that are not in controversy." If plaintiffs are forced by numerical limits to frame broad requests, it will be easier for defendants to deny, increasing litigation costs.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: The limit to 25 requests, excluding requests regarding the authenticity of documents, is reasonable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: "In a standard personal injury action against a cruise line on behalf of a passenger, we propound a set of approximately 25 requests for admissions." The proposal is a solution in search of a problem. 448, Robert D. Curran, tracks 410 without the cruise line example.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. (See Rule 33 summary.) Requests to admit may obviate the need for motions in limine with respect to certain exhibits or testimony.

445, Gerald Acker, for Michigan Assn. for Justice: Requests to admit "are cheap and effective tools for discovery." They should not be limited.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Requests to admit are a useful tool for narrowing the issue for trial. They do not impose the same burdens as requests for documents or testimony. Limitations will gain little in efficiency, and that will be at the risk of increased trial time. "The Department has handled many cases, affirmative and defensive, in which responses to more than 25 requests have been useful to narrow the claims or defenses \* \* \*."

460, Jo Anne Deaton: The presumptive limit "is long overdue." Plaintiffs' counsel have served large numbers of requests to admit "for no apparent reason other than to 'churn' discovery and increase fees."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "This change will require parties to be more selective in their use of requests of admission and to focus on the material issues in dispute \* \* \*."

464, Douglas A. Spencer: Limiting the number of requests to admit is inappropriate. They are an invaluable tool to limit the issues presented at trial.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "Reasonable requests for admission \* \* \* are perhaps the most simple and direct discovery tool allowing the parties to narrow the issues to be tried." No empirical data support imposing a limit.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was more discussion of this proposal than the other proposed numerical limits. Some defense attorneys argued that requests to admit are abused, and that 25 is a reasonable presumptive limit. But "multiple plaintiffs attorneys noted that requests for admission are very effective discovery tools, sometimes in larger numbers than 25."

520, Ron Elsberry & Linda D. Kilb, for Disability Rights Californiat and Disability Rights Education & Defense Fund: Requests to admit result in fewer objections than other types of discovery. But defendants tend to deny most requests, and plaintiffs cannot know which they will admit. Adopting a presumptive numerical limit is unwise.

524, Joel S. Neckers: "I have handled several cases in the recent past where opposing counsel filed literally thousands of request for admission," imposing thousands of hours of time to litigate and respond to the requests.

589, Kathleen M. Neary for Employment Rights Section, AAJ: "Requests for admissions are often times utilized to establish that medical or counseling bills that were incurred as a result of the unlawful employment practices are fair, resonable and were necessitated by the employment practice."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses. "The magistrate judges have seen instances in which the requests for admissions have been excessive and burdensome." The number can be addressed in a scheduling order. If the question arises later, the parties can work it out or make a motion.

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. (Also opposes the other proposed numerical limits.)

1054, Assn. of Bar of the City of New York: Supports. "[E]xcessive

or irrelevant requests for admission can be overly burdensome or harassing." A number of courts have adopted local rules setting a presumptive limit of 25 requests.

November Hearing, Darpana M. Sheth, for the Institute for Justice: There is no empirical evidence of problems with burdensome or excessive requests to admit. If there is a problem, it is that litigants do not use Rule 36 enough. Admissions serve vital purposes beyond laying the foundation to admit documents into evidence. They narrow the issues, and facilitate proof with respect to the issues that remain. Admissions that the casket monopoly in Louisiana did not serve any health or safety purposes shortened the trial to 3 hours from an expected 3 days.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Their use should be encouraged, not limited.

November Hearing, Patrick M. Regan: p 278 "The limit on requests for admissions \* \* \* is a solution in search of a problem." The purpose is to narrow the issues. Why should we want to limit that worthy goal? In litigating between 300 and 400 cases in federal courts, and many in state courts, I've never, "ever, ever had a problem with the excessive number of requests for admissions."

January Hearing, P. David Lopez (EEOC): p 68 Requests to admit "can be a very, very effective tool." It is really important to draft them right. And if one formulation triggers an objection, it is often important to craft an alternative.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. "[O]ften requests for admissions in particular play a significant role in streamlining the pursuit of these cases."

January Hearing, Elise R. Sanguinetti: p. 151 In single-plaintiff wrongful-death and catastrophic-injury cases, requests to admit are often used. It is rare to ask more than 25, but "I want to be able to do that" when necessary to save the client money.

February Hearing, Donald H. Slavik: p. 14 At 22-23: "[O]ur complaint is a set of requests for admissions." The proposed limit may not cause problems for plaintiffs. "The defense may be more harmed. I get requests \* \* \* 40, 50, 60, but if it helps narrow the scope of the issues going to trial, I think they're important."

February Hearing, J. Michael Weston: p 87 In a recent case the plaintiffs served a little under 1,000 requests to admit, asking for authentication of documents that had been produced in other cases around the country, but that were offered here in different

forms that made it difficult to figure out which was what.

February Hearing, Leigh Ann Schell: 86 requests to admit have been served in a recent case. Many of them involve matters that must be resolved by expert testimony. Negotiations have failed to win any relief. The present rules allow us to seek relief, and we will. Adopting a presumptive limit will at least encourage the parties to take a more surgical, narrow approach.

February Hearing, J. Bernard Alexander, III: p 272 Requests to admit are a way to whittle down a case. I have never had an issue where an adversary has asked a judge to cut the number of requests.

RULE 37(A)(2): COMPEL PRODUCTION

OTHER

256, Hon. Scott Crampton: This comment makes suggestions for AO Form 88, a subpoena form being revised to reflect the 2013 amendments of Rule 45.

263, The Cady Law Firm, by Christopher D. Aulepp: After criticizing parts of Rule 26(b)(1): "We are also opposed to the other proposed changes." The effect will be opposite to promoting justice, efficiency, and economy of resources.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Overall, the limits on discovery "will \* \* \* make it much more difficult for individuals to find evidence when suing a massive - and sometimes multinational - company."

268, Craig Smith: Do not adopt the changes. Many "would negatively impact almost all plaintiffs, but would particularly harm plaintiffs in cases involving multiple defendants, complex litigation, and cases where the defendant holds a disproportionate amount of information compared to the plaintiff."

271, J.C. Metcalf: Prior rules changes, including disclosure, have been a farce. Corporate defendants produce little or nothing. A successful assertion there is nothing to produce in one case may be followed in another case by producing numerous documents claimed not to exist in the first case. "The proposed rule changes will exacerbate this dynamic." They "are a nightmare for the fair and orderly administration of justice."

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Rule 8 should be amended to reflect the plausibility standard adopted in the Twombly and Iqbal decisions. At the very least, a new Committee Note should be added to acknowledge those decisions and to explain their relationship to Rule 8.

295, Andrew Horowitz: The Western District of Pennsylvania has an innovative and resoundingly successful early ADR program that has been copied by other districts. And it has "recently launched a voluntary expedited litigation program where the parties consent to mutual limits in discovery and motions practice to reduce costs and bring about faster resolution." Such experiments should be continued.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The Sedona proposals include several recommendations to address preservation to Rule 16 and at various points in the discovery rules. These proposals overlap the comments on Rule 37(e). But several may be described here because they address topics that go beyond preservation.

**Rule 16(a)** The purposes for a pretrial conference would be



expanded:

(3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C);

~~(3)~~ (4) managing discovery and discouraging wasteful pretrial activities \* \* \*.

**Rule 26(c)** The protective order provisions would expressly address preservation:

**(1) In General.** A party or any person from whom discovery is sought or who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things [may move for a protective order] \* \* \*. The court cannot consider the motion ~~must include~~ unless it receives a certification [of meet and confer], and [the motion] is accompanied by a report that conforms to the requirements of Rule 26(f)(5). [Rule 26(f)(5) may be the 26(f)(3)(F) set out below.]

A protective order could specify the terms of preservation; limit the scope of preservation; or "reliev[e] a party from preserving certain documents, electronically stored information, or tangible things."

**Rule 26(f)** The discovery plan provisions of Rule 26(f) would be expanded to include this as a new (3)(F):

(F) If the parties are unable to resolve issues discussed during a Conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:

(i) A section stating the issues during the conference and summarizing areas where agreement was reached on each issue;

(ii) A section, containing no argument, providing a brief statement identifying each issue for which agreement was not reached, including:

a short and plain statement of the position of each person or party on each issue in contention and; the proposal of each party for reaching a resolution of the issue.

494, Charles R. Ragan: endorses these Sedona proposals.

636, Jonathan Harris: Supports the proposed change to the rule for expert witness disclosures...

1031, Steven Thompson: "[t]he rules should require a more thorough 'initial disclosure' by the defense. The defense should be forced to disclose all documents and information that support or relate to the claim against them, not solely the defense to the claim. In many cases, the defense has all of the documents, drawings, data and other material necessary to get to the truth about the

plaintiffs' case \* \* \*."

November Hearing, Daniel C. Hedlund for Committee to Support the  
Antitrust Laws: p. 107 Proposes that "contention interrogatories  
\* \* \* not be required to be answered until the close of  
discovery."

**COLLECTIVE SUMMARIES**

Many comments make virtually identical arguments to make the same points, whether to support, criticize, or oppose a proposal. They are briefly catalogued here.

**General: Pro**

Many brief comments can be summarized as generally supporting or opposing the proposals with little elaboration.

Others decry the costs of discovery. Assertions that the cost of discovery forces defendants to settle meritless claims are common. And there are some comments that the costs of discovery deter plaintiffs from ever filing, or lead to abandoning an action after filing, or force settlement on unfair terms.

490, Wes Blumenshine

510, John Olinde

514, Andy Osterbrock: General support. Deleting "reasonably calculated" is particularly important because it has been misused to stretch discovery beyond any reasonable intention.

517 Jeffrey D. Smith

580, Norman Jetmundsen for Vulcan Materials Company

**General: Con**

Many opposing comments emphasize the sharp divide between plaintiffs and defendants, and urge that rules amendments should be adopted only with substantial support from both plaintiffs and defendants. In related vein, many comments urge that the proposals will further tilt the balance of federal courts toward favoring defendants and disfavoring plaintiffs. This concern is often tied to laments about recent developments in pleading standards, class actions, and expert witnesses, along with the uses made of summary judgment.

An occasional comment underscores the divide between plaintiffs and defendants by "question[ing] the motivation behind those proposing the" amendments.

Some argue the restrictions will be unconstitutional. The more specific focus is on the right to jury trial, and depriving plaintiffs of the information needed to escape summary judgment or judgment as a matter of law.

It also is common to observe that discovery now works well in most cases. And the present rules give all the power judges need to make discovery work well in all cases.

512, Joseph R. Neal, Jr.

513, Laura Zubulake: As plaintiff in the eponymous series of cases, suggests that limiting oral depositions, requester-pays, and proportionality (depending on how it is handled) "have the potential to make it more difficult for individuals."

516, Dale Irwin

522, Kenneth Allen: The proposals will endanger public safety by hampering product-liability litigation.

523, Craig Davis

527, Samuel Bearman

533, Joanne Doroshov: Much of the discovery costs defendants complain of arise from their efforts to hide information or prevent disclosure of documents.

534, Jeff Schulkin

536, Steve Saks

544, Scott Hunter

546, Tye Smith

547, Chris Nidel (One of those that questions the motivations)

550, Jacob Lebowitz

558, Richard Alembik: Most of the changes are unnecessary.

561, Margaret Simonian

565, Robert Hill: "[T]he corporate defendants control Congress and the Courts, including the rule making process. Sad day. Justice for sale in America."

566, David Addleton: The proposals "violate fundamental fairness, equal protection, and due process principles."

567, Michael Ford

573, Bryden Dow

594, sidney cominsky

**Rule 1: Pro**

The arguments supporting the Rule 1 proposal emphasize the need for cooperation, at times pointing to local rules or standards requiring cooperation. Some urge that "cooperation" should be written into Rule 1 text.

497, Kenneth A. Lazarus for American Medical Assn.

**Rule 1: Con**

Two basic points are made in opposing the Rule 1 proposal. One is that rules of professional responsibility bear heavily on cooperation; the civil rules should not confuse the subject. The other is a fear that the proposal is a lure for sanctions, with accompanying motion practice. Experience under the 1983-1993 version of Rule 11 is invoked.

524, Joel S. Neckers



**Rule 4: Pro**

**Rule 4: Con**

Opposition to shortening the time to serve reflects concerns that some defendants evade service; some are hard to find; some may be buried in layers of interlocking ownership that makes it difficult even to identify the defendant; serving multiple defendants may complicate matters; service by the Marshal's Service often is delayed. Plaintiffs have no incentive to delay service. Unless they want to delay to settle before service, or to perform the Rule 11 inquiry that tardy clients push beyond the limitations period. Requests to waive service will be discouraged because there will be only a brief period to accomplish service after the plaintiff learns that the defendant will not waive. The defendant is not prejudiced if service takes 120 days. Several comments point to the time required to effect service in another country; the most that can be said for this argument is that it implicitly relies on an ambiguity in the provision in Rule 4(m) that excepts service under Rule 4(f) or 4(j)(1) – service on a foreign corporation outside any judicial district of the United States is made under Rule 4(h)(2), which calls for service "in any manner prescribed by Rule 4(f)," not "under" Rule 4(f).

503, Patrick Malone 590, E. Craig Daue, agrees

504, Kenneth Behrman

521, Lincoln Combs

528, James Ragan

537, Victor Bergman

538, A. Laurie Koller: "I have had several cases settle after filing and before service."

541, Jessica Sura

542, Justin Kahn

545, David Rash

548, Kevin Hannon

549, George Wise: "Busy doctors are frequently hard to catch and serve in person."

551, Gregory Smith

552, Daniel Ryan (Draws from 553)

553, William Smith

554, Hubert Hamilton

557, John Lowe

558, Richard Alembik Perhaps 90 days would suffice.

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

564, Joel DuBoff

570, Nicole Kruegel

577, Clark Newhall

578, Christian Bataille

581, James Robson

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

**Rule 16(b) Case Management Pro**

The comments favoring the Rule 16(b) proposals tend to be general – enhancing early and active case management is desirable.

497, Kenneth A. Lazarus for American Medical Assn.: Supports.

583, James Howard: Agrees "with the provisions which reduce delays and create earlier deadlines."

**Rule 16(b) Case Management Con**

Most of the opposition to the Rule 16(b) proposals focuses on the acceleration of the time for the first scheduling conference. 60 days often is not enough, particularly for defendants whose lawyers need to find out what the case is about well enough to participate effectively in the conference. The problem is aggravated when a defendant takes some time interviewing firms before choosing counsel. And with large organizations time may be needed to sort through the layers of bureaucracy. The Department of Justice expresses particular concerns that arise not only from the complexities of the Department's own organization but also from the complexities of the agencies it often represents.

**Rule 26(b)(1) : Pro**

The comments supporting Rule 26(b)(1) generally pick up the themes advanced by the Advisory Committee. Proportionality has been in the rules since 1983, both in what has become Rule 26(b)(2)(C)(iii) and Rule 26(g). The factors are familiar and well understood when someone thinks to invoke them. But proportionality is too often overlooked, or overcome by mistaken expansion of the "reasonably calculated" provision. Making proportionality an express part of the scope of discovery, measured by the factors that have been in force for thirty years, will make good on the promise made in 1983 but not yet fulfilled. Some urge that the proposal should go further, limiting the scope of discovery to matter that is both relevant and "material" to the parties' claims or defenses. Many comments also give specific examples of producing huge volumes of information, as compared to relatively minuscule fractions used as exhibits at trial. The high costs of responding to discovery requests also are detailed, particularly by corporate counsel.

The argument of opponents that bringing proportionality into the scope of discovery will impose a new burden of justification on the party requesting discovery is mistaken. (1) Just as now, argument to the court will not be a question of burdens. Each party will be called on to advance the information best available to it – the requesting party to explain relevance and importance, the responding party to explain costs and burdens. (2) Present Rule 26(g) requires the requesting party to consider all of these matters and to certify to them in making the request.

It is, moreover, important to do something to rein in the costs of discovery. Cost can thwart access to justice by dissuading plaintiffs from filing actions, or from persisting when the cost of discovery becomes apparent. Cost also can force compromise and settlement. The costs of litigation in the United States, moreover, are far higher than in other countries, placing United States firms at an increasing disadvantage in global competition.

487, Peter J. Mancuso for Nassau County Bar Assn.

488, Robert Buchbinder

496, James Edwards: (Ambiguous, but seems pro.)

497, Kenneth A. Lazarus for American Medical Assn.

498, Jose I. Rojas

576, Glenn Hamer for Arizona Chamber of Commerce and Industry

January Hearing, Robert Hunter: p. 200 Over the last five years,

Altec the amount Altec has paid for settlements is 61% of what it has spent on discovery. In part that is due to succeeding at trial.

January Hearing, Steven J. Twist: p. 243 "The triumph of cost over merit is a direct result of the current rules." Eliminating subject-matter discovery, discarding "reasonably calculated," and moving proportionality up to (b)(1) will cause parties and judges to pay much needed attention to the standard. There will be no change in "burdens" when a dispute is taken to the court.

January Hearing, L. Jill McIntyre: p 259 Proportionality goes hand-in-hand with the Rule 37(e) proposal, to guide preservation by what is proportional.

January Hearing, Patrick J. Paul: p. 265.

January Hearing, John J. Rosenthal: p 305 The package is modest. It will reduce costs, and will not inhibit anyone's ability to put on claim or defense.

January Hearing, Andrew B. Cooke: p 323 "To often discovery is used \* \* \* to gain tactical or settlement leverage for discovery on discovery or for setting up requests for sanctions."

**Rule 26(b) (1) : Con**

The arguments in opposition focus most intensely on "proportionality." (1) The multiple factors are subjective. (2) Parties asked to make discovery (commonly identified as defendants) will seize the subjective character of the factors to refuse discovery of anything. (3) It is impossible to administer the factors because the importance of discovery cannot be known until the discovery has shown what there is to discover. (4) Emphasis on the amount in controversy invites responding parties and courts to throttle discovery in cases that involve small dollar amounts but matters of great public interest. Individual employee claims are a common example. (5) Moving the factors up from (b)(2)(C)(iii), where they function as a limit, to the scope of discovery in (b)(1), will change the burdens on discovery motions. Now the party resisting discovery has to show the request is outside the limits. Under the proposal, the requesting party will have to show that the request is within the scope of discovery as defined by proportionality factors. Many comments are framed in terms that ignore the obligations imposed by present Rule 26(g).

It also is said that courts accurately understand and enforce proportionality under the present rules.

Opposition to deleting the phrase that allows discovery of inadmissible matter "reasonably calculated" to lead to the discovery of admissible evidence tends to assert that this sentence has become the operating definition of the scope of discovery.

Opposition to deleting the provision that extends discovery beyond the parties' claims or defenses to include the subject matter of the action on showing good cause urges that this discovery may be necessary to uncover new claims or defenses, or to reach information that is relevant to the original claims or defenses.

As with the proposed numerical limits on depositions, interrogatories, and requests to admit, a great many comments predict that the proposed rules will add to cost and delay by generating many more discovery disputes, disputes that often will be taken to the court.

All of the proposals that seem to curtail present discovery practices also are met with the observation that courts have ample power under the current rules to ensure that discovery is confined to limits appropriate to the needs of the case. The problems with discovery are generated by defendants who obstruct and delay by motions, provide requested information only after late in the game, or simply fail to provide relevant and responsive information.



487, Peter J. Mancuso for Nassau County Bar Assn.:  
495, Jillian Estes  
502, Peter Everett  
503, Patrick Malone 539, Craig Currie: "Echo[es]" Malone  
506, Richard Davis  
505, Jason Itkin  
509, Allegra C. Carpenter  
511, Les Alderman  
515, Steve Conley  
518, Robert Stoney  
521, Lincoln Combs  
526, Jonas Jacobson  
529, Robert Palmer  
530, Travis Larsen  
532, Ann Pinheiro  
537, Victor Bergman  
538, A. Laurie Koller  
541, Jessica Sura  
542, Justin Kahn  
545, David Rash  
547, Chris Nidel  
548, Kevin Hannon  
549, George Wise  
551, Gregory Smith  
552, Daniel Ryan (draws from 553)  
553, William Smith

554, Hubert Hamilton

555, Patrick Mahoney: Including a lament about removing  
"reasonably calculated"

556, Jerry Spitz

557, John Lowe

559, Patrick Cruise

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

570, Nicole Kruegel

571, Fletcher Handley

574, Barry Julian

575, Eugene Brooks

577, Clark Newhall

578, Christian Bataille

581, James Robson

582, John M. Feder for Consumer Attorneys of California

583, James Howard

584, Christopher Bouslog

585, Dan Mordarski

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

600, Corrina Hunt

January Hearing, Janell M. Adams: p. 187.

January Hearing, Paul V. Avelar: p 250 The proposals will shift the burden of justification to the party requesting discovery.

January Hearing, Jennie Lee Anderson: p 271.

January Hearing, Jonathan Scruggs: p 328 Worries about "the amount in controversy" from the perspective of litigating First Amendment religion cases that involve nominal damages.

**Rule 30 (and 31): Numerical and Duration Limits: Con**

The most common theme in opposing all of the numerical limits proposals is that the result will be increased disagreement, more motions, and more cost and delay.

A second common theme is that the rules are functioning well as they are. There is no evidence to support the belief that a presumptive limit to 10 depositions per side is too high, that 25 interrogatories are too many, that there is a need to limit requests to admit. This position is supported by pointing to many different types of litigation that commonly require more than 5 depositions or 15 interrogatories. Requests to admit simply have not generated problems that require a numerical limit. The need for depositions ranges from individual employment cases to complex and multiparty litigation. Interrogatories are described as inexpensive and efficient means of shaping other discovery, particularly document requests and depositions. Requests to admit are described in similar terms – they may help shape other discovery (most likely requests made early in the process?), and to eliminate issues for summary judgment or trial.

A third theme is commonly put in rather guarded terms. The belief that lawyers will cooperate to expand presumptive limits when appropriate is addressed by recognizing that this cooperation happens frequently now. But in a worrisome number of cases it does not. Lowering the limits will encourage obstruction, often lawyer-driven but at times client-driven. (Cases involving government parties are singled out as leading politically motivated clients to insist on obstructionist tactics.) Bargaining will start at a lower floor. And when the outcome of bargaining is an appropriate level of discovery, the cost often is paid by trading away something else. Trust in the courts to get it right when bargaining among the lawyers fails also is doubted, albeit in respectful tones. The theme is that some judges do not want to be bothered with the burdens of effective discovery management. These judges will present a particular problem with reduced limits because they will take a presumptive limit as a judgment that ordinarily discovery beyond the limit is unwarranted.

487, Peter J. Mancuso for Nassau County Bar Assn.: 10 is appropriate.

492, David Wiley: Plaintiff employment claims.

494, Charles R. Ragan

497, Kenneth A. Lazarus for American Medical Assn.: (All proposed numerical limits.)

500, Arnold White: Employers fight unceasingly to withhold

information needed by employees. The proposed numerical limits make

502, Peter Everett

503, Patrick Malone 590, E. Craig Daue, agrees

505, Jason Itkin (All numerical limits)

506, Richard Davis (All numerical limits)

507, George Garrow (All numerical limits)

508, Sanjay S. Schmidt (All numerical limits)

509, Allegra C. Carpenter (All numerical limits)

511, Les Alderman

512, Josleph R. Neal, Jr.: Explicit focus on numerical limits, but may be more general: the proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.

518, Robert Stoney (All numerical limits)

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund

524, Joel S. Neckers (All numerical limits)

528, James Ragan (All numerical limits)

529, Robert Palmer (All numerical limits)

533, Joanne Doroshov (All numerical limits)

537, Victor Bergman (All numerical limits)

538, A. Laurie Koller: (All numerical limits) "I feel the same way about the proposed rule changes to 33 and 36 that medieval criminals felt about thumbscrews."

541, Jessica Sura (All numerical limits)

542, Justin Kahn (All numerical limits)

543, Robert Hall (All numerical limits, "adding a layer of 'proportionality' on top.")

545, David Rash (All numerical limits)

547, Chris Nidel (All numerical limits)

- 548, Kevin Hannon (All numerical limits)
- 549, George Wise (All numerical limits)
- 551, Gregory Smith (Depositions and interrogatories)
- 552, Daniel Ryan (All numerical limits; draws from 553)
- 553, William Smith
- 554, Hubert Hamilton (All numerical limits)
- 557, John Lowe (All numerical limits)
- 559, Patrick Cruise: Focus on depositions, but has no objection to shortening the length.
- 560, Jason Monteleone (All numerical limits)
- 562, Teresa McClain (All numerical limits)
- 563, James E. Girards (All numerical limits) 591, David Rudwall, agrees
- 568, Brent Hankins
- 569, Karen Allen (Depositions; interrogatories reduce the need for depositions – 15 is too few)
- 570, Nicole Kruegel (All numerical limits)
- 574, Barry Julian (All numerical limits)
- 577, Clark Newhall (All numerical limits)
- 578, Christian Bataille (Depositions and interrogatories)
- 582, John M. Feder for Consumer Attorneys of California (All numerical limits)
- 583, James Howard (All numerical limits)
- 584, Christopher Bouslog (All numerical limits)
- 585, Dan Mordarski (Depositions and interrogatories; 6-hour depositions OK, although the reduction is not necessary)
- 586, Tom Carse (All numerical limits)
- 587, Matthew Creech
- 589, Kathleen M. Neary for Employment Rights Section, AAJ (All

numerical limits)

592, Geoffrey Waggoner (All numerical limits)

595, John McGraw (All numerical limits)

596 Kenneth Miller (All numerical limits)

597, Michael Blanchard

598, Mark A. Gould (All numerical limits)

January Hearing, Paul V. Avelar: p 250

January Hearing, James C. Sturdevant: p 296 Many years of experience with individual and class actions protecting plaintiffs' consumer, employment, civil, and other rights. Examples of cases that legitimately required discovery well beyond the proposed limits. Lower limits will send a message to judges to deny needed discovery, and will increase costs and delay in litigating discovery disputes.

**Rule 33 Numerical Limits: Pro**



### **Rule 33 Numerical Limits: Con**

One common theme is that the present presumptive limit of 25 interrogatories is working well. There is no evidence of any need to reduce it.

A second theme is that interrogatories are an efficient and inexpensive means to get discovery of some facts and to help frame the use of other, more expensive discovery devices. Identification of documents and witnesses are common examples. Multiple claims require multiple interrogatories.

Reducing the number will mean that interrogatories are drafted in broader terms – 25 better-focused interrogatories will be more productive and less burdensome than 15 broadly focused interrogatories.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. mancuso for Nassau County Bar Assn.

504, Kenneth Behrman

515, Steve Conley

556, Jerry Spitz

564, Joel DuBoff

600, Corrina Hunt (Also against Rule 36 limits)

**Rule 36: Pro**

### Rule 36: Con

The arguments against imposing a presumptive numerical limit of 25 requests to admit parallel the arguments against reducing the presumptive limit in Rule 33.

Requests to admit are said to be useful in narrowing the scope of discovery by showing that some potential issues framed by the pleadings are not in fact disputed. Later in the progress of discovery they help to narrow the issues further. Many comments say that Rule 36 is an inexpensive and useful tool that has not been used to impose undue burdens. And some cases genuinely deserve more than 25.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. Mancuso for Nassau County Bar Assn.

494, Charles R. Ragan: Rule 36 can be very valuable. If any presumptive limit is imposed, it should be 50, not including requests addressed to the genuineness of documents.

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# Discovery Subcommittee Report Rule 37(e)

## Introduction

The Discovery Subcommittee recommends approval of a new Rule 37(e) to replace present Rule 37(e). The form recommended for adoption has evolved from the version published for comment, but the basic approach remains the same. The differences respond to the extensive public comment process, which provided many helpful criticisms and suggestions. The public comments included many that responded to the five specific questions posed in the Invitation for Public Comment.

The Subcommittee began its re-examination of the proposed rule the day after the third public hearing in Dallas, with a half-day meeting to discuss the adjustments that seemed warranted by the public commentary received. That meeting was followed by conference calls on February 17, 20, 25, and 28, and March 5 and 12. Notes on the February 8 meeting and all these conference calls should be included in these agenda materials.

Also included in the agenda materials should be a summary of the testimony on Rule 37(e) at all three public hearings and comments up to no. 804. A large number of comments were received after no. 804, and are available for review at [Regulations.gov](http://Regulations.gov).

This memorandum introduces the issues the Subcommittee has addressed during this redrafting effort, and which inform the rule proposal below. That amendment proposal is presented as an amendment to the current rule, which seemed simpler than presenting it as a revision of the proposed amendment. For purposes of background, an Appendix to this memorandum presents the published amendment proposal.

## Background

Present Rule 37(e) was adopted in 2006. The Committee recognized then that the continual expansion of electronically stored information ("ESI") might provide reasons to consider a more detailed response to problems arising from the loss of ESI. A panel at the Duke Conference in 2010 presented a unanimous recommendation that the time had come for a much more detailed rule.

Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. The courts agree unanimously that a duty to preserve ESI arises when a party reasonably anticipates litigation. But they differ significantly in the approaches taken after finding a loss of ESI that should have been preserved. A new rule that illuminates the purposes and methods

of responding to the loss can do much to promote uniformity and to encourage desirable judicial responses.

The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation. An accumulation of information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.

During the two years following the Duke Conference, the Subcommittee considered several basic approaches, including successive drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by a Duke Conference panel, which called for specific rule provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. In the end, however, it became apparent that the range of cases in federal court is too broad and too diverse to permit such specific guidelines. The Subcommittee chose instead to pursue a different basic approach that addresses court actions in response to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

Under this approach, as with present Rule 37(e), the proposed Rule 37(e) does not itself create a duty to preserve. The new rule takes the duty as it is established by case law. Although some comments urged that the rule should eliminate any duty to preserve before an action is actually filed, the Subcommittee continues to believe that a rule so limited would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in the comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

#### Modifications Based on Public Comments

Many of the public comments reinforced conclusions previously reached by the Subcommittee, while others provided valuable new insights. Some of the Subcommittee's general conclusions will be addressed here, with more specific explanations provided in the discussion of specific rule recommendations.

The Subcommittee remains firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed. The explosion of ESI in recent years has affected all aspects of

civil litigation; the preservation of ESI is a major issue confronting parties and courts; and the loss of ESI has produced a bewildering array of court cases.

Loss of information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Subcommittee.

At the same time, the public comments made the Subcommittee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI. Among other steps taken by the Subcommittee since the Dallas meeting has been an intensive look at cases addressing the loss of information relevant to litigation. This analysis has highlighted the wide variety of situations faced by trial courts and litigants when information is lost, and has strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies.

The public comments also made clear that the explosion of ESI will continue and even accelerate. One industry expert reported to the Committee that there will be some 26 billion devices on the Internet in six years - more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere in the "cloud," complicating the preservation task. In other words, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants. The need for broad trial court discretion in dealing with these challenges will likewise increase.

These comments caused the Subcommittee to conclude that its previously recommended approach of limiting virtually all forms of "sanctions" to a showing of substantial prejudice and willfulness or bad faith is too restrictive. It does not afford trial courts the flexibility they will need to deal with the wide range of ESI issues they will confront in the coming years.

The value of preserving flexibility was reinforced by a related conclusion. One reason for the Subcommittee's previous

proposal to significantly limit sanctions was the goal of reducing the costly over-preservation that had been emphasized by many. The Subcommittee felt that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Subcommittee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain - the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.

The Subcommittee also concluded that many measures characterized as "sanctions" in Rule 37(b)(2)(A) - the category of sanctions significantly limited in the published proposal - could be viewed as appropriate curative measures in some cases. The Subcommittee therefore refined its approach to ensure that some of these measures would be available when needed to cure prejudice caused by the loss of ESI without labeling them as sanctions.

#### The Basic Rule Framework

The basic framework of the published Rule 37(e) proposal is carried forward in the revised proposal. The foundation remains the same; the rule applies when a party has failed to preserve information that should have been preserved, in the anticipation or conduct of litigation. For reasons explained below, the Subcommittee recommends that the new rule, like current Rule 37(e), be limited to a failure to preserve ESI:

If a party failed to preserve ~~discoverable~~ electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:

The rule leaves it to the courts to develop the tests that guide a determination whether ESI "should have been preserved in the anticipation or conduct of litigation." In addition to the fact that the case law is well developed and fairly consistent in this area, determining what should be preserved will be an intensely case-specific determination. There also are more general elements that courts need to remember. Complex organizational structures and information systems often thwart perfect preservation, even when every reasonable effort is made. Moreover, because a single item of ESI often is found in multiple locations, the loss of ESI from one source does not necessarily mean it is lost forever. The ESI often can be found in another source. The massive scope of electronic information, further, means that ample information for effective

litigation often remains available even when it is not possible to know with certainty what information was contained in the lost source.

Having recognized the common law duty to preserve, the rule as published and the current recommended rule focus on the measures a court may take to address a failure to preserve ESI that should have been preserved. The published proposal divided these measures into two categories – "curative measures" and "sanctions." As explained below, many comments criticized this distinction and its implementation. The revised proposal further develops the approach to curative measures by distinguishing between measures that are no greater than necessary to cure a loss of information without any finding of prejudice, and measures that are no greater than necessary to cure the prejudice when prejudice is found. The provisions for "sanctions" are revised by omitting any reference to that word, which appears in other rules, such as Rule 11 and Rule 37. Many of the steps that might be described as sanctions remain available when appropriate as curative measures. The most severe measures, however, are limited to cases in which the court finds "that the party acted with the intent to deprive another party of the information's use in the litigation." These measures include the "case-terminating" orders dismissing an action or entering a default judgment, as well as the court's presumption that the lost information was unfavorable to the party who lost it, and an adverse-inference jury instruction.

The published proposal included a non-exclusive list of factors to be considered in determining whether a party failed to preserve information that should have been preserved, and whether the failure was "willful or in bad faith" as generally required for "sanctions." The value of any list of factors has been vigorously debated, and the wisdom of several of the factors also has been questioned. The Subcommittee's proposal carries forward a list of factors in rule text, but some Subcommittee members believe the list should be moved to the Committee Note. This will be an issue to address at the April meeting. Preservation of ESI remains a very complex subject, and one that continues to evolve. The list may help potential litigants make reasonable preservation decisions, may help counsel frame effective arguments, and may help courts to understand and respond to the arguments. On the other hand, it may be better to address the factors only in the Committee Note. The proposed amendment therefore has brackets around the rule and Note "factors" provisions.

#### The Rule in Detail

##### *Limiting the Rule to ESI*

As shown above, the present proposal changes the opening clause of Rule 37(e) by deleting "discoverable" and substituting "electronically stored": " \* \* \* failed to preserve ~~discoverable~~

electronically stored information \* \* \*."

The invitation to comment asked whether the proposed rule should be limited to ESI. The public comment was mixed on this issue, and a significant number of comments endorsed a rule that was not so limited. Nonetheless, the Subcommittee recommends that the rule as adopted be limited to ESI. That is the subject that launched this venture in the first place, and it clearly is the subject which most requires uniform guidance. The Subcommittee's review of numerous cases caused it to conclude that the law of spoliation for non-ESI is well developed and long-standing, and should not be supplanted without good reason. The Subcommittee heard little complaint about this body of law as applied to information other than ESI, and concluded that it should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Subcommittee recognizes that its recommendation to confine Rule 37(e) to failure to preserve electronically stored information could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, such as hard-copy documents, at least in terms of the approaches set out in Rule 37(e). But repeated efforts have shown that it is very difficult to craft a rule that deals with failure to preserve tangible things. The classic case is *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir.2001), involving loss of a wrecked automobile after the plaintiff's expert had inspected it but before the manufacturer had an opportunity to inspect it. The published proposal -- which was not limited to ESI -- sought to accommodate this sort of event by allowing "sanctions" if a party's actions in failing to preserve information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." This provision drew many comments suggesting that it opened the door to avoiding the limits otherwise imposed on "sanctions." Limiting the new rule to ESI avoids this complication.

In addition, there are some practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequence from its loss in one location often will be less severe than the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it -- another distinction from tangible evidence. Further, the Committee is responding to civil litigation challenges that arise from ESI, not from other forms of evidence. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuade the Subcommittee that the new Rule 37(e), like the present Rule 37(e), should be limited to ESI.

The Subcommittee recognizes that the dividing line between ESI and other evidence may in some instances be unclear. But the Subcommittee concludes that courts are well equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by this issue.

(e)(1)

The published proposal provided for curative measures in (e)(1)(A): "the court may: (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure."

The recommended proposal divides the published proposal into two parts. The first, (e)(1), focuses on loss of information without any need to consider whether the loss caused prejudice. (Curing prejudice is addressed in proposed (e)(2).) New (e)(1) provides that the court may:

Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees.

This provision makes clear that the court's first concern should be to cure the loss of the ESI that should have been preserved. It provides that the measures be no greater than necessary to cure the loss. This refinement responds to repeated urgings during the public comment period that a "least severe sanction" limitation be included in the rule.

This limit does not mean that the court must persist in pursuing measures until it is assured that the loss has been entirely cured. Instead, it means that the court cannot adopt measures greater than those necessary to cure the loss. Successful efforts to overcome the loss may resolve the prejudice question before it need be addressed.

The word "including" is added to make clear that the examples in rule text are not the only curative measures available to address a loss of information. The Committee Note published with the original proposal offered other examples that are carried forward in the revised Committee Note, including requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The added example of producing information that otherwise would not be reasonably accessible is moved from the published Committee Note to the new proposed rule text. And, as

with the published proposal, the Committee Note says that a failure to preserve may justify discovery that otherwise would be precluded under the proportionality analysis of proposed Rule 26(b)(1) and (2).

(e)(2)

Subdivision (e)(2) also grows out of the published curative measures provision, but also reflects the revision of the published provision for "sanctions." It puts a separate focus on curative measures designed to cure prejudice. The court may:

Upon a finding of prejudice to another party from the loss of information, order measures no greater than necessary to cure the prejudice.

The published proposal mentioned prejudice only in addressing "sanctions," and then conditioned sanctions on a finding of "substantial prejudice" coupled with willfulness or bad faith. Alternatively, absent a finding of willfulness or bad faith, sanctions would be permitted if the loss "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The difficulties presented by "substantial prejudice," "willful or in bad faith," and "irreparably deprived of any meaningful opportunity" were the subjects of many comments.

The (e)(2) proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by the measures in (e)(1). Like (e)(1), it adds a limit urged by many of the comments -- that the measures be no greater than necessary to cure the prejudice. As the Note makes clear, a court is not required to exhaust all possibilities of curing prejudice.

The court must find prejudice to order corrective measures under (e)(2), but this proposal does not say which party bears the burden of proving prejudice. Many comments raised concerns about assigning such burdens, and this rule does not do so, a point emphasized in the Note. Each party is responsible for providing such information and argument as it can. The court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

Because this proposal departs from the published version's approach of limiting all sanctions under Rule 37(b)(2)(A) to a showing of substantial prejudice and bad faith, it preserves the trial court's ability to use some of the Rule 37(b)(2)(A) measures to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established. See Rule 37(b)(2)(A)(i), (ii). The proposed rule does not attempt to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(2),



but instead limits those measures in three more general ways - curative measures under (e)(2) require a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures limited by (e)(3) unless it makes a finding that the party acted with the intent to deprive another party of the information's use in the litigation.

(e)(3)

Under the published proposal, the court could:

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

- (i) caused substantial prejudice in the litigation and were willful or in bad faith; or
- (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The revision proposed by new (e)(3) makes many changes in response to difficulties and potential confusions highlighted by the public comments. Under it, the court may:

- (3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

Any reference to "sanctions," or to Rule 37(b)(2)(A) as a source of sanctions, is deleted. One concern is that labeling any measure as a "sanction" generates overtones of professional responsibility and of censure. Another concern is that the sanctions listed in Rule 37(b)(2)(A) are justifiably called sanctions in that provision because they result from disobeying a court order, whereas the same measures in other settings might rightly be viewed as curative rather than punitive. Some of the (b)(2)(A) sanctions, further, seem inapposite to failure to preserve information in the absence of a court order - for example, (iv) "staying further proceedings until the order is obeyed" and (vii) contempt.

Further questions were raised by the references in the published draft to "substantial prejudice" and "willful or in bad faith." The invitation for comment asked whether these terms should be further defined in the rule text. Many comments urged that further definitions should be adopted. Particularly forceful comments addressed "willful." Depending on the context, "willful" has been defined by courts in many different ways. Under some definitions, willfulness could be found from an act intentionally done even though there was no thought about the effect on information that should be preserved for anticipated or pending litigation. A party, for example, might "willfully" trade in a smart phone without any thought about preserving the information stored in it. Nor did "bad faith" entirely escape criticism.

As noted earlier, published (e)(1)(B)(ii) drew particular criticism on the ground that it risked undoing the attempt in (i) to limit "sanctions" to circumstances of substantial prejudice and either willfulness or bad faith. "[I]rreparably deprived" and "any meaningful opportunity to present or defend against the claims in the litigation" were said to lie in the eye of the beholder. A judge who is not prepared to find willfulness or bad faith might seize on these phrases to justify sanctions in circumstances not covered by what was intended to be a very narrow exception to the requirements of substantial prejudice and willfulness or bad faith.

These concerns also affect the use of an adverse-inference jury instruction. In the universe of instructions for spoliation or withholding evidence, the most forceful tells the jury it must decide the case on the assumption that the lost information was unfavorable to the party who lost it. This presumption follows logically from the loss only if the party intended to deprive another party of the information's use in the litigation.

The Subcommittee's analysis of existing cases also shed light on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion - when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Why else would the party have destroyed it? Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")(citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence or gross negligence adopt a different rationale - that the adverse inference restores the evidentiary balance, and that the party that lost the information should bear

the risk that it was unfavorable. See, e.g., *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although not without some logical appeal, the Subcommittee has several concerns with this approach when applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the "cloud." Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, as noted above, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Subcommittee to conclude that the circuit split, at least with respect to ESI, should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on motions for summary judgment, deciding sanctions motions, or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation.

Thus, the measures described in (e)(3) can be taken only on finding that the party who failed to preserve information "acted with the intent to deprive another party of the information's use in the litigation." This extends the logic of the mandatory adverse-inference instruction to embrace as well the still more severe sanctions of dismissal or default. The Subcommittee has thought it anomalous to allow dismissal or default in circumstances that do not justify the instruction.

A difficult drafting issue presented by (e)(3) arises from the multiplicity of instructions that may be available to guide a jury's consideration of a failure to preserve ESI. Subdivision (e)(3) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference or to conclusions that jurors may draw from evidence presented at trial. For example, it would not prohibit a court, in appropriate circumstances, from allowing the parties to present evidence and argument to the jury concerning the loss of information. Nor would it bar a court from instructing a jury that it may determine from evidence presented during the trial -- as opposed to inferring from the loss of information alone -- whether lost information was

favorable or unfavorable to positions in the litigation. These measures would be available under subdivision (e)(2) if no greater than necessary to cure prejudice. In addition, subdivision (e)(3) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

*(e)(4) Factors*

The question whether rule text should include an illustrative list of factors to guide exercise of discretion conferred by the general text provisions arises continually. Proposed (e)(4) is brought forward in brackets to make clear the choice that must be made.

The arguments against lists of factors are familiar. The list may be mistaken as exclusive, never mind that the rule says "all factors" and "The factors include." Or the list may become a routine set of items to be checked off, approached without sufficient care. Or the enumerated factors themselves may be less important than other factors omitted from the examples, either when the rule is adopted or as the world changes – and changes in the world of electronically stored information are notoriously rapid. Or a wisely chosen list of factors may be expressed poorly. Or confusion may arise from the proper use of factors that bear differently on different determinations. The reasonableness of efforts to preserve information, for example, may have scant bearing in determining whether the loss caused prejudice – at most, there is a common element in the apparent importance of the information. For reasons like these it is common experience to begin with rule drafts that list factors, then to demote the factors to discussion in a Committee Note, and perhaps to take the final step of expunging all references to suggested factors for decision.

A list of factors for decision, on the other hand, may provide valuable guidance to courts and parties approaching complex questions, particularly when acting in an environment that changes as rapidly as practices change in the electronic storage of information. The Subcommittee recommends that the Committee consider whether to carry forward in the revised rule a provision that tracks, with some changes, the factors listed in the published proposal:

- (4)** In applying Rule 37(e), the court should consider all relevant factors, including:
  - (A)** the extent to which the party was on notice that litigation was likely and that the information would be relevant;

- (B) the reasonableness of the party's efforts to preserve the information;
- (C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

This version addresses the factors to application of all of revised 37(e). Factors (A), (B), and (C) are carried forward unchanged from the published proposal, although proportionality, now listed as factor (C), was published as factor (D). Factor (D) in the revised version was published as factor (E); it has been revised by adding "after commencement of the action," to dispel the implication that a party might seek guidance from a court before an action is filed. Factor (C) in the published draft -- focusing on demands for preservation -- has been removed. It received considerable negative commentary during the public comment period, and a mention of the possible role of such demands has been added to the Note.

Subcommittee members who favor including the factors in the rule believe they would be helpful to parties and judges in addressing the loss of ESI. They also believe the factors would provide some guidance to those called upon to make preservation decisions before litigation commences. They would at least identify some of the factors a judge may someday consider in judging the party's preservation efforts.

Were the factors removed from the rule, at least portions of the Note discussion of them could be relocated into the Note discussion of the provision in the rule related to failure to preserve electronically stored information that should have been preserved. But as noted above, the question whether such a discussion is adequate in the Note (where it may not receive attention from all lawyers, and therefore not be called to the attention of all judges) is open to debate.

#### *Acts of God*

The published version attempted to address a concern raised by the Standing Committee - whether the rule would permit sanctions to be imposed for events outside the party's control. The example given was the destruction of a hospital's computer records by flooding from SuperStorm Sandy. The published draft met this problem by providing for "sanctions" only if "the party's actions" caused the loss. The same protection exists in the current recommendation. The new rule applies only when a party fails to

preserve information that should have been preserved, and the Committee Note makes clear that loss of information due to a cause outside the party's control does not constitute a failure by the party to preserve the information.

*Replacing Present Rule 37(e)*

Answering a question raised in the invitation for public comment, the Subcommittee recommends that present Rule 37(e) be replaced in its entirety by the revised proposal, as intended for the published proposal.

The present rule addresses only a failure to provide electronically stored information "lost as a result of the routine, good-faith operation of an electronic information system." It generally excludes "sanctions under these rules," but allows such sanctions in "exceptional circumstances." It does not address any other measures a court may take to address the loss of information, even if occasioned by the routine, good-faith operation of an electronic information system. Inherent power, and the authority conferred by Rules 16 and 26, could readily justify any measures available under the proposed rule, and perhaps more. The proposed rule, moreover, supersedes reliance on inherent power to adopt measures it does not authorize. There is no further use for present Rule 37(e), and its retention could cause confusion in applying the proposed new rule.

## Proposed Rule 37(e)

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

\* \* \* \* \*

1  
2 (e) **FAILURE TO PRESERVE PROVIDE ELECTRONICALLY STORED INFORMATION.** ~~Absent~~  
3 ~~exceptional circumstances, a court may not impose sanctions~~  
4 ~~under these rules on a party for failing to provide~~  
5 ~~electronically stored information lost as a result of the~~  
6 ~~routine, good-faith operation of an electronic information~~  
7 ~~system. If a party failed to preserve electronically stored~~  
8 ~~information that should have been preserved in the~~  
9 ~~anticipation or conduct of litigation, the court may:~~

10  
11 (1) Order measures no greater than necessary to cure the loss  
12 of information, including permitting additional  
13 discovery; requiring the party to produce information  
14 that would otherwise not be reasonably accessible; and  
15 ordering the party to pay the reasonable expenses caused  
16 by the loss, including attorney's fees.

17  
18 (2) Upon a finding of prejudice to another party from loss of  
19 the information, order measures no greater than necessary  
20 to cure the prejudice.

21  
22 (3) Only upon a finding that the party acted with the intent  
23 to deprive another party of the information's use in the  
24 litigation:

25  
26 (A) presume that the lost information was unfavorable  
27 to the party;

28  
29 (B) instruct the jury that it may or must presume the  
30 information was unfavorable to the party; or

31  
32 (C) dismiss the action or enter a default judgment.

33  
34 [(4) In applying Rule 37(e), the court should consider all  
35 relevant factors, including:

36  
37 (A) the extent to which the party was on notice that  
38 litigation was likely and that the information  
39 would be relevant;

40  
41 (B) the reasonableness of the party's efforts to  
42 preserve the information;

43  
44 (C) the proportionality of the preservation efforts to  
45 any anticipated or ongoing litigation; and

46 (D) whether, after commencement of the action, the  
47 party timely sought the court's guidance on any  
48 unresolved disputes about preserving discoverable  
information.]

## COMMITTEE NOTE

1  
2 Present Rule 37(e), adopted in 2006, provides: "Absent  
3 exceptional circumstances, a court may not impose sanctions under  
4 these rules on a party for failing to provide electronically stored  
5 information lost as a result of the routine, good-faith operation  
6 of an electronic information system." This limited rule has left  
7 the way open for federal courts to resolve problems of preservation  
8 – and loss – of electronic information.  
9

10 At the same time, the continued exponential growth in the  
11 volume of such information, and the increasing dispersion of  
12 devices that generate, store, and discard electronic information,  
13 have greatly increased the time, money, and effort expended before  
14 and during civil litigation on the preservation, management,  
15 review, and loss of such information. Some specific problems have  
16 been identified. Federal circuits have established significantly  
17 different standards for imposing sanctions or curative measures on  
18 parties who fail to preserve electronically stored information.  
19 This not only produces different outcomes in different courts for  
20 the same conduct, it also drives persons and entities to over-  
21 preserve because they must assume that their preservation efforts  
22 will be judged by the most stringent standard of the various courts  
23 in which they might be sued. In addition, the greater availability  
24 of sanctions in some courts has encouraged the filing of sanctions  
25 motions for tactical purposes, increasing the cost and complexity  
26 of civil litigation. Because of these and related problems, many  
27 have urged the Committee to adopt a uniform approach to the loss of  
28 electronically stored information.  
29

30 Present rule 37(e) no longer provides suitable guidance to  
31 resolve these problems. It addresses only "sanctions" "under these  
32 rules," providing no guidance for the exercise of inherent  
33 authority. It is limited to losses caused by the "routine, good-  
34 faith operation" of an electronic information system, without  
35 addressing losses caused by other means.  
36

37 New Rule 37(e) replaces the 2006 rule. The new rule provides  
38 guidance for measures to be taken when information that should have  
39 been preserved is lost, something not addressed in the present  
40 rule. Loss of information through the routine, good-faith operation  
41 of an electronic information system – the only topic addressed in  
42 the present rule – will not support any curative measures under the  
43 new rule if it occurs before a duty to preserve arises. If it  
44 occurs after such a duty arises, a court can address the loss



45 through measures designed to cure the loss of the information,  
46 measures that were also available under the present rule as the  
47 2006 Committee Note makes clear.  
48

49 The new rule also directs that such measures be no greater  
50 than necessary to cure prejudice resulting from the loss. Although  
51 these curative measures could in other contexts be viewed as  
52 "sanctions," and therefore may not generally have been available  
53 under the 2006 rule, they would be available under that rule in  
54 "exceptional circumstances." The new rule provides clearer guidance  
55 for the imposition of curative measures than the broad "exceptional  
56 circumstances" phrase. In addition, the new rule makes clear that  
57 severe measures such as adverse-inference instructions, dismissal,  
58 or default are available only if the court finds the information  
59 was lost with the intent to deprive another party of the  
60 information's use in the action.  
61

62 Amended Rule 37(e) applies to loss of discoverable information  
63 "that should have been preserved in the anticipation or conduct of  
64 litigation." This preservation obligation has been recognized by  
65 many court decisions. Rule 37(e) is based on this common-law duty;  
66 it does not attempt to create a new duty to preserve. The duty to  
67 preserve may in some instances be triggered or clarified by a court  
68 order in the case. Preservation orders may become more common, in  
69 part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to  
70 encourage discovery plans and orders that address preservation.  
71 Violation of a court order is subject to all measures and sanctions  
72 that may be invoked for violating an order; Rule 37(e) addresses  
73 only the measures to be taken outside a preservation order. [Rule  
74 37(e)(4) identifies several of the factors that should be  
75 considered in determining, in the circumstances of a particular  
76 case, when a duty to preserve arose and what information should  
77 have been preserved.]  
78

79 Because Rule 37(e) applies only when a party has failed to  
80 preserve information that should have been preserved in the  
81 anticipation or conduct of litigation, it does not apply when  
82 information is lost before a duty to preserve arises. Nor does it  
83 apply when information is lost after such a duty arises, but not  
84 from the party's failure. For example, the information may not be  
85 in the party's control. Or information the party has preserved may  
86 be destroyed by events outside the party's control – the computer  
87 room may be flooded, a "cloud" service may fail, a malign software  
88 attack may disrupt a storage system, and so on. Assuming the party  
89 acted reasonably, the new rule does not apply to such situations  
90 because it cannot be said that the party was responsible for the  
91 failure to preserve the information, but neither does the new rule  
92 impede a court's power to deal with such losses of information  
93 through traditional case-management powers under Rules 16 and 26.  
94

95 The amended rule authorizes and specifies a graduated series  
96 of measures a court may employ if information that should have been

97 preserved is lost, and specifies the findings necessary to justify  
98 these measures. It therefore forecloses reliance on inherent  
99 authority or state law to determine when certain measures should be  
100 used. But the rule does not affect the validity of an independent  
101 tort claim for spoliation if applicable state law authorizes the  
102 claim. The cognizability of such a claim in federal court is  
103 governed by the applicable substantive law, not Rule 37(e).  
104

105 Rule 37(e) continues to address only the failure to preserve  
106 electronically stored information. The widespread problems that  
107 have been pressed on the Committee all arise from electronically  
108 stored information. The problems may be distinguished from other  
109 forms of information by sheer – often staggering – volume; the  
110 nearly inevitable failure of even the most carefully designed  
111 preservation efforts to preserve everything that, in hindsight,  
112 "should have been" preserved; and the prospect that the very  
113 proliferation of electronically stored information means that the  
114 information in a particular lost source may well have close or  
115 exact substitutes. Courts appear to have resolved problems arising  
116 from failures to preserve other forms of information by suitable  
117 means.  
118

119 The new rule is structured to focus attention on three  
120 different purposes for taking measures to respond to a failure to  
121 preserve electronically stored information that should have been  
122 preserved in the anticipation or conduct of litigation. One  
123 purpose, reflected in (e)(1), is to permit measures no greater than  
124 necessary to cure the loss of information, including measures that  
125 might recreate the information or develop adequate substitutes. A  
126 second purpose, reflected in (e)(2), is to determine whether the  
127 loss caused prejudice, to assess the severity of the prejudice, and  
128 to take measures no greater than necessary to cure the prejudice.  
129 A third purpose, reflected in (e)(3), is to specify measures  
130 available when a party failed to preserve information with the  
131 intent to deprive another party of the information's use in the  
132 litigation. These purposes may be approached in sequential steps,  
133 but even then they may overlap. A measure that effectively replaces  
134 or substitutes for lost information, for example, avoids the need  
135 to consider the prejudice that might result if the measure had  
136 failed. And in some cases the circumstances will justify going  
137 straight to measures to cure prejudice when the lost information  
138 cannot be recovered.  
139

140 **Subdivision (e)(1).** When the court concludes that a party  
141 failed to preserve information that should have been preserved in  
142 the anticipation or conduct of litigation, it may employ measures  
143 to cure the loss of information. The rule authorizes measures "no  
144 greater than necessary" to cure the loss of information, and  
145 provides a non-exhaustive list of examples. These include  
146 permitting additional discovery that would not have been allowed  
147 had the party preserved information as it should have. Similarly,

148 discovery might be ordered under Rule 26(b)(2)(B) from sources of  
149 electronically stored information that are not reasonably  
150 accessible because of undue burden or cost. More generally, the  
151 fact that a party has failed to preserve information may justify  
152 discovery that otherwise would be precluded under the  
153 proportionality analysis of Rule 26(b)(1) and (2)(C).  
154

155 In addition to, or instead of, ordering further discovery, the  
156 court may order other curative measures, such as requiring the  
157 party that failed to preserve information to restore or obtain the  
158 lost information, or to develop substitute information that the  
159 court would not have ordered the party to create but for the  
160 failure to preserve. The court may also require the party that  
161 failed to preserve information to pay another party's reasonable  
162 expenses, including attorney fees, caused by the failure to  
163 preserve. Such expenses might include, for example, discovery  
164 efforts caused by the failure to preserve information.  
165

166 The authority established by subdivision (e)(1) does not mean  
167 that the court is required to make every order that might replace  
168 or substitute for lost information, even if a first attempt or  
169 multiple attempts fail. Although it may be impossible to know  
170 exactly what the lost information was – it is not truly lost if an  
171 exact duplicate exists – proportionality is as important here as  
172 elsewhere. A sense that the lost information likely was not  
173 important, particularly when much information is available from  
174 other sources, may justify accepting the loss and moving on with  
175 the case. On the other hand, a sense that the information may have  
176 been important may justify an order for additional measures no  
177 greater than necessary to attempt to cure the loss.  
178

179 **Subdivision (e)(2).** This subdivision authorizes measures to  
180 cure demonstrated prejudice resulting from loss of information. If  
181 the measures to cure the loss of information authorized by Rule  
182 37(e)(1) are effective, resort to these measures should be  
183 unnecessary.  
184

185 Resort to these measures is authorized "[u]pon a finding of  
186 prejudice to another party from loss of the information." The rule  
187 does not place a burden of proving or disproving prejudice on one  
188 party or the other. Determining the content of lost information  
189 may be a difficult task in some cases, and placing the burden of  
190 proving prejudice on the party that did not lose the information  
191 may be unfair. In other situations, however, the content of the  
192 lost information may be fairly evident or the abundance of  
193 preserved information may appear sufficient to meet the needs of  
194 all parties. Requiring the party seeking curative measures to  
195 prove that loss of the information caused prejudice may be  
196 reasonable in such situations. The rule leaves judges with  
197 discretion to determine how best to assess prejudice in particular  
198 cases.

199           Once a finding of prejudice is made, the court is authorized  
200 to employ additional measures "no greater than necessary to cure  
201 the prejudice." The range of such measures is quite broad if they  
202 are necessary for this purpose. The rule provides that the measure  
203 should be no greater than necessary to cure the prejudice, but  
204 there is no all-purpose hierarchy of the severity of various  
205 measures. The severity must be calibrated by the effect on the  
206 particular case.  
207

208           In an appropriate case, it may be that very serious measures  
209 are necessary to cure substantial prejudice found by the court,  
210 such as forbidding the party that failed to preserve information  
211 from putting on certain evidence or supporting certain claims or  
212 defenses, permitting the parties to present evidence and argument  
213 to the jury regarding the loss of information, or giving jury  
214 instructions other than those limited by subdivision (e)(3) as  
215 discussed below. Care should be taken, however, to ensure that  
216 curative measures under subdivision (e)(2) do not have the effect  
217 of dismissal or default, measures that are permitted under  
218 subdivision (e)(3) only on a finding of intent to deprive another  
219 party of the lost information's use in the litigation.  
220

221           As with subdivision (e)(1), authority to order measures no  
222 greater than necessary to cure prejudice caused by a loss of  
223 information does not require the court to adopt measures calculated  
224 to cure every possible prejudicial effect. Assessments of prejudice  
225 often will be uncertain. The power to attempt a cure does not  
226 impose a requirement that all prejudice be cured, nor adoption of  
227 every measure that might reasonably be employed. Much is entrusted  
228 to the court's discretion.  
229

230           **Subdivision (e)(3).** This subdivision authorizes courts to use  
231 specified and very severe measures to address or deter failures to  
232 preserve electronically stored information, but only on finding  
233 that the party that lost the information acted with the intent to  
234 deprive another party of the information's use in the litigation.  
235 It is designed to provide a uniform standard in federal court for  
236 use of these serious measures when addressing failure to preserve  
237 electronically stored information. It rejects cases such as  
238 *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99  
239 (2d Cir.2002), that have authorized the giving of adverse-inference  
240 instructions on a finding of negligence or gross negligence.  
241

242           Adverse-inference instructions were developed on the premise  
243 that a party's intentional destruction of evidence to prevent its  
244 use in litigation gives rise to a reasonable inference that the  
245 evidence was unfavorable to the destroying party. Negligent or even  
246 grossly negligent behavior does not logically support that  
247 inference. Information lost through negligence may have been  
248 favorable to either party, including the party that lost it, and  
249 inferring that it was unfavorable to that party may tip the balance

250 at trial in ways the lost information never would have. Although  
251 some courts have reasoned that the party that lost the information  
252 should bear the risk that it was unfavorable, and therefore may be  
253 subjected to an adverse-inference instruction for mere negligence,  
254 the Committee is persuaded that such reasoning should not apply to  
255 electronically stored information. Such information is easily  
256 lost, particularly by unsophisticated parties who possess ever-  
257 increasing amounts of it from everyday activities such as using a  
258 phone, sending electronic messages, participating in social media,  
259 or even driving a car. The better rule for the negligent loss of  
260 electronically stored information, in the Committee's view, is to  
261 preserve a broad range of measures to cure prejudice caused by its  
262 loss, but to limit the most severe sanctions to instances of  
263 intentional loss or destruction.

264  
265 Similar reasons apply to limiting the court's authority to  
266 presume or infer that the lost information was unfavorable to the  
267 party who lost it. Some cases permit courts to infer lost  
268 information was unfavorable to a negligent party when deciding what  
269 measures to impose on that party or when ruling on motions for  
270 summary judgment. In addition, judges presiding at bench trials  
271 may be called upon to make decisions in light of lost information.  
272 Subdivision (e)(3) limits the ability of courts to engage in  
273 adverse inferences based on the loss of information, permitting  
274 such inferences only when a court finds that the information was  
275 lost with the intent to prevent its use in litigation.

276  
277 The measures authorized in subdivision (e)(3) are limited to  
278 instances of intentional conduct for another reason. The committee  
279 has been credibly informed that persons and entities seeking to  
280 preserve electronically stored information in anticipation of  
281 litigation are driven to preserve virtually all such information,  
282 often at great cost, out of fear that they may be subjected to  
283 adverse-inference instructions if something is lost and their  
284 actions are later judged, by hindsight, to have been negligent. One  
285 intent of the original Rule 37(e) was to assure potential parties  
286 that they could not be sanctioned "under these rules" for good  
287 faith conduct. The limitation of (e)(3) similarly assures potential  
288 parties that they will not be subjected to adverse-inference  
289 instructions or to the case-terminating sanctions of dismissal or  
290 default unless they engage in the kind of conduct that has long  
291 formed the premise for an adverse inference - intentional loss or  
292 destruction of information to prevent its use in litigation.  
293 Because potential parties can be subjected under (e)(2) to  
294 significant measures designed to cure any prejudice caused by their  
295 loss of information, the limitations of (e)(3) should not have the  
296 effect of encouraging negligent or sloppy preservation practices.

297  
298 Subdivision (e)(3) does not limit the ways in which a court  
299 may arrive at a finding of intentional conduct. Intent is rarely  
300 proved by direct evidence, and a court has substantial leeway to  
301 determine intent through circumstantial evidence, witness

302 credibility, and other relevant factors.  
303

304 Subdivision (e)(3) applies to jury instructions that permit or  
305 require the jury to presume or infer that lost information was  
306 unfavorable to the party that lost it. Thus, (e)(3) covers any  
307 instruction that directs or permits the jury to infer from the loss  
308 of information that the information was in fact unfavorable to the  
309 party that lost it. The subdivision does not apply to inferences  
310 that may be drawn from evidence introduced during a trial or jury  
311 instructions that do not involve such an inference. For example, it  
312 would not prohibit a court, in an appropriate case, from allowing  
313 the parties to present evidence and argument to the jury concerning  
314 the loss of information. Nor would it bar a court from instructing  
315 a jury that it may determine from evidence presented during the  
316 trial - as opposed to inferring from the loss of information alone  
317 - whether lost information was favorable or unfavorable to  
318 positions in the litigation. These measures would be available  
319 under subdivision (e)(2) if no greater than necessary to cure  
320 prejudice. In addition, subdivision (e)(3) does not limit the  
321 discretion of courts to give traditional missing evidence  
322 instructions based on a party's failure to present evidence it has  
323 in its possession at the time of trial.  
324

325 Finding an intent to deprive another party of the lost  
326 information's use in the litigation does not require a court to  
327 adopt any of the measures listed in subdivision (e)(3). The court  
328 may instead adopt less severe measures designed to cure the  
329 prejudice, if any, or otherwise to address the party's conduct.  
330

331 **[Subdivision (e)(4).** Subdivision (e)(4) lists factors that  
332 bear on the court's determination whether a party lost information  
333 that should have been preserved in the anticipation or conduct of  
334 litigation, and in application of the measures authorized in  
335 subdivision (e)(1), (2), and (3). They are open-ended and  
336 interdependent, and each is more likely to bear on some  
337 considerations than on others.  
338

339 The list of factors in (e)(4) is not exclusive. A  
340 determination that information not preserved reasonably appeared to  
341 be cumulative with materials that were preserved, for example,  
342 bears on whether the failure to preserve was reasonable, whether  
343 overall preservation efforts were proportional, and whether any  
344 significant prejudice flowed from the failure to preserve.  
345

346 The first factor is the extent to which the party was on  
347 notice that litigation was likely and that the information lost  
348 would be relevant in that litigation. A variety of events may  
349 alert a party to the prospect of litigation. But often these  
350 events provide only limited information about that prospective  
351 litigation, so that the scope of information that should be  
352 preserved may remain uncertain. It is important not to be blinded

353 to this reality by hindsight arising from familiarity with an  
354 action as it is actually filed. Nor should prelitigation requests  
355 that a potential adversary preserve information control. Although  
356 such requests may provide useful guidance on what information may  
357 be relevant to the issues that may arise if litigation is filed, a  
358 potential party may reasonably whittle down overbroad requests, or  
359 even plan preservation without paying attention to a manifestly  
360 extravagant request.

361  
362 The second factor focuses on the reasonableness of what the  
363 party did to preserve information after the prospect of litigation  
364 arose. The party's issuance of a litigation hold is often  
365 important on this point. But it is only one consideration, and no  
366 specific feature of the litigation hold – for example, a written  
367 rather than an oral hold notice – is dispositive. Instead, the  
368 scope and content of the party's overall preservation efforts  
369 should be considered.

370  
371 One focus would be on the extent to which a party should  
372 appreciate that certain types of information might be relevant in  
373 the litigation, and also what it knew, or should have known, about  
374 the likelihood of losing information if it did not take steps to  
375 preserve. The court should be sensitive to the party's  
376 sophistication with regard to litigation in evaluating preservation  
377 efforts; some litigants, particularly individual litigants, may be  
378 less familiar with preservation obligations than other litigants  
379 who have considerable experience in litigation.

380  
381 Although the rule focuses on the common-law obligation to  
382 preserve in the anticipation or conduct of litigation, courts may  
383 sometimes consider whether there was an independent requirement  
384 that the lost information be preserved. Such requirements arise  
385 from many sources – legislation, administrative regulations, an  
386 order in another case, or a party's own information-retention  
387 protocols. The court should be sensitive, however, to the fact that  
388 such independent preservation requirements may be addressed to a  
389 wide variety of concerns unrelated to the current litigation. The  
390 fact that a party failed to observe some other preservation  
391 obligation does not itself prove that its efforts to preserve were  
392 not reasonable with respect to a particular case.

393  
394 The third factor emphasizes proportionality. The initial focus  
395 should be on the foreseeable information needs of the anticipated  
396 litigation. But proportionality also is affected by the prospect of  
397 related litigation. Proportionality may require more extensive  
398 preservation efforts when other potential or pending litigation  
399 involves the same information. One injury related to use of a  
400 product, for example, may not generate the same preservation duties  
401 as a hundred injuries related to use of the same product. So Rule  
402 37(e)(4)(C) explains that this calculation should be made with  
403 regard to "any anticipated or ongoing litigation."  
404

405 Making a proportionality determination often depends in part  
406 on specifics about various types of information involved, and the  
407 costs of various forms of preservation. The court should be  
408 sensitive to party resources; aggressive preservation efforts can  
409 be extremely costly, and parties (including governmental parties)  
410 may have limited resources to devote to those efforts. A party may  
411 act reasonably by choosing the least costly form of information  
412 preservation, if it is substantially as effective as more costly  
413 forms. It is important that counsel become familiar with their  
414 clients' information systems and digital data -- including social  
415 media -- to address these issues. A party urging that preservation  
416 requests are disproportionate may need to provide specifics about  
417 these matters in order to enable meaningful discussion of the  
418 appropriate preservation regime.  
419

420 The fourth factor looks to whether the party, once litigation  
421 was commenced, sought guidance from the court if agreement could  
422 not be reached with the other parties. This is not meant to  
423 encourage premature resort to the court; amendments to Rule  
424 26(f)(3) direct the parties to address preservation in their  
425 discovery plan, and amendments to Rule 16(b)(3) invite discussion  
426 of this subject at the initial case management conference and in  
427 the scheduling order. Ordinarily the parties' arrangements are to  
428 be preferred to those imposed by the court. But if the parties  
429 cannot reach agreement, they should not forgo available  
430 opportunities to obtain prompt resolution of the differences from  
the court.]



APPENDIX  
Published Rule 37(e) Amendment Proposal

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

\* \* \* \* \*

~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

(1) Curative measures; sanctions. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors

31 include:

32

33 (A) the extent to which the party was on notice that  
34 litigation was likely and that the information  
35 would be discoverable;

36

37 (B) the reasonableness of the party's efforts to  
38 preserve the information;

39

40 (C) whether the party received a request to preserve  
41 information, whether the request was clear and  
42 reasonable, and whether the person who made it and  
43 the party consulted in good faith about the scope  
44 of preservation;

45

46 (D) the proportionality of the preservation efforts to  
47 any anticipated or ongoing litigation; and

48

49 (E) whether the party timely sought the court's  
50 guidance on any unresolved disputes about  
51 preserving discoverable information.

#### COMMITTEE NOTE

1

2 In 2006, Rule 37(e) was added to provide protection against  
3 sanctions for loss of electronically stored information under  
4 certain limited circumstances, but preservation problems have  
5 nonetheless increased. The Committee has been repeatedly informed  
6 of growing concern about the increasing burden of preserving  
7 information for litigation, particularly with regard to  
8 electronically stored information. Many litigants and prospective  
9 litigants have emphasized their uncertainty about the obligation to  
10 preserve information, particularly before litigation has actually  
11 begun. The remarkable growth in the amount of information that  
12 might be preserved has heightened these concerns. Significant  
13 divergences among federal courts across the country have meant that  
14 potential parties cannot determine what preservation standards they  
15 will have to satisfy to avoid sanctions. Extremely expensive  
16 overpreservation may seem necessary due to the risk that very  
17 serious sanctions could be imposed even for merely negligent,  
18 inadvertent failure to preserve some information later sought in

19 discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by  
22 adopting a uniform set of guidelines for federal courts, and  
23 applying them to all discoverable information, not just  
24 electronically stored information. The amended rule is not  
25 limited, as is the current rule, to information lost due to "the  
26 routine, good-faith operation of an electronic information system."  
27 The amended rule is designed to ensure that potential litigants who  
28 make reasonable efforts to satisfy their preservation  
29 responsibilities may do so with confidence that they will not be  
30 subjected to serious sanctions should information be lost despite  
31 those efforts. It does not provide "bright line" preservation  
32 directives because bright lines seem unsuited to a set of problems  
33 that is intensely context-specific. Instead, the rule focuses on  
34 a variety of considerations that the court should weigh in  
35 calibrating its response to the loss of information.

36

37 Amended Rule 37(e) supersedes the current rule because it  
38 provides protection for any conduct that would be protected under  
39 the current rule. The current rule provides: "Absent exceptional  
40 circumstances, a court may not impose sanctions under these rules  
41 on a party for failing to provide electronically stored information  
42 lost as a result of the routine, good-faith operation of an  
43 electronic information system." The routine good faith operation  
44 of an electronic information system should be respected under the  
45 amended rule. As under the current rule, the prospect of  
46 litigation may call for altering that routine operation. And the  
47 prohibition of sanctions in the amended rule means that any loss of  
48 data that would be insulated against sanctions under the current  
49 rule would also be protected under the amended rule.

50

51 Amended Rule 37(e) applies to loss of discoverable information  
52 "that should have been preserved in the anticipation or conduct of  
53 litigation." This preservation obligation was not created by Rule  
54 37(e), but has been recognized by many court decisions. It may in  
55 some instances be triggered or clarified by a court order in the  
56 case. Rule 37(e)(2) identifies many of the factors that should be  
57 considered in determining, in the circumstances of a particular  
58 case, when a duty to preserve arose and what information should  
59 have been preserved.

60

61 Except in very rare cases in which a party's actions cause the  
62 loss of information that irreparably deprives another party of any  
63 meaningful opportunity to present or defend against the claims in  
64 the litigation, sanctions for loss of discoverable information may  
65 only be imposed on a finding of willfulness or bad faith, combined

66 with substantial prejudice.

67

68 The amended rule therefore forecloses reliance on inherent  
69 authority or state law to impose litigation sanctions in the  
70 absence of the findings required under Rule 37(e)(1)(B). But the  
71 rule does not affect the validity of an independent tort claim for  
72 relief for spoliation if created by the applicable law. The law of  
73 some states authorizes a tort claim for spoliation. The  
74 cognizability of such a claim in federal court is governed by the  
75 applicable substantive law, not Rule 37(e).

76

77 An amendment to Rule 26(f)(3) directs the parties to address  
78 preservation issues in their discovery plan, and an amendment to  
79 Rule 16(b)(3) recognizes that the court's scheduling order may  
80 address preservation. These amendments may prompt early attention  
81 to matters also addressed by Rule 37(e).

82

83 **Subdivision (e)(1)(A).** When the court concludes that a party  
84 failed to preserve information that should have been preserved in  
85 the anticipation or conduct of litigation, it may adopt a variety  
86 of measures that are not sanctions. One is to permit additional  
87 discovery that would not have been allowed had the party preserved  
88 information as it should have. For example, discovery might be  
89 ordered under Rule 26(b)(2)(B) from sources of electronically  
90 stored information that are not reasonably accessible. More  
91 generally, the fact that a party has failed to preserve information  
92 may justify discovery that otherwise would be precluded under the  
93 proportionality analysis of Rule 26(b)(1) and (2)(C).

94

95 In addition to, or instead of, ordering further discovery, the  
96 court may order curative measures, such as requiring the party that  
97 failed to preserve information to restore or obtain the lost  
98 information, or to develop substitute information that the court  
99 would not have ordered the party to create but for the failure to  
100 preserve. The court may also require the party that failed to  
101 preserve information to pay another party's reasonable expenses,  
102 including attorney fees, caused by the failure to preserve. Such  
103 expenses might include, for example, discovery efforts caused by  
104 the failure to preserve information. Additional curative measures  
105 might include permitting introduction at trial of evidence about  
106 the loss of information or allowing argument to the jury about the  
107 possible significance of lost information.

108

109 **Subdivision (e)(1)(B)(i).** This subdivision authorizes  
110 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful

111 or bad-faith failure to preserve information, whether or not there  
112 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)  
113 is designed to provide a uniform standard in federal court for  
114 sanctions for failure to preserve. It rejects decisions that have  
115 authorized the imposition of sanctions -- as opposed to measures  
116 authorized by Rule 37(e)(1)(A) -- for negligence or gross  
117 negligence. It borrows the term "sanctions" from Rule 37(b)(2),  
118 and does not attempt to prescribe whether such measures would be so  
119 regarded for other purposes, such as an attorney's professional  
120 responsibility.

121

122 This subdivision protects a party that has made reasonable  
123 preservation decisions in light of the factors identified in Rule  
124 37(e)(2), which emphasize both reasonableness and proportionality.  
125 Despite reasonable efforts to preserve, some discoverable  
126 information may be lost. Although loss of information may affect  
127 other decisions about discovery, such as those under Rule 26(b)(1),  
128 (b)(2)(B), and (b)(2)(C), sanctions may be imposed only for willful  
129 or bad faith actions, unless the exceptional circumstances  
130 described in Rule 37(e)(2)(B)(ii) are shown.

131

132 The threshold under Rule 37(e)(1)(B)(i) is that the court find  
133 that lost information should have been preserved; if so, the court  
134 may impose sanctions only if it can make two further findings.  
135 First, the court must find that the loss of information caused  
136 substantial prejudice in the litigation. Because digital data  
137 often duplicate other data, substitute evidence is often available.  
138 Although it is impossible to demonstrate with certainty what lost  
139 information would prove, the party seeking sanctions must show that  
140 it has been substantially prejudiced by the loss. Among other  
141 things, the court may consider the measures identified in Rule  
142 37(e)(1)(A) in making this determination; if these measures can  
143 sufficiently reduce the prejudice, sanctions would be inappropriate  
144 even when the court finds willfulness or bad faith. Rule  
145 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in  
146 the expectation that the court will employ the least severe  
147 sanction needed to repair the prejudice resulting from loss of the  
148 information.

149

150 Second, it must be established that the party that failed to  
151 preserve did so willfully or in bad faith. This determination  
152 should be made with reference to the factors identified in Rule  
153 37(e)(2).

154

155 **Subdivision (e)(1)(B)(ii).** This subdivision permits the court  
156 to impose sanctions in narrowly limited circumstances without  
157 making a finding of either bad faith or willfulness. The need to

158 show bad faith or willfulness is excused only by finding an impact  
159 more severe than the substantial prejudice required to support  
160 sanctions under Rule 37(e)(1)(B)(i). It still must be shown that  
161 a party failed to preserve discoverable information that should  
162 have been preserved. In addition, it must be shown that the  
163 party's actions irreparably deprived a party of any meaningful  
164 opportunity to present or defend against the claims in the  
165 litigation.

166

167 The first step under this subdivision is to examine carefully  
168 the apparent importance of the lost information. Particularly with  
169 electronically stored information, alternative sources may often  
170 exist. The next step is to explore the possibility that curative  
171 measures under subdivision (e)(1)(A) can reduce the adverse impact.  
172 If a party loses readily accessible electronically stored  
173 information, for example, the court may direct the party to attempt  
174 to retrieve the information by alternative means. If such measures  
175 are not possible or fail to restore important information, the  
176 court must determine whether the loss has irreparably deprived a  
177 party of any meaningful opportunity to present or defend against  
178 the claims in the litigation.

179

180 The "irreparably deprived" test is more demanding than the  
181 "substantial prejudice" that permits sanctions under Rule  
182 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples  
183 might include cases in which the alleged injury-causing  
184 instrumentality has been lost. A plaintiff's failure to preserve  
185 an automobile claimed to have defects that caused injury without  
186 affording the defendant manufacturer an opportunity to inspect the  
187 damaged vehicle may be an example. Such a situation led to  
188 affirmance of dismissal, as not an abuse of discretion, in  
189 *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).  
190 Or a party may lose the only evidence of a critically important  
191 event. But even such losses may not irreparably deprive another  
192 party of any meaningful opportunity to litigate. Remaining sources  
193 of evidence and the opportunity to challenge the evidence presented  
194 by the party who lost discoverable information that should have  
195 been preserved, along with possible presentation of evidence and  
196 argument about the significance of the lost information, should  
197 often afford a meaningful opportunity to litigate.

198

199 The requirement that a party be irreparably deprived of any  
200 meaningful opportunity to present or defend against the claims in  
201 the litigation is further narrowed by looking to all the claims in  
202 the litigation. Lost information may appear critical to litigating  
203 a particular claim or defense, but sanctions should not be imposed  
204 – or should be limited to the affected claims or defenses – if  
205 those claims or defenses are not central to the litigation.

206           A special situation arises when discoverable information is  
207 lost because of events outside a party's control. A party may take  
208 the steps that should have been taken to preserve the information,  
209 but lose it to such unforeseeable circumstances as flood,  
210 earthquake, fire, or malicious computer attacks. Curative measures  
211 may be appropriate in such circumstances – this is information that  
212 should have been preserved – but sanctions are not. The loss is not  
213 caused by "the party's actions" as required by (e)(1)(B).

214

215           **Subdivision (e)(2).** These factors guide the court when asked  
216 to adopt measures under Rule 37(e)(1)(A) due to loss of information  
217 or to impose sanctions under Rule 37(e)(1)(B). The listing of  
218 factors is not exclusive; other considerations may bear on these  
219 decisions, such as whether the information not retained reasonably  
220 appeared to be cumulative with materials that were retained. With  
221 regard to all these matters, the court's focus should be on the  
222 reasonableness of the parties' conduct.

223

224           The first factor is the extent to which the party was on  
225 notice that litigation was likely and that the information lost  
226 would be discoverable in that litigation. A variety of events may  
227 alert a party to the prospect of litigation. But often these  
228 events provide only limited information about that prospective  
229 litigation, so that the scope of discoverable information may  
230 remain uncertain.

231

232           The second factor focuses on what the party did to preserve  
233 information after the prospect of litigation arose. The party's  
234 issuance of a litigation hold is often important on this point.  
235 But it is only one consideration, and no specific feature of the  
236 litigation hold -- for example, a written rather than an oral hold  
237 notice -- is dispositive. Instead, the scope and content of the  
238 party's overall preservation efforts should be scrutinized. One  
239 focus would be on the extent to which a party should appreciate  
240 that certain types of information might be discoverable in the  
241 litigation, and also what it knew, or should have known, about the  
242 likelihood of losing information if it did not take steps to  
243 preserve. The court should be sensitive to the party's  
244 sophistication with regard to litigation in evaluating preservation  
245 efforts; some litigants, particularly individual litigants, may be  
246 less familiar with preservation obligations than other litigants  
247 who have considerable experience in litigation. Although the rule  
248 focuses on the common law obligation to preserve in the  
249 anticipation or conduct of litigation, courts may sometimes  
250 consider whether there was an independent requirement that the lost  
251 information be preserved. The court should be sensitive, however,  
252 to the fact that such independent preservation requirements may be  
253 addressed to a wide variety of concerns unrelated to the current

254 litigation. The fact that some information was lost does not  
255 itself prove that the efforts to preserve were not reasonable.

256

257 The third factor looks to whether the party received a request  
258 to preserve information. Although such a request may bring home  
259 the need to preserve information, this factor is not meant to  
260 compel compliance with all such demands. To the contrary,  
261 reasonableness and good faith may not require any special  
262 preservation efforts despite the request. In addition, the  
263 proportionality concern means that a party need not honor an  
264 unreasonably broad preservation demand, but instead should make its  
265 own determination about what is appropriate preservation in light  
266 of what it knows about the litigation. The request itself, or  
267 communication with the person who made the request, may provide  
268 insights about what information should be preserved. One important  
269 matter may be whether the person making the preservation request is  
270 willing to engage in good faith consultation about the scope of the  
271 desired preservation.

272

273 The fourth factor emphasizes a central concern --  
274 proportionality. The focus should be on the information needs of  
275 the litigation at hand. That may be only a single case, or  
276 multiple cases. Rule 26(b)(1) is amended to make proportionality  
277 a central factor in determining the scope of discovery. Rule  
278 37(e)(2)(D) explains that this calculation should be made with  
279 regard to "any anticipated or ongoing litigation." Prospective  
280 litigants who call for preservation efforts by others (the third  
281 factor) should keep those proportionality principles in mind.

282

283 Making a proportionality determination often depends in part  
284 on specifics about various types of information involved, and the  
285 costs of various forms of preservation. The court should be  
286 sensitive to party resources; aggressive preservation efforts can  
287 be extremely costly, and parties (including governmental parties)  
288 may have limited resources to devote to those efforts. A party may  
289 act reasonably by choosing the least costly form of information  
290 preservation, if it is substantially as effective as more costly  
291 forms. It is important that counsel become familiar with their  
292 clients' information systems and digital data -- including social  
293 media -- to address these issues. A party urging that preservation  
294 requests are disproportionate may need to provide specifics about  
295 these matters in order to enable meaningful discussion of the  
296 appropriate preservation regime.

297

298 Finally, the fifth factor looks to whether the party alleged  
299 to have failed to preserve as required sought guidance from the  
300 court if agreement could not be reached with the other parties.



301 Until litigation commences, reference to the court may not be  
302 possible. In any event, this is not meant to encourage premature  
303 resort to the court; amendments to Rule 26(f)(3) direct the parties  
304 to address preservation in their discovery plan, and amendments to  
305 Rule 16(b)(3) invite provisions on this subject in the scheduling  
306 order. Ordinarily the parties' arrangements are to be preferred to  
307 those imposed by the court. But if the parties cannot reach  
308 agreement, they should not forgo available opportunities to obtain  
prompt resolution of the differences from the court.

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# TAB 3B

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Notes on Meeting  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Dallas, Feb. 8, 2014

On Feb. 8, the Discovery Subcommittee held a meeting at the Dallas Fort Worth Airport to discuss issues raised during the public comment period. Present were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge David Campbell (Chair, Advisory Committee), Judge John Koeltl (Chair, Duke Subcommittee), Justice David Nahmias (Georgia Supreme Court), Elizabeth Cabraser, John Barkett, Peter Keisler (joining the meeting late), Parker Folse, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), Theodore Hirt (representing the Department of Justice), and Jonathan Rose (representing the Administrative Office).

At the outset, it was emphasized that although the public hearings had been completed the public comment period would remain open for another week. Indeed, it appeared that some 83 comments had been posted on Feb. 7, and that about 150 arrived during the prior week. So any discussions had to be tentative; no conclusions would be possible until the full public comment period was done. But agenda materials would be due soon for the April meeting (perhaps in the second week of March), so that it was desirable to begin reflection on what had been learned from the public comment period even before it was fully done.

The suggestion was made that there were seven big issues, of which two seemed most important. Those two issues were (a) how to deal with the culpability requirement in proposed (B)(i), and (b) how to differentiate an adverse inference jury instruction that could only be given if the findings required by (B)(i) were made from a curative "missing evidence" instruction of the sort commonly given in many cases. Additional issues that could profitably be discussed included whether to retain (B)(ii) in the rule, whether to direct in the rule that the court use the least severe sanction, whether or how to define substantial prejudice under (B)(i), and whether to try to retain all or a portion of current Rule 37(e) in the amended rule. In addition, during the hearing on Feb. 7 the question was raised whether "the" should be inserted before "litigation" to ensure that failure to retain materials for one litigation is not treated as pertinent in an unrelated later case.

Turning to the (B)(i) culpability issue, one approach might be the one endorsed by the Sedona submission that focused on a specific intent to deprive an opposing party of evidence. An alternative was the American College of Trial Lawyers proposal to include also loss of evidence in reckless disregard of the consequences of failure to preserve. The thrust of these suggestions is to ensure that sanctions could not be imposed for actions that don't involve culpability of this severity.

John Barkett was working on a review of the case law development of the culpability analysis. That work was not finished, but it has already charted out trends and themes. One thing is clear -- there seems to be considerable and clear dissonance in the cases, both among circuits and even within circuits. Another thing that seems clear is that this uncertainty can and does contribute to the feeling that one must "keep everything" in order to avoid the risk of being sanctioned later. But the reality in the Digital Age is that even an effort to keep everything is almost certain to fail in some way. The complaints voiced by many about preservation burdens have a solid foundation in reality. At the same time, the cases also demonstrate that judges have traditionally had many tools to deal with missing evidence situations, and that this body of case law has overlapped in sometimes unhelpful ways with the handling of preservation sanctions.

The current state of the case law was summarized as beginning with Judge Francis's decision in *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y.1991). In that case, plaintiff claimed injuries due to an accident that may have resulted from defects in the brakes on the bus involved. But by the time plaintiff sued, defendant had sold the bus. Despite selling the bus, defendant still had a set of repair records for that bus at the time the suit was filed, but those records were discarded after suit was filed. Judge Francis did not find that the bus company acted with bad faith or willfully when it failed to retain that set of repair records on the bus, but nonetheless concluded that the court's power to remedy such a problem should not be limited to cases involving conscious destruction of evidence. Instead, the court should be able to level the playing field by using measures including an adverse inference instruction, but Judge Francis concluded that no such instruction was warranted in this case.

Other cases since *Turner* had involved issues about whether, when, and how courts may use such measures when the loss of evidence did not rise to the level of classic bad faith. The theory in such cases seemed not to be that the loss of the evidence clearly supported the conclusion that the evidence would harm the party that lost it, but instead emphasized the extent to which courts may give weight to the absence of evidence on summary judgment motions or permit juries to do the same by giving "missing evidence" instructions in jury trials. As then-Judge Stephen Breyer explained in *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982), the adverse inference rests on two rationales. First, the evidentiary rationale is that the destruction of evidence after notice of litigation has some tendency, sufficient under Fed. R. Evid. 401, to support an inference on the likely contents of the evidence. Second, there is a "prophylactic and punitive" effect to that follows from allowing such negative inferences, for that

possibility will deter parties from losing evidence.

The Second Circuit's Residential Funding decision invoked Judge Francis's analysis in connection with "sluggish" production rather than evidence destruction. Along with other cases, it rejected the idea that there must be proof of conscious attempts to obstruct justice to support some negative consequences. Other cases dealt with the proper handling of loss of evidence in connection with summary-judgment motions by defendants who contended that plaintiffs lacked sufficient evidence to permit reasonable juries to rule in their favor; some of these concluded that the negative inference could supply the missing weight needed to permit the case to go to the jury.

The Zubulake decisions can be interpreted against this background. It must be remembered that Judge Scheindlin there tried curative measures first, but additional discovery at defendant's expense revealed further information about the inadequacy of the preservation and also that there was further destruction of evidence even after the court's orders had been entered. Only after these efforts failed did she resort to a mandatory adverse inference jury instruction. Then in Pension Committee there seemed to be a further conclusion that failure to issue a written preservation directive was itself gross negligence as a matter of law (a point on which the Second Circuit seemed to disagree in its decision in *Chin v. Port Authority*).

In another Second Circuit case involving a homeowner's suit against an insurance company for the alleged loss of \$2.2 million worth of contents of plaintiff's house, plaintiff's expert witness described seeing photos of the contents of the house even though plaintiffs claimed they no longer had any photos (or other evidence) of the contents. The district court gave a curative missing evidence instruction, leading to a defense verdict. On appeal, plaintiffs invoked Residential Funding but the court ruled that this was not a preservation case and that the instruction was proper. This is consistent with the idea that missing evidence trial measures are distinct from punitive sanctions.

In summary, the Second Circuit approach seems best described as a case-by-case approach. One consequence appears to be that "People in New York are scared to death. The presumption of prejudice coupled with sufficiency of negligence to support that presumption is terrifying."

Other circuits set the culpability threshold for punitive sanctions higher. In the Fifth Circuit, bad faith is required, and even a finding of bad faith does not lead automatically to adverse inferences. In *Rimkus*, for example, Judge Rosenthal found bad faith but still did not use harsh sanctions. In the

recent decision in *Actos*, the judge said she would wait until trial to decide what measures seemed warranted.

To sum up, it seems that bad faith is generally required for inherent authority sanctions, but if Rule 37 is triggered (as was essentially true in *Residential Funding*, where the court was involved in setting deadlines for completion of discovery tasks), the judge has latitude to act without a finding of bad faith. At the same time, the "ancient" common law idea that failure to produce evidence within a party's control can support the inference that the evidence would be unfavorable has not called for inquiry into the culpability of the party that did not produce the evidence. Under even Second Circuit law, that is a qualitatively different measure, with emphasis on its curative effect.

One way of illustrating that point is to look at the *Devitt & Blackmar* missing evidence instruction. This is a standard instruction, and it does not emphasize whether the party that did not produce the evidence acted in bad faith. Instead, it was viewed either as a curative measure or a reasonable inference to be drawn from the evidence that was produced. The standard instruction says that where a party had evidence within its control that it could have produced and that would have been material, the jury could infer that the evidence would have been harmful to the party that failed to produce it. There is no punitive attitude or opprobrium associated with the "missing evidence" instruction like the punitive mandatory adverse inference sanction.

So there are two parallel sets of legal developments. One is the longstanding permission to argue for such an evidentiary inference, and the other is the sanction for failure to preserve, often described as an adverse-inference instruction. One way to distinguish might be between a "mandatory" and a "permissive" instruction. The former either tells the jury that the court has found that a party failed to preserve what it was legally required to preserve and/or that the jury must presume the lost evidence would be harmful to that party, while the latter informs the jury that it may make such an inference if it finds that the party failed to produce evidence.

There may be something like a blending of these two in the draft rule as published. On the one hand, it requires a culpability finding to support an "adverse-inference jury instruction." On the other hand, it says the court may "order curative measures" whenever a party fails to preserve discoverable information. On the latter point, the Note says: "Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information." That Note may be incomplete in that it



does not specifically refer to either an instruction about the legal standards governing preservation of evidence, or the "missing evidence" instruction described above.

One reaction was that the state of the case law is that these possibly separate strands "blend together," which inherently complicates the decision process. In the Fourth Circuit, for example, bad faith must be proved to support a sanction. But that requirement does not apply to the "curative" permissible inference instruction.

That observation prompted the question whether under our rule proposal a judge could dismiss a claim as a "curative measure" due to loss of evidence under proposed (e)(1)(A). Maybe that's the best or only way to "cure" the harm resulting from the loss of evidence. This drew the response that one could argue that it is, and that *Silvestri* is an example of that sort of thing.

But the problem is that unless (B)(ii) is retained in the proposed rule, the rule says you can't do that without a finding of serious culpability. Dismissing a claim is a sanction listed in Rule 37(b)(2)(A), and our rule says that those sanctions can be imposed without a prior court order but only based on findings that satisfy (e)(1)(B). But that might be the only curative measure that would put the party in the position it would have been in had the evidence been preserved.

The point was expanded by reference to the other actions mentioned in 37(b)(2)(A). For example, because 37(b)(2)(A)(ii) refers to "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence," it appears that even those measures would be "sanctions" under our rule and therefore not available as "curative measures under proposed (e)(1)(A).

These observations drew the reaction that it may have been problematical to "put sanctions in a box" in hopes that we can thereby stop overpreservation. For one thing, several witnesses at the hearing on Feb. 7 said that they would actually not do anything different if the new rule were in effect. Even if we could put sanctions "in a box," that would not solve the problem we have heard about. Repeatedly, those who were affiliated with corporate litigants affirmed that they would still preserve a great deal. There are other preservation requirements besides the one prompted by anticipation of litigation, and corporate parties may keep potential evidence because they expect to use it to win their cases.

But it also seems that "sanctions" cannot really be put into a "box" that is entirely distinct from "curative measures" such as the traditional "missing evidence" instruction. Instead,

there is a continuum. Some actions that may be "sanctions" in some contexts are "curative" in others. Perhaps, if we said that one must use the least severe sanction needed to repair the harm we would be saying that even sanctions must be "curative." One consequence of our rule therefore might be that many curative measures may be employed only if culpability sufficient to support a punitive sanction is proved. But that could severely circumscribe the ability of courts to deal with missing evidence problems, while still not solving the overpreservation problem.

A response was that at present it is clear that the Second Circuit attitude toward the risk of sanctions is key; the risk of facing the presumption that the loss of information causes prejudice is pervasive because it's impossible or almost impossible not to lose some information in the age of BYOD.

A reaction was "This is a terrible situation." The Supreme Court is unlikely to resolve this conflict. That is one of the things that rule amendments are for. There is a need here. We should not abandon the effort to provide some relief, even if we cannot provide as much relief as we may originally have hoped. This is very important, but it is also very difficult to craft general rules that accomplish what we want without also causing negative effects. It is likely that we want to avoid disabling courts that want to use various curative measures while we do want to prevent them from doing similar things as punitive sanctions. A key problem is how to specify in a rule which is which. It may be that simply invoking the list in 37(b)(2)(A) is not sufficiently precise. One way of putting it is to ask whether there is some definable category of court actions that may be employed only on proof of culpability. It seemed that even defense-side lawyers recognized during the Feb. 7 hearing that some curative actions should be permitted without culpability requirements.

A member suggested that the comment submitted to the Committee by Judge Francis seemed to offer a useful analysis. There is a drumbeat about preservation burdens. But this rule will not entirely solve that problem for the people most concerned about it. For one thing, our rule does not change the duty to preserve. Moreover, there are state-by-state rules that do not entirely match up with each other. What our rule might do is constrict the discretion of judges to respond creatively to loss of evidence. On that point, Judge Francis's view seems to be that we should keep focused on the reality that the party that lost the evidence is more at "fault" than the one who is deprived of the evidence. But that kind of evaluation depends unavoidably on the facts of a given case. And several things on the 37(b)(2)(A) list may be the best "curative" measure when employed in a given case. Judge Francis tries to capture these ideas in his submission; his language may not be perfect but deserves serious attention. Then it seems that one could go beyond that

necessary to cure is permitted only where warranted to deter. In terms of the point made by Judge Breyer in the First Circuit case, "evidentiary" solutions are "curative" and "prophylactic and punitive" objectives are proper only when bad faith is shown. So a more careful focus must be made on what is "curative" and what is "punishment." For the latter, this member would be open to including recklessness as sufficient culpability.

A different summary of the discussion was that the classic doctrine on the "missing evidence" evidentiary treatment breaks down in the age of computers because the computer world is different. And the key concern is the presumption of prejudice. One key point about the curative measure approach is that it calibrates any action to the prejudice involved. But the sanctions approach simply assumes prejudice when the requisite culpability is shown. Where negligence is sufficient, there will almost always be the possibility to argue that something more could be done to preserve information that was lost. If that's all one has to show to justify punitive sanctions, one could argue for spending almost without limit to avoid loss of anything.

A reaction was that "My view is not contrary to that." Prejudice is key to everything. Curing that should be the goal. And prejudice probably should be assumed only when bad faith is proved, although perhaps recklessness might suffice.

Another member noted that "It sounds like we are embarking on an ALI Project on the Rules of Spoliation." It is probably not possible for us to solve problems of overpreservation with our rule. The testimony we have heard supports that conclusion. At the same time, it is important that we not incetivize spoliation as a litigation weapon. "I don't like sanctions, but gap filling where evidence has gone missing is good. Punishment is bad." Therefore, we should not curtail the use of missing evidence instructions where justified. "I'm more concerned with what the other side has but doesn't give me than with what it no longer has." Discovery abuse is probably more significant than what we are talking about.

An effort was made to summarize the discussion in light of the various issues before the group. It is not clear that (B)(ii) need be retained. It does appear that the idea of "curative measures" in (e)(1)(A) needs to be fleshed out, and that those could include measures like at least some of the "sanctions" identified in Rule 37(b)(2)(A). Perhaps one way to make distinctions would be to put the word "mandatory" before "adverse inference jury instruction" in (B)(i), distinguishing the traditional permissive inference curative measure. At the same time, it would be good to remove "willful" from (B)(i), leaving it requiring a finding of bad faith.

A reaction was that this would leave the proposed rule still tethered to the list in 37(b)(2)(A) as all "sanctions." But it was proposed that the solution to that problem is to abandon the invocation of 37(b)(2)(A). That was shorthand, and it served to explain how the rule would curtail inherent authority. But the method of curtailing inherent authority is mainly dependent on affirming the court's authority to take measures for failure to preserve, not on invoking the sanctions provisions of the rule regarding violation of discovery orders. Indeed, Rule 37(c)(1) specifically authorizes exclusion of evidence (something on the list in 37(b)(2)(A)) without the need for a prior order.

The problem that emerged was to define what is permitted as "curative," and distinguish that which is a "sanction." It is likely that several measures would show up on lists of "curative measures" and of "sanctions." To some extent, it may be that clarifying that some of these measures may on occasion be employed even though they are not "sanctions" is important. In terms of opprobrium, a curative measure is very different from a sanction; having to deal with a curative measure does not involve any opprobrium, but a "sanction" does. It can even have adverse impact on an attorney's career. For a "sanction," one should have to prove bad faith.

One reaction was: "The least you can do is to cure prejudice." Indeed, one might almost say that the "least severe sanction" attitude implies something like a "minimum needed cure" attitude. But it may be that there is not an absolute distinction in terms of which measures are which.

Another reaction was that this might best be limited to ESI. That is where the problem exists. That prompted the response that if one looks down the road one can see that problem will get ten times larger. Soon there may be three times as many devices as there are people in the world, and those devices will have the capacity to store and generate more information than current devices can do. And it will all be in the cloud. Maybe we should not try to create a rule for today's problems because we can't be confident about what tomorrow's problems will be.

That prompted the reaction that some on the plaintiff side are beginning to recognize that these issues are extremely important on both sides of the v. During the Phoenix hearing one of the witnesses was a defense-side lawyer who had written a National Law Journal article on how preservation failings could be used against plaintiffs, and he acknowledged in the hearing that a rule like our 37(e) would provide important protections for individual plaintiffs. But another reaction was that "This will be obsolete in three years."

Stepping back, another member observed that we seemingly want to do several things and should be focused on them and

modest about whether we can achieve them perfectly: (1) Define and cabin "sanctions" with a bad faith requirement; (2) Reduce or eliminate gotcha games; and (3) solve the circuit split. A reaction was that the idea of distinguishing between curative measures and sanctions is important, but hard to do. We have to worry about whether adopting a rule could produce results even worse than the current situation.

A response was that the biggest source of current difficulties is the presumption that negligence gives rise to an inference of prejudice. Another member agreed -- "This will eliminate that strand of the law. The sole exception to the need to demonstrate harm is when there is bad faith." But we need to define bad faith. When that is found however, the court may presume prejudice and use a punitive sanction such as a mandatory jury instruction or a punitive dismissal.

But it was noted that Rule 37(b)(2)(A) deals with "sanctions for disobeying a discovery order" and some of them could be curative or punitive. One response is that violation of a court order is bad faith. Another was that "Bad faith is the way to go." Thinking in terms of "boxes," one might imagine two -- "curative" measures are those that are the least severe necessary to cure the (demonstrated) harm to the other side's case, and "sanctions" that may be used only if bad faith is proved.

A reaction to that approach was that there is a lingering problem with "bad faith." Does it require a specific intent, and who has the burden of proof? A reaction was that sometimes there is little ground to debate. In one case, for example, the spoliator used a program entitled "Evidence Eliminator" the night before a computer hard drive was to be examined.

Another response was that there is an interplay between the vagueness of prejudice and the extent of cure. For example, consider an order to pay the costs of additional discovery. That prompted the reaction that this is "inherent in the idea of cure." And there may be many things that do not involve the conduct of the trial or jury instructions that could be curative measures. For example, ordering that backup tapes be restored when that would not otherwise have been ordered. But it was emphasized that there must be efforts to avoid a mini-trial on whether there has been prejudice.

One way of looking at it might be that there are really three types of orders involved: (1) sanctions; (2) curative measures; and (3) case management orders. Certainly some case management orders (such as determinations about what discovery is warranted under the "proportionality" factors) may focus on material that would also be pertinent to determinations about "sanctions" and "curative measures." This echoes a point made in a Sedona submission.

A summary was attempted: We should keep proposed (e)(1)(A). It would benefit from having examples of measures that a court could employ. Then proposed (e)(1)(B)(i) would authorize sanctions that are not curative only on a finding of bad faith. Perhaps those should become (e)(1) and (e)(2) to emphasize the separateness of the two ideas.

It was suggested that under this formulation one could remove "substantial prejudice" from (e)(2) because when bad faith is proved one may presume prejudice. That would not mean a court is forbidden to consider this factor, but only that it need not impose on the victim a duty to go beyond proving bad faith and prove prejudice as well. A reaction to this idea was that the Fifth Circuit would not support overlooking proof of prejudice. And leaving in the "least severe" sanction requirement seems a good idea, in part because that would ensure a ground for appellate review.

This prompted the question "what if there's no demonstrated prejudice?" What if there is a totally bad faith effort to destroy evidence that fails -- The Keystone Cops Destroy Evidence? One response was that then the rule does not apply because there was not a failure to preserve. Another is that there's nothing to cure, which could be true if restoration of backup tapes presented all that was "erased," after all. The least severe sanction requirement has been read into 37(b)(2); there may be not need to be explicit about it in our rule.

Attention turned to the factors now listed in proposed (e)(2). An initial reaction was that they make sense in regard to curative measures, but less so in regard to sanctions. They look like reasonableness; saying that they bear on bad faith would be unnerving to some who most want a rule on this subject. An immediate reaction was that they also provide guidance regarding bad faith. Circumstantial evidence could bear on bad faith. If there were abundant warning signs of impending litigation and the party's own documents show that it knew litigation was coming (Factor (A)), if the party nonetheless made no efforts to preserve anything while knowing that its auto-delete would sanitize the trail (Factor (B)), if the effort involved in preserving the needed material would be minimal (Factor (D)), one could infer that the party actually wanted the material to go away.

But a response was that Factor (C) seems to be included in Factor (B), and that Factor (E) seems like it's courting undue motion practice. And what about other things that might be added, such as the extent of the prejudice, whether there is a viable way to remedy the loss of this information, and the extent of culpability?

It was noted that a proposal was made before final approval

of the proposed rule for public comment that proposed (e)(2) apply to selection of remedies. That was not done. One concern at that time was that the factors did not bear on proposed (B)(ii); if that provision is removed, that concern would disappear. Moreover, if we recognize this as a problem that is arrayed along a continuum rather than fitting into two hermetically sealed boxes called "curative measures" and "sanctions," it seems sensible to consider factors that bear on both sorts of responses. But the response was that if bad faith is required for sanctions, why should these other factors matter? Do they limit the court's power to punish?

One reaction was that it's very difficult to prove bad faith, unless one has a smoking gun. It must usually be proved circumstantially. An example might be the Sekisui case decided by Judge Scheindlin. In that case, the party accused of spoliation had directed an outside vendor to purge email files and the vendor responded that this seemed like a risky thing to do. Despite that resistance, the party insisted on purging the files. That might be evidence that would support a finding of bad faith.

A different way of looking at the factors is that it would be desirable to foster consensus on a rule proposal. In fact, this proposal has features that should be valuable to both plaintiffs and defendants. It would be desirable to avoid including things that defeat that purpose unless they are essential. And there is at least a possibility that some of the factors would unnerve a significant number of observers.

One suggestion was that proposed (e)(2) could be changed to say that the factors bear on evaluating the culpability issue and also in deciding the extent of a remedy. A reaction was that Factor (A) is very relevant to bad faith. Consider, for example, a case in which an executive went to the office and erased files on a Saturday after a Friday news story about the company.

Another suggestion was that the ordering of things might be (1) curative measures; (2) factors; (3) punishment for bad faith.

Another summary of the discussion was that we should keep the basic structure but recognize the overlap between curative measures and penal measures. That would involve removing the invocation of Rule 37(b)(2)(B) because things on that list may be used for curative purposes, although a few are only sanctions. For example, a presumption of prejudice, a mandatory adverse-inference instruction, a punitive dismissal, or contempt are only penal. For them, one must make a finding of bad faith. But for curative measures, of whatever sort, one does not need to find bad faith. The factors, meanwhile, may bear principally on the application of the preservation requirement and the remedy needed.

A reaction to this summary was that the revised rule would likely to be more useful to litigants other than the large companies that have been most active in consideration of these issues. Individual plaintiffs, governmental entities, small companies, etc. are more likely to run into problems than large corporations, which are already fairly organized and well-informed about many of these issues.

Discussion turned to what is curative and the role of the factors. One focus of attention was Factor (C), which several found troubling. Already such preservation letters often arrive with absurdly broad demands. That sort of thing might actually provide useful information, but the concept may be captured by (A).

Discussion shifted to ways in which curative measures might not involve measures that directly affect the conduct of the trial. One example would be shifting the cost of additional discovery or investigation made necessary by the inappropriate deletion of data. Awarding the monetary costs of such efforts is routine and explicitly encompassed within proposed (e)(2)(A). And in some cases, even bad faith efforts to corrupt litigation preparation may prove ineffective. For example, in a case challenging the conditions on a prison death row defendants tried to affect testing by adopting climate control efforts when the testing was done. The solution was to re-test the facility when its condition was not altered by such measures.

Discussion turned to whether there should be an effort to integrate present 37(e) into the revised rule. The Department of Justice comment urged retention of its provisions even though they seem to provide no protection beyond what is provided by the revised rule. One possible difficulty could result from retention of proposed (B)(ii), but the orientation seems to be that it can be removed. Now one must prove bad faith to support sanctions; surely that cannot be proved as to "good faith operation of an electronic information system" within the meaning of the current rule.

Again recapping, it was suggested that a redrafting effort for purposes of further discussion would involve several things: dropping proposed (B)(ii); integrating "least severe sanctions"; expanding "curative measures"; limiting what is now (B)(i) to bad faith; reexamining the factors, particularly (C) and (E) and perhaps relocating them; and considering adding "the" before "litigation" (even though this might produce difficulties).

In connection with bad faith, it was suggested that the rule itself might define the term, or perhaps that the rule should not use the term but instead only the definition. But it was not clear whether it should include a situation where the person consciously fails to comply with known preservation duties.



(This relates to a hypo during the Feb. 7 hearing -- what if a party decides that preservation is too expensive and says it should not be done without knowing what's being erased?)

Another point was that the revision should make clear that the presumption of prejudice is key; only with bad faith is that proper. With more aggressive curative measures, there seems to be less need for a broad definition of bad faith.

Another recap reminded the group that we should keep in mind whether current (e)(2) is only about curative measures and the duty to preserve, and not also about bad faith. If so, the sequence of presentation might be: (1) Curative measures; (2) Factors; (3) Sanctions.

Another reminder was that on the plaintiff side there is much concern that it's not really possible to prove prejudice, but that does not mean there is none. To some extent, there is no alternative to having that which was lost. A reaction was that we surely don't want to prevent the court from allowing all this to be presented to the jury.

It may be that some who have applauded our efforts will be disappointed with a revised amendment along the lines sketched for purposes of further discussion. At the same time, with the sanctions provision limited to bad faith, it will be difficult to explain why a party found to have acted in bad faith should be protected against punishment. And with regard to curative measures, it would difficult to argue that parties that have failed to preserve as they should can prevent judges from using measures that level the playing field so long as they are limited to what is necessary to undo the harm and do not imply culpability. The basic principle might be: "If you hurt the other side by failure to preserve, the judge can cure that."

Under such a rule, a company could admit that it destroyed information but also argue that substitute information is available. "No harm, no foul" is available in such a situation. Even cases that allow a presumption of prejudice do not make it mandatory. For example, in the Stevenson case the Eighth Circuit upheld that presumption that a railroad that destroyed records relating to a fatal accident inflicted prejudice on plaintiff, but also held that the trial court should have permitted the railroad to offer evidence at trial to rebut that idea.

The next step is for Prof. Marcus to try a rule redraft for discussion purposes. As noted at the outset, the public comment period is not yet over. It cannot be said with confidence whether additional important points will be made, although many recent comments seem to reiterate points already made in earlier comments. Though those newer comments emphasize the importance of these points, they do not really require entirely new

discussions. After that redraft is circulated, the next step will be a further conference call to react to the redraft.

A final brief discussion noted that these revisions would almost surely be well within the ambit of what can be done without any need to republish. On that score, the Committee's five questions in the invitation for public comment identified many of the issues that are now the focus of possible revision.

Notes of Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Feb. 20, 2014

The Discovery Subcommittee held a conference call on Feb. 20, 2014. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Justice David Nahmias, Elizabeth Cabraser, Parker Folsie, Andrea Kuperman (Chief Counsel, Rules Committee Support Office), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

The call began with a summary of the current state of Subcommittee deliberations. After the Feb. 17 conference call, Prof. Marcus circulated drafting options in three versions, with attached questions. Later, Judge Campbell circulated another set of drafting ideas, and Elizabeth Cabraser developed and circulated yet another.

Among the live issues presented by these various drafts were (1) whether to limit the rule to electronically stored information; (2) whether to retain the provisions of current Rule 37(e); (3) dealing with the dividing line between curative measures and sanctions in the rule; and (4) the "huge geography" within the phrase "adverse inference."

Various others had circulated observations about these topics, including Ed Cooper, John Barkett, and Parker Folsie. These ideas included limiting the rule to ESI, keeping current 37(e), recognizing that prejudice and fault can't be fully separated, recognizing that we no longer are focused primarily on eliminating over-preservation because that does not seem to be something we can affect very much. So we are focusing instead on a different goal -- addressing ways to cure the problem of lost information, and keeping uniformity as another goal (though likely not entirely achievable). The discussion also urged deferring a final decision on whether to limit the rule to ESI only; once the rule is pretty firmly in place, it was recommended, it will be possible to reflect on whether there are reasons why that which will work for ESI will not also work for other forms of information.

The first participant saw several major issues: First is the question whether to limit the rule to ESI. A renewed reading of John Barkett's memo on judicial handling of these issues inspired feelings of humility. Judges have been grappling with how to handle these problems literally for centuries. That should make us wary about undoing all this accumulated wisdom about missing evidence and spoliation at one fell swoop.

That said, ESI is simply a different creature. It has certainly not been the focus of this body of decisional law developed over the centuries. And it has distinctive characteristics that are peculiarly important on the subjects we

are discussing. Now many people probably generate the equivalent of millions of documents that are subject to relatively easy alteration or deletion. ESI is simply different from hard copies in a file cabinet or a car involved in a crash.

That reality affects our approach to current 37(e). Dealing with ESI raises issues for which current 37(e) provides a useful baseline. One valuable thing about it is that the rule now says that it's o.k. to have a routine of discarding things when they are no longer needed. Having an auto-delete function is acceptable. So it seems important to preserve that in the rules, although the current rule speaks of "sanctions," which may not be the right term to use as we refine our handling of these matters. We should preserve the idea that "routine operation" is all right.

A different concern is whether to list examples in the rule, and if so where to put them. If one important goal is to overturn the Residential Funding rule, it is probably important to list examples and insulate against use of certain measures in the absence of certain showings. A severe judicial measure should not occur, for example, without either prejudice or high culpability. Unless we act with care, the rule could say that extremely important "curative measures" could be authorized without any showing of either culpability above negligence or prejudice to another party.

An interjection asked whether that would mean that the rule would apply Residential Funding across the country; the result could be the reverse of what we were discussing before, which was to curtail the handling of sanctions in the Second Circuit rather than opening up freer us of sanctions in other parts of the country.

Another approach was outlined by another participant -- including in one draft a detailed listing of measures and allowing some overlap in when they can be used. The goal was explained as not supporting a presumption of prejudice whenever information is lost negligently but rather to recognize that there is a continuum and that judges should have latitude to adapt their treatment of the problem to the specific circumstances of the case involved. "It's hard to imagine that a court would impose any serious consequence without proof of prejudice. For example, both sides may want to present evidence of loss of evidence, and make arguments about it. It is attractive to think we can find a bright line, but that's probably not possible."

Another member reported coming around to the view that it would be safer to limit the rule to ESI. In addition, it seemed proper to insist on a showing of prejudice. Preserving the essence of current 37(e) also sensible. But it's not clear how to do that. One approach would be to say that no curative or punitive measures could be taken if current 37(e) applied. But if very mild measures

are "curative," why not allow them? And how could current 37(e) ever apply, given that our rule is only about failure to retain information in anticipation of litigation, and current 37(e) recognizes that there is a duty to preserve when litigation shows up on the horizon. Failure to do so is not "good faith" operation of an electronic information system. How can it be consistent to say that the judge nonetheless may not take action to deal with failure to preserve? Moreover, if "routine operation" precludes application of curative measures, haven't we nullified an important feature of what we want to do?

On the other hand, the trigger for imposing a litigation hold (what the Committee Note to 37(e) says should be done) may often be hard to discern, and the scope of the hold may be hard to determine as well. These difficulties are likely more challenging in the pre-litigation phase. So it could often happen that a party initiated a litigation hold but that it did not involve stopping all auto-delete features of a system. Indeed, doing that might threaten to disable some systems in relatively short order.

One reaction regarding current 37(e) is the at least it would be important to remove the reference there to sanctions "under these rules." That excludes "inherent authority" measures, and also presumably places no limitations on anything done under the rules that is not a "sanction." The question what is a "sanction" is, of course, at the heart of one of the issues we are addressing.

A response was that it is important to preserve the idea that retaining 37(e) should not trump everything else we are doing, particularly since the new provisions kick in only after the party is under a duty to preserve for possible use in litigation.

Another concern is whether it is wise to say that we are concerned only about the loss of "discoverable" information at that point. Given the introduction of proportionality into the formal scope of discovery, does that create a risk that parties will say that they did not preserve because it was not proportional? A reaction to that concern was that the inclusion of proportionality in the factors list might be the right focus, rather than reference to proportionality as a limit on the scope of discovery. The real issue with regard to preservation is not discovery specifically but preservation only.

A response was that only discoverable information could be the subject of a duty to preserve. Another said that "discoverable" is not needed, and possibly problematic. Is there a suggestion that one could subvert the preservation requirement by invoking proportionality to excuse failure to preserve because information probably would not be "discoverable" on proportionality grounds?

That drew a counterargument. In the first place, despite receiving an avalanche of comments, it appears that nobody objected

to the use of "discoverable" in our draft. Concerns about the revision of Rule 26(b)(1) on this point seem overblown. In a sense, proportionality has been in the rules for a long time, and nobody has warned that it undermined preservation before. And it would be almost foolhardy for a prospective litigant to assume it will later be able to persuade a judge that its decision not to preserve something on this ground was justified.

Another reaction was "Is there a duty to preserve non-discoverable information in anticipation of litigation? Why would that be?"

Reacting to this discussion, another participant pointed out that the basic thrust of the factors is on reasonableness. The real question is whether it was reasonable to do what the party accused of spoliation did.

The issue was pursued with the concern that 37(e) is limited to ESI. Does it matter that the demarcation between that and other items is blurring? Do the rules really define what ESI is? Will there be a "bleedover effect" of 37(e) even though it is directed only to ESI?

One reaction was that the Committee Note to Rule 34 in 2006 emphasized that the expectation then was that the term ESI would be broadly interpreted. And various tough-to-categorize examples have occurred to the Subcommittee. The black boxes in cars are one example -- are they ESI or tangible items? Similarly, it is reported that there is robotic surgery -- robots controlled by computers performing surgery. Is the software ESI and different from the rest of the robot?

The suggestion was made that we draft only for ESI. With regard to other sorts of evidence, the common law of spoliation still applies. If and when a judge is faced with a hybrid issue, the judge will have to come up with a sensible resolution. We can't easily do that with a rule. Instead, we should focus on the big problem, and the big problem is limited to ESI.

Another participant favored limiting the rule to ESI. Once that is done, we may want to step back and ask whether it should be so limited. But that's the right starting point. It also was a good idea to keep current 37(e). But it's equally important to make sure that we disapprove Residential Funding, or at least the ways it has been used.

For this participant, the most troubling question is whether to include examples. What is the point of doing that if the list is not a limitation? The real objective should be to define what's not allowed without certain findings. If we can't agree on that, why have examples? Maybe Alternative no. 3 really is the way to go; it has descriptive features but does not offer examples of

them. And probably the lists of examples would overlap. At least some of the drafts circulated before this call do have overlaps. What is the utility of a rule like that?

A reaction regarding Alternative no. 3 was "What change would that sort of rule make in the current law?" The response was that "curative measures" are allowed only to cure proven prejudice. "That overrules Residential Funding." With punitive sanctions, if Rule 37(a)(2) is not the guidance needed, then we should at least drop the invocation of Rule 11's invitation to use measures to deter.

In sum, the reason we are being cautious is that the decisions depend on the nuances of individual cases. Do the factors assist in this regard? The reaction was that "The factors are obvious. Any judge or lawyer would address them." So the main thing is to see if one can subdivide the sorts of orders that might result from spoliation. Can we say, for example, 3 are o.k. with no showing, another 3 are o.k. with a showing of prejudice, and 4 are only allowed with a showing of high culpability? If we can't say that, why have a list?

Another reaction was that it is difficult to focus only on prejudice or only on culpability. Instead, it seems that both matter together. But the reaction to that is that "These are rules we are making, not just standards." If we can agree on examples, they are useful. But if it's not possible to say that certain measures are only permitted with a certain trigger, that is not useful.

This discussion suggested a possible way forward: Some things, such as striking a pleading, are only in the highest culpability category. A mandatory adverse inference instruction seems to be in the same category. So that's a start.

But another reaction was "Can directing that facts be taken as established possibly be regarded as 'curative'?" That seems mandatory. Another was "That's not so different from saying you can't offer evidence on or oppose certain contentions."

Another suggestion was that these sorts of things may have to be addressed in the Note rather than the rule. The guide should be that the purpose is to cure the problem, not to punish. Saying more than that is likely to be difficult to do in rule language.

Another alternative would be to use examples that are fact patterns. Those could illustrate more effectively. "In a case where X, Y, and Z have happened . . ." That drew the observation that "If the group can agree on examples, that's something."

Summing up, the following was offered as the next drafting steps:

(1) Continue to think more clearly about descriptions that give guidance. Saying loss of anything that is arguably relevant suffices to support stern measures would mean no change in the law adopted by judges in the Second Circuit.

(2) We should downplay any strong justification in terms of reducing over-preservation. Now we see that our rule will not much affect that behavior, so the tradeoff in lost judicial latitude is too costly. But we need to ensure that the most severe measures are available only for the most culpable conduct. That would overrule Residential Funding.

Agreement was expressed on the ground that there seems consensus on including default judgments, striking pleadings, dismissals and mandatory adverse inference instructions in the high-culpability category. The "low end" measures can probably be identified also. Maybe the answer is to leave the in-between category free of examples.

Summing up for the next round of drafting, therefore, the blueprint is:

- (1) Keep current 37(e) somewhere
- (2) Limit to ESI
- (3) Try to find consensus on examples at least at the ends of the spectrum.

Another problem came up -- How do we fit that with current 37(e)? One difficulty is that the rule we proposed and current 37(e) are different in basic orientation. Current 37(e) says that courts may not do certain things (sanction). Our rule says courts may do certain things only on certain showings. That is a different orientation. To keep the current 37(e) raises the risk that it would nullify what is authorized by the new parts of the rule.

This drew the response that perhaps we could rewrite the current rule along the following lines: "A party does not fail to preserve . . ." But that drew the objection that current 37(e) itself assumes that a litigation hold will result from a trigger event.

The next step is for Prof. Marcus to prepare a further draft and for the Subcommittee to schedule another conference call, hopefully on Feb. 24 or 25.



Notes of Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Feb. 25, 2014

The Discovery Subcommittee held a conference call on Feb. 25, 2014. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Justice David Nahmias, Elizabeth Cabraser, John Barkett, Peter Keisler, Parker Folsie, Andrea Kuperman (Chief Counsel, Rules Committee Support Office), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

The call began with a summary of the current state of Subcommittee deliberations. Prof. Marcus circulated a set of redrafts on Feb. 21, and various additional drafts had been circulated by Judge Campbell, Elizabeth Cabraser, and Parker Folsie. Most recently, Judge Campbell had circulated a revised version of his redraft early on Feb. 25.

An initial suggestion was that there seemed to be at least three basic issues to address during this call: (1) Was the Marcus Feb. 20 redraft or the Campbell "rifle shot" approach preferable?; (2) Should we retain current 37(e) in a revised draft?; (3) Should the rule authorize the actions specified in Rule 37(b)(2)(A), or at least some of them, by cross-reference? (For example, as pointed out before the call, one of those actions is a stay, and that seems inapplicable to the lost evidence situation.)

The "rifle shot" approach was introduced as aiming largely to deal with the exact issue presented by Residential Funding -- that negligence alone would support an inference of prejudice and therefore a mandatory adverse inference instruction. Beyond that, there seemed value to address also a larger question about what else a court can do, seemingly justifying a cross-reference to at least some of the actions described in Rule 37(b)(2)(A).

At the same time, it seemed best not to try to keep current Rule 37(e). That rule ceases to apply once a duty to preserve arises, and our rule addresses preservation only from the time a duty to preserve arises. So it seems implicit in our rule that no sanctions can be imposed for failure to preserve before that duty arises, since under our rule sanctions are permitted only if (a) a duty to preserve arose, and (b) a party destroyed evidence with the intent to deprive an adverse party of that evidence.

Another matter involved in the drafting of the rifle-shot approach was to try to cabin sanctions based on "inherent power." Although the Supreme Court's *Chambers v. NASCO* decision seems clearly to require bad faith for a court to use such authority, it is not clear that all lower court cases do so. By invoking Rule 37(b)(2)(A) only as to certain matters where an intent to deprive of evidence is found, we could cut off use of inherent authority in

other situations. It was suggested, however, that achieving that result might not depend on invoking Rule 37(b)(2)(A); perhaps all that need be done is affirmatively to authorize the use of some "sanctions" for failure to preserve, and thereby to show that the problem is covered by the rules. Covering it in the rules should suffice to mean that inherent power is unnecessary and therefore should not be used, as articulated in our current Committee Note.

Yet another effort made in the redrafting was to introduce consideration of both culpability and prejudice with regard to both curative measures and "sanctions." Thus, the draft "curative measures" provision permits additional measures when "culpability" is shown, and permits the use of measures either to cure prejudice or to deter culpable conduct.

An initial question was about "culpability." Would that include simple negligence? The answer was yes. As Judge Rosenthal's opinion in Rimkus shows, prejudice and culpability work in tandem in guiding the court in making decisions in this area. A follow-up question was whether this meant one could use measures to deter negligence. Yes, it might. The idea is that the Note would explain that the two factors work in tandem.

The question then became whether the rifle-shot draft got closer to the goal of having a revised rule than the Feb. 21 draft.

An initial response was that it did not seem to do so. This member agreed that we are better off not retaining the provisions of current Rule 37(e). But the drafting seems to have blended elements of punitive and curative measures into a single provision. The inclusion of both prejudice and culpability in the same provision, and the inclusion of companion goals of curing prejudice and deterring culpable conduct creates confusion.

The response was that this blending "comes from the cases." The courts are looking to both factors in deciding cases, and we should also do so in our rule. Judges don't seal off their minds and think only about one or only about the other. A reaction to that response was that "It's problematic to blur" the two together in the rule.

Another reaction was that invoking the list in 37(b)(2)(A) gets away from a better idea of not including examples in the rule. And it creates problems in that not only do we want to leave out (vii) (contempt) but also (iv) (stay). Having a list creates a risk that courts will conclude sometimes that the only things allowed are what's on the list in the rule. Unlike earlier drafts, this list is not preceded by "including," so it seems this is all that can be done.

And what's on the list in the "sanctions" part of the draft may be overbroad. The Residential Funding issue is with mandatory

adverse inference instructions; in the words of the draft, that is an instruction that the jury "must presume the [lost] information was unfavorable to the party." But the draft also included "may . . . presume" as within the sanctions category. Isn't that what a "missing evidence" curative instruction will do?

Another member built on these comments of concern about the presence of culpability and prejudice side by side in the draft of "curative measures." A rule might better cut off some things unless a finding of culpability of certain magnitude is made. For example, consider cases with low culpability but high prejudice, high culpability but low prejudice, and medium culpability and prejudice. Should those all be handled the same? Does blending the two considerations really result in a rule that constrains judges? Can a sanctions decision be reviewed on appeal? Even with simple negligence alone and no significant prejudice, is there nothing off the table? Could this actually mean that Residential Funding is affirmed, not repealed?

The response was that a mandatory instruction would not be available absent proof of intentional destruction to deprive another party of evidence. That is the method of overturning Residential Funding. The various situations just described can be handled in the curative measures provision so long as it says that the court should use the least severe sanction necessary. An exception can be built in for exceptional cases, but even that might not be necessary in that (in the terms of our published (B)(ii) draft) dismissal or default are probably warranted only when they are the least serious measure that will undo the harm.

This drew the reaction that prejudice and culpability are separate inquiries. With prejudice, the judicial reaction should be "What is needed to cure?" With culpability, the judicial reaction should be "What is needed to deter?" Those are different things. That was the way we were talking about these issues before, and that way is better than blending together.

The suggestion was that culpability and deterrence could be removed from the "curative measures" provision. Then the progressive arrangement of the rule might be something like (1) failure to preserve may support certain curative measures without any finding of prejudice; (2) with a finding of prejudice, the court may in addition take further measures; (3) with a showing of high culpability the court could take measures to punish or deter. This approach could be explained further in the Note, and the addition of culpability and prejudice to the factors list in (e)(2) could tie in with this progressive attitude toward authorized judicial responses to loss of evidence.

That led to the question whether it was wise to set the bar as high as the draft set it for "sanctions." It requires that the party act with the intent to deprive another party of the evidence.

Should the standard for sanctions be that demanding?

A reaction was to ask whether it should be made clear in the rule that a "missing evidence" instruction is not dependent on this demanding showing. Removing that from the list of measures that require a high showing of prejudice raises the question whether it should be included explicitly in the "curative measures" provision. At least one draft circulated before the call added it explicitly to that provision.

A reaction was that it probably would be best to leave that subject for the Note, but that the Note should make it very clear that the judge may use such an instruction. Actually, such instructions should be understood as very different from sanctions. It would be important to avoid satellite litigation, and delving into state of mind and parties' purposes in taking actions such as preservation measures is an invitation to that sort of thing. An instruction of this sort should be available without even the need to prove prejudice (which is mentioned in the curative measure provision); it may be the mildest form of response to a missing evidence problem, and need not assign any blame. Indeed, it was suggested that a party that failed to retain the evidence (or at least to produce it at trial) might want such an instruction as something of an antidote for the risk that the jury might assume the worst in the absence of an admonition from the judge not to draw unfavorable inferences. That is surely not the only reason such instructions may be desirable, but it is one. And that's hardly a situation in which the party seeking the instruction is seeking a "sanction" against anyone. Indeed, one could say that it's seeking to deflect an adverse inference that the jury might otherwise make.

Another member returned to the question of culpability and prejudice in the "curative measures" provision. It would be best not to have both in that provision. For one thing, having two variables "opens the door too wide for courts." For another, the invocation of general deterrence is almost unbounded. The real focus of that provision should be on curing prejudice; perhaps exceptional circumstances provide a warrant for exceptional measures but culpability and deterrence should not be there.

Another member circulated another set of drafting ideas just before the conference call, and elaborated on them. The starting point is that much of what we have been discussing has been commonplace in courts for decades, even centuries. Judges do not need rules to deal with these issues. But Residential Funding has complicated the picture by authorizing mandatory adverse inference instructions based on a finding of negligence, and some SDNY judges have moved close to a strict liability attitude in which failure to retain, without more, establishes negligence. That is the source of much over-preservation frenzy.

The rifle shot that is needed, therefore, is only to declare that what Residential Funding started should stop -- that such instructions can only be used in instances in which the party acts with the intent of depriving another party of evidence. Then, and only then, does the logical foundation for the instruction exist.

That prompted the suggestion that the argument was for only including the "sanctions" provision of the most recent draft, and leaving out both a "curative measures" provision and the factors. The response was that doing so might be a good way to avoid "biting off more than we can chew." Moreover, it seems that the case law is moving in this direction; judges increasingly are moving to stronger measures only on a finding of significant culpability and demonstrated prejudice.

That observation about recent decisions drew the question whether there was actually a need for rulemaking at all. Is the problem solving itself? The immediate response from several participants was "We do need to do something." The problem is not solving itself, or it is not doing so fast enough.

At the same time, we should be careful not to cut off or curtail the sorts of practical solutions judges have been devising in light of the circumstances before them. That could happen if we had an overly punitive orientation, or seemed to encourage satellite litigation. It is likely important to include curative measures in order to emphasize (a) that those may be used, and (b) that those are the desirable solution to the problem.

That prompted the question whether a simple rule that forbade the mandatory adverse inference instruction absent high culpability would suffice if coupled with something like "Nothing in this rule limits the court's authority to adopt curative measures to undo prejudice." The response was that such an approach might work, but that it would have to be carefully examined.

Another question was "Why not include things other than the adverse inference in the prohibition on actions in the absence of a finding of high culpability? Surely dismissing the case or striking pleadings should require that also." A response was that the cases -- even in the Second Circuit -- recognize that high culpability is required for that sort of sanction. The problem area is only with mandatory adverse inference instructions.

Summing up, it was suggested that there might be two or three basic goals in further drafting:

- (1) Reject the Residential Funding authorization for a presumption of prejudice supporting a mandatory adverse inference instruction. That is "target no. 1."
- (2) Deal with the vast inherent authority area that courts

have developed on this subject. They don't seem adequately attuned to the Supreme Court's direction in Chambers that such authority exists only when bad faith is proved.

(3) Make it clear that Rule 37 sanctions can be used in such high-culpability situations. (This point may overlap with point (2) about curtailing inherent authority if an affirmative grant of authority to deal with failure to preserve supplants reference to inherent authority.)

Two additional goals seem worth pursuing:

(1) Minimize any "collateral damage" on judicial and litigant creativity in curing or sidestepping problems created by loss of evidence. That seems inherent in the notion that a cure should only go as far as needed to cure; cures that do the job effectively ought to be encouraged.

(2) Providing guidance is a goal worth having in mind. The list of factors can do that job. Early on, many urged that a rule regulating the details of preservation be adopted. For a variety of reasons that proved unworkable. But our factor list can provide much guidance. That may not be as reassuring as some would prefer, but it is better than having nothing at all.

The next step is for Prof. Marcus to try to redraft. The next conference call will be on **Friday, Feb. 28, at 8:00 a.m. Eastern time.**

Notes of Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Feb. 28, 2014

The Discovery Subcommittee held a conference call on Feb. 28, 2014. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Justice David Nahmias, Elizabeth Cabraser, John Barkett, Peter Keisler, Parker Folse, Andrea Kuperman (Chief Counsel, Rules Committee Support Office), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

The call was introduced as focusing on a pending draft circulated on Feb. 27 by Judge Campbell. This draft built on the draft circulated on Friday by Prof. Marcus and was designed to achieve several objectives: (1) It should deal with the basic ruling of Residential Funding that prejudice may be presumed and that a mandatory adverse inference jury instruction could be used in a case of negligent loss of evidence. (2) It is relatively brief on the notion that simpler is better. (3) It is designed to allow the court latitude to level the playing field in response to loss of information. (4) It intends not to interfere with existing law on inferences a jury may draw from the absence of evidence. (5) It should discourage use of inherent authority by providing rules that deal with judicial responses to lost ESI, making resort to inherent authority unnecessary.

Thus, the draft eliminates labels for the various measures it authorizes. It avoids trying to be specific about the middle of the spectrum of actions the court might take (on finding prejudice), while being precise about the ends -- those that can be taken with no showing of prejudice, and those that may be taken only with a showing of intent to deprive another party of evidence. With no showing of prejudice, some measures would be allowed. If there is a finding of prejudice, additional measures are allowed that are necessary to cure the prejudice. The draft does not address a "burden" of establishing prejudice. The goal here is to preserve latitude for the court to deal with problems of missing evidence when that causes prejudice. Then the third step is a "bullet" for the Residential Funding line of cases, making certain orders dependent on a finding of intent to deprive another party of evidence. But labels like "curative measures" or "punitive measures" have been avoided; this is intended to be simple and straightforward.

A further introduction identified at least two important issues: (1) Did the draft fully nullify the Residential Funding line's authorization for serious sanctions for negligence or gross negligence? (2) Was it appropriate to eliminate any reference to "exceptional circumstances" that would permit aggressive measures without a finding of intent to deprive another party of evidence?

This introduction drew the reaction "I like the rewrite." One issue is whether the words "if appropriate" should be added. They appear in Rules 11 and 26(g), and might be added to ensure that it is clear that the fact the predicate for stronger measures has been established does not mean that the court should employ those measures. True, the draft says the court "may" use such measures, not that it "must" do so, but this point might get lost. Another concern is whether it's clear what should be done if the intent to deprive is established -- what if the effort to destroy is unsuccessful? Is this covered? For example, the recent decision in the Google litigation circulated by Parker Folsie involved a finding of "bad faith" but no serious sanction.

Another member was encouraged by the redraft. The unsuccessful attempt to destroy information does not seem to fit into the rule, which is about loss of information. If the information survived, the rule does not apply. And this rule is "quite elegant." But it does seem to disallow some things in Rule 37(b)(2)(A) that should be available to the court to cure demonstrated prejudice. Maybe the Note could supply what's needed for those measures.

Another member reported liking the draft. It is simple. The explanations for it make sense. The "zero prejudice" situation does not seem to present a problem. One issue that has been raised before is highlighted with the bracketed "may or" before "must" in regard to the adverse inference instruction in the final sentence. It would be important to make certain that putting those words into the rule does not deprive the court of the ability to use "missing evidence" measures at trial. The draft limits the list of measures that are allowed with a showing of intent.

Another member found the rule to be a "real breakthrough" that shows that "we've struck a balance." It is short and simple and it establishes clear principles. In part, that's because it is easier to follow and absorb this way. Moreover, this member would be comfortable with a rule limited to ESI. That is a special problem and this is a special solution to that problem. Nonetheless, the last sentence seems to go too far by authorizing all measures in Rule 37(b)(2)(A) because item (iv), a stay, simply does not seem to fit. In addition, the use of the phrase "in evidence" raises questions about whether that means the party must know the rules of evidence to form the intent necessary, or can avoid a finding of having the specified intent by arguing that the material was hearsay and therefore not admissible. After all, even under our proposed change to Rule 26(b)(1) material need not be admissible to be discoverable.

A reaction was that "in evidence" is implicit and need not be included. But it was added that we heard time and time again that only a tiny fraction of ESI that is produced is ever actually used in the case, much less introduced at trial.



A reaction on another point was that it is important to say "may or" before "must" in the jury instruction provision. For the judge to tell the jury it "may presume" lost evidence was harmful to the party's position is a heavy burden to endure.

Another member said "I like the draft." But it might be better to break it up into parts (1), (2), and (3). The first would be limited to a list of measures permissible with no finding of prejudice. The second would be open-ended. The third would be limited to 37(b)(2)(A), but might also apply to other equally severe sanctions. Another thought was that the limitation to ESI seems hard to justify as a matter of principle. Why is that form of evidence different? If the basic principle is "Don't sanction for loss of evidence unless it was done on purpose," why is that protected only with regard to ESI? The negative implication of this limitation is that it's allowed for all other evidence.

The reason for limiting the rule, it was explained, was that the "absent exceptional circumstances" escape valve is not there. To extend the rule to all forms of evidence would overrule the *Silvestri* line of cases. (B)(ii) in our published draft was doing the same job. But under this rule you could not do what the court did there if the rule applied to tangible evidence.

Another reaction was that it is logically right to say that ESI is not so different, but the sanctions problem we are worried about arises in cases involving lost ESI, not lost evidence of other sorts. And it is important to recall how much heartache proposed (B)(ii) caused. That provision was our effort to preserve a sanctions option for catastrophic loss of evidence. In light of the public comment, that route seems much more difficult than limiting the rule to ESI.

A response was that it is likely true that ESI is not really analogous to, for example, loss of the car or bus involved in an accident. But it was pointed out that a lot of ESI is actually stored in the computers of cars nowadays. Some is discarded or overwritten in the ordinary course of operation, but some might be affected by litigation-related activities. So applying the ESI v. not-ESI distinction may be difficult sometimes. The problem is "I don't know what to do about that. It may have to await a technological development. That's why I go with the ESI limitation."

It was suggested that we could deal with this by putting back in a sentence like the one in an earlier draft saying that "Absent exceptional circumstances, the court may" use certain measures only on finding the requisite intent, or saying the court may not use certain measures absent exceptional circumstances. But that would raise a point made earlier -- that if we forbid adverse inference instructions at the same time we allow dismissal or default, we seem to be creating an upside down situation in which a lesser

measure is forbidden while the nuclear option remains open.

This raised the question whether we are really comfortable saying that even if there is gross negligence and very severe prejudice, still the court can't do anything mentioned in Rule 37(b)(2)(A). Shouldn't it be able to limit the spoliator's use of certain evidence, or perhaps reliance on certain claims or defenses? Yet those are on the 37(b)(2)(A) list. After all, this comes into play only after the party has failed to preserve something it should have preserved. So you could say prohibiting use of evidence or defenses due to loss of evidence is allowed without a finding of the forbidden intent because otherwise the victim will be unable to respond to those. It might be likened to the old dead man statutes, which forbade testimony on occasion about transactions when the only other witness had died. Moreover, is there a reason not to extend the rule to cover loss of "documents"? Maybe tangible items should be left out, but why not cover documents also?

One response is that we have been shown no need to change the way judges have handled anything other than ESI. ESI is where the problem is, so a rifle shot solution should be limited to that.

Another response was that if Residential Funding is the only concern, we could remove the reference to the orders in Rule 37(b)(2)(A), which could be used as "curative" if necessary. But it was objected that those measures, particularly dismissal or default, are more dispositive than a mandatory adverse inference instruction. But that drew the reaction that the logical foundation for the adverse inference is the intent to destroy to prevent use as evidence; otherwise it is a penalty for sloppy records management.

Another reaction drew on current case law -- "In half the circuits you can't presume prejudice absent bad faith. This is not a concern there." The Note can explain why the rule says this.

A response was that it is a peculiar rule that says "You have to enter a default or dismiss the case because the rule says an adverse inference instruction is not allowed." Won't the affected party always say "I waive the protection of the rule"? Does this make sense?

That prompted the question "What is the source of authority to dismiss or enter default?" Our rule should supplant inherent authority. Rule 37(b) authorizes those measures, but only for disobedience of a court order. Another response was that if we took the reference to 37(b)(2)(A) out of the rule and instead said "no greater than necessary" that might suffice. A different way to look at it is that a mandatory instruction is an odd thing.

Another issue was whether the draft's language saying that a

finding of intent to deprive of evidence is required for the court to presume that the information was unfavorable. Isn't it enough that the rule forbid the instruction without also forbidding the court from drawing such a conclusion? The inclusion of this phrase was explained as necessary to the project of overruling Residential Funding. That decision says the court can presume prejudice from loss. We need to say it can do that only on a finding of the proscribed intent. Particularly if the middle range of measures includes strong ones, it is important that negligence or "gross negligence" not suffice to establish prejudice, but prejudice is what triggers that set of curative measures. The more aggressive they are, the more important it is to defeat reliance on negligence to support the court's presuming that the information would be unfavorable.

A suggestion was that the final sentence really had three thoughts that could be broken out, and all of them depend on a finding of the specified intent: (1) The court may presume prejudice, which is the key to using the additional measures authorized by the second sentence; (2) The court may instruct the jury that it may or must presume the information unfavorable; and (3) the court may punish the party, in part to deter repetition of such conduct.

A response was that this is leading back to distinguishing between "curative measures" and "sanctions." Doing so waters down the effort to overrule Residential Funding.

Another participant suggested that this set of problems is a reason to keep "exceptional circumstances" in the rule. Doing that does afford a route to a judge so inclined to side-step the true limiting purpose of the rule, but there's a limit to what a rule can do. This could lead to putting back exceptional circumstances and expanding the rule beyond ESI. For that purpose, the rule could say the court may presume the loss of the information "was prejudicial." That ties back to the second sentence of the rule.

Another suggestion was to add punishment as a valid goal under the third sentence. "That's where the sanctions nature of sanctions comes into play." Being clear about that "would force courts to confront what they are doing."

These suggestions were resisted on the ground that we need high thresholds for the serious adverse consequences. Unless we have them, anything goes. Saying that one can use any measure necessary to cure, including dismissal or default, or that exceptional circumstances suffice, even in the absence of a finding of intent to deprive, undercuts the goal.

The focus turned to the last sentence. That should say that what it authorizes is only available when the court finds the forbidden intent, but then should enable the court to devise

measures that go beyond curing the loss of the information or the prejudice resulting from that loss. That might involved taking out the reference to Rule 37(b)(2)(A) in the last sentence, so that certain orders mentioned in that rule could be used. The last sentence could then forbid only certain specified orders, such as dismissal or default.

A related problem arose: Does this suffice to supplant inherent power? The answer was yes, because it would confer authority on the judge to act, specify what must be found to justify the actions, and define which actions are permitted based on what findings. That should mean there is no longer room for inherent authority to operate.

This prompted another concern: If we open the final sentence to using sanctions to deter, are we creating a "spoliation tort"? A response to this concern was that this is not awarding damages to compensate, which is what a tort claim usually does. But in terms of incentives to pursue punishment, there is still a risk and concern about this orientation.

An effort was made to sum up the discussion. The goal should be to focus on the big picture. Redrafting should tee up the topic for one last conference call. Prof. Marcus should redraft, modeled largely on the most recent draft circulated on Feb. 27 by Judge Campbell and, alternatively, on the draft circulated by Justice Nahmias. The goal of the redraft will be to avoid detail and provide concrete language to make the major choices about what the rule should say.

One reaction was "Don't punish courts by restricting their discretion to fashion pragmatic solutions." Another was "We went down this road right after the Dallas meeting." The assumption was that, without reference to Rule 37(b)(2), our rule can nevertheless cabin inherent authority. The draft may also identify three or four big issues to be resolved in the next conference call. One of those issues would be whether we should restore the factors to the rule, or leave them to the Note.

Prof. Marcus would circulate a redraft with alternative versions before the next conference call.

Notes of Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
March 4, 2014

The Discovery Subcommittee held a conference call on March 4, 2014. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Justice David Nahmias, Elizabeth Cabraser, John Barkett, Peter Keisler, Parker Folsie, Andrea Kuperman (Chief Counsel, Rules Committee Support Office), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

The call was introduced as focusing on three variations of the rule discussed during the last conference call, as circulated by Prof. Marcus after that call. Judge Campbell had circulated a slightly revised version of one of those alternatives earlier on the day of this call.

It seemed that the prior call had largely achieved agreement on several critical points. One is that courts should have substantial latitude in adopting measures to cure the loss of information that should have been preserved. Similarly, it was generally agreed that it was important to overrule Residential Funding.

These areas of agreement also led to an inherent tension, however. It might be that a judge would conclude that severe measures were necessary to cure prejudice. If that were true, judges inclined to follow Residential Funding might also conclude that the rule permitted them to do so for negligent loss of information, and there might also be a risk of "inversion" if the rule forbade a mandatory adverse inference instruction in situations in which a court could actually adopt more severe measures to "cure prejudice."

Given this tension, there seemed three ways we might come out. First, we might make all remedies except an adverse inference permissible to cure prejudice. That would permit courts to call anything else "curative" and use it despite the rule.

Second, the rule could go to the other extreme and forbid any serious measures in the absence of an intent to deprive another party of evidence. That seems too strict, and to curtail the court's latitude to deal with proven prejudice too narrowly. That approach might be softened by offering an "exceptional circumstances" justification for taking measures otherwise forbidden, but the "exceptional circumstances" provision in current Rule 37(e) has not seemed to operate very effectively.

Third, we might try to develop a dividing line between what can and cannot be done with curative measures. That sort of rule would take some very severe measures of the table in the absence of

a finding of the forbidden intent, and also might well leave us with a somewhat squishy line between measures that could be employed as curative and those forbidden absent a finding of the specified intent.

An initial reaction was that the last solution is probably better than either of other two. "The problem is that there is no perfect answer. We cannot write a rule that will avoid all problems. Instead, we must make a choice, and try to make the best choice to minimize the problems." One way to do that would be to classify default and dismissal as the other things in addition to a mandatory adverse inference instruction that could be imposed only on a showing of intent to deprive.

A member volunteered that excluding default and dismissal is not really necessary because the courts have developed a common law requirement of a comparable showing of intent to justify those sanctions. So they could be removed from the list in the rule because the rule's limitations are not needed with regard to those orders. But a response was that if the case law requires such a showing to support a case-dispositive sanction, why not put it into the rule? Such a rule could still provide guidance. That would potentially deal with uncertainty for some judges or lawyers.

Another member agreed with this comment. Most lawyers and judges do not have the information base of this group, so the rule can be useful to them. But it was objected that some courts don't define "bad faith" in precisely the way we do in our draft rule. That prompted the question whether any used alternative formulations that were more demanding than the one in our draft, and the response was that this was not certain. The draft's formulation is probably o.k., and very similar to the one used by Judge Rosenthal in *Rimkus*, for example.

Another member offered agreement with the third approach, and two others agreed with that. Consensus was reached on trying to define the "high" end of measures that could only be imposed with a finding of the requisite intent and leaving "necessary to cure the prejudice" as the standard for the middle range of measures.

It was suggested, however, that the introduction to the last sentence (including the listing of measures limited to cases involving a finding of intent to deprive) should be modified to make it clear that the measures it specified could not be employed as "curative" absent such a finding. One suggestion was to begin that sentence with "And . . ." Alternatively, the sentence should begin as on Alternative no. 2 circulated before the call -- "Only if it finds that the party acted with the intent" the court may use these measures.

This suggestion prompted the question whether it is not clear that the second sentence (on "curative measures") was somehow

exempt from the finding requirement of the third sentence regarding intent. For example, under our rule could a lawyer really argue for a mandatory adverse inference instruction as a "curative measure" even though the rule says the court can't use that without the intent finding? The reaction was that with a stand-alone sentence that might be a risk. Perhaps, it was suggested that the last sentence could begin "However" to make it clear that what it identified could only be imposed with the finding required under that sentence. Alternative language might be "But only . . ." to introduce this sentence.

A different concern arose: Why is striking a pleading not also on the list of those measures forbidden absent the requisite finding? That is quite severe, and might indeed lead directly to default if the court considered the party to be in default because its answer was stricken. A response that this sort of order might often not have large consequences. It could involve, for example, striking one of 19 affirmative defenses, or one of 11 claims. Another response is that the cases don't indicate that this is among the things that have arisen with preservation problems. Another response was that if a judge did strike an answer and then enter default because the answer was stricken that would likely show that one of the listed measures had in fact been used, meaning that the finding requirement would apply. It was suggested that some mention of this set of issues might be appropriate in the Note. In some instances, striking a claim or defense might be appropriate and necessary to cure the prejudice resulting from loss of evidence.

A different question was whether this sort of limitation is a reason for limiting the rule to ESI. Preventing dismissal even if the instrumentality that caused the harm has not been retained would not be desirable, so the rule should not apply to that situation. That was why the revised rule was limited to ESI.

Focusing on the first portion of the rule (measures allowed without proof of prejudice), the suggestion was made to add the word "including" there to make it clear that the list of measures authorized to cure the loss of information is not similarly limited. A question was whether including "including" loosens the rule too much. A response was that it does not; this category should be the first reference for all. The best outcome is to come up with some pragmatic solution to the loss of the information. But the question was asked whether this could include excluding evidence. That's something we expect could be available when prejudice is shown, but might seem odd if no prejudice is shown. The reply was that this is not the sort of thing that's intended; this is not to bleed through to more serious measures so much as to foster creativity in coming up with solutions to the lost information problem.

Another reaction was that a "missing evidence" instruction

might be appropriate under the first sentence. Another was that the "curative measure" provision says that the measure must be "no more than is necessary" to cure; that means the other side has a full opportunity to argue that lesser measures would suffice. The limit in the first sentence is that the measure must be no greater than necessary to cure the loss of evidence. That's a limit like the limit in the second sentence to measures no greater than necessary to cure the prejudice. The Note could observe that the drafters expected and fostered creative solutions.

This discussion prompted the suggestion that the rule could say that the court could "order measures to the extent necessary to cure the loss of information." A redraft circulated by Parker Folse after the last conference call included such language.

Another question arose about the authorization for payment of attorney fees in the first sentence. How does that cure the loss of information? Maybe it cures the prejudice in terms of costs resulting from that loss, but it doesn't really cure the loss itself. One reaction was that it might be considered a "stand alone." Courts routinely will impose costs incurred due to misconduct or nonfeasance on the party whose conduct caused those costs. But this measure does deal with the prejudice of raising the issue and pursuing the cure for the loss of information. It was suggested that the rule language might be changed to something like "incurred to recover the information." A reaction was that we could leave it alone. This is a commonplace measure that the rule can properly recognize.

Another recurrent question returned: Should the new rule be limited, like the current 37(e), to ESI? The unanimous response was that it should.

Discussion turned to the factors. The published proposal included factors. Some public comments endorsed them as providing useful guidance. But certain factors had also drawn fire. Since the comment period ended the factors had been revised in drafting. One that caused much uneasiness (whether a demand to preserve had been made) was removed. Others (the extent of prejudice and the extent of culpability) had been added. But for simplicity's sake in the last round of drafting the factors had not been presented. Should they be included in the revised proposal?

An initial response was that they should not be in the rule, but only in the Note. A reaction was that there is a value to putting things into the rule. For one thing, not everyone reads the Note. For another, at least some judges may think that only the Rule is controlling and that the Note is surplusage. "Unless we lack confidence in the factors, we should put them in the Note. Another reaction was "I favor rule text. Including the factors is helpful. Making the rule longer is unfortunate, but that is not equally important.



Others said they favored including the factors, but did not feel strongly about it. One concern was that the various factors don't seem to apply well or equally to all provisions in the rule, yet they most likely have to be said to apply to the entire rest of the rule. Another reaction was "I was shocked to learn that people don't read the Note." More seriously, this member thinks that having the list will reassure and guide people.

The consensus was to retain the factors in the rule for present drafting, but in brackets. They were adopted by the full Advisory Committee, and that committee should have the option to decide whether to retain them. Some members of the larger group may have strong views on this subject. Indeed, some members of the Standing Committee may have strong views. We should keep in mind that the Standing Committee also approved our initial rule proposal after much discussion, and that our proposal included factors.

The resolution was that Prof. Marcus would redraft the rule along the lines agreed in the call, and include the factors in the rule but in brackets. A further conference call would be scheduled for the week of March 10 to continue the drafting activity. The agenda materials are due at the beginning of the following week, so there is limited time for further development after that week.

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Notes, March 12, 2014 Discovery Subcommittee

The Discovery Subcommittee met by conference call on March 12, 2014. Participants included Subcommittee members Judge Paul W. Grimm (chair), John M. Barkett, Elizabeth Cabraser, Parker C. Folse, and Peter D. Keisler. Judge David G. Campbell participated as Advisory Committee chair. Judge Koeltl participated as liaison from the Duke Conference Subcommittee. Andrea L. Kuperman, Benjamin J. Robinson, and Julie Wilson represented the Administrative Office. Edward H. Cooper participated as Committee Reporter.

Judge Grimm opened the meeting by observing that the most recent draft Committee Note for proposed Rule 37(e) has brought the Note into line with the most recent developments in the proposed rule text. It is a good step along the way. But it cannot be completed until final choices are made about rule text. And some changes remain.

The proposed rule text continues to provide alternative versions of (e)(3), the paragraph that allows mandatory-adverse inference instructions, adverse inferences by the judge, default, or dismissal, only on finding that information was not preserved with the intent to deprive another party of the information's use in the litigation. The first alternative begins with the limit: "Only upon finding." The second alternative sets the limit at the end: " \* \* \* but only upon a finding." Discussion chose the first alternative.

Subdivision (e)(1) describes measures to cure the loss of information. The draft suggests alternative choices: measures "sufficient" to cure the loss, or measures "to the extent necessary" to cure the loss. "Sufficient" has been questioned on the ground that it suggests the court must continue to pursue curative measures until it actually manages to cure the loss. That seems wrong both because it may not be possible to cure the loss and because the court should not be obliged to resort to all possible curative measures even after initial measures have failed to cure the loss. Several participants preferred "to the extent necessary." But then it was asked whether confusion will arise from the contrast with (e)(2), which provides for measures "no greater than necessary" to cure the prejudice. It was agreed that (e)(1) should be revised to become parallel with (e)(2): "other measures no greater than necessary to cure the loss \* \* \*."

Subdivision (e)(3) presents a choice in attempting to describe the mandatory-inference instructions that can be given only on finding an intent to deprive another of the lost information's use in the litigation: "instruct the jury that it [may or] must presume the information was unfavorable to the party" that failed to preserve it. Should "may or" remain?

Discussion began with a reminder that the Subcommittee intends to overrule the decision in Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir.2002) and the district-court

decisions that have developed it. The instructions in those cases tell the jury that it "may" adopt the presumption. Overruling Residential Funding requires limiting instructions that the jury "may presume."

Retaining "may \* \* \* presume," however, creates a difficulty. There is no problem with classic withheld evidence instructions given when a party has an advantage in obtaining evidence that still exists and does not offer it at trial. But an inference from a mere failure to preserve is more complicated. The inference depends on evaluating what the evidence was, why it was not preserved, and how important it may have been in the overall context of all the evidence. One common form of instruction tells the jury to decide what to make of the failure to preserve in the context of everything they heard at trial. "The circles overlap." If intent to deprive is required to give an instruction that the jury may infer the evidence was unfavorable, the rule may go too far. It is important to overrule Residential Funding. But it also is important to preserve the opportunity to allow lawyers to show a failure to preserve and to argue that the failure to preserve justifies an inference the information was unfavorable, and to enable the court to instruct the jury on how to evaluate the evidence and argument.

These distinctions are discussed in the draft Committee Note at lines 338-347 (337-346 on some printers). Discussion generally approved the draft. But the concerns continued. There is agreement on what we want to do. The challenge is to find the proper expression in rule text, as illuminated by the Committee Note. We want to bar a "presumption" from the loss of information alone, but also to allow inferences from all the evidence, including the failure to preserve. "Presumption" is an overbroad word for the full context - it is there to address conclusions drawn from the failure to preserve alone, unsupported by any other basis for an adverse inference. Perhaps the rule text should say: "may or must presume from the loss of information alone that the lost information was unfavorable to the party." The instruction in Residential Funding was that the jury may presume from gross negligence alone that the lost information was unfavorable. An alternative might be: "may or must presume from the fact of the loss alone that the lost information was unfavorable \* \* \*."

This suggestion was met with a concern that the rule text should not attempt to do the full job. It is awkward enough that it is forced to describe the inference by "presume." "Presume" in this setting does not seem to mean a conditionally mandatory inference in the sense of a rebuttable evidentiary presumption. Instead it seems to mean a permissible inference. But the traditional language of these instructions, and the language of the instruction in Residential Funding, was "presume."

Adding "from the loss of information alone" to the rule text

was further challenged by asking what it would mean if the court leaves it to the jury to decide whether the party failed to preserve with the intent to deprive another party of the lost information's use in the litigation. It is better not to attempt to add this or similar language to rule text. But the Committee Note should address these problems.

Another doubt was expressed. Suppose the judge finds a failure to preserve information that should have been preserved, but also finds there was not an intent to deprive another party of the information's use in the litigation. The judge, however, does find gross negligence, and perhaps prejudice. For example, all e-mail messages of a key player were not preserved. The parties should be allowed to argue to the jury whatever elements they can show that bear on the decision whether to infer that the lost information was unfavorable. The key role played by the person whose messages were lost is one element. So there may be testimony by someone who remembers the general content of the messages – either supporting an inference they were unfavorable, or undermining the inference. There may be explanations of the failure to preserve – we meant to preserve it, we told our new IP team to preserve it, they failed to preserve it, and here is our best evaluation of how it is that their efforts to preserve came to fail. Because the judge has found there was not an intent to deprive another party of the information's use, we want to prohibit an instruction that the jury may presume it was unfavorable. But the present rule text leaves it proper to instruct the jury that they should determine, on the basis of all the evidence about the loss and the nature of the lost evidence, whether to infer that the evidence was unfavorable. They also can be instructed to evaluate any inference that it was unfavorable in the context of all the other evidence, both favorable and unfavorable. Perhaps it is better that this form of instruction not use the word "presume." The jury is likely to understand these concepts better when the instruction refers only to inferences.

This discussion concluded by suggesting that one word be added to a sentence in the part of the draft Committee Note that addresses these problems: "Nor would it [the rule] bar a court from instructing a jury that it may determine from evidence presented during the trial – as opposed to inferring from the loss of information alone – whether lost information was favorable or unfavorable to the positions in the litigation."

A different component of draft (e)(3) directs that a judge may "presume that the lost information was unfavorable to the party" who lost it, but only on finding an intent to deprive another party of the information's use in the litigation. "Presume" may seem the wrong word for this part. The idea is that the judge has a choice; the judge may infer the information was unfavorable, but the judge also may refuse to draw the inference. How does "presume" fit that choice? This idea, further, addresses two separate forms of

judicial action. One arises when the case is tried to the court without a jury – the judge then is undertaking the factfinding function that, in a jury trial, would be addressed by the part of the rule that limits the availability of a jury instruction framed by "presume." The other arises before trial, when a judge is deciding on measures to address a failure to preserve ESI that should have been preserved. "Presume" is not a helpful description of what the judge is asked to do in either setting. If "presume" is the word used in the cases dealing with jury instructions, the few cases that address decisions by the judge are silent, although at least one describes an inference drawn from the failure to preserve. In the abstract, there is a powerful argument the rule text should say the judge may "infer" the lost information was unfavorable. But we are stuck with "presume" for the next subparagraph that addresses jury instructions. Adopting a different word for decisions by the judge is likely to cause confusion. It is better to stick with "presume" in both subparagraphs.

(e)(3) presents a final style question. The Subcommittee decided that it is better broken down into subparagraphs (A), (B), and (C). As recognized by the Rules Style Manual, this form supports quick and clear reading and application. It also is supported by the choice to begin this paragraph with "Only upon a finding," rather than place this limit as a "but only upon finding" at the conclusion of the series. It also will move "or" to precede subparagraph (C): ; or (C) ~~or~~ dismiss the action or enter a default judgment."

Draft (e)(4) carries forward a list of factors to be considered "In applying Rule 37(e)(1)-(3)." The Subcommittee has been ambivalent about the value of providing this list of factors. But it is desirable to carry the question to the full Committee; this paragraph will be placed in brackets to draw attention to the discussion in the Subcommittee Report.

The reference to "(e)(1)-(3)" was questioned. The factors in (e)(4) address the determinations in (1)-(3), but also address failure to preserve, which in the proposed form of subdivision (e) is an introduction that conditions each of the following paragraphs but precedes all of them. It was agreed that this reference should be shortened to "Rule 37(e)," or perhaps "this Rule 37(e)."

Factor (F) in draft (e)(4) is "the degree of culpability of the party in failing to preserve the information." This factor is reflected in two sentences of the draft Committee Note:

On the other hand, account may be taken of the degree of culpability in determining what burdens it is appropriate to place on the party who lost the information. A party who acted reasonably but unsuccessfully in an attempt to preserve information is different from a party whose efforts were unreasonable to the point of negligence,

gross negligence, or recklessness."

Discussion of these sentences began with the suggestion that the reference to negligence, gross negligence, or recklessness could undo the attempt to overrule Residential Funding. Courts that have become comfortable with Residential Funding will cling to this sentence as an escape from the plain language of the rule text. Then it was asked whether the first sentence – On the other hand – can survive. It does express a valid thought, and is no more than an illustration of factor (F). But this may lead back to the question whether "culpability" should remain in the list of factors. It was added to the list at a time when an attempt was made to include culpability in the rule text of a version of (e)(2) that would direct the court to balance the degree of prejudice against the degree of culpability in choosing what measures to take in addressing prejudice caused by the failure to preserve. That version has been superseded. But it expressed a consideration that courts are likely to consider in choosing among possible methods to cure prejudice. Why not recognize this as a factor, or at least in the Committee Note? Is it because courts, however much they may be influenced by a sense of relative culpability, do not articulate that factor in their opinions explaining a choice of curative measures, once they have concluded there was not an intent to deprive another party of the information's use? Is it also because other factors in the list embrace the same considerations – the reasonableness and proportionality of the efforts to preserve both reflect the evaluations that would lead to findings of negligence or worse.

Further discussion suggested that the first sentence, "On the other hand" remains valuable. The Committee Note describes a number of different measures that might be used to cure a loss of information. Some impose greater burdens than others. Why not recognize that the court's choice of a suitable measure may be influenced by the degree of culpability in failing to preserve? Judges can, and will, take account of culpability. The paragraph that includes this discussion of culpability begins with a reminder that the court is not required to make every order that might replace or substitute for lost information. It is useful to follow through with advice that the choice of measures may be influenced by the degree of culpability. Or perhaps the concern with referring to degrees of culpability might be addressed by this change: "On the other hand, account may be taken of the party's conduct degree of culpability in determining what burdens \* \* \*." But it was asked again whether this advice is needed. The court has to figure out what to do about the failure to preserve. It can choose from a list that includes not ordering any curative measure to going to the limit of what is necessary to cure the loss. It can take account of the degree of culpability without being told to do so. So too it will take account of the degree of culpability and the extent of prejudice in choosing curative measures under (e)(2). More burdensome curative measures are appropriate when there is

prejudice. But (e)(3) bars adverse judge inferences, mandatory adverse-inference instructions, default, or dismissal as curative measures unless there is a finding of intent to deprive another party of the information's use in the litigation.

It also was suggested that it is unwise to suggest that culpability be weighed in deciding on (e)(1) curative measures for the loss of information. The choice could become punitive.

The Subcommittee concluded that factor (F) should be deleted, and also to delete the two quoted sentences from the draft Committee Note. It may be appropriate to find some substitute to balance out the paragraph – perhaps something like "Other factors may persuade the court that other measures should be pursued."

Further discussion led to the further conclusion that factor (E) also should be deleted. It refers to the degree of prejudice suffered by the opposing party. This is adequately covered by (e)(2), which has evolved to describe measures "no greater than necessary to cure the prejudice." That clear direction does not need any supplementation by a factor in (e)(4).

Other parts of the draft Committee Note were considered.

Lines 126-137 (125-137 on some printers) show overstriking on part of the discussion that explains the decision to address only failure to preserve ESI. These sentences suggest that although the rule does not address failure to preserve other forms of information, the considerations that bear on addressing a loss of ESI also may bear on the loss of traditional documents. They also note that it may be difficult to draw a line between ESI and other forms of information – the familiar example has become loss of a paper print of an e-mail message. The question is whether this discussion should be restored. Some have thought it helpful. But it may seem speculation. More directly, it may seem odd to address the rule only to failure to preserve ESI, but then to turn around and suggest that it works well for failures to preserve other forms of information. Beyond that, there is a well developed body of spoliation law for losses of other forms of information. We should hesitate to extend a rule spurred by the special problems of preserving ESI to the more familiar problems of failures to preserve other forms of information. The Subcommittee decided to delete these sentences.

Lines 156-159 (155-158) in the draft note were amended: "And in some cases the circumstances will justify going straight to measures to cure prejudice when the information clearly cannot be recovered ~~that cannot be obviated by restoring the lost information or developing effective substitutes.~~" This change reflects the fact that if information is restored, the restoration eliminates any prejudice.



Lines 87-101 (88-102) of the draft Committee Note address the problems that arise when initially successful efforts to preserve ESI are defeated by causes outside a party's control. The familiar illustrations are fire, flood, earthquake, system failure, or malicious computer attacks. This discussion responds to questions raised in earlier Standing Committee review of Rule 37(e). But it should reflect the possibility that the party should have taken steps to protect against foreseeable catastrophe. It may be negligent, or worse, to install a computer system in a basement located in a well known flood zone. This concern was resolved by adding these words: "Assuming the party acted reasonably, the new rule does not apply to such situations \* \* \*."

A final question asked whether it may be possible to improve the rule text to make clear two intended effects of proposed (e)(3). One is that a finding of an intent to deprive another party of the lost information's use in the litigation can justify an inference it was unfavorable, an adverse-inference jury instruction, or dismissal or default, even if those measures are greater than necessary to cure any resulting prejudice. The other is that without this finding of intent, none of those measures may be adopted to cure prejudice. Suggested language will be welcome.

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# TAB 3C

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**Feb. 27 Draft -- Interim summary; to be expanded. This draft covers all three public hearings and written comments up to no. 804. Many of the written comments are very similar, and similar comments not making new points are grouped together in the Overall section and not repeated in later sections. That means that the later sections do not necessarily reflect all comments on those topics.**

[The following summaries refer to the comments by the numbers assigned to them by the Administrative Office. The full comments should be available through Regulations.gov. The numbers there begin with USC-RULES-CV-2013-0002-, followed by the numbers that appear in these summaries. Since the final number, included below, is the only thing that's different, there seemed no reason to include the rest.

Note also that some commenters appear more than once. Some who submitted written comments also appeared at a hearing, and some submitted more than one written comment.]

The comments are arranged topically as follows

1. Overall
2. Rule 37(e)(1) -- Failure to preserve
3. Rule 37(e)(1) -- Curative measures
4. Rule 37(e)(1)(B)(i)
5. Rule 37(e)(1)(B)(ii)
6. Rule 37(e)(2)
7. Need to retain provisions of current Rule 37(e)
8. Limiting the rule to electronically stored information
9. Additional definition of "substantial prejudice"
10. Additional definition of "willfulness or bad faith"

## 1. Overall

Ronald J. Hedges (262): Does the proposed rule violate the Rules Enabling Act? In *Interfaith Comm. Org. v. Honeywell Int'l, Inc.*, No. 11-3813 (3d Cir. June 4, 2013), the Third Circuit considered whether Rule 68 might infringe on substantive rights provided by the fee-shifting provisions of the Resource Conservation and Recovery Act, but rejected that argument. The district court, however, had held that Rule 68 was incompatible with Congress' purpose in enacting RCRA that applying the rule to cases brought under the act would violate the Rules Enabling Act. "Does proposed Rule 37(e) violate the Rules Enabling Act? Would it simply govern the 'manner and means' by which a party's substantive right to a sanctions award is governed? Or would the rule alter the 'rules of decision' by which a court would adjudicate that right? Would the requirement that courts find willfulness or bad faith vary a substantive right? Or would negligence still be sufficient for the imposition of serious sanctions? Does not the proposed rule set forth substantive standards for a court to apply -- at least some of which do not now exist?"

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The proposal has little or no deterrent value, which should be the purpose of a rule purporting to sanction unacceptable conduct by a party. The rule change would make it more difficult to obtain sanctions. This is moving in the wrong direction. "At a time when the plaintiffs' aviation bar needs liberalization of the discovery rules to deter and cure the problems being encountered in their technically complex cases, the Committee advances proposals which will make discovery of sophisticated corporate defendants more difficult and spawn new discovery avoidance tactics among defendants and their lawyers."

Lawyers for Civil Justice (267): A new preservation rule is urgently needed. Under current law, courts have created ad hoc litigation hold procedures, and parties struggle to define the line that should apply to the scope of preservation. As a result, they are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. This fear has fueled an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information. But the proposal lacks sufficiently clear preservation directives, and also includes sanctions standards that permit sanctions to be imposed based on an insufficient showing of culpability. Beyond that, we need a bright-line rule on the preservation trigger. The rule instead enshrines the vague "foreseeability" standard in the opening sentence. In its place, the Committee should adopt a bold, clear and reasonably

balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps. Judicial decisions have transformed the traditional spoliation rule that was a brake on plaintiffs' conduct prior to suit into a new rule that places great affirmative burdens on defendants to preserve all potentially relevant material. Under the "reasonable anticipation" trigger standard, decisions must be made before receipt of a scope-defining complaint. Critics of this rule that use hypotheticals involving auto-delete do not make justifiable objections for a variety of reasons.

Washington Legal Foundation (285): WLF fully embraces the overarching objective of proposed 37(e), which is to replace the disparate treatment of preservation and sanctions with a single uniform standard. In particular, the rejection of the Second Circuit's ruling that mere negligence is sufficient to support sanctions (in *Residential Funding, Inc. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002)) is welcome. WLF believes these changes have the potential to significantly curtail the amount of satellite litigation about spoliation allegations and also reduce the high costs of over-preservation.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts, but is concerned that the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." The absence of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of these terms by the courts. AHIMA suggests that Committee may wish to consider further clarification and definition of those terms.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the *Federal Courts Law Review* concerning the proposed amendments. It stresses that preservation and spoliation issues are not only concerns for institutional defendants. "In the past, particularly in an asymmetrical case (such as a single employee discrimination action brought under Title VII), plaintiff's counsel might have paid only fleeting attention to his or her client's preservation obligation since it was presumed that the defendant employer had possession, custody or control of all the relevant ESI. That confidence may be misplaced, however, with the advent of social media. \* \* \* Since the plaintiff controls when litigation commences, as well as the nature and scope of any claims asserted, a plaintiff's attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions." "[S]ome version of proposed Rule 37(e) may provide relief from the balkanized approach to the spoliation issue that now characterizes the litigation landscape, thereby bringing some predictability to this area of law."

Fred Slough (291): The proposed rule "provides an incentive to destroy records. The opposing party has too high a burden to be able to hold those who destroy evidence responsible. A jury should know that the violator has hidden potentially damaging evidence and the new rules make it more difficult for a Judge to impose such a sanction."

Philip Favro (298): (Includes two articles about the package of proposed changes) By ensuring that the sanctions analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach that may benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The proposed rule also addresses some of the lingering concerns of the plaintiffs' bar. For example, it specifically empowers the court to order additional discovery or other curative measures when a litigant has destroyed information it should have retained.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section wholeheartedly supports codifying the obligation to preserve information in anticipation of and during litigation. This measure should promote more consistent application of the standards for triggering and defining the scope of the duty to preserve. The Section also agrees that the appropriate scope of the information to be preserved is "discoverable information" as defined in proposed Rule 26(b)(1), or current Rule 26(b)(1) if that is retained without change.

Thomas Y. Allman (308): Generally speaking, the proposed rule should help to promote a uniform approach and foreclose the current practice of using inherent sanctioning power as an end run around existing Rule 37(e). But a number of aspects of the proposed rule raise concerns that need to be addressed.

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer has experience in mass tort cases involving federal MDL proceedings, and endorses all the comments submitted by LCJ, of which it is a member. It notes that the current system virtually guarantees costly overpreservation of evidence because no clear standards are given about when a party should "reasonably anticipate litigation." For example, in a group of class actions that were recently concluded Bayer preserved an estimated 17,388 GB of information over a period of four years. In response to plaintiffs' discovery requests, we produced 31.1 GB of that information (1.3 million pages). The ratio of information preserved to information produced was 559:1. We believe that the proposed 37(e) amendments would be an improvement, but that they do not go far enough.

Jonathan Smith (NAACP Legal Defense Fund) (310): The



proposed changes would permit parties who have failed to preserve discoverable information to suffer minimal consequence, and could have a detrimental effect on civil rights litigation. They place an extremely heavy burden on parties seeking sanctions or adverse-inference instructions as a result of an opposing party's conduct during the discovery process.

Steven Banks (Legal Aid Society - New York City) (317): Instead of simply revising the current rule governing preservation of electronic discovery, the amendment creates a broadly applicable new rule that significantly curtails the trial court's discretion to sanction spoliation of any evidence, electronic or otherwise. This is a significant change in the federal rules, creating a standard for sanctions that would be very difficult for any party affected by the destruction of evidence to meet. Legal Aid opposes the proposed rule. In the Second Circuit, where we typically litigate, sanctions are more broadly available than would be true under the proposed rule. We agree with Judge Scheindlin's comments in Sekisui American Corp. v. Hart, 2013 WL 41163122 (S.D.N.Y., Aug. 15, 2013), that imposing sanctions only where evidence is destroyed willfully creates perverse incentives. In one recent case involving a prisoner who was beaten by another prisoner, employees of the City Department of Correction watched videos of the area where the assaults occurred but then deleted them. In another similar case, the City preserved only fragments of the video of the event. It turned out that the Department had essentially no video preservation policies, despite the obviously critical nature of surveillance videotape to the litigation. It is patently unfair for our clients to have to meet the very stringent threshold proposed by this new rule in order to permit the trial court to impose sanctions.

U.S. Chamber Institute for Legal Reform (328): The rewriting of Rule 37(e) is needed because the current rule's effectiveness has been called into question. Because companies fear that they will be sanctioned for loss of information, preservation costs have continued to mount under the current rule. Fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information, even though only an infinitesimal fraction ends up being used by the parties in litigation. The proposed new rule is an improvement over the current rule. A rule that gives the court the option of using curative measures is sensible. But the ILR believes that the rule should be improved by strengthening its protections against sanctions.

Bryan Spoon (329): The proposed changes benefit large corporations and add another barrier between a plaintiff and the materials that could prove or disprove the case. Spoliation is already a major issue, and these changes make it easier for corporations to destroy relevant document without appropriate

sanctions.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): Preservation issues have taken on a life of their own. Corporations worry about preserving terabytes of e-discovery that may never be relevant to any of the claims or defenses at issue in any litigation. Many of the preserved documents serve no business purpose and are preserved solely due to fear of sanctions in light of the unsettled legal standard. Before the proliferation of e-discovery, practitioners were faced with the simpler question of what paper documents needed to be maintained. E-discovery creates a completely different dynamic. The volume is exponentially greater. There is a greater risk of inadvertent destruction. The FDCC therefore urges the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information.

Doug Lampe (343) (Ford Motor Co.): Ford supports revising Rule 37 to establish uniform preservation and sanctions guidelines across courts, and agrees that the revisions would at least somewhat reduce the burden of over-preservation.

Kim Stone (345) (Civil Justice Assoc. of Calif.): We support the proposed changes to Rule 37(e), which should help reduce unnecessary and expensive preservation of information. We agree with the comments of the Lawyers for Civil Justice and the Institute for Legal Reform.

Shanin Specter (344) (Kline & Specter): Our firm represents plaintiffs in catastrophic injury cases, particularly medical malpractice. We believe the proposed rule alters substantive law, and goes beyond practice. The adoption of this rule would preempt the application of the substantive law regulating spoliation of evidence of those states which have addressed the topic.

The Sedona Conference Working Group 1 (346): It is unclear whether the Committee's proposed changes to Rule 37(e) as currently drafted will have a substantial impact on the goal of reducing the burden and costs associated with overbroad preservation or setting forth a uniform national spoliation standard. We ask that the Committee carefully consider our alternative proposals, which we submitted to the Committee in October and December of 2012. We approve of the goal of replacing current Rule 37(e) with a rule that would establish a uniform national culpability and prejudice standard. But we have a number of concerns about the manner in which the current proposal is drafted.

Pennsylvania Bar Assoc. Fed. Practice Comm. (350): The Committee endorses the concept of a uniform approach to spoliation sanctions in federal courts. The proposal has a

careful balance with respect to the imposition of an adverse inference. It lowers the degree of malfeasance required by the spoliating party as the prejudice to the opposing party increases, such that only ordinary negligence is required if the prejudice is extreme, bad faith or willful conduct is required for lesser prejudice, and no adverse inference sanctions is available without at least substantial prejudice to the opposing party.

Eric Hemmendinger (Shawe Rosenthal) (351): We support changing Rule 37 to limit motions for sanctions for failure to preserve. The current rule has given rise to discovery which is aimed not at obtaining evidence, but at identifying something arguably relevant which the employer failed to preserve, which then becomes the centerpiece of a spoliation claims. We support limiting such claims to situations in which the failure caused substantial prejudice and was willful. But we fear that the list of factors in the rule may cause trouble, and could encourage parties to seek discovery about those matters. We think that a party seeking such discovery should have to demonstrate substantial prejudice at the outset, before getting any discovery on this ground.

Kenneth D. Peters & John T. Wagener (353): The proposed rule is comprehensive and demonstrates an intent to tie sanctions for failure to preserve discoverable evidence to conduct that is "willful" or "in bad faith" and causes "substantial prejudice." These changes may help to mitigate a litigant's ESI burden, which often results in over preservation. But proposed (B)(ii) is likely to generate substantial motion practice as the courts struggle to define exactly what it means. It should be deleted.

Advisory Comm. on Civil Litigation, E.D.N.Y. (355): We do not support this amendment at this time. We agree that, ideally, there should be a uniform national rule governing the consequences of failure to preserve information. But in view of the rapid and continuing evolution of electronic discovery, we do not believe the time is ripe to promulgate such a rule. The different federal courts diverge about the proper standards for determining the consequences of failure to preserve discoverable information, and the Supreme Court has not yet spoken on the issue. Promulgation of a uniform rule should await further experience and further development of the law in this area.

Richard McCormack (356): It is extremely important that these changes be made in order to ensure fairness to all sides in the litigation. The change should establish a much-needed uniform national standard that would lessen the cost of over-preservation and additional litigation over allegations of spoliation. But I think that (B)(ii) should be removed as the courts are likely to use it to avoid the primary rule. In addition, the Committee should make it clear that sanctions are

available only when the party has acted willfully and in bad faith. The list of factors in proposed 37(e)(2) should be removed. Finally, the rule should prescribe a clear, bright-line standard on when the affirmative duty to preserve information is triggered. The best one would be commencement of litigation.

Dusti Harvey (358) (AAJ Nursing Home Litigation Group): The wholesale revamping of Rule 37(e) represents both a broad shifting of the burden in determining whether a discovery violation is subject to court sanction as well as a narrowing of a court's ability to impose sanctions in the first place. The current rule requires the party failing to provide electronic discovery to demonstrate that its conduct was in good faith. The proposed changes appear to limit a court's ability to sanction a party for failing to produce discoverable material generally (not merely electronic discovery). The changes would require the aggrieved party to convince the court of numerous factors, some quite intangible, before sanctions could be imposed. Discovery violations by corporate defendants have become commonplace in all types of litigation. But most acts or omissions giving rise to the destruction, loss, or withholding of discovery would likely not be sanctionable under the proposed rule.

Edward Hawkins (362): Eliminating the adverse inference instruction by changing Rule 37(e) will serve only to encourage rule-breaking plaintiffs and defendants to withhold evidence. The sting of the adverse inference instruction helps to keep both the plaintiff and the defendant forthcoming with discovery.

John M. Gallagher (379): The proposed change to Rule 37(e) purports to insulate a party from sanctions for failure to provide ESI if it has been lost as a result of routine, good faith operation of an electronic storage system. But once one party sends to the other party a "litigation hold" letter, the world of "routine" has been lost in the rearview mirror.

Richard Malad (376): I strongly oppose this rule change. We represent plaintiffs who confront defendants with a substantial advantage at the outset. The various rule changes will only serve to limit discovery these plaintiffs need. The Rule 37(e) change will place limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous state specifically permit it. The rule change also allows the court to consider "proportionality" of the preservation efforts, likely as an appeal to defendants who do not want to preserve large amounts of information.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We applaud the effort to develop a national standard for spoliation sanctions and confine the most serious sanctions to a narrower set of situations. But we think that "willful" is the wrong term to use in (B)(i) and that (B)(ii) should be removed entirely from

the amended rule.

Alan Morrison (383): I support the back-end approach of focusing on the consequences of failing to preserve, rather than attempting to establish front-end preservation requirements (assuming that would be permissible in a rule). I also agree that curative measures, as opposed to sanctions, are a better option.

Glen Pilie (Adams & Reese) (385): We support the adoption of amended Rule 37(e) and agree with the LCJ comments regarding the need for a clear rule regarding the scope of ESI preservation. We offer an example of a recent case in which our client was the defendant and suffered sanctions due to its failure to preserve temporary internet files that might have shown that its employees accessed the plaintiff's secure website to order forklift parts. The case is NACCO Materials Handling Group v. The Lilly Company, 278 F.R.D. 395 (W.D. Tenn. 2011). Plaintiff was a billion dollar global forklift manufacturer, and it claimed defendant, a small family-owned forklift dealership, had engaged in improper use of access to plaintiff's site. But it did not sue for four months after discovering the alleged access to its website. After suit was filed, defendant issued a litigation hold to key personnel in the parts department, which seemed to be involved. It did not instruct every employee in the company to preserve ESI and did not retain an ESI expert. Instead of an outside expert, it relied on its in-house IT director (who split his duties between that job and serving as a trainer for forklift repair). Defendant did not immediately cease its ordinary retention practices and establish protocols with regard to backup files, and employees were not instructed to disable "auto-delete" functions on web browsers or in temporary internet files. The magistrate judge imposed sanctions for failing to protect this information even though there was no evidence that any relevant information was lost. Moreover, defendant had a pending 12(b)(6) motion at the time. Defendant decided, however, to settle while an appeal of the magistrate judge's ruling was pending before the district judge, largely due to the harshness of the looming sanctions and the potential disruption they could cause to this small business if not reversed.

International Assoc. of Defense Counsel White Paper (390): The proposed rule holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation about allegations of spoliation. It establishes a national standard that would eliminate the court's ability to impose sanctions under "inherent authority" or state law. The amendment should provide practitioners with added security when advising clients on discovery issues.

Hon. James C. Francis IV (395): The proposed rule would radically alter the standards for remedying spoliation. In the process, it would curtail the ability of innocent parties to obtain relief when they are prejudiced by the destruction of information potentially relevant to litigation. But the rule does not solve the problems it purports to address. Instead, by focusing on the state of mind of the spoliator it introduces additional uncertainty and arbitrariness. Most importantly, it would undermine public perception of the fairness of our justice system. I urge the committee to withdraw the proposed rule or modify it substantially. There is no evidence that courts have imposed disproportionately serious sanctions. To the contrary, default, dismissal, and the imposition of an adverse inference instruction have generally been ordered only in response to the most egregious conduct by a party. Even if the rule were to produce uniformity in federal court, any entity that operates nationally would confront the risk of the most rigorous state court sanctions rules (citing cases from state courts). Moreover, the concept of willfulness varies depending on the context in which it appears (citing cases). A rule that provided more precision and certainty about the preservation obligation itself might hold promise, but this rule does not try to do that. Moreover, overpreservation is not caused solely by the prospect or actuality of litigation; regulatory and other preservation obligations exist. And lawyers do not think like criminals, adjusting their behavior based on the penalty for violating an obligation rather than the obligation itself. Yet the rule leaves that obligation unchanged. The rule might also prevent courts from using narrowly tailored preclusion orders to address the loss of specific information. Focusing on intent invites arbitrariness, because it is one of the most difficult things one can ask a court to resolve, and it would also tend to favor unsophisticated plaintiffs as compared with savvy business defendants. The Advisory Committee has not addressed, much less rebutted, the principle underlying Residential Funding -- that the party responsible for the loss of evidence, not the innocent party, should be responsible for the consequences that result from loss of information. Making sanctions unavailable unless the party deprived of the evidence can demonstrate bad intent of the spoliator would make the judicial system look unjust. A better proposal might look like the following:

(e) Failure to Preserve Discoverable Information

(1) Curative measures. If a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation, the court may impose a remedy no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith.

(2) Factors to be considered in fashioning a remedy. The court should consider all relevant factors in determining the appropriate remedy where a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it an the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservations to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Steven J. Twist (396): This rule is a much-needed reform. The fear of spoliation sanctions is a major driver of litigation cost. The fear is created by the lack of a nationwide standard that prohibits sanctions for loss of information unless it was in bad faith.

Hon. Shira Scheindlin (398): This rule does not provide a clear standard for preservation, as many urged the Committee to do. It does propose a national standard for imposing sanctions. At the moment, the circuits are in disarray, and I agree that a single national standard for the federal courts would be desirable although such a standard will not bring true national uniformity as the fifty state courts may adopt different standards. The idea of curative measures is good, but the rule is unclear and seems to be too restrictive. In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court addressed an instruction to the jury that it had the power to find that if a party had control over information but failed to preserve it the jury could infer that the lost information was unfavorable to that party. The court said this was not a sanction and that neither the court nor the jury was required to make such a finding. So it sounds like a "curative measure" under the proposed rule, but how many judges would think of a jury instruction as a curative measure? In sum, this proposal will create new problems without solving old ones. Magistrate Judge

Francis has proposed a different rule. I agree with his proposal and all of his comments.

Eduarde Miller (Boehringer Ingelheim, USA, Inc.) (399): The proposed rule would appropriately prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." Such a standard is necessary and long overdue. There is no doubt about the need to create a uniform national standard aimed at avoiding costly over-preservation and ancillary litigation over allegations of spoliation. But proposed (B)(ii) is unnecessary and could eviscerate the entire rule by allowing courts to impose sanctions without finding willfulness or bad faith. And the conjunctive should be "and" in (B)(i). Also, the factors in (e)(2) should be removed because they are not relevant to the principal point in the proposed rule and there is a risk that they could be converted into mandates for certain conduct. Finally, it would be better to add a clear, bright-line standard for preservation to the rule.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): The proposed changes only encourage stonewalling and hiding the ball, both of which regularly occur already in product liability litigation. We already know that the failure to produce information by defendants often causes substantial prejudice. But making plaintiffs prove that imposes an unfair burden on them.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The proposed amendment is a step in the wrong direction. Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. But the changes will set the bar for obtaining sanctions so high that they will never be met.

Mark S. Stewart (Ballard Spahr) (412): Currently there is a diversity of judicial views on preservation and sanctions across the country. This diversity means that companies that operate in multiple jurisdictions have to err on the side of over-preservation, which drives up discovery costs. The uniform standard contemplated by the proposed amendment will allow companies to formulate a single strategy geared toward complying with that national standard. A uniform federal standard will probably also impact state practice. These developments would benefit plaintiffs as well. Before the use of social media was widespread, plaintiffs' counsel generally did not have much reason to pay attention to the possibility of being sanctioned. Today, the increasing importance of social media in cases brought by individuals changes that calculus. The cost of preservation sanctions motions may soon be visited more evenly on plaintiffs and defendants. The 2010 FJC study demonstrated that spoliation motions are infrequently granted, but that they generally double



the time it takes to resolve a case, and that it is 27 times more likely that the case will proceed to trial. Limiting sanctions to intentional misconduct will reduce this expensive and time-consuming motion practice and facilitate efficient case disposition that will ultimately benefit all litigants.

Mark Kundla (416): The proposed rule appropriately limits sanctions to situations in which the party's conduct is "willful" or in "bad faith" and causes "substantial prejudice." These changes will help to mitigate a litigant's ESI burden, which often results in excessive costs of document retention.

Harlan Prater (418): The amended rule would establish a much-needed uniform national standard that would curtail costly over-preservation. But the use of the term "willful" as part of the standard is problematical because some courts define it in a way that would make sanctions too easy to obtain. I think that the standard should be "willful and bad faith."

William Adams (419): The proposed rule would alleviate the threat of sanctions for minor or unintentional failures to preserve every piece of potentially relevant evidence.

Daniel Edelman (420): This change, like all the proposed changes, would have a disproportionate impact on a plaintiff's already-limited ability to obtain relevant discovery from evasive corporate defendants. The cumulative effect of these changes would devastate our clients's ability to pursue their legal claims in what is already a David v. Goliath situation.

Dave Stevens (428): I'm not a lawyer, but I favor these changes. I own a small campground in Ohio, and find that I spend about as much time trying to minimize the threat of litigation as I do trying to win more customers. I favor the limit on penalizing businesses for discarding information to cases involving bad faith. The cost of litigation has caused us to eliminate diving boards and the rope swing, and I'm not going to install a zip line due to liability worries.

Ryan Ferguson (433): The new sanctions provision is a positive step, which should prevent sanctions being imposed on a party without consideration of the impact of the loss of evidence on the case. The costs of storing and later reviewing this material put undue pressure on the parties to settle without regard to the merits.

Donald Bunnin (Allergan) (436): We favor the amendment because we believe it will clarify litigants' obligations and ease some of their burdens. In one product liability trial, we preserved and collected approximately 10 million documents. But only four thousand needed to be produced to plaintiff. Yet the costs of preserving the data exceeded \$275,000. We would support

changing the rule to say willful "and" bad faith.

James Cocke (444): I support the amendments. We are a medium sized company that finds that current discovery avenues are so broad that if we were to truly attempt to comply with all of the discovery demanded of us we would have to shut down our operation and spend all of our time addressing ESI and the endless monster that modern computers and their progeny have created.

Stephen Aronson (446): I agree with Sen. Kyl that creating a national standard against discarding information that would hamper litigation is beneficial.

Robert D. Curran (448): Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. In any case involving a car crash that ends up in federal court, the parties anticipate litigation. Indeed, we frequently encounter work product objections to discovery that are premised on the anticipation of litigation. But critical evidence, such as security videos, black box data, automobiles themselves, devices involved in the accident, and the like are often destroyed or lost. The proposed change to Rule 37(e) is a step in the wrong direction because it sets the bar for sanctions so high that it will never be met.

Vickie Turner (450): We agree with LCJ and commend this proposal. We also agree that the standard should be "willfulness and bad faith" and that (B)(ii) should be removed. We also think that there should be a clear standard on when the duty to preserve arises.

David Hill (452): I agree with Sen. Kyl that there should be a clear national standard that says companies can be punished for discarding information only if done in bad faith.

John Brown (454): I support a clear national standard that would allow companies to be punished if they discard information in order to hide something or hamper litigation or if done in any other bad faith. But discarding as part of a records retention system it should not be punished.

Michael Scott (455): E-Discovery has posed new and difficult problems regarding evidence retention. I urge the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. I think that commencement of litigation should be the standard. I think that (B)(ii) should be removed because it would "swallow the rule." I also think that in (B)(i) the standard should be "willful and bad faith." I urge the deletion of the factors in 37(e)(2). If they are not deleted, they should be put into the Note.

Niels Murphy (456): The proposal to adopt a rule establishing a national standard holds great promise to curtail costly ancillary litigation about allegations of spoliation. But (B)(ii) could "swallow the rule" and should be removed. There also should be a clear, bright-line standard for the trigger. The "anticipation of litigation" standard in the proposed rule is not sufficient, and a "commencement of litigation standard" would be better.

Andrew Knight (458): I generally support new 37(e). Presently spoliation becomes the focus of the litigation in many cases rather than the merits of the case. I think the "willful or bad faith" standard is troubling because many courts consider a company's establishment of routing auto-delete mechanisms to be "willful." I think that the standard should be "willful and bad faith." I also believe that (B)(ii) should be removed from the rule so as to avoid confusion.

Stuart Delery (U.S. Dep't of Justice) (459): It is important that the Committee keep in mind that this rule will govern not only complex commercial litigation but also all other types of cases. Litigants with less sophistication, such as pro se litigants, do not have access to technical personnel to advise them on computer-based concerns.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

George Schulman (L.A. Country Bar Assoc. Antitrust & Unfair Bus. Prac. Section) (462): Our experience in modern litigation is that the amount of electronic information is exploding exponentially. A case involving a singular event, such as a filed contract, can generate thousands of emails among the parties. Matching up electronic production for all of the parties almost always reveals missing emails. Whether they are missing because of lack of preservation or just a bad search for evidence requires additional rounds of discovery and often leads nowhere. Thus, while we appreciate the Committee's work in establishing a national standard and exempting mere negligence from severe sanctions, we note that efforts to uncover what is missing and why will surely run into the timing and discovery limits proposed elsewhere in the report.

Janet Poletto (463): We view the proposed amendment as an improvement over the existing situation. It appropriately limits sanctions to situations where a party's conduct is "willful" or "in bad faith" and causes "substantial prejudice." These changes will help mitigate a litigant's ESI burden, which often results in excessive costs of document retention and management for fear of sanctions.

Lisa Kaufman (Texas Civil Justice League) (466): TCJL strongly supports the proposed language for 37(e) requiring a showing of willful or bad faith conduct causing substantial prejudice before sanctions may be imposed. This change will reduce the risk that routine data maintenance will expose a litigant to sanctions simply for performing its day-to-day business operations in a cost-effective and reasonable manner.

Michael Freeman (Director, Tort Litigation, Walgreen Co.) (467): I favor the changes, but think 37(e) should go further. The word "and" should be substituted for the word "or" in (B)(i) on the culpability standard, and (B)(ii) should be deleted.

Kenneth Wittnauer (VP & Gen. Counsel, Britax Child Safety, Inc.) (483): These changes are helpful in providing certainty regarding preservation obligations. But I join others in saying they do not go far enough and urge that the word "and" be used instead of "or" in (B)(i) and that (B)(ii) be removed from the rule.

Peter Mancuso (Nassau County Bar Ass'n) (487): We support the proposed amendments to 37(e) and welcome the general approach of dealing with the failure to preserve ESI in a less onerous and fairer manner. In particular, we support the effort to incorporate directly into the rules an obligation to preserve information in anticipation of litigation. Rather than relying on inherent power, codifying the principle makes sense. We also agree that the correct focus should be on "discoverable information." We agree that sanctions (rather than curative measures) should be imposed only upon a showing of substantial prejudice and willfulness or bad faith. We disagree with those who have argued that this change will encourage careless or sloppy preservation efforts. We do not believe counsel or their clients will act in such a manner simply because a finding that (B)(i) is not satisfied might enable them to avoid sanctions.

Robert Buchbinder (488): The obligation to preserve evidence and the consequences of noncompliance has, under the current rules, resulted in meritless spoliation arguments that often derail litigation. The proposed changes to 37(e) are most helpful in providing certainty to my clients regarding their preservation obligations.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013,

forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. Regarding (B)(ii), there was concern that the language used is vague and risks swallowing the rule. Because the sanctions turn on the importance of the information rather than culpability, very severe sanctions could result from essentially innocent conduct. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

James Edwards (496): Litigation today is inefficient, costly, and uncertain. One reason for these problems is uncertainty about preservation. We lack clear and consistent guidelines for preservation of information, and in many cases parties must settle claims due to the high costs rather than on the merits. Proposed Rule 37(e), along with amended Rule 26(b), should address the burdens of both over-preservation and overbroad discovery.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations (497)): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Martin Stern (501): I support the proposed amendment to Rule 37(e). But I think that it should be changed in two ways. First, "or" in (B)(i) should be changed to "and," and second, (B)(ii) should be eliminated altogether. Several also urge adoption of clear, bright-line standards for preservation decisions. Many other comments repeated this support and voiced these two recommendations for change, including those from Andy Osterbrock (Dow Corning Corp.) (514); Joel Neckers (524); Christian Bataille (578); Chet Roberts (579); Jamie Bryan (621); Vincent LaMonaca (on behalf of SVC, Inc) (640); Kenneth Waterway & Kelsey Black (652); L. Neal Ellis, Jr. (665); Tony Hullender (BlueCross BlueShield of Tennessee) (667); Lawrence D. Wade (668); Rex Darrell Berry (669); Scott Barbour (672); Lawrence L. Connelli (675); Lindy H. Scoffield (678), James T. Anwyl (679) and Leigh A. Stepp (680) (the last three letters are identical and come from the partners in Anwyl, Scoffield & Stepp, LLP); Debra L. Stegall (686); Richard Chesney (687), Gregory Bwower (690), Henry D. Nelkin (691), Michael Jenks (692), Lynn H. DeLisa (697), Rudolph Petruzzi (764) (the previous six comments are all from lawyers in the same law firm and endorse the amendments in general and 37(e) in particular); Cheryll L. Corigliano (694); Joyce G. Bigelow (696); Jeffrey Rubin (703); Mark Lavery (726); William Pokorny (731); Lee Mickus (Colorado Civil Justice League (755); Daniel Kuntz (MCU Resources Group, Inc.) (761); Michael I. Thompson (792); Michael Murphy (797); Jennifer B. Johnson (802).

Patrick Malone (503): This amendment is unnecessary. Moreover, the opportunity to obtain an adverse inference jury charge is an important incentive to keep parties honest in their discovery obligations. This rule change would reward wrongdoing. This comment resembles many other comments, both in its objections to the 37(e) proposals, but also in enumerating objections to the proposed changes to Rule 4, Rule 26, Rule 30, Rule 31, Rule 33, and Rule 36. Similar comments were received from many others, including: James Ragan (528); Victor Bergman (537); A. Laurie Koller (538); Justin Kahn (542); David Rash (545); Chris Nidel (547); Kevin Hannon (548); George Wise (549); Gregory Smith (551); Daniel Ryan (552); William Smith (553); John Lowe (557); Margaret Simonian (561); Teresa McClain (562); James E. Girards (563); Nicole Kruegel (570); Clark Newhall (577); James Howard (583); Christopher Bouslog (584); Tom Carse (586); E. Craig Daue (590); David Rudwall (591); Geoffrey Waggoner (592); John McCraw (595); Kenneth Miller (596); Michael Blanchard (597); Mark Gould (598); Herbert Ogden (608); Scott Loarned (611); Lars Lundeen (614); Marcia Murdoch (616); Shane Hudson (620); Thomas Bixby (627); Ian Crawford (628); James Swift (633); Todd Schlossberg (644); Craig Miller (650); John Baryllick (651); Thomas Yost (653); Brad Prochaska (658); Peter Ehrhardt (661); Alexander Blewett (685); Benjamin Graybill (704); Craig Wilkerson (718); Emily Joselson (on behalf of Langrock Sperry Woll) (730); Scott Smith (732); Karen Roby (734); Anonymous Anonymous (745); Sam U (746); Lisa Riggs (752); Mark Mandell (799).

Lawyers for Civil Justice (540) (supplementary comment): We strongly support the effort in Rule 37(e) to provide a uniform and predictable national standard that allows parties with potentially discoverable information to use their best judgment to manage their preservation efforts. And we still think that "willful" should be eliminated in (B)(i), and that the (B)(ii) exception should be eliminated. We also favor adding relevance and prejudice to the list of factors in 37(e)(2).

Glenn Hamer (Arizona Chamber of Commerce) (576): "By permitting [sanctions] only where willful conduct was carried out, the Committee's recommended changes to Rule 37(e) allow companies some certainty as they balance protecting themselves from litigation with addressing the needs of the market they serve. We urge the committee to further strengthen this protection by limiting spoliation sanctions only where conduct was committed in 'bad faith.'"

Bradford A. Berenson (General Electric Co.) (599): GE's preservation challenges are enormous. It has over 300,000 employees world-wide, plus another 100,000 contractors who work closely with its employees. Approximately 35,000 employees leave the company or transfer jobs each year. GE operates in over 3,400 locations in 160 countries. In confronting preservation challenges, GE is faced with approximately 4,770 terabytes of email alone. Each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, and then ensure that the hold is honored. Enterprise-wide, this is a herculean task. The present "gotcha" game some plaintiffs adopt forces GE to engage in tremendous over-preservation. But those costs are overshadowed by the greater costs that arise when discovery actually occurs in litigation. "As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review, a task that typically requires a trained professional to examine each document that might be producible." (The comment offers three examples of situations in which GE incurred huge costs that bore no reasonable relation to the litigation stakes.) GE is particularly struck that the quality of justice in other countries seems relatively comparable with that in the U.S., while the cost of litigation in those countries is much, much lower. "[T]he disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that were participants in the global litigation market have a chance to opt out of the U.S. system, they often do."

Federal Magistrate Judges' Ass'n (615): The FMJA endorses the revision of Rule 37(e). "We believe the drafters have struck a balanced approach by requiring courts initially to look to possible remedies and weighing culpability in imposing sanctions."

Florida Justice Reform Institute (634): We strongly support the basic concept behind the proposed changes to Rule 37(e). A national standard is beneficial to promote the rapid development of a robust body of case law and to promote certainty and efficiency. But we think that (B)(i) should be limited to bad faith and the (B)(ii) should be removed from the rule. In addition, we favor adding a materiality factor to proposed 37(e)(2).

Cal Burnton (642): I favor the change to bring back a sense of professionalism and search for justice, which has been disappearing for our profession. With all the documents and electronic data existing wherever paper and data reside, one can never say that "all documents" have been produced. Yet the "sanctions" game will be played for no reason other than to put pressure on the other side, on the misguided view that if you hurt the other guy, you must be helping your own clients. But the rule should be changed in (B)(i) to require both bad faith and willfulness.

Hon. Lois Bloom (E.D.N.Y.): Along with the proposed changes to Rule 26, 30, and 33, the change to Rule 37(e) will cause more disputes and increase cost and delay. These amendments will only create new problems instead of curing existing ones.

Dana Bieber (Liability Reform Coalition of Washington): We support proposed 37(e), which we believe holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation.

Richard Valle (656): I am against the proposed changes. "As for the proposed revisions concerning Rule 37(e), I have a current case where it has taken almost a year to obtain all of the different versions of my client's medical records and bills. The court just ordered a forensic examination of Defendant's computer system. I don't believe we would be learning these things under the proposed revisions to the rules."

Noah Purcell (Solicitor Gen. State of Washington, on behalf of Washington State Attorney General's Office) (677): We enthusiastically agree with the proposed amendment to Rule 37(e). The absence of express proportionality limits in the current rules has the effect of significantly inflating the costs, complexities, and burdens of litigation by incentivizing over-preservation and over-broad discovery. We also favor the idea courts should prefer using curative measures to imposing sanctions.

Michael E. Klein (Altria Client Services) (684): I am manager of discovery support for all Altria and Philip Morris USA litigation. We have repeated experience producing huge amounts of information and finding that virtually none of it actually



surfaces in the litigation. In answer to the Committee questions during hearings about whether the Rule 37(e) amendments would really result in measurable relief for businesses, we can report that the answer for us is "yes." The immediate benefit would be a significant reduction in the amount of information subject to preservation in our product liability litigation. So "the proposed Rule 37(e) amendments will provide millions of dollars of relief annually." We think that the rule should not be limited to ESI, that (B)(ii) should be eliminated, that 37(e) should not be retained, that the rule should define "substantial prejudice", and that B)(i) should not authorize serious sanctions based on an unmoored concept of "willfulness."

Kenneth Suria (689): This is a welcome change because it offers protection for inadvertent and unintentional misplacing of discoverable material.

James Heavner (The Hartford Financial Serv. Group) (748): The Hartford spends millions of dollars every year preserving and producing documents, and supports this effort to provide a clearer and more reasonable standard for assessing this effort. But we think that looking to the Sedona Conference's emphasis on whether efforts to preserve were made in good faith is more promising. We also think that the rule should be emphasize whether alternative sources exist for the information.

Paul D. Weiner (704): My firm is the largest management-side law firm in the world. I spend full time on E-Discovery had have a team working for me. I want to "underscore the crushing eDiscovery burdens facing employer's in today's digital world." Consistence across circuits is critical and is missing. One thing that is a bane is the frequency of overly broad cot-and-paste preservation demands, which are served in a knee-jerk fashion. I think that the mandates of Rule 26(g) should apply to such demands, and that lawyers be directed to make sure they are proportional. There is a dire need for rule amendments.

#### Washington D.C. Hearing

David R.Cohen (Reed Smith): The rule change is absolutely necessary. Sanctions motions are used as tactical devices. The stakes are too high. You can't afford to be wrong about preserving things.

Jonathan Redgrave (Redgrave LLP): Current Rule 37(e) has failed. The replacement has promise, but I have drafting issues. (I will submit detailed comments later.) The Committee should move forward with these rules. We can't wait forever for the ever-elusive empirical data to develop.

Thomas Allman: I endorse proposed 37(e), and agree it should be used to replace the current rule. My reason is that it

cabins inherent power. As Judge Sutton said in *U.S. v. Aleo*, 681 F.3d 290, 310, that is important; when the rules address something judges should not attempt to escape the limits of the rules by falling back on "inherent power." The current lack of uniformity is an affront to the legal system, and the goal of restoring it is worth the candle. The rule will incentivize reasonable conduct.

Anna Benvenuti Hoffman: We are a small civil rights firm, with a focus on police misconduct. We routinely face difficulty obtaining needed information from defendants. This rule change would encourage stonewalling. An adverse inference is not a heavy sanction. She thinks that the rule change should be rejected entirely. If that does not happen, it should at least be limited to electronically stored information. Overall these amendments send a signal that there is too much discovery. Some judges are hostile to our claims. There is no reason to bolster the arsenal of defendants.

Dan Troy (GlaxoSmithKline): Preservation imposes great waste on his client. Something like 57% of our email is preserved for possible use in litigation. We have about 203 terabytes preserved. That's more than 20 times the entire collection of the Library of Congress. And the amount we have to preserve is rapidly increasing; since 2010 it has gone up a lot. We need a uniform national standard, and we also need a reasonable standard.

Robert Levy (Exxon): Exxon has 5200 people (including former employees) on litigation holds right now. This is a major problem. We have to evaluate all this material on our E-Discovery platforms. Assuming each of these people has to spend ten minutes per day to comply with this extra duty (a reasonable prediction) that means about 327,000 hours per year are used up dealing with litigation holds. This extraordinary effort is necessary because judges evaluate our performance only by hindsight. As a consequence, preservation is a big part of our design of our information systems. Preservation concerns affect our ability to make changes in those systems. Something that would deal with the conflicts among the circuits would be helpful to us. Under the present circumstances, it is very difficult to make a semi-confident decision about how to handle preservation issues. If the standard is negligence, how can I ever feel safe? That's why some people feel they must preserve everything. True, this set of problems is a result of improvements in technology, and any rule will be somewhat imprecise. But a rule could significantly improve on the current corrosive uncertainty.

Lily Claffee (U.S. Chamber of Commerce): Preservation exacts a heavy psychic toll on U.S. business and American global competitiveness. These burdens don't just affect mega-corporations, and may be even more significant (and potentially

crippling) for small firms. It would be even better for the rule to go farther and address specifics on trigger, scope, and duration of preservation obligations. "I can drive a truck through relevance" under the current rule. It would be better to say "material and relevant." Without those additional specifics, I would be tempted to continue to overpreserve.

Jennifer I. Klar (Relman, Dane & Colfax): This rule change would produce bad results and also change substantive law. It would impede the search for truth. Indeed the D.C. Circuit has held that there is a need in employment discrimination cases for adverse inferences where information is lost. A negligence/gross negligence standard is sufficient protection for defendants. Anything more provides too much protection. So this is a substantive change, not a procedural change. It also raises grave fairness issues. Defendants have documents, and even now the plaintiff must prove negligence in connection with destruction to obtain any relief. To require proof of something more creates a perverse incentive. At least, limit the rule to electronically stored information and don't apply it to paper documents. Those are critical to employment discrimination cases. The cost claims made by big corporations do not provide a ground for this change. Residential Funding gives them sufficient protection.

Malini Moorthy (Pfizer, Inc.) (testimony & no. 327): She is head of the Civil Litigation Group E-Discovery team. Pfizer supports the proposed changes to Rule 37(e). The current situation confronts companies like this one with vastly disparate obligations to preserve. The need for action can be illustrated by an example involving Pfizer. In litigation about hormone therapy, a court ordered the company to preserve 1.2 million backup tapes. That order remained in effect for a long time. These tapes had about 100 gigs per tape, resulting in preservation of a total of about 100 petabytes of data. This preservation cost an estimated \$40 million over the six years the order was in effect. But the company never had to use a single one of the backup tapes. It produced a total of 2.5 million documents to the plaintiffs (25 million pages). Only 400 of those documents were used in the litigation, mainly 100 of them produced early in the case and before the huge bills began running up. The shift in the culpability standard in the rule would help avoid this sort of thing, as would the emphasis on proportionality.

#### Phoenix hearing

Robert Owen: Rule 37(e) is a "tremendous step in the right direction." But it is vital that the rule be tightly written. There must be no wiggle room. Some judges will try to bend the rule. One S.D.N.Y. judge has already construed "willful" very broadly. A particular benefit of adopting the rule would be to

prevent courts from relying on inherent authority. The goal should be to (a) establish a single national standard, and (b) make clear that it is higher than the negligence standard that the Second Circuit adopted in Residential Funding. Preservation has become much more complicated than it was in 2002 when Residential Funding was decided, particularly with the advent of multiple portable devices. It's almost impossible to train employees to avoid mistakes or keep everything.

Timothy Pratt: He was general counsel of Boston Scientific, and came to appreciate the litigation costs such an entity must bear. It is certainly not possible to eliminate all costs, but the scale of costs preservation can impose is extremely wasteful. For some years, Boston Scientific had \$5 million in costs to outside vendors for preservation. Since 2005, Boston Scientific had preserved about 107 terabytes of information, most of that in the last three years (as the volume of information escalated). "Everyone knows there's huge over-preservation and over-production."

David Howard (Microsoft): Microsoft has updated the report it offered during the Dallas mini-conference. In an average case, it now finds that the breakdown of number of pages preserved as opposed to the number used at trial is huge -- only 1 in 1,000 of the pages produced is used at trial, and only a very small percentage of those preserved is even produced:

Preserved -- 59,285,000 pages  
Collected and processed -- 10,544,000 pages  
Reviewed -- 350,000 pages  
Produced -- 87,500 pages  
Used at trial -- 88 pages

Microsoft is forced to over preserve by the current rules, which do not clearly define the duty to preserve. It has spent \$600 million to preserve and to manage discovery, including vendor costs. On being asked, witness is uncertain how Microsoft could identify the 88 pages used at trial in the case example above, or the 87,500 produced, before litigation is filed. But the burden in mounting. In 2013, Microsoft found that it was preserving 1.3 million pages per custodian, a 400% increase by this measure since 2010. Proposed 37(e) will help deal with this problem. We have to keep information to prove our side of the case, but the current attitudes towards, and uncertainties about, preservation mean that we must preserve much, much more. This does not really benefit our opponents, but it does really benefit our opponents in terms of availability of needed evidence.

Paul Weiner (Littler, Mendelson): There are recurrent gotcha tactics that exploit the "crushing" burdens of E-Discovery. Plaintiff lawyers rely on overbroad cut-and-paste preservation demands. He would add "preservation" explicitly to

Rule 26(b)(2)(C) to address this sort of problem. Rule 37(e) is a good start in dealing with these problems. If it achieves consistency across circuits it will be a very good thing. The addition of proportionality is a bedrock concern. It would be good also to incorporate a Rule 26(g) undertaking with regard to preservation demands. He has written about the preservation obligations of plaintiffs, and sees that new 37(e) could provide them with benefits also. One would be the reference to "sophistication" in the Committee Note.

Thomas Howard: Proposed 37(e) will solve real problems. The theme should be to make sure that the rules continue to be predictable. That can minimize motion practice. Note that in products cases (which he handles) most of the defendant's documents offered at trial are offered by the defendant.

Stephen Twist: Preservation and discovery costs amount to more than what his company pays the plaintiff on the merits for cases in which plaintiffs are successful. The leading factor in managing litigation is cost, not the merits of the claims involved. But he is not certain how much he would save if 37(e) were adopted, and intends to submit that information later.

Jill McIntyre: Adoption of 37(e) will enable companies to preserve less without denying adversaries access to any important information.

John Rosenthal: The burdens of preservation are real. Last year, Winston & Strawn lawyers spent 100,000 hours on preservation. He strongly supports the package. Corporations must overpreserve. Proposed 37(e) will provide predictability. But further refinements would be desirable. He co-chaired the Sedona drafting group, and favors its approach. But he does not think that changes that would require re-publication and delay the amendment process a year or two are important enough to justify that delay.

#### Dallas Hearing

Matthew Cairns: (He is a former officer of DRI, but two officers of DRI will be testifying for the organization later in the hearing.) In his practice, he finds himself representing municipalities, and finds that they cannot afford the sort of rigors that E-Discovery can impose. One example is a case involving a town that had only one computer, located in the town hall. But to be suitably careful, he concluded it was necessary to impose a hold also on the computers of 10 volunteers, even though their computers included all their personal information. (These volunteers were sued in their individual capacities.) Prof. Hubbard will provide empirical evidence about this topic, but the point is that these burdens are real. Opponents of change use hypotheticals; proponents of change use real life data

and examples. Nonetheless, he cannot say that adopting the proposed rule would actually have resulted in doing things differently in the case described.

Rebecca Kourlis: Broad research supports the conclusion that the current system is unduly burdensome for both sides and that it invites gamesmanship. (Almost) all agree that increased judicial management is a good thing. But it cannot be said that there are compelling data on any of the topics addressed by the amendment package. More data might be helpful, but more data are not likely to answer all questions. IAALS believes that the proposed changes are moving in the right direction.

John W. Griffin: It is true that there are myriad standards for preservation. But in essence everybody knows the rule -- if evidence is important it should be preserved, or at least it should not be destroyed. The new rule would seem to accept loss of evidence due to a party's negligence. That should not be accepted, for if it is the system will break down. The courts will suffer if parties that "lose" evidence are "blessed by the courts" despite these failures. Regarding one case he litigated against the government on whether a diabetic could be in the FBI, he was able to prove his case only after getting the medical records of all the current officers in the country and demonstrating how many of them were allowed to serve despite seemingly serious health problems.

Mark P. Chalos: All agree that having a national standard is laudable. We represent plaintiffs, and with corporate defendants we don't see "one document" missing, but rather "big gaps in data." Our concern is that this rule change would make it almost impossible to obtain sanctions to demonstrate the culpability required by the amended rule. The heightened standard of showing that something that was lost is essential to the case is also problematic. Making inadvertence an safe harbor in fact will have broad implications. The burden should be on the spoliator to prove "no harm, no foul."

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) G.E. operates in 160 countries and is involved in thousands of civil cases. The burden of preservation can be immense. To illustrate, GE has a Microsoft Outlook Exchange email system with 450,000 mailboxes distributed across 141 servers in 8 locations around the world. Each month, about 550 million emails are sent through those servers, but generally not stored on them. These realities impose great burdens on GE when it tries to comply with its preservation obligations. Focusing on email alone, GE faces a potential universe of 4,770 terabytes of email alone, located in hundreds of thousands of devices around the world. GE's lawyers have to define some sort of litigation hold appropriate

to a case, and then send notices and reminders. Enterprise-wide, this is a herculean task. Often we cannot anticipate the twists and turns of litigation, and our efforts will be measured years later using 20/20 hindsight. That retrospective evaluation of preservation will happen in an adversarial atmosphere frequently leading to "gotcha" tactics. Altogether, this situation has led GE to engage in what must be tremendous over-preservation. Ultimately, very little of the material preserved is actually produced (in those instances where litigation in fact ensues), and very little of what is produced is actually used in the litigation. Since GE operates world-wide, this experience causes it to contrast the U.S. litigation burdens it faces with its experience in other countries. Simply put, there is no comparison; the U.S. system is in a league all its own. The breadth of discovery and the uncertainty of preservation obligations contribute to this wasteful behavior. GE therefore supports the change to Rule 37(e) to provide a nationally uniform standard and limit sanctions to cases involving bad faith destruction of evidence. It also thinks that the word "willful" should be removed and the "no fault" (B)(ii) provision should be removed. GE is also concerned about the "curative measures" provision because it could become the avenue through which judges would reintroduce sanctions under a different heading.

Michael Harrington (Eli Lilly & Co.): Since 2008, he has found that the total litigation spend on discovery has increased 60%; for preservation in particular, the cost may approach \$40 million for his company. Rule 37(e) is an improvement, although imperfect. It is not clear, however, that adopting the proposed rule will actually change his company's preservation practices, at least at first. He would look to the factors in 37(e)(2) in making decisions; they would provide guidance, although he does not like all of them as they are presently articulated.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. "We have a wonderful system, but nobody can afford it." Details are provided in Don Bivens' letter of Feb. 3 (no. 673 -- to be summarized separately). Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Reckelssness can go toward that determination.

Gregory C. Cook: The costs to litigate have gone up, particularly due to E-Discovery. We should have a uniform national standard, and curtail ancillary litigation. Before the advent of ESI, there was no need to tell people that they did not to keep their post-it notes, but with ESI everything might be preserved. (B)(i) should say "willful and bad faith," and (B)(ii) should be removed.

Thomas P. Kelly (Pfizer): The amount of ESI is staggering. For example, Pfizer has about 300 active legal holds involving about 80,000 people. It has 5 billion emails in legacy archives, a number that grows by a billion a year. It also has 250,000 boxes of documents, totalling about 750 million pages of material. It has to engage in preservation of these dimensions because there is no consistent standard on what it has to do. As things are now, we have to keep everything. If proposed 37(e) were adopted Pfizer would not have to preserve as much; standards would develop to guide it.

David Warner (Shell): He is the manager of global litigation information management for Shell. Technology is changing, and opportunity for unintentional mistakes is much greater than it was when Residential Funding was decided. The rules have not kept up with the changes in technology. The current rules are too broad; we have to keep millions of documents on permanent hold. Eventually only 1% of these are actually produced. The constraints mean that he has to stand in the way of Shell technological innovation designed to improve company operations. But technology will not provide solutions to these problems. No search tools exist to search different systems, and systems proliferate and evolve. On one matter, the cost of Shell of maintaining information on a hold was \$20 million to \$80 million. What it needs is something that narrows the scope of preservation.

Stephen Puiszis: Favors removing "willful" from (B)(i), which would correspond to the standard for sanctions in the 7th Circuit. He is also unnerved by the idea of curative measures, which involve no element of prejudice or harm. On (e)(2), he would take out Factor C on demands to preserve.

Megan Jones (COSAL): She is a member of Sedona. ESI has only been with us for about ten years. Although it has been a challenge to deal with "the tidal wave of electronic discovery," we should recognize how rapidly things can and do change. What technology created technology can manage. Her organization is focused on enforcing the antitrust laws, and it is concerned that under the proposal emails will be deleted with no recourse for those trying to prove anti-competitive practices. She supports Judge Francis's example for Rule 37(e). How could a plaintiff prove substantial prejudice? For example, suppose an employee testifies that "from time to time he talked to a competitor about pricing." Without emails to prove the details, how can she demonstrate that she has lost critical evidence?

Prof. William H.J. Hubbard (U.Chi.Law School): He has performed an empirical study and provided with his testimony the Summary of Findings of that study: It looked to a sample of 126 companies, including companies of all sizes and in a broad range of industries. Over 79% reported a "great extent" or "moderate



extent" of preservation burdens. Companies report "overpreserving" to protect against serious uncertainty under current law. Rules amendments that clarify and define the standards for sanctions should reduce the phenomenon of overpreservation. Because only a small proportion that preserved information is ever used, reducing overpreservation would likely not have any negative impact on the production and use of data in litigation. The final report will not be ready until Feb., 2015. In testimony, Prof. Hubbard stressed three points: (1) Preservation is not a problem only for big companies; (2) A small fraction of matters generate high costs -- 0.5% of the matters generated 60% of the costs; and (3) Most preserved data is never collected or reviewed. Asked whether adoption of 37(e) would make a change in preservation activities, he said that one could expect a small but meaningful reduction in preservation as a result. At the same time, concerns about detrimental effects of adopting the rule seemed nil to him. Asked about whether much of what's preserved is kept not due to potential litigation but because of other preservation requirements, such as regulatory requirements, he said that the survey did not distinguish between these two types of preservation. Most of what is preserved today will be preserved even if the rule is adopted. Core records will be preserved; we are talking about data and the margins. For example, federal requirements may mandate keeping some kinds of email exchanges.

John Sullivan: There are entire law firms dedicated solely to preservation. These amendments will improve the situation, but (B)(i) should say "willful and bad faith."

Lee A. Mickus: Uniform standards are needed, and "willful" should not be used. There is confusion about what that word means.

Gilbert S. Keteltas: He co-chairs his firm's e-discovery team. He often sees 100 custodians under a hold, and a terabyte or more of information preserved.

David Rosen: Proposed 37(e) is a path for protecting corporate interests. Highlighting proportionality is not desirable. Although it is true that preservation can be costly, it should be remembered that plaintiffs bear real costs for preservation also.

Stuart Ollanik: He wrote "Full Disclosure" (1994) and joined in comments submitted by Paul Bland. It is important to remember that there is usually a substantial asymmetry of assets between individual plaintiffs and corporate defendants. He challenges the notion that defense discovery costs are a result of overbroad preservation or production efforts. Instead, those costs result from defense efforts to avoid discovery -- defendants litigate very vigorously to keep from turning over

evidence. It seems that they now treat that activity of theirs that raises costs and a reason to curtail discovery and preservation. Proposed 37(e) will eliminate disincentives to keep needed information. He agrees with the comments of Judges Francis and Scheindlin.

Conor Crowley: He is Chair of one Sedona Conference Working Group. The bifurcation of curative measures and sanctions does not achieve the goal of a uniform national standard. See Sedona's October, 2012, submission to the Advisory Committee. It would be better for the rule to require that the party act in good faith than to focus on whether it acted in bad faith. If bad faith is the focus, it should be defined as acting with a specific intent to deprive the opposing party of evidence. In addition, "substantial prejudice" should be defined as materially burdening a party in proving its case. (B)(ii) is too broad in suing the "meaningful opportunity" criterion. The list of sanctions should be made more extensive, and the rule should itself direct that the least severe sanction be used. Factor C should be removed from (e)(2). Factor (B) could be interpreted too narrowly. In addition, (e)(2) should be expanded to include another factor -- whether the party destroyed information known to be relevant. He does not favor republishing, and thinks that these changes can be made without republication.

Daniel Regard: He is the CEO of I Discovery Solutions. He is appearing as a technologist, not to take sides. From that perspective, "willful or bad faith" seems ambiguous. All automatic systems are intentionally set up by somebody. There are myriad such "automatic" activities. Data movement is really copying and deleting of data. Data changes move data and eventually lead to deletion of some. Use of cloud computing means that the cloud provider may be the one specifying or regulating such things; this may result in much less ability for control by the person subject to the duty to preserve. And these challenges are likely to increase. One can forecast 26 billion devices on the internet by 2020. The amount of location and time information all these devices will generate will be enormous, even by contrast to the already enormous amount of big data presently. But it is not reasonable to expect technology to solve all these problems. For one thing, the demand for solutions is simply not comparable to the demand behind the creation of new devices and development of new functions for devices. He recommends moving forward with the amendments.

John D. Martin: He is the manager of an e-discovery practice with 30 professionals. He generally supports the package. But his clients find themselves in "preservation paralysis." In one case, the client preserved about a half million backup tapes at a cost of \$1 million per year (\$2 per tape?). He supports amending 37(e), but worries about "willful" being too uncertain. As things now stand, there is little real

incentive for plaintiffs to tailor their discovery requests. One suggestion is addition of the word "the" before "litigation" to make it clear that this is not about whether certain materials should have been preserved for some litigation, however remote from the present one, but whether they should have been preserved for this case. But he acknowledges that this line should not exclude attention to preservation for the first case involving an allegedly defective product when the current suit is the 50th suit.

Ashish Prasad: He is CEO of Discovery Services, LLC. The big ticket over the past five years has been the impact of TAR on e-discovery costs. His prediction is that it will lead to a "small reduction" in review costs, but that other developments will offset this effect. Most lawyers are not comfortable with having only machines look at documents and will insist that lawyers do so. One reason is to identify trade secrets and the like. So the real savings will probably be something like 25%. At the same time, there will be large increases in data volume, so improved methods may largely be a way to stay in place and not fall farther behind.

Ariana Tadler: She represents plaintiffs. She is concerned about an escalation of motions practice under amended 37(e), and also about the challenge of proving substantial prejudice. The current problems were not caused by the rules, but by the behavior of lawyers. The solution is cooperation, not 37(e). How will this rule really stop over-preservation? She supports a rule like Judge Francis's proposal. Sedona really struggled to reach consensus on these issues; they are very difficult. And now Prof. Hubbard reports that there won't be much effect even in terms of what the corporate litigants want.

Jennifer Henry: Amended 37(e) would be an important change to provide guidance for preservation. It would assist litigants. The State of the law is in flux, and parties live in fear of the consequences of failure to preserve. An example is an airline client that has five full-time employees who manage preservation only, not review of materials for production. This leads to massive over-preservation. She would remove "willful" from (B)(i) and add a bad faith requirement to (B)(ii).

David Kessler: He is Chair of the e-discovery practice at Norton Rose Fulbright. He is a huge proponent of using TAR. But it should not be written into the rules. But the requirement of specific objections under Rule 34 will not help so long as plaintiffs are still making overbroad requests.

## 2. Rule 37(e)(1) -- Failure to preserve

Eli Nelson (284): This provision sets out an ambiguous standard for proof. Who determines whether information should have been preserved? What is the context of such a determination -- a priori or ex post? What test is applicable. I suggest changing the rule to say "which the party knew or should have known needed preservation." This would clarify that the standard is reasonableness.

Washington Legal Foundation (285): The rule should articulate a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information. Much of the wasteful cost of discovery stems directly from the ever-increasing burden of over-preservation, which is largely a result of guesswork resulting from fear of sanctions. The current "anticipation of litigation" standard is largely unworkable and impractical because these decisions must be made before litigation begins, and without the benefit of the scope of discovery provided by the pleadings. Moreover, before suit is filed there is no judge able to resolve discovery disputes or preservation issues. The rule should adopt a decisive and clear-cut "commencement of litigation" standard, triggered by the filing of a complaint. This rule would set uniform expectations while preserving a party's ability to prove or defend a case.

Lynne Thomas Gordon (287) (American Health Information Management Assoc.): Although AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information, the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." Provisions of the proposed amendments are still subject to considerable interpretation, thereby bringing into question whether these amendments will achieve the goal of uniformity. For example, the lack of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of those terms by the courts.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges that the rule adopt a "commencement of the litigation" trigger for determining when preservation obligations are imposed. The proposal would required preservation "in anticipation" of litigation. This trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming.

Andrew B. Downs (359): Often the prospect of litigation is foreseen far earlier well down the corporate organizational structure than at the level where the individuals with the training, background, and authority to initiate litigation holds

are located. The "anticipation of litigation" standard is subjective and fails to recognize the fundamental traits of human nature -- humans are slow to recognize they may have erred, they react slowly to unforeseen events, and do not like to deliver bad news to superiors. For these reasons, I urge you to replace the "anticipation of litigation" standard with a two part either/or standard under which the duty to preserve begins when notice of the suit is received, or when the party receives a written request from the other party to preserve relevant information.

International Assoc. of Defense Counsel White Paper (390): The rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard requires preservation decisions to be made prior to the receipt of a scope-defining complaint. Litigants need a clearer roadmap in this area. The IADC recommends that the rule adopt a clear "commencement of litigation" trigger.

William Lockett (415): There should be a defined point in time when a duty is imposed on a party to preserve information. Perhaps it is when a notice of claim letter is received and the claim is defined with relative certainty, or perhaps it should be the date of service or other notice of commencement of litigation. Whatever the "marker" ends up being, it should be clearly stated.

Harlan Prater (418): Though I generally support the amendment, I am concerned with the adoption of the "anticipation of litigation" standard. The new rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. One would be a "commencement of litigation" standard balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary.

Federal Magistrate Judges' Ass'n (615): We note a possible ambiguity in Rule 37(e)(1), which refers to the failure "to preserve discoverable information that should have been preserved in anticipation or conduct of litigation." The predicate of any sanction must be that the information was not only discoverable but actually sought in discovery. Failing to preserve information in the abstract should not result in any sanction. It is the failure to produce information sought in discovery because of the failure to preserve it that justifies sanctions. We recommend inserting qualifying language in the rule to make this meaning clear:

If a party does not produce information sought in discovery because the party failed to preserve discoverable

information that should have been preserved in the anticipation or conduct of litigation, the court may . . .

Phoenix hearing

Timothy Pratt (Federation of Defense Counsel): What we need is a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. We think that it would be best to adopt a "commencement of litigation" trigger for that obligation. The "anticipation of litigation" test is uncertain and forces parties to make preservation decisions before they know whether a lawsuit is even coming. Such a rule is bound to lead to differing standards in different courts. The "commencement of litigation" standard is desperately needed.

William Butterfield: There should be a clear separation between a curative measure and a sanction. One way to do that would be to refer in the rule to a "non-sanction-based curative measure."

Dallas Hearing

## 3. Rule 37(e)(1) -- Curative measures

John K. Rabiej (272): The proposed amendments helpfully carve out "curative measures" from what have been sanctions, but in so doing they fail to retain a showing of prejudice as a prerequisite for use of such measures. Because curative measures may have consequences comparable to the severest sanctions, a showing of prejudice should be required. Accordingly, the Committee Note should be amended along the following lines: "Although a party need not make a showing that the opposing party is culpable in losing discoverable information, the party should typically make a showing of the actual degree of prejudice resulting from the lost information before a curative measure is imposed." Examples of serious curative measures include a directive to restore backup tapes, or permitting introduction of evidence at trial concerning the loss of information, along with attorney argument about that subject. Most judges will have the good sense to require a showing of prejudice before employing such measures, but history has taught that outlier decisions can have profound impact on ESI discovery jurisprudence, and that they are rarely subject to appellate review. Unfortunately, the Committee Note as presently written says that the court may impose a curative measure to restore lost ESI even though it would otherwise be precluded under the proportionality test of Rule 26(b)(2)(C). Meanwhile, proposed 37(e)(1)(B)(i) requires "substantial prejudice," and (B)(ii) requires a higher degree of prejudice. Altogether, this may invite arguments that no prejudice at all is required for imposition of curative measures. An early example of judicious consideration of prejudice is *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90 (D. Colo. 1996), which notes that prejudice is important along with culpability when making sanctions decisions. Typically, the courts have recognized prejudice in later decisions (noting a number of recent decisions). In *Gates Rubber*, plaintiff argued that because terminating sanctions were not involved no showing of prejudice was necessary. It would be best to guard against such arguments in the future; this may seem a small point but an ounce of prevention may be warranted here.

Washington Legal Foundation (285): The proposed rule authorizes imposition of "curative measures" without a showing of willfulness, bad faith or substantial prejudice. Presumably the party needs only to establish that lost information was relevant. But curative measures may sometimes have consequences every bit as severe as sanctions, at least some meaningful threshold should be satisfied before curative measures are authorized. A minimal showing of substantial prejudice should be required in the rule before curative measures are imposed. Unless such substantial prejudice can be shown, no curative measures should be necessary.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the *Federal Courts Law Review* concerning the

proposed amendments. "The Advisory Committee's proposal has the salutary effect of re-focusing attention on the 'remedial' aspects of a spoliation motion."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section applauds the Committee's attempt to bring order out of the chaos of differing standards for remedial measures for spoliation. It agrees that there should be a showing of substantial prejudice and willfulness or bad faith to impose sanctions.

Thomas Y. Allman (308): The distinction between "sanctions" and "curative measures" is quite murky and will allow a district court to avoid the ban in (B)(i) on all but the harshest sanctions simply by invoking the "curative measures" provision. This suggests that curative measures will become the primary remedy, rather than "sanctions," and that adverse inferences will fall into the former rather than the latter. The Sedona Conference, in comparison, defined the full spectrum of "sanctions" without differentiation, but separately acknowledged the role of case management and remedial orders as necessary to "effectuate discovery or trial preparation."

The Sedona Conference Working Group 1 (346): We have a number of concerns about the curative measures provisions. First, we believe that the Committee Note should be clarified to avoid any misunderstanding of this provision to suggest that courts would be limited in their authority to utilize similar measures to manage their cases, such as ensuring compliance with their orders. More basically, however, we believe that "curative measures" should not be treated separately from "sanctions" under Rule 37(e). Instead, the rule should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies ("sanctions") for failures to preserve relevant information, and that it should emphasize that where a party has acted in good faith in its preservation efforts, such sanctions should only be imposed in exceptional circumstances. The rule could undermine the Committee's goals by permitting "curative measures" without a showing of either exceptional circumstances or of prejudice and culpability. In practice, there is often no difference between the ultimate effect of many "sanctions" and "curative measures." Moreover, courts have characterized serious sanctions, such as a permissive adverse inference jury instruction, as remedial rather than as a "sanction." See *Mali v. Fed'l Ins. Co.*, 720 F.3d 387, 393 (2d Cir. 2013). Interpreted in this way, the "curative measures" provision would undermine the goal of reducing overpreservation. As detailed below, Sedona's October, 2012, proposal would forbid imposition of sanctions "if the party acted in good faith." This approach (with an "exceptional circumstances" exception) should be adopted for sanctions for failure to preserve evidence. When courts use such remedial or case management orders under another



rule, neither prejudice to the requesting party nor culpability need be shown. Accordingly, the Sedona submission in Exhibit A says that "Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation." But "curative" sanctions potentially affect parties and counsel long after the case in which those sanctions are issued. For example, *pro hac vice* applications sometimes require counsel to report whether they have ever been sanctioned.

John Beisner (382): I enthusiastically endorse the portion of the proposal that authorizes courts to order curative measures. Under the current rule, the only option for a court faced with a party's loss of information is to sanction that party. But the goal of the rule should not be punishment, and giving the courts the option of ordering curative measures is logically.

Alan Morrison (383): Curative measures are a better option than sanctions.

Hon. James C. Francis IV (395): The differentiation between curative measures and sanctions in the proposed rule is a positive contribution. Particularly because there are professional repercussions for lawyers subjected to sanctions, this is a positive development. But the proposed rule puts the boundary in the wrong place. Each of the so-called "sanctions," including case-ending orders, may be curative if it is necessary to rectify the substantial loss of evidence.

Hon. Shira Scheindlin (398): In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court indicated that a permissive adverse inference instruction is akin to a curative measure, making a finding of culpable intent unnecessary. But how many judges would so regard a jury instruction?

David Kessler (407): There should be a requirement that a finding of negligence is included in the curative measures provision. That would make it clear that the adverse inference sanction is just that -- a sanction -- and not a "curative measure." In general I support the bifurcation of curative measures and sanctions. But I am concerned that it may not be clear that the listing of curative measures does not seek to limit a court's authority to use similar measures to manage its cases. I agree with Sedona that the Note should clarify this point. I also agree with Sedona that an adverse inference is, in all forms, a punitive sanction. It is very difficult to recover from, and too often case-dispositive. Since discoverable information will almost always get lost (to some extent), it should be absolutely clear that adverse inferences are not available unless the findings required for sanctions are made. Curative measures should not be case-altering (or career-

altering). Therefore, courts should be prohibited from using curative measures to correct a failure to preserve discoverable information where the party has acted reasonably or where the requesting party cannot establish some prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The changes to 37(e)(1)(A) say that permitting additional discovery is a "sanction." It seems to us that this means plaintiff can only get further discovery on proving spoliation. But discovery should be available without proving spoliation. The rule then says that the court can also "order curative measures." But the only curative measure that will deter spoliation is to strike defenses. The only other curative measure that comes to mind is an adverse jury instruction.

Robert D. Curran (448): The changes to 37(e)(1)(A) propose "sanctions" for failure to preserve. But the first proposed sanction is to "permit additional discovery." Thus, it would seem that the plaintiff has the burden to uncover the spoliation and then is granted only the right to pursue more discovery, a right which should have been accorded anyway. The second sanction is to order curative measures, but the only one that will deter spoliation is to strike defenses. It is unclear what "curative measures" exist other than striking defenses or providing a jury instruction regarding a rebuttable presumption as to what information would have shown. The third sanction is to shift attorney fees, but those fees will usually not amount to much.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem.

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Jeanna M. Littrell (FedEx Express): As an LCJ member, FedEx urges attention to the comment from John Rabiej about including a prejudice requirement in relation to "curative measures," which can be very serious consequences.

David Cohen: The Committee was wise to leave in remedial measures so that parties can still get additional discovery if they need it, even sometimes with attorney fees as well. We used to call those things "sanctions," but we're no longer placing that bad label on them because you don't have to be guilty of bad conduct for these to be used.

Jonathan Redgrave (Redgrave LLP): The curative measures provision is not tethered to any notion of culpability, which is unfortunate. Supports John Rabiej's suggestion regarding need for showing of prejudice.

Robert Levy (Exxon): We agree with John Rabiej on the need to emphasize prejudice as a prerequisite for "curative measures." Those can be very significant.

#### Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) GE is concerned about the introduction of "curative measures." This could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation and, if unwarranted, be equally unfair. Moreover, the absence of any prejudice requirement in (e)(1)(A) means that the curative measures could provide a means to evade the substantial prejudice requirement in (b)(i), creating, in effect, a no-fault, no-prejudice loophole in the rule. That would produce a step backwards in most jurisdictions from the current situation. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions.

Lee A. Mickus: He generally represents auto companies. He favors dropping (B)(ii). On the other hand, he has no problem with missing evidence instructions.

Brian Sanford: He is a plaintiff lawyer. In his opinion, adverse inference instructions are curative measures and the rule should so recognize.

## 4. Rule 37(e)(1)(B)(i)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The burdens on an injured party are so high as to render this "sanctions" provision essentially meaningless. First, it must show that the offending party failed to preserve discoverable information. Then it must establish that it should have preserved that information in anticipation of litigation. Then it must show that due to the loss of this information it has suffered "substantial prejudice." Even if it proves these things, the party must also prove that the failure to preserve was either "willful" or done in "bad faith." These are "both impossibly high (and subjective) standards that tend to be very difficult to establish without the proverbial 'smoking gun' to establish scienter."

Lawyers for Civil Justice (267): The conjunction should be changed from "or" to "and" so that the rule says sanctions may be imposed only on a finding that the failure to preserve was "willful and in bad faith." Permitting a "willful" failure to preserve as sufficient could include any deliberate conduct. This is confirmed by Judge Scheindlin's decision in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013), which applies the following standard: "The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently." Under this standard, establishing a standard auto-delete function could be characterized as "willful." The standard should make clear that sanctions are allowed only on a finding that the failure to preserve resulted from a desire to suppress the truth. Alternatively, the rule could define "willful" to include scienter or knowledge.

Daniel B. Garrie (281): The proposed amendment does not adequately deal with how the moving party proves the need for the missing information. As Judge Scheindlin eloquently said in Sekisui American Corp. v. Hart, 2013 WL 4116322: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it would allow parties who have destroyed evidence to profit from that destruction." Now counsel must advise their clients that destroying evidence is risky, as the burden is on the destroying party to prove good faith. If the burden shifts to the innocent party to show prejudice or harm, companies will not be as fearful of deleting evidence. Imagine a corporation who stumbles upon very harmful evidence, but destroys it knowing that the opposing party could never prove the value of its contents. The amended rule inadvertently protects the bad actor. If the rule is amended, "spoliation will run rampant."

Eli Nelson (284): There are currently differing interpretations of the threshold for sanctions, and this rule change will make it harder to order sanctions. Without the teeth of sanctions, there is no credible disincentive for those tempted to act badly. Document preservation is not something on the radar for many lawyers. Sanctions provide an excellent vehicle for promoting ethical behavior by lawyers, and the fact they can be ordered in the judge's discretion provides a desirable prod to lawyers. But requiring a finding of willfulness or bad faith will make it easy to defeat sanctions. With this change, it may become appropriate for counsel to advise their clients to roll the dice, or to remain ignorant of their preservation obligations. If they are "merely negligent" in that regard, the clients will actually improve their chances of winning on the merits. In particular, this strategy will assist them in winning the war of attrition. "Discovery about discovery" will become necessary to vindicate the rights of the victims of such conduct. At a minimum, "gross negligence" or "recklessness" should be added to willfulness and bad faith as a sufficient finding. This would make litigants pay more attention to the preservation obligations than they have so far.

Washington Legal Foundation (285): WLF believes that the use of the disjunctive is highly problematic. Conduct that is merely willful does not necessarily spring from a desire to suppress the truth, so "willfulness" alone should not suffice to establish the requisite scienter for imposition of sanctions. Some judges will not hesitate to impose sanctions if the rule can plausibly be read to permit them. See Sekisui Am. Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly even if without intent to [breach the duty to preserve it], or negligently."). Finding culpability under such circumstances would undermine the goals of this amendment. It would be better to require that the court find that the loss of information was "willful and in bad faith" before sanctions can be imposed.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA is concerned that the proposed amendments shift the burden to prove the need for missing information to the missing party. As Judge Scheindlin noted in Sekisui American Corp. v. Hart: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators."

National Center for Youth Law (292): This amendment would reject case law that holds negligence to be sufficient culpability to support sanctions. It essentially requires the innocent party to prove that it has been substantially prejudiced

by the loss of relevant information, even where the party destroyed information willfully or in bad faith. "Not only does such a change incentivize negligence (as long as it's not 'willful or in bad faith') but it creates an almost insurmountable burden on the plaintiff."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party that acted willfully or in bad faith to spoliage relevant material. Concerns have been raised regarding whether the proposed rule is inconsistent with the goals of sanctions, including deterrence and shifting risks to parties destroying evidence. For precisely such reasons, many courts have applied a presumption of prejudice where a party has willfully destroyed evidence. Burdening parties with the necessity of proving the relevance of information that no longer exists presents obvious problems. Finding alternative sources may often be possible, but often it is not.

Thomas Y. Allman (308): Under (B)(i), a potential producing party will be immune from sanctions even if discoverable information is lost through negligent or grossly negligent conduct, and even if the conduct is deemed "willful" it is still protected unless there is proof that "substantial prejudice" has resulted. A safe harbor of that nature is essential to create predictability, particularly for potential parties implementing preservation obligations prior to suit. But the ambiguity of the word "willful" significantly weakens that effect. It may be described to include anything that is "intentional." Similarly, the requirement that prejudice be shown could be compromised by courts that conclude the "willfulness" implies substantial prejudice. Beyond that, (B)(i) risks being undermined by (B)(ii), which makes sanctions available outside the tangible property realm in the absence of culpability. It would also be desirable to make it clear in the Note that the Committee has rejected *Residential Funding*.

Kaspar Stofflemayr (Bayer Corp.) (309): Granting authority to impose sanctions for loss of information that is "willful" though not in bad faith is not sufficient protection. And the non-exclusive list of factors in proposed 37(e)(2) confuses rather than clarifies the matter. Parties who are concerned to avoid sanctions at all costs will continue to overpreserve evidence unless the Rules delineate a clear line between a bad faith failure to preserve evidence and less culpable failures. We endorse LCJ's proposal to replace "or" with "and" in (B)(i).

Jonathan Smith (NAACP Legal Defense Fund) (310): Moving parties will often be unable to demonstrate the degree of harm suffered since they will not fully know what the lost information

would have revealed. As Judge Scheindlin recently said (Sekisui American Corp. v. Hart, 2013 WL 4116322), this shift "incentivizes bad behavior on the part of would-be spoliators." This does not mean that the moving party should be exempt from having to establish prejudice in order for sanctions to be imposed; those results should occur only in cases in which real harm has occurred. But the proposed amendment places a burden on the moving party that is too heavy. Civil rights plaintiffs, in particular, must often obtain their evidence from the defendants. LDF suggests that the rule be changed so that if the court concludes that the spoliating party has acted culpably (even in only a negligent manner) it bears the burden of demonstrating that the lost information is not relevant to any of the claims being asserted by the other party.

John F. Murphy (Shook, Hardy & Bacon) (314): Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring "substantial prejudice" and actions that were "willful or in bad faith." The present divergence in standards has created confusion, particularly for institutional clients such as corporations, businesses or governments. To enhance the revisions, the Committee should consider changing the standard from "willful or in bad faith" to "willful and in bad faith" to prevent the bad faith element from fading away or disappearing altogether. Doing so would be a reasonable extension to the Committee's work on the rule to ensure that those who make reasonable efforts to preserve information not suffer sanctions.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the culpability standard should require proof of both willfulness and bad faith. Allowing sanctions for conduct that is willful but not in bad faith undermines a core purpose of the proposed amendment -- to punish intentionally harmful conduct only. Pursuant to the articulated standard, Pfizer could be sanctioned for loss of material pursuant to an existing document retention policy, even if the policy had been implemented in good faith. Because willfulness does not require bad faith, the current wording of the amended rule appears inconsistent with the intention of the Committee.

U.S. Chamber Institute for Legal Reform (328): The ILR believes that the standard should be willful and in bad faith. At least one judge has interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind. See Sekisui A. Corp. v. Hart, 2013 WL 4116322 at \*4 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC

is concerned that the use of the word "or" in this subsection would authorize sanctions for willful conduct. That could include deliberate conduct that was void of any evidence of bad faith. One often cited willful act is the use of a standard auto-delete function. The use of such a function could be willful, but not in bad faith. FDCC recommends that the Committee consider substituting "and" for "or" to make clear that the conduct must be both willful and in bad faith.

The Sedona Conference Working Group 1 (346): Sedona believes that "willful" should be removed from the culpability standard and that "bad faith" should be replaced with "did not act in good faith" for the goal of uniformity. The specific Sedona proposal (submitted to the Committee in October, 2012 and included in Appendix A to this submission) provides as follows:

Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

This determination should be made with reference to a number of elements:

In determining whether a party acted in good faith in its preservation efforts \* \* \*, a court must consider whether the party:

- (A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;
- (B) intentionally destroyed information relevant to the claims or defenses;
- (C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;
- (D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and
- (E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

The Sedona proposal then directs that the court "must select the least severe sanction necessary to redress the failure to preserve" and provides the following enumeration of possible



sanctions:

- (A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;
- (B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;
- (C) staying further proceedings until the order is obeyed;
- (D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;
- (E) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action as the prevailing party claims;
- (F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (G) striking pleadings in whole or in part;
- (H) dismissing the action or proceeding in whole or in part;
- (I) rendering a default judgment against the non-movant; or
- (J) treating the failure as a contempt of court, if there has been a violation of a previous order.

Andrew B. Downs (359): The rule should say that sanctions are unavailable unless the loss was "willful *and* in bad faith," not willful *or* in bad faith. Conduct can often be willful without there being any intent to cause the resulting harm, or even when the actor could not reasonably foresee the resulting harm. Conduct which is willful and in bad faith should not be tolerated. Good faith conduct that is "willful" in a strict meaning of the term should not be sanctionable.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We think that "willful" is the wrong term to use if the intention is only to authorize sanctions against one who acted with intent to spoliolate. Some courts define "willful" as synonymous with volitional action, but no connotation of bad faith. We think that willful either should be deleted from the proposal, or the disjunctive "or" should be replaced with "and."

John Stark (381): Limiting sanctions to willfulness and bad faith combined with substantial prejudice in the litigation is a wise standard to keep litigation from devolving into a game of document management. Willfulness or bad faith should be defined as intent to destroy evidence to prevent a party from prevailing in litigation. The problem with leaving "willfulness" undefined is that it may be deemed to mean a simply intent to dispose of information. The exception where there is no willfulness or bad faith -- "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" -- provides a reasonable escape valve for a truly catastrophic situation caused by the destroying party's actions.

John Beisner (382): I applaud the proposal requiring a party to demonstrate "substantial prejudice" to support a sanctions request. This will limit the parties' ability to exploit spoliation traps. But the culpability standard should focus on whether the party's actions were "willful and in bad faith." Some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind (citing Sekisui). But sanctions should be authorized only when a party has engaged in intentionally culpable conduct -- knowingly destroying evidence that it knows should have been preserved. With ESI, it may be impossible to keep all information on a given subject. Sanctions for spoliation should be available only when the party knew it had a duty to retain the information.

Alan Morrison (383): I think that one aspect of the sanctions provision should be clarified. It does not appear to authorize the court to impose attorney's fees as a sanction. Sanctions under Rule 37(e) are limited to those listed in Rule 37(b)(2), but most lawyers would regard attorneys' fees as not included. But Rule 37(b)(2)(C) does allow attorney's fees. It is unclear, however, whether (C) is included. I would add "and (C)" after "Rule 37(b)(2)(A)" on line 22 unless the Committee wants to exclude attorney's fees. I find the standard -- "willful or in bad faith" -- uncertain because there is no definition of those terms. Of the two, bad faith is less problematic; presumably it means something more than lack of effort or sloppiness, but the focus on the party's subjective intent is problematic, particularly when it is an organization with many individuals having potential responsibility for retaining records. Instead, objective tests like recklessness or gross negligence are clearer and should be sufficient, particularly since the level of sanctions can make the punishment proportionate to the level of misconduct. Willful is more of a problem; as Judge Posner has written willful is "a classic weasel word. Sometimes it means with wrongful intent but often it just means with knowledge of something or other." Unless some clear guidance can be provided, I would leave it out and rely solely on an objective standard such as recklessness or gross negligence.

International Assoc. of Defense Counsel White Paper (390): The use of "willful" is problematic because some courts define willfulness as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. The problem could be solved by substituting "and" for "or" in (B)(i).

Steven J. Twist (296): The word "willful" should be removed, making it clear that the test is "bad faith." Some courts interpret "willful" to mean simply intentional, and if that word remains in the rule it will remain impossible for companies to make reasonable decisions about preservation. Moreover, several circuits have higher standards, so adopting the published standard would lower the standard in those circuits.

Hon. Shira Scheindlin (398): Substantial prejudice is an open-ended concept that will be interpreted differently by each judge facing the question. It is a subjective determination. Worse yet, "willful" must mean something other than "bad faith" given that the latter term is preceded by "or." What, then, does it mean? My research shows that it varies depending on the context in which it is used. I would not like to see this problem cured by eliminating "willful" and leaving only "bad faith." That sets the bar too high. Such a rule would encourage sloppiness and disregard for the duty to preserve. If the Committee wishes to keep the focus on state of mind, then I would urge that the language include "gross negligence," "reckless," or "bad faith" rather than "willful" or "bad faith." I am very concerned about the burden of proof with regard to "substantial prejudice." It is unreasonable to require the victim to prove not only culpable state of mind but also to prove prejudice when it cannot know the value of the information that it does not have. The better approach would be to presume that the lost information was important if the culpable conduct was done with a sufficiently egregious state of mind. The presumption can be rebutted by the spoliating party. That is the fair approach.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): We already know that the failure to produce information by defendants often causes substantial prejudice. But having to show that failure to preserve was willful or in bad faith imposes an extraordinary burden on a claimant seeking to obtain curative measures or sanctions against a party that destroyed evidence. Defendants will simply claim that their "retention" policies made the evidence unavailable. Then they get a "pass" and no sanctions will ensue. But the cost of keeping information in this electronic age is de minimis. Moreover, locating relevant materials is easy also. "Instead of manually sorting for weeks through what can often be tens of thousands of pages, or in many of my cases millions of pages, now we do an electronic search in

moments to find relevant information to assist in prosecuting or defending a claim. \* \* \* No matter what is claimed about the cost of preserving and producing information electronically, anyone can see that it is far cheaper to handle than on paper."

John Kouris (Defense Research Institute) (404): DRI believes that the use of the disjunctive in this proposal ("willful or in bad faith") is highly problematic. Some courts (see *Sekisui*) define "willful" as intentional or deliberate conduct without any showing of a culpable state of mind, such as by establishing a standard auto-delete function. We think "or" should be changed to "and."

David Kessler (407): The word "willful" should be stricken. In addition, the rule should be amended to require the court to use the least intrusive curative measure or sanction to remedy the failure to preserve.

Michael Reed (on behalf of members of the ABA Standing Committee on Federal Judicial Improvements) (409): We believe that the language is problematic. The term "willful" is hopelessly ambiguous. We believe that the threshold standard for the award of sanctions instead should be a demonstration of gross negligence or recklessness by the movant. We also believe that it's unfair to place an initial burden on the moving party on a spoliation motion to prove prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This amendment practically imposes a scienter requirement that will rarely if ever be met. This will cause the plaintiff to engage in massive discovery to prove scienter.

Mark S. Stewart (Ballard Spahr) (412): The rule should be changed to say there must be a finding that the loss of information was "willful and in bad faith." Without that change, some courts may find the willfulness component satisfied because a party had purposefully acted in a way that caused data to be lost without intending to prejudice a litigant. In *Sekisui*, for example, plaintiff deleted computer files to free server space six months before sending a notice of claim. Despite finding that plaintiff acted without a "malevolent purpose," the court found that the intentional destruction of evidence after the duty to preserve attached amounted to willful destruction. The language of the proposed rule should be revised to avoid this sort of result.

William Adams (419): The rule should say willful "and" bad faith.

Ryan Ferguson (433): The rule should say willful "and" bad faith. Merely requiring that the conduct was willful leaves open

the possibility that parties will be sanctioned for following what would otherwise be legitimate document retention policies.

Robert D. Curran (448): The requirements for getting sanctions under this provision impose impossible conditions. There is practically a scienter requirement, which will never be met. And it would require plaintiff to engage in massive discovery to prove scienter.

Thomas Wilkinson (461) (with copy of article from Penn. Bar Ass'n Fed. Prac. Comm. Newsletter): Judge Scheindlin's point about the dubious nature of putting the burden on the party seeking sanctions to prove substantial prejudice is persuasive; it is well-established that the burden should lie with the party best able to provide information about the question at issue. But her further charge that the amendment creates perverse incentives and encourages sloppy behavior is not so persuasive. Although the amendment would limit the court's ability to issue sanctions, it also encourages the court to order curative measures. The court could, for example, direct a party to restore lost information or to develop substitute information or permit the introduction of evidence at trial about the loss of information or allow argument to the jury about the possible significance of that lost information. These adverse consequences serve to encourage litigants to engage in reasonable and diligent document and data preservation practices.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

Gwen D'Souza (Maryland Employment Lawyers Assoc.) (660): Currently, negligent destruction of evidence will support an adverse instruction allowing the jury to infer the defendant's bad faith and possible retaliatory or discriminatory animus. We oppose the change in (B)(i) requiring the plaintiff to prove wrongful intent in the destruction of evidence before proving wrongful intent in the underlying employment is too onerous. Placing on the plaintiff the additional and new burden of proving harm is also unwarranted. And these pro-defendant changes are

unlikely to produce savings for defendant. It is unclear how it can really save money spent on preservation just because the rule is amended this way.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We strongly oppose including "willful" as an alternative to "bad faith." We attach in our Appendix a compilation of citations to varying interpretation of the word "willful" in the various circuits. We also think that any standard less demanding than "bad faith" would be wrong for the serious consequences Rule 37(e) addresses. If the term "willful" really means the same thing as "bad faith," we don't need it, and if it means something else, we do not want it.

Washington D.C. Hearing

Jeana Littrell (FedEx Express): If courts interpret "willful" to include settings on an auto-delete function, that might mean we would have to stop using auto-delete on all our systems, or at least all subject to a litigation hold. That would be very costly, and would strain the limits of existing technology for finding responsive ESI.

David R. Cohen (Reed Smith): The present formulation of creates a risk because some courts interpret "willful" very broadly. It would be better to say "willful and in bad faith."

Jonathan Redgrave (Redgrave LLP): Using both "bad faith" and "willful" will lead to disputes. He favors using "bad faith" and defining it. Also, the rule should say that the least severe sanction should be employed; saying that only in the Note is not enough.

Thomas Allman: It is good to reject Residential Funding. But some recent decisions have defined "willfulness" too broadly. It may be that a good definition of willfulness in the Note will be an antidote to that risk. It is important to make very clear that the old Second Circuit view is not to be followed under the new rule.

Peter Strand (Shook, Hardy & Bacon): We think it would be much better to say "willful and bad faith." "Folks don't destroy documents."

Dan Troy (GlaxoSmithKline): We favor having the rule say willfulness and bad faith.

Alexander Dahl (Brownstein Hyatt Farber Schreck): The current formulation that treats "willful" action as sufficient to justify sanctions is too elastic. For example, see Judge Scheindlin's decision in Sekisui, where she defines willfulness in a very broad manner. True, she also expresses opposition to

this committee's current proposal in that decision, but the point is that some judges will regard the current proposal as authorizing sanctions in a broad swath of cases. In short, so long as decisions like the Sekisui ruling scare the people who have to make preservation decisions, the rule change will not achieve its purpose of reducing the hugh burden and cost now resulting from divergent approaches to preservation. The rule should say that bad faith is required, and that it requires a showing of a decision based on consciousness of a weak case or awareness that evidence helpful to the other side would be destroyed.

Jennifer Klar: Negligence or gross negligence would be more appropriate standards than what the Committee has proposed. That would protect parties that have acted reasonably. Under the willfulness or bad faith standard, the destruction of evidence will go unchecked, creating an incentive to destroy evidence. Moreover, including adverse inference instructions with sanctions is wrong because that is a remedial measure, not a sanction. The D.C. Circuit has proclaimed that such measures are "fundamentally remedial."

Michael C. Rakower (N.Y. St. Bar Ass'n): We recommend including a definition of willfulness. It should stress intentional action. It also should focus on a party's "actions or omissions", not just on actions. Omissions may more often be the reason these problems arise.

#### Phoenix hearing

Robert Owen: Retaining "willful" as sufficient will dilute the rule. One judge in the S.D.N.Y. has already indicated a very broad interpretation of that word. It would be best to substitute "and" for "or" in the rule -- "willful and in bad faith."

William Butterfield: The requirement that a party seeking sanctions prove that the loss of information caused "substantial prejudice" is a large burden. For this reason, the rule should provide that the alleged spoliator should have the burden of proving that there was no substantial prejudice. That would matter only if the court were persuaded that the necessary level of culpability were established. In those cases, given that the alleged spoliator has more knowledge of its own information than the other side, it makes sense to place the initial burden on that party to show that there has been no significant prejudice. "Willful" is also a "problematic" standard in the rule. The Committee Note should provide examples of bad faith. One would be failure to take any steps to preserve, allowing the auto-delete function to destroy evidence.

Stephen Twist: The word "willful" should be removed.

Jill McIntyre: The "substantial prejudice" standard will be helpful to companies. Usually they don't delve into the data to determine what to preserve; no company will make a detailed evaluation of the data at the preservation stage, unless litigation is imminent. So rather than do that, it will avoid risks by overpreserving. Although reducing preservation does not save much money all by itself, it does reduce costs later on for collecting, processing, and producing. Asked how the "substantial prejudice" standard assists companies in making such decisions, witness answers that it shows that it's o.k. to risk loss of some information.

John Rosenthal: The distinction between sanctions and curative measures is illusory and should be abandoned. One illustration of this illusiveness is that "permissive" adverse inference instructions are sometimes regarded as curative measures presently by judges. On the other hand, some case law calls things we seem to regard as curative measures "sanctions." Yet our draft would allow "curative measures" to be imposed without a showing of either prejudice or culpability. If curative measures are left in, a prejudice requirement should be added.

#### Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) Regarding the standard for allowing sanctions should clearly make them unavailable for anything like negligence. Therefore, he would be concerned about adopting a "reckless disregard" standard. The Sedona standard is better.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

John H. Martin: Texas has a lot of jurisprudence on what "willful" means. If you use that word, you should define it.

Neva Lusk: (B)(i) should say "willful and bad faith." Otherwise any intentional action could result in sanctions. There are a lot of mom and pop operations that do intentional actions that should not suffice to support sanctions. Does not like "reckless disregard" as a standard either. Instead, one should use a totality of the circumstances standard. Asked whether a party that simply decided not to comply with



preservation obligations because of the cost of doing so could be sanctioned if it was indifferent to, but not aware of, what was lost, answered that this conduct would not indicate a specific intent to deprive another party of relevant evidence.

## 5. Rule 37(e)(1)(B)(ii)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): This proposal is even more troubling than (B)(i). "First of all, the phrase 'irreparably deprived' is past tense and, therefore, suggests that an injured party proceeded with the litigation of its case and was, as a result of the offending party's conduct, not able to pursue its claims during the course of the litigation. But if an injured party has to wait until it has failed on its claims at trial as a result of vital evidence being destroyed then none of the sanctions provided for under Rule 37 will matter." And what does the term "irreparably" add to "deprived"? That seems to establish some higher standard that an injured party must meet to show its entitlement to relief. Finally, the use of the word "present" raises concerns among those who have the burden of proof. "[A]n injured party may be deprived of vital evidence necessary to prove its claim by the wrongful conduct of a defendant, but still have a scintilla of evidence sufficient to *present* its claim to a jury."

Lawyers for Civil Justice (267): This provision should be stricken. There is no need to include this provision since ample measures exist to handle the rare kind of case in which this problem can arise. Removing the provision would not weaken existing spoliation law. The Silvestri case, for example, could have been handled the same way it was handled under this rule without (B)(ii) because the court could have deemed plaintiff's conduct to be willful or in bad faith. It was surely prejudicial. Moreover, under the proposed rule remedial or curative measures would have permitted the court to preclude plaintiff's experts from testifying or allowed defendant's attorney to comment at the trial. Other cases confirm that this provision is not needed to justify needed sanctions results. But including this provision will likely result in an increase in motions seeking harsh sanctions. Indeed, this provision provides "a tort-based spoliation recovery" that is beyond the authority of the Rules Enabling Act, for "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from 'a court's inherent power to control the judicial process'" (quoting *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009)). Moreover, the "irreparably deprived" phrase is too amorphous, and results would tend to differ from judge to judge. In addition, "including the (B)(ii) exception in the new rule will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the 'irreparably deprived' language."

Washington Legal Foundation (285): (B)(ii) creates a risk that it will essentially swallow the rule by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. Although the Committee evidently intends that

the "irreparably deprived" language will be applied narrowly, litigants claim "irreparable harm" as a matter of course in sanctions battles, and experience suggests that judges and litigants alike will some come to view the expression as a convenient way to circumvent primary operation of the rule. Absent willful or bad faith conduct, there should be no authority to impose sanctions on an innocent or merely negligent party. (B)(ii) should be removed from the proposed rule.

Alex Jennings (294): I think that (B)(ii) should be retained even if 37(e) is limited to electronically stored information. Although limiting the rule to ESI might lessen the effect felt if this part is removed from the rule, it still provides a narrow exception when sanctions are allowed even in the absence of willfulness or bad faith. This narrow exception has been used by courts. Due to the exceptional circumstances that are necessary for relying on this provision, such as tangible evidence, limiting the rule to ESI is not enough. The flexibility of (B)(ii) can be incredibly necessary.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section supports authority to impose sanctions without regard to culpability when a party's actions have "irreparably deprived a party of any meaningful opportunity to present or defend against claims." Were this provision not included, the Section would be concerned that an adverse-inference jury instruction or a direction establishing matters or facts could not be imposed when the spoliated information is central to the action but the spoliator was merely grossly negligent or reckless. The standard in (B)(ii) is sufficiently high that it likely will be only the rare case in which sanctions may be imposed when the spoliator does not act willfully or in bad faith.

Thomas Y. Allman (308): The (B)(ii) provision should be dropped. In its place, the phrase "absent exceptional circumstances" should be added to the rule to avoid overruling *Silvestri* and similar cases. The Committee Note could then explain that this exception is designed to help avoid courts using it inappropriately to impose liability without fault. If the Committee is not prepared to remove (B)(ii), it should consider limiting it to "documents and ESI."

Malini Moorthy (Pfizer) (no. 327): This provision creates a risk that courts will not narrowly apply what is meant to be limited to very exceptional cases. Plaintiffs routinely assert that they have been "irreparably deprived" of critical information.

U.S. Chamber Institute for Legal Reform (328): ILR urges that this section be deleted altogether. Allowing sanctions without a finding of wilfulness and bad faith would exacerbate

the problem if spoliation "mini-litigations." It would also be unfair because an adverse inference instruction produces all but a declaration of victory for the side that obtains the instruction against the other side.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that this provision could swallow the rule by enabling judges to impose sanctions without any finding of willfulness or bad faith. It urges removal of the provision.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): I was asked whether my suggestion to add "absent extraordinary circumstances" to the beginning of (B)(i) and drop (B)(ii) would lead to greater uncertainty because it would be open ended. That would make the alternative a truly rare exception, not an equivalent alternative as in the current draft.

Doug Lampe (343) (Ford Motor Co.): Ford is concerned that retaining (B)(ii) would eviscerate much of the clarity sought by the Committee. All advocates for sanctions claim they have suffered "irreparable deprivation." All that "irreparable" means is that the information sought is gone, and "deprivation" only means that the loss of the information is regrettable and unfortunate. Ford urges that a bad intent component be included in any rule governing the imposition of sanctions. If that is not done, Ford urges that (B)(ii) be changed to make it clear that the claim or defense must be so restricted by the absence of information that the court would be required to dismiss the claim or defense were there no relief under (B)(ii).

The Sedona Conference Working Group 1 (346): Sedona believes that if the "Absent exceptional circumstances" approach it has recommended is adopted (b)(ii) would not be necessary. We think that the wording of the Advisory Committee's proposal would be susceptible to inconsistent interpretations because the term "meaningful" is inherently subjective. The "absent exceptional circumstances" approach provides the court with appropriate flexibility to address situations where the loss of evidence has deprived a party of the ability to pursue or defend against the claims. If the Committee proceeds with (B)(ii), we believe it should be rewritten to focus on whether the party has been "irreparably deprived of the ability to present or defend against the claims in the litigation." This language seems to us much less susceptible to inconsistent interpretations than the Committee's "any meaningful opportunity" language.

Kenneth D. Peters & John T. Wagener (353): This provision should be deleted. It will generate motion practice as the courts struggle to determine what it means.

Andrew B. Downs (359): This provision is an invitation to sanctions motions. The irreparable loss of evidence should not

convert otherwise unsanctionable acts or omissions into sanctionable ones. If there is an "irreparable deprivation" exception, lawyers will use it, but not as the Advisory Committee contemplates. It takes but one published decision expanding the scope of this provision to encourage yet more sanctions motions and more litigation of collateral issues.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We are concerned that courts may overread (B)(ii) because it applies to any loss of information that "irreparably deprives a party of any ability to present or defend the action." The rule should make clear that sanctions are permitted in the absence of culpability only where the adverse party cannot, as a result, submit any evidence in support or defense of the claim. It may be best that this provision be eliminated, but at least it should be explicitly cabined.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that sanctions for loss of evidence should be limited to cases of bad faith. To create a lesser standard of culpability for loss of evidence that causes catastrophic prejudice would encourage counsel who cannot show that the loss of evidence was due to bad faith to claim that the impact of the loss satisfies the standard of no "meaningful opportunity" to prosecute or defend. This in turn would require opposing counsel to argue that the party seeking sanctions could nonetheless prevail -- in effect arguing the other side's case.

John Beisner (382): (B)(ii) should be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation claims as a litigation tactic and impose significant costs on American companies by encouraging them to store every last byte of information.

Alan Morrison (383): I believe the use of the word "any" on line 30 of the proposal places too heavy a burden on the party seeking sanctions. I would substitute "a" for "any," to lessen the burden and produce a fairer balance. In line 32, the use of "all claims" seems to mean that the deprivation must affect all claims; should it not be "any" claim. Beyond that, why not use "claim or defense," as used in Rule 26(b)(1) and several other places in the rules. Thus, the provision could read "irreparably deprived a party of a meaningful opportunity to litigate a claim or defense in the action."

International Assoc. of Defense Counsel White Paper (390): (B)(ii) could be problematic and allow courts to impose sanctions absent any willfulness or bad faith. It is likely that some courts would use the exception to avoid the primary rule. The IADC recommends that the exception be removed from the proposed rule.

Steven J. Twist (296): (B)(ii) should be removed from the rule. It is likely some courts would use the exception to avoid the primary rule.

John Kouris (Defense Research Institute) (404): This provision could swallow the rule and defeat the basic goal of the amendment to constrain use of sanctions for failure to preserve. It is likely that some courts would simply use this provision to sidestep the requirements of (B)(i).

David Kessler (407): This provision should be removed. It makes the responding party the insurer of its opponents' ability to sue.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This provision at least offers the possibility (compared to (B)(i)) of having some teeth. But we ask, at what point this decision is to be made? Is it only at the end of the trial? If it is toward the beginning of the litigation, it would be almost impossible for plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to present or defend against the claims in the litigation? This would require massive evidentiary hearings and certainly will be almost impossible to determine at the beginning of the process.

Mark S. Stewart (Ballard Spahr) (412): This provision may paradoxically undermine the amendment's purpose. The exception should theoretically apply only rarely, but courts may use it to avoid the rule. Requiring intentional conduct to justify sanctions is necessary to achieve the amendment's goals. We think that this provision should be removed.

William Lockett (415): This provision should be removed. There is plenty of strength in the rule as written when there is any indication of willfulness or bad faith with respect to failure to preserve evidence.

Thomas Kirby (435): This provision is seriously ambiguous and should be clarified. The language "any meaningful opportunity to present or defend against the claims in the litigation" could be read in several different ways. It could mean that severe sanctions are proper if any one meaningful opportunity to present or defend any one claim is foreclosed, even if other equally meaningful opportunities or defenses remain. Or it could mean that sanctions are proper only if every meaningful opportunity has been foreclosed. I suggest that the rule be rewritten to say "one or more meaningful opportunities to present or defend against one or more claims in the litigation" or "all meaningful opportunities to present or defend all [or at least one of the] claim[s] in the litigation."

Robert D. Curran (448): At what point is the determination

called for by (B)(ii) to be made? Is this only at the end of the trial. If it is toward the beginning of the process, it would be almost impossible for the plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to litigate. This would require massive evidentiary hearings. And no party would be willing to admit, much less try to prove, that it cannot prove its case.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): There were multiple suggestions on how to address the concerns of the (B)(ii) exception to the requirement to prove culpability. A significant number of participants urged that (B)(ii) should be removed entirely, and that the Committee Note should state that 37(e) does not overrule the Silvestri line of cases. Others raised the issue that the Committee Notes themselves are not approved by the Supreme Court, making this a less-than-ideal way to address these concerns. One participant endorsed an idea proposed by Thomas Allman that would delineate between documents, ESI, and tangible things. This provision could be removed, it was suggested, if new 37(e) were applied only to ESI and documents, but not to tangible things.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We support the proposition that, in that rarest of cases where a party's non-bad faith conduct destroys evidence such as to make it impossible for the other party to litigate, extreme sanctions might be appropriate. We do not agree with the suggestion -- implicit in a question the Committee asked -- that such unintentional catastrophic destruction cannot happen to ESI. It can, and the rule should apply to all manner of information.

#### Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): The focus should be on the importance of the lost information to the action; materiality is key.

Thomas Allman: Drop (B)(ii) from the rule. The better

solution is to preface the rule with "Absent exceptional circumstances, . . ." That will take care of any exceptional case that might fall within (B)(ii).

Alexander Dahl (Brownstein Hyatt Farber Schreck): This provision creates a risk that judges seeking a ground for imposing sanctions but unable to fit within (B)(i) will distend (B)(ii) into something much broader than what the Committee has in mind. The provision is unnecessary. Problems of the sort addressed can be solved by curative measures.

Michael Rakower (N.Y. St. Bar Ass'n): We support the Committee's formulation of sanctionable conduct, but recommend that willfulness be defined. We propose that it be either intentional conduct or conduct that's sufficiently reckless so as to enable someone to foresee a high likelihood of harm. Our report is more precise on the formulation of this preferred standard. We also think it is important to add "or omissions" after "actions."

#### Phoenix hearing

Robert Owen: This provision should be eliminated. It will produce adverse results and dilute the goals of the rule rather than solve a real problem.

Timothy Pratt (Federation of Defense Counsel): This provision should be eliminated.

Thomas Howard: This provision should be limited to tangible things. That is where the problem exists -- loss of the instrumentality of injury. ESI is simply different.

Robert Hunter: Imposing sanctions for nonculpable loss of evidence is wrong. This sort of thing can happen often. For his company, employees servicing units often remove, discard, or alter units as part of servicing. Even if they ask "Have there been any problems?" they may not find out about something that comes up long afterwards.

Stephen Twist: (B)(ii) should be removed.

John Rosenthal: This provision should be eliminated. It deals with a mythical situation and will cause myriad problems.



## 6. Rule 37(e)(2)

Lawyers for Civil Justice (267): The factors in Rule 37(e)(2) do not belong in the rule. Originally (at the time of the Dallas mini-conference in September 2011) the Subcommittee was considering "bright line" rules to specify clear preservation standards and bring certainty to this area. In particular, specificity on the "trigger" would have been welcome. The Subcommittee abandoned this approach, however, leaving it to the courts to determine whether information should have been preserved. But the list of factors is incomplete and potentially misleading. There is no relative ranking of the importance of the various factors. Although some emphasize attention to whether a party behaved reasonably, there is little discussion of the impact of the absence of reasonableness. If these provisions are included in the rule, there is a significant risk that they will spur ancillary discovery. Courts may "cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the rule." For example, the Note states that the prospect of litigation may call for altering routine operations and says that issuing a litigation hold is often important. "It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate." See *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409 (S.D.N.Y. 2009). The specific factors compound the uncertainty:

Factor A does not define with any precision the circumstances that constitute notice that litigation is likely or that information would be discoverable.

Factor B calls for evaluating the reasonableness of preservation efforts, but reasonableness is an inherently vague standard and the fact some information was lost does not mean reasonable efforts were not employed.

Factor C regarding good-faith exchanges about preservation could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.

Factor D regarding proportionality does not spell out presumptive categories of data which need not be preserved absent prior notice. Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands.

Factor E may be useful in some cases, but requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to

provide guidance.

Washington Legal Foundation (285): The list of factors is not particularly helpful. None of these "reasonableness" factors sheds any relevant light on the central question -- whether the failure to preserve material was willful or in bad faith, resulting in substantial prejudice. Because it is an incomplete catalog of considerations, it risks being misinterpreted as mandates whose violation would justify the imposition of sanctions irrespective of the culpability and prejudice requirements. WLF urges the Committee to eliminate these factors from the rule altogether. At the most, they could be mentioned in the Note.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): (This is an article from the Federal Courts Law Review concerning the proposed amendments.) Preservation issues are best addressed by the parties as early as possible and from a reasonable, good faith perspective. Counsel should not send pro forma preservation letters with overbroad demands, and the recipient of a preservation demand should view the request as an opportunity to open a dialogue on the scope of any preservation obligation, rather than an affront to be ignored. "Conferring with opposing counsel does not place the responding party at a tactical disadvantage, particularly if the recipient has already concluded that the preservation demand letter was sufficient to trigger a litigation hold."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): Although the Section strongly endorses the concept of describing with particularity these and other such factors in the text of the rule, we are concerned that the language and the factors do not clearly express the Advisory Committee's intent. We think that the factors include everything in current Rule 37(e) and that it should accordingly not be retained if the new provision is adopted. But the introductory language saying that the factors bear on whether discoverable information that should have been retained has been lost singles out willfulness and bad faith as topics without considering the extent to which these factors also bear on whether an action was negligent or grossly negligent, which could affect what is an appropriate corrective measure under proposed 37(e)(1)(A). In addition, although the Committee Note says that the Committee has an "expectation" that only the least severe sanction necessary in the circumstances will be used, there is nothing in the rule that says so. The Section thinks that the introductory material should be revised as follows: "The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information, including . . . ."

Thomas Y. Allman (308): The Committee rejected the

inclusion of a detailed rule on preservation in favor of the "factors" listed in proposed 37(e)(2). But there is a dark side to the choice to merely hint at what the Committee might see as desirable by listing idiosyncratic "factors." The factors listed identify only selected aspects of the mix of issues involved and do provide the type of practice commentaries issued by more nimble entities such as the Sedona Conference. The Committee seems to assume that the factors will ensure that if a potential party makes reasonable preservation planning decisions it will not be branded a "spoliator." But the rule does not allow a party to safely rely on its ex ante assessment of proportionality in designing the scope of an initial preservation effort, even in the absence of access to the opposing parties or to a court. There is also a serious risk that courts will unfairly or inadvertently turn the encouragement of reasonable conduct on its head by determining that the protection from sanctions will be forfeited in the absence of following the advice in the Committee Note. For example, the Note unequivocally advocates the interruption of routine operations and touts the use of litigation holds, implicitly endorsing their use regardless of the circumstances. Courts have so used statements in the Committee Note to the 2006 amendments. The factors listed in Rule 37(e)(2) do not belong in the Civil Rules and should, at most, only be described in the Committee Notes as a checklist of possible issues to consider. But if the current formulation is retained, the Committee should make it clear that sanctions may be imposed only upon proof of heightened culpability and substantial prejudice. In addition, the Note should clarify that the diminished scope of discovery under amended Rule 26(b)(1) due to proportionality concerns is equally applicable to the scope of preservation under proposed 37(e).

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer strongly urges the adoption of a clearly defined and easily identifiable triggering event, such as the commencement of litigation, that would initiate a defendant's obligation to take affirmative steps to preserve information. The ill-defined "reasonable anticipation of litigation" standard under current law is too vague to provide useful direction to a party who wishes to avoid the risk of sanctions while still limiting preservation and costs to what the law requires. An example illustrates the problems under the present rule: In late 2012, an attorney sent the company a letter attaching a federal court complaint he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. It also rejected the demands, but so far as it knows no lawsuit has been filed. Meanwhile, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information. Current law gives scant guidance on when the company should no longer "anticipate litigation."

U.S. Chamber Institute for Legal Reform (328): This provision should be deleted from the rule. None of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitute reasonable conduct in the preservation context.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges deletion of this section of the proposed rule. The factors do not assist in determining whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice. If the Committee does not delete the factors, FDCC suggests that they be included in the Committee Note rather than the text of the rule itself. Including the factors in the rule suggests that they are mandatory considerations.

The Sedona Conference Working Group 1 (346): Sedona has proposed a set of factors to use in determining whether a party acted in good faith, its preferred standard for sanctions. It believes that its factors are superior to some identified in the Committee's draft. In particular, it believes that receipt of a "preservation letter" should not be mentioned. The existence of a preservation duty really has little to do with such letters; the duty can arise without any such demand, and demands are often made when there is really no duty. This factor may result in gamesmanship. We agree that the reasonableness of the party's preservation efforts should matter, but are concerned that the Committee's language is too narrow and might be read as limited to whether sufficient efforts were made to preserve the specific information that was lost. Instead, the focus should be on the "overall reasonableness" of the party's preservation efforts.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): Regarding proposed 37(e)(2)(D), we note that it does not say what factors inform proportionality in this context. The Committee Note suggests that courts should consider the same factors that inform the proportionality inquiry under new Rule 26(b)(1), and we expect that most courts will do so. But we think the text of the rule should explicitly refer to the Rule 26(b)(1) factors that courts should consider.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): In Rule 37(e)(2)(E), we propose changing "the party" in the first line to "any party." There may be circumstances in which it would be reasonable for the requesting party to seek the court's guidance on the responding party's obligation to preserve evidence. In addition, we think that the invitation in the Committee Note (see pp. 45-46) for consideration of a party's lack of sophistication in evidence-preservation practices would

encourage lack of diligence or, worse, sharp practices by parties insincerely profess to be "unsophisticated."

John Beisner (382): I think these factors should be deleted from the proposed rule. None of them relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Instead, they emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Reasonableness is a highly elastic standard, and using it will only foster greater uncertainty over whether a party may or may not delete information. There is also the risk that some courts will view failure to satisfy any one of these factors as sufficient to justify sanctions in a case where the loss of information was not the result of the party's willfulness or bad faith.

Alan Morrison (383): I worry about the focus in factor (A) on whether the information would be "discoverable." Particularly if the change to Rule 26(b)(1) invoking proportionality is adopted, that determination may be quite difficult to make. It also seems to me that requiring this sort of inquiry is ill-advised, and to create incentives for parties to destroy evidence, or allow it to be lost, on the ground that they had a reason to think it would not "discoverable under Rule 26(b)(1)." Similarly, paragraph (D) makes proportionality to "any anticipated or ongoing litigation" pertinent. Is that the same as the proportionality idea now introduced into 26(b)(1)? Does it include all the factors in 26(b)(2)(C)(iii) or 26(b)(1)?

International Assoc. of Defense Counsel White Paper (390): Although (e)(2) is illuminating and potentially helpful, it provides too tempting an opportunity for trial courts of varying judicial temperaments to bend the rule to achieve their own objectives instead of providing a bright line rule for litigants to understand and follow with confidence. The IADC recommends that the list of factors be eliminated, or at most included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts.

Hon. James C. Francis IV (395): Perhaps the most beneficial aspect of the proposed rule is the non-exclusive list of factors that courts are directed to use in assessing a party's conduct. Proposed (e)(2) makes clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect. Further, the factors properly encourage the parties to engage with one another with respect to preservation and to bring

disputes that cannot be resolved informally to the court for resolution.

Hon. Shira Scheindlin (398): These factors reveal little or nothing about willfulness or bad faith. Rather, they are factors that assess the reasonableness of the conduct. This creates a disconnect. If the standard for the imposition of sanctions included negligence or gross negligence the factors would make sense. But as the rule is written now they are not helpful.

John Kouris (Defense Research Institute) (404): This list of factors is not helpful and should be deleted or, at most, included in the Committee Note rather than the rule text. What the rule should do is articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. The current, ill-defined boundaries of discovery drive over-preservation. The "anticipation of litigation" standard in particular causes real difficulties.

Stuart Delery (U.S. Dep't of Justice) (459): The Department strongly supports including the concept of proportionality, as is included in the current factors. Disputes about the proper scope of ESI discovery or recovery efforts often involve exponentially greater cost than comparable disputes involving paper documents. Too often the accusations of lost information, and expensive and time-consuming efforts to address or prepare for accusations, or to recover long-discarded emails, outweigh the value of the case. We recommend that the Note clarify that the scope of discovery a party anticipates should be consistent with the scope of Rule 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information" because some will claim a disconnect between the scope of information covered by this new rule and the scope of information that is otherwise available in discovery. We also think that factor (A) on foreseeability should be modified. The Department has confronted situations in which a party repeatedly "loses" data while claiming ignorance of its preservation obligations. We think that "was on notice" might not capture this situation, and that the rule should allow the court to take account of prior instances of the same or similar conduct by the party. We therefore propose that (A) be revised as follows:

- (A) the extent to which the party reasonably should have known ~~was on notice~~ that litigation was likely and that the information would be discoverable;

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): A few expressed support for the factors in (e)(2), but most supported revising them. A significant number favored substantially revising (e)(2) to remove the "laundry list," leaving the analysis flexible to be

tailored for specific cases. One participant expressed the concern that the factors include many items that occur after the fact, which could result in gamesmanship. Factors (A) and (B) garnered most support, and several argued that the rule should be limited to those alone. One participant also suggested collapsing the introductory language. Other factors drew criticism. (E) was said to be confusing and unhelpful, based on the ambiguity of the word "timely." The same thing was argued with respect to "proportional" in factor (D). Others argued that the list of factors should be made explicitly non-exhaustive.

Charles Ragan (494): With respect to the factors listed in (e)(2), I suggest that less would be more, and that the factors should be limited to:

- (A) the extent to which the party was on notice that litigation was reasonably likely and that the information would be relevant; and
- (B) the reasonableness of the party's efforts to preserve the information.

I think that proposed factors (C) through (E) are subsumed within the first two. I suggest adding "reasonably" to (A) to conform to the majority rule in case law for triggering legal hold obligations. I suggest the substitution of "relevant" for "discoverable" because the scope of relevance is elastic -- it can contract or expand, as claims are modified. In particular, there may information the discoverability of which is not apparent when notice occurs that litigation is reasonably likely. A party should not be subject to sanctions if it secured the core information at the outset, but did not foresee the final configuration of the claims, and that information that is ultimately "discoverable" in regard to added claims but has been lost in the interim might lead to sanctions.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations (497)): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards

adopted by professional entities.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that including the factors in the rule is a bad idea. It will encourage courts to place too much weight on the enumerated "checklist" elements while ignoring others, and might even erode the essential point that the imposition of extreme sanctions depends on a finding of actual bad faith. Beyond that, we unanimously and particularly object to Factor (C), for it portends sanctions for not "consulting" in response to a request to preserve information. The factor seems to assume that such consultation is always required. This factor should be eliminated even if the factors list is retained. We are also uncomfortable with Factor (E), for it seems to presume that it is the duty of the recipient of the request to go into court to have its decision what information to preserve confirmed.

James Heavner (The Hartford Financial Serv. Group) (748): This list is unnecessary and risk creating uncertainty in application if retained in the body of the rule. Several of the factors listed yield answers that do not contribute to the underlying issues.

#### Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): These factors should not be in the rule. Put this type of material in the Committee Note. On the other hand, the notion that the court must limit itself to the least severe sanction, now only in the Note, should be put into the rule itself.

Thomas Allman: Consider dropping (e)(2) from the rule. The provision is trying to do too much. The goal should be to write a good Committee Note. I am not happy with the factors beyond reasonableness and proportionality. Even if they do foster uniformity they are troubling.

Michael C. Rakower (N.Y. St. Bar Ass'n): The directive that the court use the least severe sanction should be in the rule, not just the Note.

#### Phoenix hearing

Robert Owen: Factor (C) is troublesome. It seems to invite blanket overbroad preservation demands. Particularly in the pre-litigation setting these are formless demands and provide no content from which the recipient can determine what really needs to be preserved.

Timothy Pratt (Federation of Defense Counsel): The "factors to be considered" should be eliminated from the rule. The



discussion should be limited to the Note.

Paul Weiner (Littler, Mendelson): Factor (C) should include a 26(g) feature, making lawyers certify that their preservation demands are justified and not designed to impose costs on the other side.

Thomas Howard: The (e)(2) factors should be removed from the rule. Perhaps discussion should be included in the Note. The concern is that they will be applied uniformly and in a wooden manner. It might be said that consistency on application of the factors is to be avoided.

John Rosenthal: The factors should be revised along the lines recommended by Sedona. For one thing, any judicial "remedy" for loss of information should be proportional to the loss. For another, the rule should say that the court must use the least severe sanction.

#### Dallas Hearing

Michael Harrington (Eli Lilly & Co.): He is uncertain whether the adoption of proposed 37(e) would produce immediate or dramatic changes in his company's preservation practices. But he would look to the factors spelled out in the rule for guidance. So he likes the idea of having factors, although he is not entirely happy with all the factors that are in the proposed rule now.

William T. Hangley (ABA Section of Litigation leadership): As a general matter, the idea of having factors is useful and the factors included are useful. But factor C is not helpful. It seems to presume that failure to respond to such a demand is likely to produce trouble. But some demands are not worth answering, so the mere fact of not responding should not support negative actions. He also does not like Factor E. It does not take account of the fact that often these demands are delivered to nonparties or before litigation commences.

Gregory C. Cook: He does not favor the factors. Particularly with class-action litigation, Factor A presents great difficulties before suit is filed. Case law could develop to provide guidance in the way that the factors attempt to provide guidance. But if the list is retained, it will be regarded as an exclusive list, and rigidify the analysis.

Karl Moor (Southern Company): His company is a utility. The factors don't provide much guidance. You have to imagine the largest scope of plaintiff's claim. The proportionality test would help. But I have to help them build their case by informing them about our systems. So even though reasonableness and proportionality factors would help there would still be large

burdens.

## 7. Need to retain provisions of current Rule 37(e)

Lawyers for Civil Justice (267): Because proposed Rule 37(e) covers all of the conduct that the current rule does, LCJ believe that it is unnecessary to retain the current 37(e) language in the proposed rule.

Alex Jennings (294): I think existing 37(e) should be abrogated and completely replaced. The new rule appears to cover all situations in which the current rule would apply. Including the old rule might only serve to confuse lawyers as to when each part might apply, assuming it could be parsed. Additionally, the rule has been invoked only rarely, as the Committee notes. I think that is because it needs to be refined. If the original rule is retained, it might simply encourage courts to continue awarding sanctions for behavior that they deem to be exceptionable, sanctionable under other rules, or not result from good-faith operation.

Thomas Y. Allman (303) I was originally a proponent of targeted amendments to current Rule 37(e). But I have come to believe that the proposed rule is a superior formulation to support a "fresh start" on a meaningful national rule. It comprehensively occupies the spoliation sanction field to the exclusion of inherent sanctioning power. This provides a significant advantage over the current rule. As noted by Judge Sutton in *U.S. v. Aleo*, 681 F.3d 290, 310 (6th Cir. 2012), "a judge may not use inherent power to end-run a cabined power."

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that current Rule 37(e) need not be retained.

U.S. Chamber Institute for Legal Reform (328): If the Committee makes the changes proposed by the ILR to the proposed new rule, there is no need to retain current 37(e).

Doug Lampe (343) (Ford Motor Co.): Ford believes that there is no reason to retain the current provisions of Rule 37(e).

The Sedona Conference Working Group 1 (346): We believe that existing Rule 37(e) need not be retained if the amended rule adopts a good faith standard, as we have urged. But if the Committee retains the provision authorizing imposition of "curative measures" without regard to culpability or prejudice, we believe that the provisions of current 37(e) should be included lest the protection it currently provides be lost.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): It would be important to retain the current 37(e) provisions if proposed (B)(ii) is adopted. The current rule precludes the imposition of sanctions for the loss of ESI due to the routine, good faith operation of an electronic information system.

Otherwise, parties who claim they have lost "any meaningful opportunity" to prosecute or defend a case as the result of the ordinary, good faith operation of an electronic information system will seek sanctions. If proposed (B)(ii) is not adopted, and if the standard for (B)(i) sanctions is limited to bad faith, there would seem to be no need for current 37(e).

David Kessler (407): The current rule should not be retained. As detailed by the Committee, the current rule has not been effective.

Mark S. Stewart (Ballard Spahr) (412): In practice, Rule 37(e) has not been widely applied and has done little to stem the tide of discovery sanctions that arise out of the failure to preserve data. It applies only in a very limited situation -- "good faith operation of an electronic information system" -- which has proven to be a nebulous and confusing standard for courts to apply. The rule does not take into account either the intent of the party or whether the loss prejudiced the receiving party.

Vickie Turner (450): We see no reason to retain current Rule 37(e). We agree that the amended rule is sufficient, and the proposed Committee Note clearly explains the robustness of the amended rule.

Stuart Delery (U.S. Dep't of Justice) (459): The Department does not supported the proposed removal of current 37(e). Many Executive Branch agencies strongly believe that the current rule should remain and is a necessary protection. Unlike hard-copy documents, electronically stored documents can be generated in almost unlimited quantities and can eventually impose significant burdens in storage and maintenance. Essentially, the removal of 37(e) will suggest that discovery sanctions may be available simply as a result of the typical -- and economically necessary -- routine deletion of old electronic content. Such a revision seems to fail to accord with the realities of modern business and electronic communications. Although the revised rule seems to accommodate some of these concerns, it still leaves an important gap by allowing for sanctions in (B)(ii). Since a governmental entity will be unable to predict the full slate of future claims that may arise against it, this carve-out will work to undermine the safe harbor recognized in the remainder of the rule. Even though the Committee has made it clear that it intends (B)(ii) to be used only rarely, but litigation about whether the exception to the required proof of willfulness or bad faith will undoubtedly arise in a much wider set of matters. The amended rule does not expressly provide a safe harbor for routine operation of a computer system. Although the case law is sparse on current 37(e), it is relied on when creating a document retention policy and has been used in litigation in negotiating resolution of

discovery issues. Many of the Executive Branch agencies we have consulted do not support the removal of current 37(e). At a minimum, the Department suggests the following modification to (B)(ii):

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. Subsection (ii) does not apply to electronically stored information that is lost as a result of the routine, good faith operation of electronic information system before the anticipation or conduct of litigation.

Charles Ragan (494): I see no good reason to retain current 37(e). It was initially described as a "safe harbor," but barely served as a shallow cove.

Edwin Lowther, Jr. (629): Retaining the current provisions of 37(e) is unnecessary because the proposed rule covers all the conduct that the current rule covers.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that maintaining this provision would serve the salutary purpose of making clear that automated elimination of information is not sanctionable when it is not a product of bad faith. By the same token, the excision of the existing provision might lead some courts, somewhere, to conclude that the existing law is no longer the law.

## 8. Limiting rule to electronically stored information

Lawyers for Civil Justice (267): The rule should apply to all types of discoverable information. A single standard is vastly superior to having two separate standards. For one thing, distinguishing between ESI and physical evidence is likely to become more complicated in the future.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information (not just electronically stored information).

Alex Jennings (294): The rule should continue to be limited to electronically stored information. The rules are still struggling to catch up with the volume of material that companies and individuals store electronically, which is the main reason the sanctions issue is a preoccupation for lawyers. Until we find a way to store everything forever in a way that doesn't completely overload the discovery system as well as the storage system, I think that this proposed rule uses a fair standard for ESI. There are other mechanisms already in the rule that allow for proper handling of sanctions in relation to other material. Rule 37(e) does not need to be expanded in this way to give judges another way to assign sanctions with regard to non-electronic materials.

Jonathan Smith (NAACP Legal Defense Fund) (310): LDF recommends that, if it is adopted, new Rule 37(e) be limited to electronically stored information. There are unique costs and challenges associated with that information, particularly as to preservation and spoliation, justify continuing to limit 37(e) (as currently limited) to electronically stored information. Given that these amendments to 37(e) are substantial, it may be best first to limit their effect to electronically stored information.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the rule should not be limited to loss of electronically stored information, but should apply to all discoverable information.

U.S. Chamber Institute for Legal Reform (328): The rule should not be limited to electronically stored information. Having separate rules for electronically stored information and other evidence will create confusion for litigants. Because the proposed rule sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): Along with dropping (B)(ii), it would be desirable to

focus the rule on discoverable "information." As defined in Rule 34(a), that includes (A) any designated documents or electronically stored information, and (B) any designated tangible things. But it might suffice if (B)(ii) were limited to the latter -- excluding not only electronically stored information but also documents. In his ongoing study of current spoliation cases, fully 90 to 95% deal only with documents and electronically stored information, not tangible things. This would greatly assist in pre-litigation efforts, and minimize over-preservation.

Doug Lampe (343) (Ford Motor Co.): Ford does not see a principled basis for distinguishing among different types of discoverable evidence based on the manner in which it is stored. A single standard applicable to all evidence would encourage consistency from courts in addressing motions for sanctions and provide better guidance to parties.

The Sedona Conference Working Group 1 (346): We do not believe that the rule should be limited to electronically stored information. The issues arise equally with preservation of hard copy documents and other tangible things. Many litigated matters involved significant quantities of hard copy documents, and their preservation should be treated consistently. Moreover, future technologies might involve storage we would not consider "electronic."

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): The rule should not be so limited. ESI may be the biggest issue in discovery today, but the destruction or loss of documents and tangible things is just as important as the destruction or loss of ESI. Limiting the rule to loss of ESI would suggest that there can be different standards for the imposition of sanctions for the loss of other sorts of evidence, leading to divergent rulings from court to court on issues such as whether sanctions can be imposed if the loss of physical evidence is due to negligence. A uniform rule would promote certainty and reduce the likelihood of unproductive satellite litigation.

David Kessler (407): The rule should not be limited to electronically stored information. Not only is a single standard easier to follow and enforce than multiple standards, but there is no principled reason to differentiate between the spoliation of electronic and paper documents.

Vickie Turner (450): We do not think the rule should be limited to electronically stored information. A uniform standard applicable to all evidence would be best. The distinction is murky at best and should not be introduced into the rule.

Stuart Delery (U.S. Dep't of Justice) (459): If a spoliation rule is promulgated, it should apply equally to

electronic documents, paper, and tangible things. The Note should make the scope of application clear. There is a risk that divergent, complicated, and confusing spoliation case law will develop if the rule does not apply equally to all potential evidence. Cases almost always include a mixture of electronic information and documents/objects in other forms. The rules should not provide that a party who diligently saves its email on the one hand, but shreds key hard-copy notes on the other to be treated differently depending on the form of the information lost.

Federal Magistrate Judges' Ass'n (615): The FMJA believes that the rule should not be limited to loss of ESI, but should extend to all discoverable information. Different standards for failure to preserve ESI and failure to preserve other discoverable information would almost certainly generate substantial motion practice about the practical differences between ESI and other discoverable information.

Edwin Lowther, Jr. (629): The rule should adopt one clear standard applicable to all types of discoverable information.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): The rule should not be limited to ESI. The obligations to preserve ESI and other information should not be different. This will become more true as the line between ESI and other documents blurs and transforms.

James Heavner (The Hartford Financial Serv. Group) (748): A unitary standard is the most appropriate architecture for the rules going forward. We see no distinction between paper and electronic documents when it comes to defining core preservation obligations. And applying the rule to all preservation would make for more efficient judicial policing.

Washington D.C. Hearing

Thomas Allman: One way to deal with the problem presented by the current inclusion of (B)(ii) is to limit the rule so that cases like Silvestri are excluded from it. But distinguishing between "electronically stored information" and "documents" is unlikely to work. Perhaps a better way would be to exclude "tangible things." Those are treated as a separate category in Rule 34, and seem to be distinct in the sense that they are likely to be the sorts of things that might be so central as to justify sanctions in the absence of willfulness or bad faith.

Phoenix hearing

Thomas Howard: The rule should not be limited to ESI.



## 9. Additional definition of "substantial prejudice"

Lawyers for Civil Justice (267): Yes. The standard should be that the information is material to claims and defenses. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y.) at \*4 FN 48.

Alex Jennings (294): I think a further definition would be helpful. The Committee even observes that prejudice in this part of the rule need not be as cataclysmic as the prejudice that would justify sanctions under other parts of the rule. A definition might look like: "substantial prejudice -- such that it results in the party being unable to present its case successfully, prevents it from substantiating its claim, or results in unfair dismissal of its claim"

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section sees no reason to define "substantial prejudice" any further. It will always be context specific. The report cites a number of examples of judicial handling of this issue.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that an additional definition of "substantial prejudice" is important.

U.S. Chamber Institute for Legal Reform (328): Yes a definition would help ensure a national uniform standard. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. For example, one court says the standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the claim] or defense." Sekisui Am. Corp., 2013 WL 4116322, at \*4. But "substantial prejudice" should be defined as a more stringent standard, that the loss of information is somehow material to a party's claims or defenses.

Doug Lampe (343) (Ford Motor Co.): Courts would benefit from additional guidance regarding this term. The courts should be reminded that meeting this factor requires demonstration of a direct and meaningful impairment of a party's ability to advance a claim or defense.

The Sedona Conference Working Group 1 (346): We support the Committee effort to require that a party seeking sanctions show that it has been seriously prejudiced in its ability to prove its case. But we believe that the rule should make clear that sanctions are allowed only if the party was materially hindered in presenting or defending against the claims in the case. For

that reason, the rule should specify that a party is not substantially prejudiced where the lost relevant information has not materially prevented a party from presenting or defending against the claims. We also believe it is important that the rule state that the sanctions motion must be timely, a requirement that is currently absent from the proposed rule.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We do not believe that any further definition is necessary. Judges routinely exercise their discretion to decide issues of prejudice. Prejudice may arise in myriad factual scenarios, and a rule defining what constitutes prejudice might inadvertently exclude situations in which true prejudice exists that do not strictly fall within the definition. The availability of alternative sources of the information and the importance of the lost information are rather obvious factors to be considered in assessing prejudice, and incorporating them in the rule appears superfluous.

David Kessler (407): Yes, there should be such a definition, though this conclusion is tied in with how the Committee addresses "willfulness or bad faith" in (B)(i). Although "substantial prejudice" is not easy to define, there are some things it is not. It must be more than just prejudice, which means that it must be more than merely relevant, even if it was supportive of the requesting party's case. Thus, the standard used in *Sekisui* ("a reasonable trier of fact could find that [the lost evidence] would support [the] claim or defense") is too low. Substantial prejudice should mean that the requesting party is materially impaired in prosecuting its claims or defenses due to the destruction of the evidence, because no other similar evidence of a similar kind and character is available.

Vickie Turner (450): We favor adding a definition, and propose that "substantial prejudice" "equates to significant harm to a party's ability to advance a material claim or defense."

Stuart Delery (U.S. Dep't of Justice) (459): We believe there should be an additional definition in the rule. We proposed a new 37(e)(3) as follows:

- (3) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:
  - (A) The availability of reliable alternative sources of the lost or destroyed information;
  - (B) the materiality of the lost information to the claims or defenses in the case.

This proposed rule language is consistent with the Committee's intent to have reasonableness incorporated into a court's preservation analysis. This language provides the appropriate and explicit framework for the court's analysis, and provides parties with clear guidance on what elements of prejudice must exist before they consider filing a motion for sanctions. This language also helps the court focus on the actual harm to the requesting party.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "substantial prejudice."

Edwin Lowther, Jr. (629): The rule should provide a definition to clarify when substantial prejudice exists, and it should be tied to materiality of the information to claims and defenses in the case.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We do not believe that an additional definition is necessary. Judges will consider all factors relevant to the circumstances. Enumerating factors risks overemphasizing the listed factors and devaluing legitimate factors that do not happen to be included in the list.

James Heavner (The Hartford Financial Serv. Group) (748): We support including an additional definition, and think a focus on materiality to claims and defenses is warranted.

## 10. Additional definition of "willfulness or bad faith"

Lawyers for Civil Justice (267): The standard in proposed 37(e)(1)(B)(i) could define "willful" to require scienter or knowledge. See, e.g., *Micron Tech, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests); *Vadusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his wilful conduct resulted in its loss or destruction"); *Goodman v. Praxair Serv., Inc.*, 632 F.Supp.2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction). In short, willfulness should be defined to include an element of malice. Doing so would make it clear that sanctions are limited to acts executed in bad faith.

Alex Jennings (294): I don't think any additional definition of willfulness or bad faith is required. Courts are familiar with these concepts and the application of them. An additional definition could lead to situations in which they are applying criteria they are not acquainted with.

Thomas Y. Allman (308): The term "willful" would benefit from clarification. The rule could specify the necessity of showing that the conduct was undertaken for the purpose of hiding adverse information or a similar formulation showing purposeful conduct. Connecticut has already done so. Two other viable options are (1) delete the "willfulness" category entirely, or (2) insert "and" for "or" and require that both elements ("willfulness" and "bad faith") be proven.

Malini Moorthy (Pfizer) (327): Pfizer believes that the standard should require a finding that the loss of information was willful and in bad faith. If that is not done, it believes that an additional definition of willfulness would be helpful.

U.S. Chamber Institute for Legal Reform (328): Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith, such as pursuant to a routine document preservation system. Sanctions should be allowed only when the party acted knowing that it had a duty to retain the information.

Doug Lampe (343) (Ford Motor Co.): Willfulness, standing alone, should not be a sufficient basis for imposing sanctions. If the Committee nevertheless retains it in the disjunctive, it should be clarified that it means purposeful intent to preclude

the availability for use in litigation. Millions of documents are destroyed "willfully" every day, but it is only pertinent to the discovery process if the documents were willfully destroyed in apprehension of litigation.

The Sedona Conference Working Group 1 (346): Sedona recommends that the rule should speak in terms of whether the party "did not act in good faith" rather than relying on either willfulness or bad faith. Using "willful or bad faith" risks having courts impose sanctions for negligent or grossly negligent conduct. Additionally, emphasizing good faith would prompt development of a set of factors that incentivize good behavior. But if the Committee is not willing to make this change, we encourage that it clarify that its culpability standard requires a finding that the alleged spoliating party acted with "specific intent" to deprive the opposing party of material evidence relevant to the claims or defenses. We have rejected the false distinction between curative measures and sanctions. Our standard should apply to all measures adopted to respond to failure to preserve.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that the only standard of culpability for the imposition of sanctions should be bad faith, which should be defined to mean "taken with the intent to destroy or delete potentially relevant evidence or in a reckless disregard of the consequences of the party's actions." As a suggestion, we propose that "willful" be deleted but that after "bad faith" the following be added: "that is, were taken with intent to destroy or delete potentially relevant evidence or in reckless disregard of the consequences of the party's actions." This change would accomplish three things: (1) it would eliminate the terribly ambiguous concept of "willfulness"; (2) it would provide a uniform standard that should be easily understood by lawyers, judges, litigants, and witnesses; and (3) it would make clear that the sanctions provided are not to be imposed on a showing of negligence. It is the same as the standard advanced by the Leadership of the ABA Section of Litigation in a letter dated March 13, 2013, to Judge Campbell.

David Kessler (407): Yes, this is the single most important thing the Committee could do to improve the amendment. The standard should be that loss of information is "willful" if it is "the intentional destruction of evidence for the purpose of depriving an opponent or the Court of the evidence." This standard runs closest to the purpose of sanctions and goes furthest in preventing preservation and spoliation being used as weapons in discovery.

Vickie Turner (450): We recommend that both willfulness and bad faith be required. Defining both terms will be necessary to provide clarity. We suggest defining "willful" and "bad faith"

to include an element of intent to preclude availability of evidence for use in litigation, as well as knowledge of wrongdoing. The definition should say that only obstructionist efforts plainly meant to gain an unfair advantage in litigation are sanctionable.

Stuart Delery (U.S. Dep't of Justice) (459): We agree with others who have urged clarification for (B)(i). We suggest that "willful" and "bad faith" be defined to require purposeful, harmful intent. One way to do that would be to change the rule to "willful and in bad faith." Spoliation sanctions should not be issued if a party did not take purposeful, intentional action to destroy information. Parties will nevertheless take care to preserve information absent the threat of sanctions because curative measures can also be burdensome, costly, and affect case strategy. Other preservation obligations may also exist, and parties have their own needs to preserve evidence to use to prove their own cases. In addition, the rule should encourage good information management practices in their normal IT operations.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "willfulness or bad faith."

Edwin Lowther, Jr. (629): The rule should include some language making it clear that good faith but intentional acts are not cause for spoliation. "Willful" should be defined to include an element of scienter.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that the term "Willful" should be deleted. But we believe that courts have substantial experience interpreting the concept of bad faith, and that a further definition is not needed.

James Heavner (The Hartford Financial Serv. Group) (748): We believe the conjunction should be "and," not "or." This would relieve uncertainty about the meaning of "willful."

#### Phoenix hearing

Robert Owen: The definition should be the one offered by Sedona -- an intent to deprive the adverse party of evidence.

Timothy Pratt: Willful should be defined. He favors the Sedona definition. It's not clear that "willful and bad faith" is different from just saying "bad faith."

David Howard (Microsoft): We favor the Sedona definition of willful.

Thomas Howard: Willfulness should be defined. He favors

the Sedona definition.

Robert Hunter: The rule should define willfulness as destroying information with knowledge that it will impact a claim.

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# TAB 4

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# TAB 4A

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RECOMMEND APPROVAL FOR ADOPTION: RULE 6(d)

This proposal to amend Rule 6(d) was published for comment in August, 2013. The small number of comments summarized to date all approve the proposal without further discussion. The proposal is on track for a recommendation to approve for adoption.

1 **Rule 6. Computing and Extending Time; Time for**  
2 **Motion Papers**

3 \* \* \* \* \*

4 **(d) Additional Time After Certain Kinds of Service.**

5 When a party may or must act within a specified  
6 time after ~~service~~ **being served** and service is made  
7 under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are  
8 added after the period would otherwise expire under  
9 Rule 6(a).

**Committee Note**

What is now Rule 6(d) was amended in 2005 “to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served.” A potential ambiguity was created by substituting “after service” for the earlier references to acting after service “upon the party” if a paper or notice “is served upon the party” by the specified means. “[A]fter service” could be read to refer not only to a party that has

been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). “[A]fter being served” is substituted for “after service” to dispel any possible misreading.

RULE 6: TIME AFTER BEING SERVED

390, J. Mitchell Smith for International Assn. of Defense  
Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice:  
Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Endorses.

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# TAB 4B

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RECOMMEND APPROVAL FOR ADOPTION: RULE 55(c)

This proposal to amend Rule 55(c) was published for comment in August, 2013. The small number of comments summarized to date all approve the proposal without further discussion. The proposal is on track for a recommendation to approve for adoption.

1 **Rule 55. Default; Default Judgment**

2 \* \* \* \* \*

3 (c) **Setting Aside a Default or a Default Judgment.**

4 The court may set aside an entry of default for good  
5 cause, and it may set aside a final default judgment  
6 under Rule 60(b).

7 \* \* \* \* \*

**Committee Note**

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

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RULE 55(c): SET ASIDE FINAL DEFAULT JUDGMENT

390, J. Mitchell Smith for International Assn. of Defense  
Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice:  
Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.:  
Endorses.

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# TAB 5A

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1214

**REPORT OF THE RULE 84 SUBCOMMITTEE**

1215           The Rule 84 Subcommittee recommends approval for adoption of  
1216 the proposal to abrogate Rule 84 and the official forms that was  
1217 published last August. It further recommends approval of the  
1218 parallel proposal to transfer present Forms 5 and 6 to become  
1219 incorporated in the Rule 4(d) provisions for requesting a waiver of  
1220 service.

1221           The Subcommittee met by conference call on March 5 to discuss  
1222 this recommendation. Notes on the meeting are attached. The notes  
1223 elaborate the conclusions advanced here.

1224           Abrogation was recommended in large part because this  
1225 Committee has not been able to spare any significant share of its  
1226 agenda for regular review and potential revision of the official  
1227 forms. Any careful discharge of this task would demand much time  
1228 that should not be diverted from more important tasks.

1229           A secondary consideration has been the tension that may be  
1230 found between the pleading forms and modern pleadings standards.  
1231 The forms were initially adopted in 1938, and later made sufficient  
1232 under the Rules, to illustrate the simplicity and brevity  
1233 originally contemplated by the pleading rules. Functioning as  
1234 simple pictures, they played that role well. The original concept  
1235 of notice pleading came to be well understood, but developments in  
1236 motions to dismiss under Rule 12(b)(6), Rule 11 requirements,  
1237 modern statutory causes of action and pleadings requirements,  
1238 Supreme Court decisions on the requirements of Rule 8, and a  
1239 general increase in the complexity of litigation now lead most  
1240 lawyers to plead far more than the minimum thresholds illustrated  
1241 by the forms. There is serious ground to wonder whether the  
1242 pleading forms could be revised in a way that would assist lawyers  
1243 in pleading modern causes of action. Part of the uncertainty lies  
1244 in extrapolating from the narrow subjects illustrated by most of  
1245 the forms to the many and frequent types litigation that have no  
1246 representation in the forms. And some of the uncertainty lies in  
1247 whether a single form could be crafted to address the wide variety  
1248 of factual circumstances that might arise with respect to a  
1249 particular type of claim, such as patent infringement. Developing  
1250 a suitable generic form complaint for patent infringement could  
1251 prove surprisingly difficult, to say nothing of the need to  
1252 confront or sidestep the risks that a form for direct infringement  
1253 might inadvertently affect a complaint for contributory  
1254 infringement or the like.

1255           The Subcommittee has been concerned that most of the  
1256 opposition to abrogation springs from the academic community. Much  
1257 of the opposition ties to continuing unease over the direction of  
1258 contemporary federal pleading standards. Some of the opposition is  
1259 expressed by arguing that the Enabling Act process is not satisfied  
1260 by simply publishing a proposal to abrogate Rule 84 and the  
1261 official forms. On this view, each form has become an integral part

1262 of the rule it illustrates. Abrogating a form effectively amends  
1263 the rule as well. So to abrogate the pleading forms, for example,  
1264 the Enabling Act requires publication of each pleading rule that  
1265 relates to each form.

1266 The Subcommittee believes that the publication actually made,  
1267 with the full opportunity to comment, satisfies the Enabling Act.  
1268 The opportunity to comment has been seized, as evidenced by the  
1269 comments received on the Rule 84 proposal.

1270 The Subcommittee also believes that abrogation is still the  
1271 best course. Weighing the competing concerns against the reasons  
1272 for proposing abrogation, abrogation is appropriate.

1273 March 5, 2014 Rule 84 Subcommittee Notes

1274 The Rule 84 Subcommittee met by conference call on March 5,  
1275 2014. Those attending included Subcommittee members Judge Gene  
1276 E.K. Pratter, Chair; John Barkett; Laura Briggs; Theodore Hirt; and  
1277 Judge Solomon Oliver, Jr.. Judge Jeffrey S. Sutton participated as  
1278 Chair of the Standing Committee. Andrea Kuperman and Julie Wilson  
1279 represented the Administrative Office. Professor Edward H. Cooper  
1280 participated as Reporter.

1281 Judge Pratter introduced the purpose of the meeting. Although  
1282 dwarfed by the responses to the Duke Rules package and the Rule  
1283 37(e) proposal, the published proposal to abrogate Rule 84 and the  
1284 forms, saving only Forms 5 and 6 by incorporating them into Rule 4,  
1285 has drawn significant comment and testimony. Many comments are  
1286 favorable, including those from organized bar groups. Other  
1287 comments, however, challenge the proposal primarily on two grounds.  
1288 One is that publication of the Rule 84 proposal alone does not  
1289 satisfy the Rules Enabling Act. One thread of this concern is that  
1290 although the letter of the Act has been observed, the proposal has  
1291 been overshadowed by the company it kept in the full set of  
1292 proposals published last August. Potentially useful comments have  
1293 been set aside in the press of commenting on other proposals. A  
1294 deeper principle has been urged by one comment: the Forms have  
1295 become so far entwined with the rules they illustrate as to require  
1296 publication of each rule affected by a form along with the proposal  
1297 to abrogate Rule 84. As one example, Rule 8 should be published and  
1298 connected with all of the forms that illustrate pleadings.

1299 A second ground challenging the proposal ties to the pleading  
1300 decisions in the *Twombly* and *Iqbal* cases. These comments urge in  
1301 various ways that the Supreme Court itself has violated the  
1302 Enabling Act by amending Rule 8(a)(2) through the process of  
1303 deciding individual cases, when the Court itself has recognized  
1304 that the Enabling Act provides the only appropriate means of  
1305 amending the rules. They also urge that the Committee has  
1306 deliberately chosen to defer any proposals to amend any of the  
1307 rules to reflect or revise the effects of these pleading decisions  
1308 as they play out in the lower courts. Abrogating the pleading forms  
1309 is unwise if separated from a full-blown review of pleading  
1310 standards. The forms now illustrate pleadings that suffice under  
1311 the rules. They provide authoritative guides to the lower courts in  
1312 the simplicity and brevity contemplated by the rules. That  
1313 important function will be lost, and pleading practices may be  
1314 distorted, if the forms are simply abrogated.

1315 These grounds are occasionally supplemented by comments urging  
1316 that the forms actually serve useful purposes for some lawyers and  
1317 for pro se parties.

1318 It was noted that most of those who oppose abrogation of Rule  
1319 84 are academics. It is troubling that so many of those who devote  
1320 their professional work to thinking about the deep principles of

1321 procedure challenge the proposal. That many of the challenges tie  
1322 directly to continuing dissatisfaction with the Supreme Court's  
1323 recent pleading decisions does not fully alleviate these concerns.

1324 Initial responses were direct: the proposal to abrogate Rule  
1325 84 has it right. There are good reasons to abrogate Rule 84 and the  
1326 forms independent of concerns about contemporary pleading practice.  
1327 The proposal was properly published under the Enabling Act, and  
1328 drew attention and comments. That is enough.

1329 The Subcommittee was reminded that the Standing Committee had  
1330 approved publication of the proposal, and has been kept informed of  
1331 the progress of public comments. Some members attended the morning  
1332 portion of the January hearing held in conjunction with the  
1333 Standing Committee meeting in Phoenix.

1334 The particular concerns that have been expressed as to the  
1335 pleading forms have an offset. The patent bar has become  
1336 increasingly frustrated with Form 18, the form complaint for patent  
1337 infringement. Bills pending in Congress, aimed at regulating  
1338 infringement actions brought by nonpracticing entities, include  
1339 provisions addressed to Form 18. One example is a bill that asks  
1340 the Judicial Conference to abrogate Form 18 within 12 months. That  
1341 is earlier than the December 1, 2015 effective date that would  
1342 apply if abrogation of Rule 84 and the Forms is approved along the  
1343 line to Advisory Committee, Standing Committee, and so on. Form 18  
1344 is a good illustration of a serious problem with a Form. Keeping  
1345 the Rule 84 proposal on track, if it continues to seem a sound  
1346 proposal, will ease discussions with Congress about the wisdom of  
1347 undertaking a deliberate end-run around the Enabling Act process.

1348 One response might be to treat the publication and comment  
1349 period as sufficient justification to go ahead with a proposal  
1350 limited to abrogation of Form 18. But that could be seen as a  
1351 serious distortion of the process, relying on an all-encompassing  
1352 proposal to justify an action that has not been the subject of any  
1353 independent and focused consideration.

1354 It was noted that there is support from practitioners for  
1355 abrogating Rule 84 and the Forms. Most of the opposition seems to  
1356 reflect continuing academic distress with the Supreme Court's  
1357 recent pleading decisions. There is a "subtext" of concern that the  
1358 forms serve a useful educational function. But education in  
1359 effective pleading practices can be provided by forms emanating  
1360 from other sources. Practicing lawyers rely on other sources. Most  
1361 district courts - probably all - have basic forms for pro se  
1362 litigants.

1363 Discussion turned to the Administrative Office Forms Group.  
1364 The AO forms for civil actions do not now include any form  
1365 complaints. It is possible that pleading forms could be developed  
1366 in this process, but it also is easy to understand that the  
1367 problems that would make it so difficult for the Advisory Committee

1368 to undertake to maintain the present forms in suitable order, much  
1369 less to generate new forms, would confront the working group. The  
1370 plan has been that if Rule 84 and the Forms are abrogated, the  
1371 Advisory Committee will appoint a liaison to the Working Group.  
1372 What work will develop after that remains to be seen.

1373 This discussion reminded the Subcommittee that a major concern  
1374 has been that the working agenda of the Advisory Committee has been  
1375 too crowded for many years to permit any responsible attention to  
1376 the Forms.

1377 The Subcommittee concluded by agreeing to recommend adoption  
1378 of the proposal to abrogate Rule 84 and the official Forms.

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# TAB 5B

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RULE 84: OFFICIAL FORMS: RULE 4 FORMS

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The proposal to abrogate all the forms will certainly help the problems caused by Form 18 for patent litigation, Rule 8 should reflect the new plausibility standard more directly.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports all aspects of the proposal. Doing nothing is unattractive, since "[i]n certain instances, the forms are no longer satisfactory." Devoting the work required to make the forms attractive and to keep them attractive "would require a substantial commitment without a substantial benefit, in light of the understanding that the Official Forms are not widely used." Abandoning the enterprise seems better, particularly given the availability of alternative sources of high-quality forms, including the Administrative Office. Notice pleading is now well understood, as modified to require something more than the pleading forms seem to require. And the choice to convert present Forms 5 and 6 to become forms attendant to Rule 4 is an "elegant solution."

342, Stephen C. Yeazell: The Forms have taught lawyers that pleadings can, and should be, simple. "That many lawyers eschew simplicity does not seem a good reason for failing to encourage it." Abrogation could be desirable, but only if it is prelude to a project to develop new forms "as a means of providing substantive guidance to litigants who must navigate current pleading doctrine, including *Twombly* and *Iqbal* - a move that, from the rest of the proposals, seems not to be on the Committee's agenda."

389: Professor Yeazell adds a post-script urging that Forms 1 through 6 be retained "clear and uniform." They are directed to members of the public, "some of whom will not have retained counsel." Incorporating Forms 5 and 6 as appendices to Rule 4 is fairly clumsy, at odds with the elegance of the Style Project. Keep them, at least, as they are.

383, Alan B. Morrison: Some of the Forms are outmoded, and their original purpose has been fulfilled. "But they still continue to serve as reminders as to how the Rules, especially Rule 8, should be interpreted." It would be good to arrange to have the Administrative Office forms included in publications of the rules.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves the Rule 84 and Forms proposals without further comment.

453, A. Benjamin Spencer: Professor Spencer opposes the amendment of Rule 84 and abolition of the Forms. Rather than abandon the forms, they should be updated and elaborated with additional

examples that might give litigants more guidance. At a minimum, they should not be yoked to the monumental discovery proposals that have distracted attention from this important topic.

The forms provide a template for the uninitiated, both the pro se litigant and the novice practitioner. They "provide interpretive guidance to courts and practitioners seeking to understand the meaning of the federal rules," as Judge Clark so clearly pointed out. And they "provide a source for challenging wayward interpretations of the rules by courts." Form 30, for example, demonstrates that the Twombly and Iqbal pleading standards should not be extended to affirmative defenses. Finally, Rule 84 is the only rule after Rule 1 that serves a normative, hortatory function in encouraging simplicity and brevity. 648, Elise E. Singer: Joins this comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal, including the adoption of present Forms 5 and 6 into Rule 4 to "serve the important interest of encouraging waivers of service of process in appropriate cases."

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

493, Jonathan R. Siegel, subscribed by 109 more legal academics: rule 84 and the Forms should not be abrogated. (1) Twombly and Iqbal "have revived discredited and imprecise fact pleading. No one knows how to plead to satisfy them, even in a simple slip-and-fall case. (2) The point of the Forms is not to provide samples to be used by lawyers – no one uses them – but "to indicate to *judges* how simple and brief pleadings can be." That requires that the forms be official and suffice under the rules. (3) The suggestion that there is a tension between the Forms and emerging pleading standards "is a polite way of saying that the courts are violating the Federal Rules," at least if they dismiss a complaint that Rule 84 proclaims sufficient. 499, Beth Thornburg: Makes substantially the same arguments, and endorses the Siegel comment.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, and also endorses appending present Forms 5 and 6 to Rule 4.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The proposal rests on "casual empiricism and self-evident bias." The Committee began believing that no one uses the Forms, then selected a number of unidentified lawyers who confirmed the Committee's belief. (2) The memorandum prepared for the Committee shows the lower courts have struggled with the task of reconciling the Twombly and Iqbal decisions with the Forms. To rely on the "tension" between the Forms and plausibility pleading "resolves a question that the Committee has yet to fully consider." "This is all the more troubling given that one

trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process \* \* \*." Abandoning the forms will effectively shut the door on reform of the pleading rules. (3) It is self-contradictory to assert that the original purpose of the Forms has been fulfilled and at the same time to describe a tension between the Forms and plausibility pleading.

711, Eric Holland: "[W]hen I began to practice in 1991 and began to draft federal court pleadings, I often referred to the forms," including the form complaint for FELA actions. Throwing open the universe of other forms "will only cause confusion and chaos, not the certainty that the FRCP should stand for."

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position. The Association could not reach a consensus, indeed was greatly fragmented. (1) A lengthy statement opposing abrogation of Rule 84 observes that whatever tension there may be between the pleading reforms and *Twombly* and *Iqbal* does not arise from any form addressing antitrust claims or official-immunity cases. Much of the tension arises from Form 18, a complaint for patent infringement; that can be addressed by modifying or repealing Form 18. The AO has not provided pleading forms. Only anecdotal evidence supports the claim that the forms are not used by attorneys or pro se litigants; arguably they continue to serve a useful function when employed by pro se litigants or attorneys. The forms have been successful for 75 years, belying the argument that it will take too much work to maintain them. If it is premature to take sides in the developing pleading standards, it is premature to abolish the Forms. (2) A lengthy statement supporting abrogation argues that the choice is between revising the forms or abandoning them. The Committee choice to abandon them should be supported. "[M]ost lawyers are not aware of the pleading forms and even fewer utilize them." "There is no evidence that the forms are used on more than rare occasions, and most lawyers in this Association were unaware of Rule 84 or the forms." Many of the Forms contain labels and conclusions, contrary to current pleading standards; the Forms and the standards conflict in some cases. Courts are split on the approach to reconciliation; most judges find the two standards cannot be reconciled. "The evolution of case law interpreting Rule 8(a) can proceed without Rule 84." Study of Rule 8, and possible amendments, would not be affected by abrogating Rule 84.

January Hearing, Arthur R. Miller: p. 36, at 40: "[O]bliteration of Rule 84 in [sic] the forms is a very stealth-like signal that you're approving *Twombly* and *Iqbal*."

January Hearing, Brooke Coleman: p. 114 Rule 84 makes each Form an integral part of the rule it illustrates. Abrogating a Form "necessarily changes the rule to which it corresponds." Form 11,

for example, has generated much attention because it remains an authoritative example of what Rule 8(a)(2) means, helping to understand the potential reach of the pleading decisions in the Twombly and Iqbal cases. To abrogate Form 11, it is necessary to publish Rule 8 as well for comment. It is no excuse that the Committee seeks to get out of the Forms business entirely, without taking any position on the impact of any Form on the interpretation of any Rule. 654, Brooke Coleman: These themes are summarized, then supported by a 17-page essay. February Hearing, Danya Shocair Reda: p 349 "I am actually in Professor Coleman's camp on this." "[A] number of the rules are promulgated in conjunction with the forms." Abrogation of Rule 84 "signals an approval of a heightened pleading standard." If the pleading standard is "out of whack with the form[,] [t]hat's a problem of the Supreme Court jurisprudence, and not a problem of our rules."

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 Form 18 sets a much lower standard for pleading direct infringement, so it has an impact on a motion to dismiss, but that is quickly mooted under rules in courts that require the plaintiff to provide detailed infringement contentions soon after filing.

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1389

REVISE RULE 82 FOR PUBLICATION

1390 The Standing Committee acted in January to approve publication  
1391 at a suitable time of a proposal to amend the second sentence of  
1392 Civil Rule 82 to reflect the enactment of a new venue statute for  
1393 civil actions in admiralty. Publication was to await incorporation  
1394 in a package with other rules proposals, and has not yet occurred.  
1395 Publication was chosen because it was not clear whether the  
1396 proposed rule text was the best means of accommodating the new  
1397 statute. This conservative approach has proved wise. It was agreed  
1398 that the message transmitting the proposal for publication should  
1399 ask whether to delete the cross-reference to 28 U.S.C. § 1391, an  
1400 issue explained below. Further reflection before publication  
1401 suggests that indeed § 1391 should be dropped from the rule text,  
1402 and that the text should be further revised to reflect the language  
1403 of new § 1390. The version approved for publication is set out  
1404 first below, followed by the revised version that seems better. If  
1405 the revised version is approved, it will be presented to the  
1406 Standing Committee with a request for approval to publish the  
1407 revised version at a suitable time. The reasons for the change are  
1408 set out after the proposed new rule text.

1409

*Version Approved in January*

1410 **Rule 82. Jurisdiction and Venue Unaffected**

1411 These rules do not extend or limit the jurisdiction of  
1412 the district courts or the venue of actions in  
1413 those courts. An admiralty or maritime claim under  
1414 Rule 9(h) is not a civil action for purposes of 28  
1415 U.S.C. §§ 1390-1391-1392.

1416

*Proposed Version*

1417 These rules do not extend or limit the jurisdiction of  
1418 the district courts or the venue of actions in  
1419 those courts. An admiralty or maritime claim under  
1420 Rule 9(h) ~~is not a civil action~~ [invokes][is] an  
1421 exercise of the jurisdiction conferred by 28 U.S.C.  
1422 § 1333 [for purposes of 28 U.S.C. §§ 1390 ~~1391-~~  
1423 ~~1392]~~.

1424

COMMITTEE NOTE

1425 Rule 82 is amended to reflect the enactment of 28 U.S.C. §  
1426 1390 and the repeal of § 1392.

1427

*Discussion*

1428 It has long been understood that the general venue statutes do  
1429 not apply to actions in which the district court exercises  
1430 admiralty and maritime jurisdiction, except that the transfer

1431 provisions do apply. This proposition could become ambiguous when  
1432 a case either could be brought in the admiralty or maritime  
1433 jurisdiction or could be brought as an action at law under the  
1434 "saving to suitors" clause. Rule 82 has addressed this problem by  
1435 invoking Rule 9(h) to ensure that the Civil Rules do not seem to  
1436 modify the venue rules for admiralty or maritime actions. Rule 9(h)  
1437 provides that an action cognizable only in the admiralty or  
1438 maritime jurisdiction is an admiralty or maritime claim for  
1439 purposes of Rule 82. It further provides that if a claim for relief  
1440 is within the admiralty or maritime jurisdiction but also is within  
1441 the court's subject-matter jurisdiction on some other ground, the  
1442 pleading may designate the claim as an admiralty or maritime claim.

1443 The occasion for amending Rule 82 arises from legislation that  
1444 added a new § 1390 to the venue statutes and repealed former § 1392  
1445 (local actions). The reference to § 1392 must be deleted. And it is  
1446 likely appropriate to add a reference to new § 1390 for reasons  
1447 that are only slightly more complicated. Deleting the reference to  
1448 § 1391 also is appropriate.

1449 New § 1390(b) provides:

1450 (b) Exclusion of Certain Cases. -Except as otherwise  
1451 provided by law, this chapter shall not govern the venue  
1452 of a civil action in which the district court exercises  
1453 the jurisdiction conferred by section 1333, except that  
1454 such civil actions may be transferred between district  
1455 courts as provided in this chapter.

1456 Section 1333 establishes "original jurisdiction, exclusive of  
1457 the courts of the States, of: (1) Any civil case of admiralty or  
1458 maritime jurisdiction, saving to suitors in all cases all other  
1459 remedies to which they are otherwise entitled."

1460 Section 1390(b), by referring to cases in which the court  
1461 "exercises the jurisdiction conferred by section 1333," thus ousts  
1462 application of the general venue statutes for cases that can be  
1463 brought only in the admiralty or maritime jurisdiction, and also  
1464 for cases that might have been brought in some other grant of  
1465 subject-matter jurisdiction but that have been designated as  
1466 admiralty or maritime claims under Rule 9(h).

1467 The proposed amendment carries forward the purpose of  
1468 integrating Rule 9(h) with the venue statutes through Rule 82. It  
1469 is appropriate to refer to all of § 1390, not subsection (b) alone,  
1470 because § 1390(a) provides a general definition of venue, while  
1471 subsection (c) addresses transfer of an action removed from a state  
1472 court.

1473 The original proposal was submitted to the Maritime Law  
1474 Association for review and approved. That seemed to provide  
1475 adequate reassurance for publication. It had the virtue of making  
1476 only a minimal change, retaining most of the amended sentence and

1477 revising only the statutory references.

1478 Further review, however, suggests that the statement that an  
1479 admiralty or maritime claim is not a civil action cannot be carried  
1480 forward. This drafting was adopted in 1966 when the admiralty rules  
1481 were merged with the civil rules. Rule 1 was amended to state that  
1482 the rules govern "in all suits of a civil nature whether cognizable  
1483 as cases at law or in equity or in admiralty." Rule 2, then as now,  
1484 stated that there is one form of action – the civil action. The  
1485 Committee Note to Rule 82 said that by virtue of Rules 1 and 2,  
1486 suits in admiralty have been converted to civil actions. So Rule 82  
1487 was amended to provide that an action that includes a claim  
1488 designated for admiralty or maritime jurisdiction under Rule 9(h)  
1489 is not a civil action for purposes of what then were §§ 1391-1393.  
1490 That avoided disruption of the settled interpretation that those  
1491 general venue statutes did not apply to admiralty claims.

1492 The difficulty with carrying forward the 1966 qualification of  
1493 the status of admiralty claims as civil actions is that new §  
1494 1390(b) twice describes the exercise of admiralty jurisdiction in  
1495 "a civil action." To say that a Rule 9(h) claim is not a civil  
1496 action for purposes of § 1390 would be to attempt to take the claim  
1497 outside of § 1390, the opposite of the intended accommodation.

1498 Nor is there any apparent need to continue to refer to § 1391.  
1499 Section 1390(b) takes care of that.

1500 This revised proposal has been sent to the Maritime Law  
1501 Association for further comment. No response has yet been received.  
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# TAB 7

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1503 RECOMMEND PUBLICATION OF RULE 4(M) AMENDMENT

1504 Several of the comments on the version of Rule 4(m) published  
1505 for comment as part of the Duke Rules Package in August 2013  
1506 suggest it would be valuable to recommend publication of this  
1507 proposed further revision:

1508 **Rule 4. Summons \* \* \***

1509 (m) TIME LIMIT FOR SERVICE. \* \* \* This subdivision (m) does not apply  
1510 to service in a foreign country under Rule 4(f), 4(h)(2), or  
1511 4(j)(1) \* \* \*.

1512 COMMITTEE NOTE

1513 Rule 4(m) is amended to correct a possible ambiguity that  
1514 appears to have generated some confusion in practice. Service in a  
1515 foreign country often is accomplished by means that require more  
1516 than the 120 days originally set by Rule 4(m)[, or than the 90 days  
1517 set by amended Rule 4(m)]. This problem is recognized by the two  
1518 clear exceptions for service on an individual in a foreign country  
1519 under Rule 4(f) and for service on a foreign state under Rule  
1520 4(j)(1). The potential ambiguity arises from the lack of any  
1521 explicit reference to service on a corporation, partnership, or  
1522 other unincorporated association. Rule 4(h)(2) provides for service  
1523 on such defendants at a place outside any judicial district of the  
1524 United States "in any manner prescribed by Rule 4(f) for serving an  
1525 individual, except personal delivery under (f)(2)(C)(i)." Invoking  
1526 service "in the manner prescribed by Rule 4(f)" could easily be  
1527 read to mean that service under Rule 4(h)(2) is also service  
1528 "under" Rule 4(f). That interpretation is in keeping with the  
1529 purpose to recognize the delays that often occur in effecting  
1530 service in a foreign country. But it also is possible to read the  
1531 words for what they seem to say – service is under Rule 4(h)(2),  
1532 albeit in a manner borrowed from almost all, but not quite all, of  
1533 Rule 4(f).

1534 The amendment resolves this possible ambiguity.

1535 *Discussion*

1536 The Committee Note explains the proposal. Many of the comments  
1537 on the 2013 proposal to reduce the time for service under Rule 4(m)  
1538 argued that more time is needed for service in a foreign country,  
1539 indeed that even 120 days often is not enough. These comments make  
1540 sense only on the assumption that service under Rule 4(h)(2) is not  
1541 exempt from the Rule 4(m) time limit. Among the comments studied so  
1542 far, the comment from the New York City Bar Association notes the  
1543 ambiguity and expressly recommends that Rule 4(h)(2) be added to  
1544 the list of exceptions from Rule 4(m). There is no apparent reason  
1545 to avoid the change. But publication may reveal complications that  
1546 either defeat the whole proposal or require additional  
1547 qualifications. If for some unforeseen reason it comes to seem  
1548 desirable to subject service under Rule 4(h)(2) to the time limits

1549 of Rule 4(m), a nice question will be presented: how should the  
1550 rule text be amended to clarify the ambiguity by going the other  
1551 way? "This subdivision (m) applies to service outside any judicial  
1552 district of the United States under Rule 4(h)(2), but does not  
1553 apply to \* \* \*"? (Any passing regret about the inability to revise  
1554 a Committee Note without revising rule text is assuaged by  
1555 reflecting that revising the Committee Note alone would alleviate  
1556 the ambiguity only after an accumulation of cases, probably over a  
1557 period of many years, pointing out the new approach.)



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**INFORMATION**

1559 RULE 6(d): "3 DAYS ARE ADDED"

1560 The Standing Committee acted in January to approve publication  
1561 at a suitable time of a proposal to amend Rule 6(d) to delete the  
1562 provision extending by 3 days the time to respond after service by  
1563 electronic means under Rule 5(b)(2)(E). The time for publication  
1564 will be affected by continuing work of the all-Committees  
1565 subcommittee that is working on rules revisions to adjust to the  
1566 continuing evolution of e-communication. One choice may be to  
1567 publish Rule 6(d) ahead of parallel changes in other sets of rules,  
1568 drawing comments as a bellwether for all. Another choice may be to  
1569 publish parallel changes in all sets of rules at the same time; if  
1570 all sets are ready for a recommendation to publish at the May  
1571 meeting of the Standing Committee, that is the likely course. It  
1572 also remains possible that publication may be delayed to support a  
1573 broader review of the question whether to carry forward the "3 days  
1574 are added" provision as to one or more of the other modes of  
1575 service that are included in Rule 6(d). If publication is limited  
1576 to striking e-service from the 3-added-days list, the message  
1577 proposing publication will ask whether the 3 added days should be  
1578 deleted for all or some other modes of service now included in Rule  
1579 6(d).

1580 Discussion at the Standing Committee meeting raised related  
1581 questions about the "3-days are added" provision. One source of  
1582 concern is familiar from discussion of e-service: the three added  
1583 days defeat the ease of calculating the many time periods set in  
1584 weekly intervals of 7 days, 14 days, 21 days, or (not as often) 28  
1585 days. That concern leads the most enthusiastic opponents to suggest  
1586 that the 3 added days provision be expunged for all forms of  
1587 service, including service by postal mail. The most modest  
1588 proposal, at the other end, would be to make only one further  
1589 deletion, arguing that when service is made by a means consented to  
1590 in writing under Rule 5(b)(2)(F) there is no need to allow the  
1591 extra time. (It is not clear whether these proponents would allow  
1592 the parties to agree on an extended time to respond, compare the  
1593 limits in Rule 29(b) on stipulations to extend the time to respond  
1594 to discovery.) Greater uncertainty was inspired by the provision in  
1595 Rule 5(b)(2)(D) for service by leaving the paper with the court  
1596 clerk if the person to be served has no known address. This  
1597 provision may be invoked in litigation involving pro se parties.  
1598 Whether the 3 added days have more than symbolic value in such  
1599 cases is unclear.

1600 These questions involve the other advisory committees for  
1601 rules that have parallel provisions. They will be brought on for  
1602 further discussion through the coordinating subcommittee.

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