

**MINUTES OF MEETING  
COUNCIL ON COURT PROCEDURES**

Saturday, June 4, 2016, 9:30 a.m.

Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

**ATTENDANCE**

**Members Present:**

Hon. Rex Armstrong  
 Hon. Sheryl Bachart  
 John R. Bachofner  
 Hon. D. Charles Bailey, Jr.  
 Jay W. Beattie  
 Arwen Bird  
 Michael Brian  
 Hon. R. Curtis Conover  
 Kenneth C. Crowley  
 Travis Eiva  
 Hon. Tim Gerking\*  
 Robert M. Keating  
 Maureen Leonard  
 Shenoa L. Payne\*  
 Hon. Leslie Roberts  
 Derek D. Snelling\*  
 Hon. John Wolf  
 Deanna L. Wray  
 Hon. Charles M. Zennaché\*

**Members Absent:**

Troy S. Bundy  
 Jennifer L. Gates  
 Hon. Jack L. Landau  
 Hon. David Euan Leith

**Guests:**

None

**Council Staff:**

Shari C. Nilsson, Executive Assistant  
 Mark A. Peterson, Executive Director

\*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 22 ORCP 36 ORCP 43 ORCP 45 ORCP 47	ORCP 15 ORCP 20 ORCP 21 ORCP 23 ORCP 25 ORCP 27 ORCP 32 ORCP 43 ORCP 44 ORCP 55 ORCP 57 ORCP 68 ORCP 71	ORCP 9 ORCP 22 ORCP 27 ORCP 36 (2 versions) ORCP 43 ORCP 45 ORCP 47 ORCP 57	ORCP 15 ORCP 22

I. Call to Order

Mr. Brian called the meeting to order at 9:32 a.m.

II. Minutes

A. Approval of May 7, 2016, Minutes

Mr. Bachofner made a motion to approve the draft May 7, 2016, minutes (Appendix A). Judge Bailey seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters

Mr. Bachofner asked for a reminder about the process for the remainder of the biennium and publication and promulgation of draft amendments. Prof. Peterson stated that, as a matter of procedure, it is best if committees are finished with their work by the June meeting and the Council votes to put draft amendments on the docket for the September publication meeting. He pointed out that voting to place draft amendments on the September docket is an informal process. At the September meeting, the Council votes on whether to publish these draft amendments for public comment. This vote requires a quorum and a simple majority. After the public comment period, the Council meets again in December and votes whether to promulgate any of the published amendments. That vote requires a quorum and a super majority. Any of those rules that are promulgated are submitted to the Legislature at the beginning of the legislative session and, if the Legislature takes no action, they become law. Prof. Peterson noted that the Legislature has the option to reject or modify any of the Council's changes, but that it has not done so during his tenure as Executive Director.

Prof. Peterson stated that, although no meetings are scheduled for July or August, there is nothing that prevents the Council from working over the summer to finalize matters. He noted, however, that amendments should be finalized well in advance of the September meeting in order to receive full consideration by the Council and because making amendments on the fly at the publication meeting can get messy and tends not to be the careful, deliberative work the Council strives to achieve. Prof. Peterson pointed out that, two biennia ago, the Council published a draft amendment of Rule 27 in September and received pretty effective public comment that resulted in a decision not to promulgate the rule in December. He observed that it is helpful to have the collective wisdom of the bench and bar when working on rule amendments. Prof. Peterson explained that, from September to December, the Council typically only makes changes that repair errors or reflect very modest adjustments based on public comment. It is not the practice of the Council to make wholesale changes to draft amendments after they have been published for public comment.

Mr. Brian reiterated that drafts can be placed on the publication agenda for September by a simple majority vote, can be published for public comment in September by a simple majority vote, but can only be promulgated in December by a super majority vote. He noted that not appearing at the December meeting is the equivalent of a “no” vote. Mr. Bachofner encouraged members not to do this.

#### IV. Old Business

##### A. Committee Reports

###### 1. ORCP 7/9/10 Committee

Mr. Bachofner stated that the committee has completed its work and reminded the Council that a draft amendment had been moved to the September agenda.

###### 2. ORCP 22 Committee

Ms. Payne explained that the committee had met again in May and talked further about whether to address the issue of judicial discretion in ORCP 22 C(1) this biennium or to postpone that discussion until the next biennium. She stated that the committee’s consensus was to postpone the discussion in order to take a deeper look at the issue, particularly since the issue was raised late in the biennium.

Mr. Bachofner recalled that, at the May meeting, the Council had asked the committee to look at the history of why judicial discretion is not allowed in this case. Mr. Beattie stated that he had looked at the history and that it was a little opaque. He noted that former Council member Frank Pozzi had wanted a party to retain a veto over third party practice. Mr. Beattie stated that the Council had considered changing this provision at a later time and that the former Council Executive Director, Fred Merrill, had an issue with there being veto power in this rule while other rules authorize judicial discretion. He noted that the Council had roughly the same discussion at that time as it has been having this biennium, but that there apparently was no momentum at that time to change the rule. He summarized by stating that there were some strong personalities who proposed the current rule and opposed changes to it later.

Mr. Eiva noted that the issue is not necessarily one of giving plaintiffs veto power but, rather, involves the resolution of cases in a timely fashion and not making cases more complicated as they progress, and is also related to the allocation of fault and making fair decisions with that kind of policy in Oregon. He pointed out that there is a lot more in the legislative history than has been presented to the

Council, and opined that the Council should review that history more thoroughly before making any decisions. Mr. Beattie noted that the extent to which legislative history is relevant to our current inquiry is a systemic issue. He stated that, particularly since 1987, there has been significant tort reform legislation, abrogation of joint and several liability, and fault allocation as a part of general trial practice as opposed to the third party practice that Oregon used to have. While legislative history may be illuminating or instructive, it is not necessarily binding. Mr. Beattie stated that the Council must look at the circumstances now and ask whether the existing rule can be justified in the current environment. He reiterated that the committee could not reach a consensus and that there are many issues besides this "veto power" that need to be resolved, hence the committee's suggestion to examine the rule more comprehensively next biennium.

Prof. Peterson agreed that another issue to be discussed is the time frame imposed in section A and whether it should be imposed more broadly throughout the rule. Mr. Bachofner opined that the person in the best position to determine whether it is too late or inappropriate to add a third party is the judge, who should be allowed that discretion. He also suggested that, if a judge believes that more than 90 days is appropriate, the judge can exercise that discretion. He added that, particularly since the enactment of tort reform in Oregon, we do not have the ability to have the jury consider the fault of a non-party as part of the fault allocation so, if it has to add up to 100 percent and it is determined more than 90 days later that there is another party at fault, amendment would be necessary. Mr. Bachofner stated that his feeling is, if the Council is already amending the rule to allow any party to add a third party defendant, it would be simple to change the word "and" to "or" in subsection C(1). He stated that this is the only rule of which he is aware that gives a party veto power over a judge.

Mr. Eiva stated that he could think of five policy reasons why the rule should remain in its current form, and suggested that the Council should wait until next biennium to have a comprehensive debate on the policy. He stated that he did not feel that making the change at this time would allow the full benefit of the Council's consideration. He noted that Oregon lawyers have been living with the rule in its current form for three decades, that the Council has opposed changing it several times, and that there are important policy reasons as to why it did so. Mr. Eiva volunteered to put in the necessary time and effort next biennium to research the issue. He stated that he appreciates that judicial discretion is generally a good thing but opined that sometimes there should be limitations on it.

Ms. Payne stated that the committee's proposed amendment of ORCP 22 (Appendix B) is a simple amendment changing the words "the plaintiff" to "any party" in subsection C(1). She asked that the Council vote on whether to place the draft amendment on the September agenda. Mr. Beattie made a motion to put the amendment on the September agenda. Mr. Eiva seconded the motion, which passed unanimously by voice vote. Prof. Peterson stated that Rule 22 will be placed on the agenda for the first Council meeting of the next biennium.

### 3. Electronic Discovery Committee

Judge Zennaché reminded the Council that the committee had brought two proposed draft amendments for discussion at the last Council meeting. One was a change to Rule 43 to require a conferral in regard to electronically stored information (ESI) if one of the parties requested it. He stated that the other draft was a potential modification of Rule 36 C to identify some criteria for courts to use in determining what constitutes an "undue burden." With regard to the modification of Rule 43, Judge Zennaché stated that the Council had asked the committee to meet again. The committee met and reached consensus and had prepared for the Council's consideration a draft amendment of Rule 43 (Appendix C) that requires conferral at the request of a party who believes there is ESI, but includes some limitations on the duty to confer to address some concerns of Council members. For example, a meeting is not required until all of the parties have appeared or indicated that they intend to appear. He stated that the committee also added a modification saying that the court can consider "good faith" compliance with the rule in deciding on protective orders or motions to compel production. Judge Zennaché explained that the committee had prepared a report to provide some legislative history that illuminates the good faith requirement and the expectation of the committee that these conferrals are not going to be a one-time event. He explained that, more often than not, there will be an initial meeting and a need for later meetings to fully resolve all of the issues. He reiterated that the committee had reached consensus on the draft amendment to Rule 43, and suggested that the Council vote on this draft before discussing the potential change to Rule 36.

Judge Gerking suggested adding the word "also" to the new language in subsection E(2) to make it read more smoothly: "The court may also require that the parties meet to confer about ESI production." Judge Zennaché did not oppose such a change.

Mr. Bachofner expressed concern about triggering the request for conferral with the written notice of intent to file an appearance because common defense practice is to send out an ORCP 69 A request to not enter a default immediately

upon receipt of the assignment, which is typically anywhere from 3 to 20 days before one even has the file materials. He stated that requiring the parties to meet and confer about the scope of production within 21 days after serving an intent to file an appearance may be premature. He stated that he would prefer that the time frame in the draft amendment be changed to “after all parties have appeared” because that at least gives a recently retained lawyer the opportunity to examine the file. Judge Bailey observed that there are many parties who do not appear and are nonetheless working on negotiations. He stated that, if a lawyer sends a notice of intent to appear and has not had the opportunity to look at the file, he or she can merely say in good faith that there is nothing to work with at this point in time. Mr. Bachofner pointed out that the draft language says that within 21 days the parties “shall meet.” Ms. Wray noted that the problem that the committee was attempting to solve with the new language was the request coming with the complaint but, as a defense attorney, she does not want to encourage plaintiffs’ lawyers to send her ORCP 69 A 10 day notices just so they can ask for an ESI meeting. She noted that there can be unintended consequences.

Mr. Keating pointed out that, while Mr. Bachofner stated that the defense usually sends out a letter of intent to appear as soon as the assignment is received, he personally usually first determines whether he has service issues and when the statute runs, as he has 30 days from the date of service to file a response. He stated that, sometimes, a defendant will hire him and say “I learned the insured was served three weeks ago,” which speeds up the timeline, but observed that if you get timely notice of service you can extend it out. Mr. Keating noted that he drafted the language to which Mr. Bachofner objected. He explained that he will frequently send the letter and not make an appearance because he wants to negotiate or get more discovery before he starts making representations about the facts. He observed that, like Ms. Wray, he does not want to have the plaintiff’s lawyer send him the 10 day notice of intent to take a default because of this issue. He stated that, if he receives a request for production served with the complaint, he can call the vast majority of lawyers that he works with and tell them he will be working on discovery and have negotiations begin during the telephone call. Mr. Bachofner stated that his concern arises from the “shall” requirement, but he agreed that it is helpful that the word “reasonable” occurs later in the rule. He stated that he believes that a good practice that he has followed for a while is that, when you get the assignment, you send a notice of intent to appear, not waiving any defenses because you need to be able to look at the file. He gets assignments frequently where he does not get materials for at least 10 days after he has gotten the telephonic assignment, and there could have been service or not, but the better practice is to send the notice of intent to prevent a default. He observed that he is concerned about this, but that it is not a huge issue and that he can live with it, especially since the Council has created some history about it. Prof.

Peterson asked whether it is helpful that the conference is seen as a step in an ongoing process. Mr. Bachofner stated that it is. Judge Armstrong noted that there is no particular sanction for failing to be helpful; an attorney can appear for a conferral meeting and explain that he or she will not be able to be very helpful because he or she has not received much information, but that he or she is there and prepared to have the discussion. Mr. Bachofner explained that he takes the rules seriously and, when a rule says "shall," he considers that an obligation. Judge Zennaché noted that the rule does say that an attorney has a duty to be there in good faith, so if that attorney shows up at the meeting and has a good reason that he or she cannot answer the questions yet, the court should consider it.

Judge Gerking pointed out that, if a lawyer does not yet have the file and meets with opposing counsel who does, that lawyer can always ask what kind of ESI opposing counsel is seeking. After the meeting he or she can communicate that to the client, which gives a heads up to the defense before they even see the complaint and the file material. He stated that he believes that the proposed amendment is a good change. Judge Roberts observed that this is the kind of technical rule where having published comments in addition to the rule itself would be very valuable. She explained that the Council knows what it has in mind, but fleshing that out in staff comments would also be helpful. Judge Zennaché explained that this is also why the committee submitted a report in an effort to make some legislative history.

Mr. Eiva noted that, the way the proposed amendment is written right now, it could be read that a party can only ask for one meeting. He wondered whether a party is allowed to ask for more meetings or whether just one is allowed. Judge Zennaché stated that this goes to the consideration of whether a party is acting in good faith or not. He stated that he does not feel it is necessary to make a change to the proposed amendment to clarify that. Mr. Beattie stated that, as a practical matter, if you intend to move to compel production or for a protective order, you will need to meet anyway and that most people have multiple meetings. Judge Bailey stated that he does not read the proposed amendment in the same way that Mr. Eiva does and that he does not see anything that limits the number of meetings. Mr. Eiva stated that his problem is that he could see someone potentially saying "we met once, we do not need to meet again under the rule because the language states 'any party may request a meeting to confer.'" Judge Roberts suggested a friendly amendment adding the language "at any time" or changing the word "meeting" to "meetings." Mr. Crowley noted that the committee has addressed this issue in its report that establishes legislative history. He stated that he expects that, in most cases, more than one meeting will be required. Mr. Eiva observed that it is not that often that members of the bar

access legislative history.

Mr. Brian asked whether the Council would like to accept Judge Roberts' suggestion to make a modification to the proposed amendment to clarify that the expectation is that there may be more than one meeting. Judge Bailey suggested putting the letter "s" in parentheses after the word "meeting." Judge Armstrong suggested the language "one or more meetings." Judge Roberts noted that the reality is that many attorneys do not carefully read the existing rules, so it is unrealistic to expect that attorneys will carefully read the Council's legislative history. Mr. Brian suggested that making it clear in the rule that there can be one or more meetings eliminates the possibility of gamesmanship. Judge Bachart stated that, given the opportunity to make the language explicit, she believes that the Council should. Judge Roberts made a motion to adopt the language suggested by Judge Armstrong. Mr. Bachofner seconded the motion, which was passed unanimously by voice vote. Mr. Bachofner moved to put the amended rule change to Rule 43 on the September publication agenda. Mr. Crowley seconded the motion, which was passed unanimously by voice vote.

With regard to ORCP 36, Judge Zennaché noted that the proposed change has been more controversial within the committee and involves adding language to modify section C regarding motions for protective orders based on undue burden (Appendix C). He stated that the added language has become quite controversial and that the committee has been unable to close the gap between the plaintiffs' members of the committee and the defense members of the committee. He explained that the committee had provided the following materials to the Council: information from Ms. Payne and Mr. Eiva regarding the proportionality requirement and concerns that the plaintiffs' bar has with it (Appendix D), Sedona Conference materials from Mr. Keating (Appendix E), and a memorandum prepared by Mr. Crowley regarding his perspective on why the proposed language is necessary at this time (Appendix F). Judge Zennaché suggested that, rather than having him try to explain the different positions of these different parties, it would make more sense to have the various parties explain their positions. Mr. Eiva noted that Ms. Leonard has also done a great deal of research on this issue and that he wished to have her explain her position.

Judge Zennaché stated that, before the Council began a discussion, he wanted to be clear that the proposal is not to modify the scope or production but, rather, to add content to the section on undue burden. Ms. Nilsson pointed out for the Council that, from a procedural standpoint, if the Council votes to put a proposal on the publication docket for September, it does not mean that the Council will vote to publish it and, even if it does get published in September, that does not mean it will be promulgated in December. She stated that, if a proposal is



published for public comment, that may bring some additional perspectives that the Council had not previously considered.

Ms. Leonard stated that she had to educate herself and that she does not claim any expertise on eDiscovery. She stated that Mr. Crowley's memo was helpful and confirmed a couple of things she had previously heard. She observed that virtually all discovery these days is eDiscovery. She pointed out that, if the idea of proportionality is inserted in Rule 36, it would not be limited to eDiscovery but, rather, would apply to all discovery. She asked herself what the problems with eDiscovery are and, in talking with other lawyers, came up with a list of four items. The first is the difficulty in finding and retrieving old documents when formats have been superseded over many years. The second involves data that is manipulated with proprietary software applications and cannot be accessed without those applications, which are often under license and have confidentiality protocols. She stated that these concerns may be addressed with the protective order process already in place under the existing rules. The third issue is that relevant data is sometimes enmeshed with proprietary materials and trade secrets with no way to separate them. Again, this issue could possibly be resolved by protective orders and confidentiality requirements. The fourth issue is volume, because there are many more documents available in electronic format than were maintained in paper format. Ms. Leonard stated that the question with this issue becomes, what does it actually mean for discovery. She stated that, at one level, the electronic world actually makes it easier to retrieve, sort, find, and manipulate data. She pointed out that Mr. Crowley's memo to the Council mentions that the State has adopted a voluntary conferral process, and stated that this fourth issue is what the conferral process is meant, in part, to start to address.

Ms. Leonard stated that her understanding is that businesses need to be managing their documents in a retrievable way in any case, and obligations of discovery should not be that much different from what businesses are already doing. She observed that ESI is not like her basement, where random items might be thrown down the stairs but, rather, it is an organized world. Businesses need to be able to manage, retrieve, index, and discard ESI after a relevant period of time passes for storage. She wanted to identify what is unique to ESI that makes lawyers get so frustrated, and she could not see that much that could not be resolved with more knowledge about the technical aspects of manipulating data. She stated that her research renewed and confirmed some of her concerns about the factors set forth in the proposed rule. If a business cannot retrieve documents in storage because the process of retrieval is unmanageable, it is not a discovery problem but, rather, it is a business problem. She wondered why a factor like case value would be used to limit access to relevant information and stated that, if the problem is the cost to retrieve, it may be an exaggerated problem. She pointed out that she does not

know what it would really cost to retrieve certain information from someone's business files, but that there are technical people who do know. Ms. Leonard opined that this is more a process of educating the bar, especially the older generation. She stated that her concern with the proposed rule is that we have identified certain problems with ESI, and perhaps some of those need a remedy, but the proposed proportionality rule is not the answer. Her feeling is that it is simply a global way of limiting discovery in every case based on factors that really do not address what she believes the ESI problems are.

Mr. Eiva stated that he wished to emphasize the statement from Prof. Arthur Miller of New York University School of Law before the Advisory Committee on Civil Rules in 2014. He observed that his concerns are not just plaintiffs' lawyers' concerns. He pointed out that Prof. Miller, who is known as the "dean of the federal rules," had expressed great concern when the federal proportionality rule was being passed. He stated that Prof. Miller had emphasized that the problems that the proportionality rule was trying to address seem like technology problems that will ultimately be healed by technology. Mr. Eiva stated that most of us understand that we can access an enormous amount of information by getting on the Internet and searching. He explained that he knows that such a method is impossible due to privacy concerns but, if he could have eight hours on a company's intranet, he would likely be able to access the information he needed without having to go through the process of having to ask the other side to produce thousands and thousands of pages. He opined that the real problem is the way attorneys have to request documents in order to motivate the other side to go find them; it has to be a broad request as opposed to a pinpointed request, so perhaps the solution is more about conferral in order to defuse costs as opposed to limiting discovery in toto. Mr. Eiva stated that, under Rule 43, he can call someone to a deposition and require that they bring a certain item. Ideally, that person could appear with a computer that has intranet access to that company's computer system and be asked to search the database for a certain item. He stated that, obviously, defense counsel would need to see that item before plaintiff's counsel could, so such a solution could not work now, but he suggested that perhaps there could be a special rule for eDiscovery instead of a global proportionality rule, with special masters or referees who can actually work out issues after a conference between the parties. He noted that a great part of the problem of the large volume of documents arises from the fact that there is an inefficient game of telephone where plaintiffs must ask broadly for documents so as to make sure they get what they need, and so defendants must respond broadly.

Mr. Bachofner pointed out that proportionality would actually force other plaintiffs' attorneys to follow the guidelines that Mr. Eiva just suggested, and

stated that such a rule change just brings everyone to that point. He stated that, if the whole point is to consider the proportionality of the case, the attorneys on both sides are going to have to look at ways to get to the necessary documents in a more efficient manner because the value of the case may not justify a large expenditure. For instance, in a case with a value of \$50,000, would it make sense to spend \$20,000 on eDiscovery to locate various documents? Judge Zennaché pointed out that it might make sense if the social issues are valuable enough. Mr. Bachofner agreed and stated that this is another reason that it makes sense to have some way to have the court consider proportionality and all of these issues. Mr. Eiva opined that the court is in a very dark place to make that decision and has no light to shed on the problem.

Judge Roberts noted that undue burden is part of the rule now, and that the Council's discussion is about the content of that concept and whether there is any degree of uniformity among courts or any degree of guidance to practitioners on what to bring to the court to establish or to refute an argument of undue burden. She noted that it applies just as much to Ms. Leonard's hypothetical basement as it does to eDiscovery; in a lawsuit with a private individual who wants to search everything in that basement, what do you talk about with the court? She stated that this rule is about is how the court should address that question and how the practitioner should address that question, not how it should be resolved. She pointed out that, in any case, the rule does not tell the court how it should resolve those issues but, rather, just tries to channel the discussion. Ms. Leonard disagreed and pointed out that such a rule change would put factors before the court about which the court has to make some resolution, such as case value. Judge Roberts stated that it does not tell a judge what the resolution should be. Ms. Leonard suggested that it weights toward resolution. She stated that a plaintiff with a low value case is already in a defensive posture when it comes to seeking discovery to prove their case. She opined that the proposed amendment would be a significant change.

Judge Armstrong stated that Ms. Leonard's scenario would also be true under the existing rule. He stated that, when a party appears before the court and states that it wants to prevent discovery because there is a low value case and such a high cost discovery burden should not be imposed, a court could absolutely agree under the existing rule. He noted that he appreciates Ms. Leonard's point that, by now identifying specific factors, the rule change would focus people's attention in a way that starts to cause thoughts, but pointed out that those thoughts would still be there whether the rule told people to think in those terms or not. Judge Zennaché agreed. Mr. Beattie wondered in what way the language does not simply inform the court's exercise of its discretion, as it always does. Ms. Leonard stated that she finds the proposed factors to not be very directive and that they do

not inform the discussion. She referred to the specific factor, “importance of the issues” and stated that the parties will not agree about that and who knows what the court will make of that disagreement, especially at the beginning of a case where it is unclear what evidence will emerge. Judge Bailey opined that the change will help focus each judge as to what undue burden is and encourage more uniformity among the courts. He stated that there are some factors to consider that are more specific than just “undue burden,” whereas now “undue burden” can mean all of the things listed in the proposed rule and a lot more. Judge Roberts suggested that, if Ms. Leonard believes that there should be other factors included or some that should be eliminated, she should raise them so that the Council may discuss them. Ms. Leonard stated that she believes that the factors proposed are the wrong factors and that we should have a discussion generally and build a factors test. Judge Zennaché pointed out that extensive discussions to determine the appropriate factors had already occurred during committee discussions.

Mr. Keating stated that he has already reported to the committee and the Council on several occasions about his experiences that have focused his attention on this particular issue. He gave an example of representing a hospital system with five hospitals and many clinics where the opposing party sent a request for every picture, document, e-mail, and computer record relating to a certain issue. In such a case, under the current rule, he would provide what he thinks is reasonable eDiscovery and, if a motion to compel is filed, explain to the court what he has already done and that, if more is required, it will cost much more money, an expense that he believes is disproportionate. He explained that, when the answer from the court is “motion to compel allowed,” he would like to know if the court considered the expense involved. He stated that the response to a motion to compel is asking for the court to recognize undue burden and expense, which is really simple. He pointed out that he has been going through this procedure with no guidance to assist the judge in determining exactly how much is undue.

Mr. Keating observed that there is a fear that “proportionality” will somehow cause harm to plaintiffs, but pointed out that the definition of “undue” is “disproportionate” according to Webster’s Dictionary, and “undue” has been in Rule 36 C since its inception as well as in the statutes that preceded it. He remarked that the proposed rule change points to issues that may create a disproportion. He stated that it is important that the significance of the issues be in the rule because there may be a low value case that is subject to a statutory cap where the opposing counsel is looking for evidence based upon probable cause of misbehavior by the defendant and broad, expensive discovery may well be in proportion to the importance of the issue because there is, separate from the money, a social function that our legal process serves. Mr. Keating stated that he

can think of cases where that might occur. He submitted that putting the burden on the defense to answer open-ended, unlimited, unfocused requests is inappropriate, and that the proposed amendment to Rule 43 is a big step forward, because now conversation only takes place when negotiating on a motion to compel a year after the lawsuit is filed. These two things work together to inform not only judges when they have to rule on a motion to compel, but to inform parties when they sit down and confer. He stated that this is a legitimate change that creates a forum where a conversation can be had about whether it is really important to, for example, search the janitor's e-mail inbox.

Mr. Keating pointed out that the language before the Council is the product of a process that was thoroughly considered by the drafters of the federal rule and that the rationale is laid out in the Sedona Conference papers. The proposed language is not unreasonable and is already the product of a process. He pointed out that the change does not tell the judge how to make a decision but, rather, requires that the judge address proportionality when a request has been made for a protective order or in ruling on a motion to compel where the defendant asserts one or more of these particular criteria. He observed that the change would be very helpful to the bar and reiterated that the current process is unpredictable. Mr. Keating observed that it would also be helpful to be able to explain to his client that, while the client believes that the burden of eDiscovery is terribly disproportionate, these are the reasons why the court does not think so and that the client will have to comply or be sanctioned.

Mr. Beattie observed that similar language is currently working in the federal court. He stated that he has a considerable amount of experience with the federal rule because he is handling an environmental pollution case where the accumulation of documents has been occurring for 20 years, with pollution that has been occurring since World War II, with a lot of ESI and frequent issues about how far, how much, and how expensive it will be to produce that information. He observed that federal court judges have no problem applying the new federal rule and actually taking into consideration the expense and even the allocation of that expense, and it is a consideration they look at along with the other considerations under FRCP 26. He stated that there is no stumbling block to the plaintiffs in getting everything that they want but, rather, there is a good framework for the court.

Mr. Eiva observed that the federal court is one stumbling block after another for plaintiffs in general. He opined that adding the proposed language would marry Oregon law to federal case law, which has been restricted with many opinions by federal court judges. He wondered why the Council would choose to do this. He stated that Oregon looks to *Pamplin v Victoria* [319 Or 429, 877 P2d 1196 (1994)]

for guidance because Oregon does not have trial court opinions. Mr. Eiva suggested that adopting the proposed amendment right after adoption of the new federal rule implies that Oregon wants to do what the federal courts are doing and Oregon will end up adopting federal jurisprudence. He noted that every problem Mr. Keating mentioned can be addressed in the undue burden analysis. Mr. Keating replied that this does not currently happen. Judge Bailey noted that he currently has plaintiffs who appear before him and argue that judges cannot address those kinds of considerations or look at those criteria. He stated that this rule says, "yes you can"; it is that simple. Judge Bailey stated that plaintiffs' attorneys often say that it is not fair to look at the nature of the case or the costs because it is unfair to the plaintiff, who has a vested interest in getting the information. Mr. Eiva observed that, the way the rule is written, it says that the judge "shall" think about the factors. He posited that the proposed amendment focuses on the extraordinary case, and wondered what case it is where a judge would say "no discovery because your case is not worth it." Judge Zennaché pointed out that no one is talking about getting no discovery. Several plaintiffs' bar members of the Council noted that discovery is denied frequently at the present time for this reason. Mr. Bachofner stated that it is not just about what the court considers, but also about what litigants need to consider and emphasize in motions and responses to motions. He submitted that Oregon enjoys a pretty collegial atmosphere where the overwhelming majority of parties will be able to confer and work out the issues using these considerations. He stated that he already considers proportionality and, most of the time, he is able to work it out with opposing counsel. He stated that this change at least gives everyone notice that these are things you need to look at so that the court can be consistent. He wondered why any attorney would not want consistency.

Judge Armstrong wondered, with regard to Mr. Eiva's concern about federal case law, if there could be some way that the Council could emphasize that it likes the language of the federal rule as guidance but does not like federal case law as a source for insight into it and, in adopting the language, the Council is not adopting any federal decisions as guidance about the meaning of these principles. He stated that the words are good words but the Council does not want the federal court's overlay and approach because Oregon does not share that overlay or approach and does not believe it represents the right sensibility. Therefore, what has already been said in any federal case law applying these principles or any case law that follows does not become part of the adoption itself. Mr. Eiva stated that, if such a comment is only found within legislative history, it is not enough. He reiterated that generally, in Oregon, discovery is not restricted and that it is an extraordinary circumstance where the cost so outstrips the value of litigation. He noted that he has been practicing for 11 years in a practice with many high-value cases and, in ordinary circumstances, he does not face these motions. He

expressed concern about placing this “extraordinary case” rule prominently in the Oregon Rules of Civil Procedure.

Ms. Wray stated that, while she would love to have more consistent trial court rulings in Oregon, she can think of a number of other rules the Council could start working on today. She stated that it is not just undue burden in discovery where there are inconsistent trial court rulings. She stated that this rule in particular does not deserve or need judicial guidance as opposed to summary judgment or Rule 21 motions. She noted that there are a host of rules that need factors if the Council is going to go down that path. Ms. Wray pointed out that the factors listed in the proposed draft are not factors that were developed by the Council’s committee but, rather, were developed in the federal rules. She wondered whether time was spent in committee meetings debating each of these and whether we want them in the Oregon rules. She stated that she did not become a Council member so that she could rubber stamp the insertion of federal court rules into Oregon rules because she respects that Oregon has a long tradition of being different from the federal courts. She expressed that she would like to hear from the committee about what factors it believes should be considered and, if that work still remains to be done, it should be done. Ms. Wray stated that she is not opposed to the concept of proportionality, but that this process seems rushed. She feared that the Council may be proceeding on the concept that these are great factors because people across the country that we do not know have decided that they are. She stated that non-personal injury plaintiffs’ attorneys are totally on board with this rule, as it works in a lot of different settings, but there is a segment of personal injury cases where it might be unfair.

Ms. Payne agreed that it is a good idea to wait and get more information before moving on a rule change. She wanted to clarify that the information submitted by her and Mr. Eiva was a compilation of material that did not just come from the plaintiffs’ bar but, rather, included information in opposition to the new federal proportionality rule from a congressperson, a federal district court judge, 171 academic professors, and the Center for Constitutional Litigation. She stated that their submissions show that there were a lot of neutral organizations in opposition to the change to the federal rule. She noted that the paper submitted by the professors discussed a study done by the Federal Judicial Center that examined whether there was an issue with discovery, whether discovery in the federal bar was really a problem, whether it was expensive, and what the new federal rule was trying to fix. She stated that the study found that the average cost for discovery in the average case was \$15,000 for plaintiffs and \$20,000 for defendants, which is not the extreme case but the point was whether the new rule was being put into place to fix a problem that does not exist. Ms. Payne pointed out that there is no evidence of the average cost of discovery in Oregon at this

point, but she wondered whether the Council is attempting to create a rule for the extreme case rather than for the general case. She observed that the goal should be to craft the rules for the general case, because the undue burden analysis and protective orders already exist for extreme cases. She noted that more information will become available over time, particularly as the federal rule is used and it becomes more clear how it is working and affecting parties. She stated that she would also like to know how other states are handling the issue, and whether they are adopting or rejecting the federal language and why. Ms. Payne explained that she had also provided information to the Council about the Pound Civil Justice Institute's July forum on whether states should adopt the federal rule, and stated that there will be a lot of useful material for the Council on both sides of the issue from that forum. She observed that there is no reason to rush into adopting the federal rule when we could really be considering the appropriate factors for undue burden.

Mr. Beattie asked about changing the language in the proposed rule to state that the court "may" consider these factors because at least this would give the court some certainty that economic factors are one of the concerns to consider in deciding what constitutes an undue burden. He stated that, as Mr. Eiva has mentioned, Oregon does not report trial court decisions, discovery issues rarely make it up to the Court of Appeals or Supreme Court, and discovery is never the subject of mandamus because it is subject to direct appeal, so there is no guidance from the courts on this. He stated that this leaves it open for an argument that economic factors are not to be considered in the undue burden analysis, so he thinks the rule should just make it clear that they are; the rule should not direct that the factors will dictate a particular outcome, but that they may be considered.

Mr. Crowley stated that, when he joined the Council, he thought this was an important issue and felt very strongly that an eDiscovery committee was needed. He stated that, in the last 10 years, he has seen a complete revolution in how civil litigation is conducted, with no more paper files; all litigation is eDiscovery, and all litigation is large. In his experience, every little case, even with pro se litigants, involves eDiscovery. While he has heard a lot of talk about the extreme cases, his experience is that these issues arise in the *regular* cases and, for those who are practicing law and do not see this in regular cases right now, it is going to be happening in regular cases, because at some point we will see a paperless system. For him, the most important thing about the proposed rule change is that it allows Oregon to be a part of the conversation whereas, if we wait, we are not a part of the conversation. He noted that Oregon is already behind on this issue, which impacts how everyone practices law and drives up the cost of litigation for everyone. He stated that what is happening across the country now in litigation is that firms are forced to hire outside vendors to help manage the mountain of data



in their cases, and this is complex, time-consuming, and a huge added litigation cost.

Mr. Crowley stated that the state strives to get a handle on the discovery process in several ways, the first of which is an early case conference to talk about such costs and ways to manage them. He stated that, hopefully, this will be the answer in most cases, because once the court and opposing counsel become educated about the specific issues involved, it will be easier to reach reasonable solutions. However, this will not always happen; there will be times when the court will need to be brought in on a case, and the proposed proportionality rule addresses how to manage those issues. He noted that the committee has a difference in opinion, from his perspective largely because there is now an advantage on the plaintiffs' side with the existing rules. He observed that there is a huge disadvantage to defendants because all of these costs, complexities, and time disadvantages weigh down the defense and, when it is time to go to court, the burden is on the defense to explain that. He stated that he does not believe that the proposed proportionality language will create a big disadvantage in those cases where the damages are small and costs of discovery are higher, because a court is in a good position to be able to weigh how that plays out in terms of the proportionality language and he does not think that will shut off those plaintiffs' opportunities for justice. That is certainly not the intent of the proposed rule. He thinks that the proposed rule balances the playing field and moves us forward in our modern times by addressing the issues that we face today.

Mr. Crowley noted that the committee has been debating how to approach this issue throughout the year and the conclusion is not something that has been rushed. He stated that there is just a difference of opinion between members of the committee and the committee felt that it was important to bring the issue to entire Council. The discussion today reflects that difference, but it is a huge issue on which the Council is in a position to take leadership, and the Council is the perfect body to move the bar forward in how to deal with these issues. Mr. Crowley observed that, if the Council does move forward to public comment, there will be a lot of comment to weigh, and he does not know where that leaves us in December. He stated that the most important thing is that the Council not sit back and wait because, two years from now, the issue will be even bigger and there will be even more issues to address. He stated that he recognizes that the proposed language does come out of the federal rules, but pointed out that this does not mean that Oregon will apply the language in the same way as the federal rules. Mr. Crowley believes that Oregon can be a leader in how this language is interpreted, but not if the Council does not include it the ORCP and adopts a "wait and see" attitude.

Mr. Brian stated that his problem with the potential rule change is the hypothetical case where there is a “smoking gun” document buried among all of the documents that Mr. Keating was requested to produce for what he claimed was a disproportionate cost of \$5 million. Mr. Keating observed that, with all the thinking he has been doing about this issue, he does not understand the damage to a plaintiff’s case because of the proposed rule change. He noted that, in reality, all the change would do is to ask the court to assess and address the burdens. He stated that every plaintiffs’ lawyer he knows believes in his or her soul that there is a smoking gun and that, given that belief, there would only be one solution to the problem – to say there is no burden undue enough. He stated that there could be no fact a defendant could ever use to justify limiting the plaintiff’s request to say “I want every document in your organization that uses the plaintiff’s name” and, if that were true, we ought to just take the words “undue burden and expense” out of the rule. Mr. Keating stated that a lawyer needs to have trust that his or her opponent, a member of the bar with a loyalty to the court and the system, will not knowingly sit on a smoking gun. He stated that he also does not believe that the system can proceed on a built-in attitude that a defendant, particularly a corporate defendant, is corrupt and would do everything in the world to prevent the disclosure of a particularly bad thing. He stated that he has never done that and that he produces items if they are not privileged, so why would his client have to spend \$5 million to look in the janitor’s email box?

Mr. Brian explained that his problem is not with the lawyer but, rather, with the client who chooses not to tell the lawyer. He noted that he has had clients who do not tell him everything and he is sometimes unaware of a fact until he hears about it in a deposition. He stated that it seems that, in the end, the proposed changes are a squeezing down of the access to relevant data on both sides, and he struggles with that issue. He stated that he has not come to a possible solution in his own mind. Mr. Beattie stated that this is always the personal injury paradigm because there are huge corporate plaintiffs and defendants, some of whom are insured under defense within limits (DWL) policies, who blow through their indemnity providing eDiscovery. He observed that a plaintiff with a \$1 million DWL policy who had a \$20 million discovery demand would be on his or her own.

Judge Roberts stated that, with so many judges in the state of Oregon, the current rule does get applied with standards but she observed that there is one set of standards for each and every judge. She stated that, with the current rule, Oregon is doing justice on the fly. She pointed out that most of Oregon’s rules *do* have standards, including the summary judgment rule, and stated that it would be comparable to the discovery rule if that rule said simply “any party can move for summary judgment and the court can issue it,” because that is the state of the current discovery rule – anybody can say “undue burden” and the court can say

“yes” or “no” without anything to channel that discussion. Judge Roberts opined that even changing the proposed amendment to read “may consider” would be better than the existing rule. She suggested that, perhaps, the Council could insert an unprecedented parenthetical in the rule that says “Oregon is not adopting the federal rule or federal case law.” She stated that, because there are so many federal trial court decisions in this country, anyone can give her 25 federal cases on any side of any issue that are not relevant to Oregon law. She pointed out that discovery will be developed at the trial court level, not on appeal, so there will not be a body of case law that tells us what the standard is. Judge Roberts observed that, with most Oregon rules, the standards are either patent or express in the rule, and they ought to be in the discovery rule as well. With regard to delaying the change, she stated that her courtroom contains a standard in gold letters on the wall that says “justice delayed is justice denied.” She suggested that the Council ought to do things, and ought to deal with this unguided consideration so that there is some uniformity within the state courts. She did agree that the proposed amendment does deal in large part with extraordinary cases because, in the vast majority of cases, discovery issues never come to court; the court only deals with the troubling issues.

Judge Bachart stated that she does not view the proposed change with any particular case in mind. She stated that she does not see it as leveling the playing field but, rather, structuring the analysis. She stated that, regardless of the size of the jurisdiction, judges are already seeing these issues in motions to compel in every type of case. She noted that judges spent two days at the Circuit Judges’ Conference on eDiscovery issues because they are constantly confronted with them. Judge Bachart explained that she views proportionality as a factor that judges are going to consider among other things in a non-exclusive list, and that she expects that all of the arguments that plaintiffs and defendants are making to the court will be presented to her in a memo that will include at least these factors so that, when she is confronted with a motion to compel, she can go through each one in her findings. She noted that it is not an exclusive list and that “importance” does not necessarily equate to “money.” She also stated that “undue burden” does not necessarily equate to “volume.” She stated that she has Portland attorneys coming into her courtroom showing her Multnomah County or Washington County decisions just to give her some guidance about eDiscovery issues so, while those decisions are not controlling, that is what they are relying on now. She expressed concern about waiting to discuss this issue more next biennium, since the problem is happening now. She stated that she feels that the change will provide some uniformity to a very diverse Oregon bench and frame the discussion when motions to compel are brought before the court.

Mr. Bachofner opined that the proposed change does not favor plaintiffs or

defendants but, rather, is neutral. He stated that he finds it particularly interesting that, when the Council discusses a neutral change like this, there is an outcry that it is somehow unfair but, when defense attorneys try to get medical records from a party that has filed a lawsuit and chosen to litigate, they get push back on getting access, even though he has seen countless times where he has subpoenaed records to trial and found documents that were not produced regarding prior injuries in records that were not necessarily related to the same body part. He pointed out that there is always going to be some suspicion on one side that the other side is not providing him or her with all available discovery; which party feels that way will change depending on the case. Mr. Bachofner observed that it makes sense to have some guidance provided about the particular factors that should apply. He stated that, while some Council members believe that these are not the correct factors, he does not hear them saying what the correct factors should be. From his perspective, the proposed factors seem to be good factors to start with and, at this point, the only issue at hand is putting the proposed amendment on the publication agenda for September. He suggested that the rule should, in fact, be put on the publication agenda and moved forward for public comment in order to have an even more informed discussion. He pointed out that these actions do not mean that the Council will vote to promulgate the rule. Even if the Council decides to go back to the drawing board next biennium, it would do so with the wisdom of our bar and our judges throughout the state to assist in coming up with the best possible rule.

Judge Zennaché also reminded the Council that it is just considering putting the proposed amendment on the agenda for September. He stated that the committee very purposely did not include the proportionality language in Rule 36 B with regard to the scope of discovery but, rather, put it in section C with regard to what constitutes an undue burden and a list of non-exclusive factors that the court should consider in making that determination. He stated that this was because Oregon is not trying to adopt the federal rule in toto. Judge Zennaché remarked that the Council is certainly not trying to say that Oregon wishes to adopt federal jurisprudence. He also pointed out that, with regard to criticism of the factors listed, it has been his perspective from the very first meeting of the committee that these were the factors to be considered and, frankly, the committee did not fall apart on factors but, rather, on proportionality. He stated that the factors became a concern later but that the committee initially included the undue burden analysis because it thought that, whenever a court decides undue burden, it necessarily implies a balancing. He stated that it was not intended to be a sea change because, frankly, courts can already consider all of the listed factors. He urged the Council to put the proposal on the September agenda and put it out for public comment so that the Council can make a more informed decision about whether or not to promulgate it.

Judge Armstrong stated that, looking back through the criteria themselves, he was struck that the provisions that caused the greatest anxiety to the bar are the importance of the issues at stake and the amount in controversy, which represent value judgments. From the plaintiff's perspective, whatever it is that someone wants to litigate and achieve what they believe is a just result is important. He observed that to suggest that there is an overriding value judgment exercise that the court can put into play is a source of some discomfort to people. With regard to the amount in controversy, it may be the case that a person has suffered an injury that caused them to lose a small body part, which may not be deemed to be worth a huge amount of money, but the person would still feel understandably aggrieved. Judge Armstrong opined that justice cannot be achieved without some appreciation of cost and, since society does not provide the money it broadly needs to run the justice system, at some level there has to be a constraint on what justice is worth to society. He pointed out that, from the side of people who wish to litigate, it is easy to think that there should not be any limit to that cost and that society should provide those resources. He stated that, with regard to the suggestion Ms. Payne and others made about considering different criteria or principles to guide the ultimate determination of what undue burden is, the Council could remove or add a factor.

Judge Conover stated that Judge Armstrong made a very good point. He asked whether the opponents of the proposed amendment were suggesting that any one particular factor should not be included. He stated that a judge, under the current undue burden and expense analysis, could still consider any of these factors and wondered whether the concern is that these particular points are being emphasized. Ms. Leonard opined that the proposed amendment would reverse the burden of proof so that plaintiffs would be required to justify their discovery requests. Judge Zennaché noted that the committee included that the language in the section of the rule regarding protective orders purposely so that the burden would be on the party asking for the protective order, not the other way around. Ms. Payne explained that Ms. Leonard is asking how one would justify the importance of the issues at stake. She stated that the burden is likely going to fall on the plaintiff at that point to say that the issues are important, resulting in a disagreement between the plaintiff and the defendant about whether the issues are important, where the plaintiff will encounter the problem of not having the discovery to support his or her argument. She noted that Judge Armstrong's points are very well taken and that the two factors he mentioned are definitely where plaintiffs' counsel's concerns lie. Ms. Leonard pointed out the importance of discovery and stated that it would be difficult for one seeking information to support the need for the requested discovery absent knowledge about information the defendant possesses. Judge Armstrong observed that, often, a lawyer will have a specific, tangential, yet important issue that he or she

feels needs to be proven, about which discovery presumably will provide information. While the requested discovery may seem non-essential to the opposing party, the proposed rule change gives the court some guidance to help it determine what is atfoot and what might make that information important to the case.

Prof. Peterson noted that most of the factors seem arguable, and stated that he understood Ms. Leonard's point about shifting the burden. If one considers the needs of the case or the importance of the issues, both sides will have very different opinions. Some factors that are more objective would be the amount in controversy or costs. In terms of uncoupling Oregon's rule from federal law, Prof. Peterson suggested using the language "may weigh" instead of "shall consider" and removing the amount in controversy. Mr. Eiva agreed that this would be helpful. He stated that he currently has a workplace injury case against several corporate defendants with about 40 discovery requests, the answer to each of which was "not proportional." He opined that the reason is that the defendant is a billion dollar corporation and for them to do anything, even to make a telephone call, is expensive. He suggested that this will be the new objection; every time an individual has a suit against a corporation, the corporation will invoke the proportionality analysis as a matter of fact, because what is one life worth compared to the company spending money to find the requested information. Judge Zennaché asked whether Mr. Eiva really believes that a defendant's lawyer would file a motion for a protective order based on the argument that a client's life should not justify him or her making a telephone call. Mr. Eiva explained that he was talking generally about the cost of defendants getting the discovery. He stated that it is not an extreme example but, rather, the first example of what is happening in Oregon since the federal rule passed.

Judge Armstrong asked why the defendant would not just argue "undue burden" in an objection to the request. Mr. Eiva stated that this goes back to what Judge Zennaché said, that the proposed amendment is carefully placed within the section of the rule addressing motions for protective orders. He stated that the basis for a motion for a protective order is often initially put in the objection to the request for production and, therefore, it really is the plaintiff's motion to compel that gets the dispute addressed, as opposed to a motion for a protective order where the defendant lays it all out and explains why it is a problem. Judge Zennaché pointed out that the defendant could already say it is an undue burden, and that adding this language would not change the ability to make such a specious objection to discovery. Mr. Eiva stated that one of the concerns with the proposed language is that it does not put any value on the weighing but, rather, it says "here is a factor to consider." It is in the context of ORCP 36 B(1) that says that discovery is broad. Judge Zennaché agreed and stated that he is trying to

change that. Mr. Eiva reiterated that discovery is broad, and wondered how much value to give these factors within that realm. He pointed out that the proposed amendment does not give that kind of guidance because it emphasizes certain factors over others that are not enumerated in the rule, even though it says "among other factors." He wondered how much weight those other factors are going to get when they are not emphasized in the rule. Judge Roberts asked what other factors Mr. Eiva would like to see included. Mr. Eiva stated that he had not been asked to consider what other factors he would like to include, and that he would need time to consider it. Judge Armstrong stated that this is where the response would come in, in theory, that the opposing party could weigh in on the factors in the response.

Judge Gerking observed that Council members had been discussing this issue for some time and that he had not heard one legitimate argument preventing the Council from at least voting to put the proposed amendment on the September agenda or publishing it for comment. He opined that it makes no sense to discuss it further, since no one would talk anyone else out of anything. He observed that feedback from the bench and bar might help the Council get through this difficult issue.

Mr. Bachofner made a motion to change the word "shall" to "may" in one version and put both this amended version and the existing version on the September agenda so that the Council could vote to publish the rule in potentially two different ways for the public to consider. Mr. Eiva objected to public comment on these versions and stated that there should be a version of the rule that has different factors and removes the amount in controversy from the factors. Mr. Keating stated that, with regard to removing the value of the case, he does not know how to make a calculation as to whether the expense is undue if the cost of production is three times larger than the prayer. He stated that he is somewhat attached to the word "shall" because of the experiences he has had. He would prefer for the judge to comment on it because receiving an order stating "the motion to compel is granted" does not give him any information about why. Judge Wolf stated that, if the amount in controversy were removed, the Council likely would not receive any comments. Mr. Eiva suggested one version with the language and one without.

Mr. Bachofner made a motion to put the proposed amendment as drafted on the September agenda. Mr. Crowley seconded the amendment, which passed by voice vote with several nay votes.

Mr. Eiva made a motion to put a second amendment on the September agenda, as drafted except for the following changes: changing the word "shall" to "may" and

removing "amount in controversy." Ms. Payne seconded the motion. Judge Conover asked for clarification that the intent is not to preclude a judge from considering the amount in controversy – just not to specifically enumerate it. Mr. Eiva agreed that the intent is not to preclude a judge from considering the amount in controversy and that, among other things, the extreme case can be decided that way. The motion passed by voice vote with several nay votes.

#### 4. ORCP 45 Committee

Ms. Wray explained that the committee has had a draft (Appendix G) prepared for several months but that it had not yet come before the Council for a vote on whether to advance it to the September publication agenda. She noted that the Council had discussed the issue fully during previous meetings, and that she did not want to belabor the issue. Mr. Bachofner reminded the Council that the issue at hand was brought up late last biennium, and that the proposed change allows a party to include in a request for admissions a request to stipulate to the authenticity of documents to avoid the need to bring a records custodian to the trial simply to authenticate documents. He stated that virtually every plaintiffs' and defense attorney to whom he has spoken about the issue thinks that this is a good way to streamline trials so that records custodians do not need to be present at trial unless absolutely necessary.

Mr. Bachofner made a motion to put the draft amendment on the September publication agenda. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

#### 5. ORCP 47 Committee

Judge Roberts explained that the committee's proposed draft amendment (Appendix H) is before the Council and that the committee has removed any controversial changes. Mr. Brian stated that his recollection is that the purpose of the change is to permit any party to move for summary judgment. Judge Roberts agreed. Prof. Peterson stated that he had noticed that Council staff had inadvertently deleted the word "or" in section A. Mr. Beattie suggested a friendly amendment to re-insert the word. Judge Armstrong made a motion to put the draft amendment, as amended, on the September publication agenda. Judge Roberts seconded the motion, which was approved unanimously by voice vote.



## 6. ORCP 79-85 Task Force

Prof. Peterson suggested that the Council may need to appoint a new convener for the ORCP 79-85 task force. He stated that he has been ineffective in scheduling meetings with the diverse members. He reported that the task force has met by teleconference a few times and has agreed upon changes to Rules 79, 80, and 81, most of which are to clean up antiquated language but some of which put the rules into more of a checklist format, as suggested by Judge Zennaché. Prof. Peterson stated that the Oregon Law Commission (OLC) is looking at the issue of receiverships and, since a few biennia ago the language that the OLC proposed regarding foreign depositions required extensive revision by the Council, it might be wise to work with the OLC on these changes. He asked the Council for authority to do so, as well as to have the task force meet over the summer and then have the staff circulate the task force recommendations by e-mail in advance of the September meeting. The Council would then vote on whether or not to publish them at that meeting, and any draft amendments would then be subject to public comment. Judge Zennaché asked for clarification that, if the Council votes to put a draft amendment on the agenda for the September meeting, the Council is not voting to publish them. Prof. Peterson confirmed this.

Mr. Brian asked who the task force members are. Prof. Peterson stated that Mr. Bachofner, Judge Bailey, Judge Conover, Judge Gerking, Mr. Snelling, and Judge Zennaché are the Council members on the task force, and that attorneys Michael Fuller and Russ Garrett are also members. Mr. Bachofner stated that pre-judgment remedies are somewhat of an esoteric area and that, for those who do debtors' or creditors' rights, it requires a complex approach that takes a little bit of thinking through before it can even be intelligently discussed. Mr. Beattie asked whether the committee has been working through drafts. Prof. Peterson stated that draft amendments of rules 79, 80, and 81 have been informally passed by the task force but without any clear direction to forward them to the Council. He suggested that, if a meeting could be arranged, the task force could likely get those three draft amendments to the Council fairly quickly. Mr. Brian asked if the changes would be substantive. Prof. Peterson replied that the changes are not really substantive; however, he is concerned with any potential changes being made by the OLC. He stated that, if the OLC is going to make a change that involves practice, it would behoove the Council to be involved in that process.

Mr. Brian asked whether any Council members had concerns about the task force working during the summer and forwarding any draft amendments for the Council's review well in advance of the September meeting. No such concerns were expressed.

Judge Zennaché volunteered to be the new convener for the task force. Prof. Peterson stated that he would support Judge Zennaché in any way he could. Mr. Beattie noted that, if there is a comment from the Council in general, it should be compact and focused so that the discussion does not become wide ranging. Judge Bailey noted that the changes are not particularly nuanced things and thus far have not been substantive. Prof. Peterson stated that input from the Council will be helpful to avoid unintended consequences that any seemingly innocuous changes might bring.

V. New Business

No new business was raised.

VI. Adjournment

Mr. Brian reminded the Council that the next meeting will be on September 10, 2016, at the Oregon State Bar Offices. He adjourned the meeting at 12:02 p.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director

**DRAFT MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**

Saturday, May 7, 2016, 9:30 a.m.

Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

**ATTENDANCE**

**Members Present:**

Hon. Rex Armstrong  
 John R. Bachofner  
 Hon. D. Charles Bailey, Jr.  
 Michael Brian  
 Troy S. Bundy\*  
 Kenneth C. Crowley  
 Travis Eiva  
 Jennifer L. Gates  
 Hon. Tim Gerking  
 Robert M. Keating  
 Hon. Jack L. Landau  
 Hon. David Euan Leith\*  
 Maureen Leonard  
 Shenoa L. Payne  
 Hon. Leslie Roberts  
 Derek D. Snelling  
 Deanna L. Wray  
 Hon. Charles M. Zennaché\*

**Members Absent:**

Hon. Sheryl Bachart  
 Jay W. Beattie  
 Arwen Bird  
 Hon. R. Curtis Conover  
 Hon. John Wolf

**Guests:**

Matt Shields, Oregon State Bar

**Council Staff:**

Shari C. Nilsson, Executive Assistant  
 Mark A. Peterson, Executive Director

\*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 9 ORCP 15 ORCP 22 ORCP 36 ORCP 43 ORCP 47	ORCP 15 ORCP 20 ORCP 21 ORCP 23 ORCP 25 ORCP 27 ORCP 32 ORCP 43 ORCP 44 ORCP 55 ORCP 57 ORCP 68 ORCP 71	ORCP 27 ORCP 57	ORCP 15

I. Call to Order

Mr. Brian called the meeting to order at 9:32 a.m.

II. Minutes

A. Approval of April 2, 2016, Minutes

Mr. Keating suggested several changes to the draft minutes previously circulated to the Council (Appendix A). He asked that, in the last paragraph of page 14, the following sentence be inserted: "Defendant objected to the request as overly broad and unduly burdensome." He also requested that, in the same paragraph, the language "because the opposing attorney claimed that Mr. Keating had not specified that he had produced all emails" be deleted. In the same paragraph, he asked that the language "a more extensive search," be changed to "an exhaustive search." Mr. Keating made a motion to amend the minutes as described. Judge Gerking seconded the motion, which was approved unanimously by voice vote. Mr. Bachofner made a motion to approve the minutes as amended. Ms. Payne seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters

A. Introduction of New Judge Member

Prof. Peterson welcomed Judge D. Charles Bailey from the Washington County Circuit Court to the Council. He remarked that the Council has not had a Washington County judge member during his tenure with the Council, and he stated that it would be good to have representation from the second largest judicial district. Judge Bailey stated that he is pleased to be on the Council and that he hopes to be as helpful as he can. Council members introduced themselves.

B. Changes to ORCP Mentioned During Oregon Law Institute Continuing Legal Education (CLE) Program

Prof. Peterson stated that he and Mr. Bachofner were recently presenters at an Oregon Law Institute CLE. He noted that two presenters during the ethics portion talked about Rule 69 B and the 10 day notice. In response to an audience member who asked if an attorney may send the 10 day notice on the 28th day if the defendant has not yet responded, the presenters noted that there had been a change so that the 10 day notice period is no longer allowed to run concurrently with the 30 days in which to answer as provided in Rule 7 C. Prof. Peterson also stated that the presenters had mentioned that they had not yet received their West 2016 version of the ORCP and they had to go to the

Council website to read the current rule. He reminded the Council that he had been in touch with West to offer the publisher the Council's amendments as well as the Legislature's changes in a timely fashion, but West apparently is not interested in publishing the rules at the time or before the amendments take effect. He stated that he had also reached out to Legislative Counsel to see if that office is interested in producing a specialty book in a timely fashion that includes the ORCP and the Oregon Evidence Code, provided the Supreme Court allows them to also include the Uniform Trial Court Rules. Legislative Counsel seemed interested in the proposal.

C. CLE Credit for Council Membership

Mr. Brian stated that he had contacted the Oregon State Bar's CLE accreditation staff several months ago regarding obtaining CLE credit for Council members' service. He indicated that he needs to follow up and will be doing so over the summer. Judge Gerking asked whether such a change would need to be approved by the Board of Governors (BOG). Mr. Bachofner stated that he believes that the CLE department would deal with such matters. Council members agreed that CLE credit is a great idea.

IV. Old Business (Mr. Brian)

A. Committee Reports

1. ORCP 7/9/10 Committee

Mr. Bachofner directed the Council to a draft amendment of ORCP 9 (Appendix B). He explained that the committee had met again to see whether it should do anything to address the eFiling issue with people not being served with eFiled documents. He remarked that, at the last BOG meeting, someone had also raised the issue of why people are not getting copies, and opined that something should be done to remedy this. He stated that he had explained to the rest of the BOG that the Council has been examining the issue and that the Uniform Trial Court Rules (UTCR) Committee is also aware of it. He reminded the Council that, before the April Council meeting, he had contacted the chair of the UTCR Committee, who indicated that the UTCR Committee had come to essentially the same conclusion that the Council as a whole did – that it is an education issue rather than a rule issue. Mr. Bachofner stated that the committee has decided as a group that it does not want to make a change to the rule because, by the time the Council's rule change would take effect, hopefully the Oregon Judicial Department (OJD) will have made a change to the process and either make electronic service automatic or otherwise remedy the existing problems.

Mr. Bachofner stated that he speaks frequently at CLEs and that he has started the

education process in that way and that he is also encouraging attorneys to let their colleagues know about the issue. He pointed out that there are a number of bar members frustrated that they are not receiving notice of documents filed with the court and that his position is to err on the side of redundant notice. He stated that the best practice is to provide e-mail service on opposing counsel, even when electronically filing.

Mr. Bachofner explained that many changes to Rule 9 are administrative. He noted that proof of service by electronic service is now located in subsection C(3) and section H and that proof is basically made by affidavit or declaration that service was completed by electronic service. He stated that sections G and H state that, unless a party is exempted from electronic service by an order of the court, service may be made by e-mail. This language is to make the rule consistent with the electronic service rules that have gone into effect. Mr. Bachofner stated that the committee believes that the draft of ORCP 9 is ready to be submitted to the Council for voting on whether it should be put on the agenda for the September publication meeting.

Ms. Payne stated that it appears that section G is changing so that attorneys no longer have to consent to e-mail service to be served by e-mail, but subsection C(2) states that an attorney must include in the affidavit of service that the other party has either consented or has confirmed receipt of the e-mail. She wondered why the requirement to show that a party has consented to such service is still present if the requirement for consent has been removed. Mr. Bachofner explained that the reason consent is no longer required is to be more consistent with the electronic service requirement of the UTCR if there is electronic filing of a document. If, for instance, an attorney already has consent from the opposing party before that party has eFiled a document in a matter, that will satisfy ORCP 9 C(2), but the attorney also should make sure that the other side has received it rather than just a bounce back message or an out of office message. Ms. Payne stated that serving by e-mail has always been distinct from electronic service. She wondered about the reference to electronic service in a rule that is talking about e-mail service. Judge Zennaché asked for clarification about whether Ms. Payne was referring to section G. Ms. Payne confirmed that she was talking about line 11 of that section that removes the requirement for consent. She stated that she is in agreement with the change, but that it seems to conflict with the idea in subsection C(2) that an attorney must show in an affidavit that a party has consented to e-mail service. Judge Zennaché stated that, with regard to e-mail service, the committee originally changed the rule to say that consent is no longer required, but an attorney must provide proof of service that the recipient did receive the document. However, some members of the Council responded to that suggested change by raising a concern about being required to continually prove

receipt of documents by attorneys who just generally agree to service by e-mail. In order to facilitate that preference, the committee responded by making a change to allow these attorneys to say at the beginning of a case that they always want service by e-mail. Judge Zennaché did express some concerns about the language in line 11 of section G because electronic service that one consents to when one files electronically is different from e-mail service.

Ms. Payne reiterated that she likes the language in subsection C(2) but that it is confusing when section G says that one does not have to consent to e-mail service. She sees this as a conflict. Mr. Bachofner explained that subsection C(2) does not say that but, rather, says that the attorney must certify that the other side has consented or that they have actually received the document. He stated that section G states that a party who has communicated by e-mail or electronic service must notify the other party in writing of any change to their e-mail address. The two are not inconsistent; if the opponent has consented to e-mail, an attorney does not have to show that they received the e-mail but, if the opponent has not consented, an attorney does have to show proof of receipt. Ms. Payne stated that it makes sense that an attorney can serve anyone by e-mail but, if an attorney has not consented, the attorney would have to show proof of receipt. Judge Zennaché agreed that this is what the committee was trying to accomplish. Prof. Peterson pointed out that this is a significant change and that, when the Council last changed Rule 9, many people were uncomfortable with e-mail service and only agreed to it as an opt-in procedure. He also recalled that Judge Wolf had previously remarked that most certificates of service that he reviews do not comply with the existing rule, and expressed concern that this may be another attorney education issue of the Council's own making. He was a bit worried about whether lawyers will actually follow the new rule. Mr. Bachofner stated that this is also consistent with an issue discussed in the CLE at which he and Prof. Peterson presented yesterday; certificates of readiness with electronic filing are not being submitted regularly by attorneys or are incomplete. He stated that this is an education issue as well. He stated for the record that he still has concerns about e-mail service with these existing problems, and pointed out that trying to track e-mails when one may receive hundreds a day is stressful. He agreed that e-mail is the way of the future, but noted that it is still a concern.

Mr. Brian proposed a hypothetical situation where he and Mr. Bachofner are opposing counsel and Mr. Brian indicates to Mr. Bachofner that he will not accept service by e-mail. He asked what Mr. Bachofner's options would be under the proposed amendment to Rule 9. Judge Gerking asked whether Mr. Brian would have a right to refuse e-mail service. Mr. Bachofner stated that he must accept e-mail service unless he is exempted from it by an order of the court. Mr. Brian stated that Mr. Bachofner could override his objection and e-mail him the

document, but then he would have to give the judge a piece of paper saying that he served Mr. Brian by e-mail and Mr. Brian has confirmed that he received it. He asked how Mr. Bachofner would do that. Mr. Bachofner noted that he would always serve by mail as a courtesy if an attorney had asked him not to serve by e-mail. He pointed out that this is best practice. Mr. Eiva observed that Mr. Bachofner would not be able to complete a certificate of service for e-mail because he could not confirm that Mr. Brian had received the document. Ms. Payne noted that this is a problem that she has with part of Rule 9. She did note that the Outlook e-mail program allows a sender to see when someone has opened an e-mail. Mr. Brian pointed out that this is different from receiving it. Ms. Payne disagreed. Mr. Brian stated that, in actual practice, this does not prove that he read it. Mr. Bachofner stated that receipt can be confirmed in several ways, including an e-mail return receipt showing that the e-mail was opened, an e-mail reply, or a verbal confirmation. He stated that he will typically tell opposing counsel not to send documents only by e-mail because he is worried he will miss something.

Judge Bailey observed that there is software that allows someone to see when e-mail is received and opened, and he could not imagine that this is a scenario where someone would not be considered to have "received" an e-mail, regardless of whether they read it. He stated that the serving party can present the certification and all of the information and that the burden will be on the opposing party to say that he or she did not receive the document. Mr. Brian stated that his scenario envisions that he receives an e-mail from Mr. Bachofner, that he knows what will be contained within, and that he therefore does not open the e-mail. He wondered how Mr. Bachofner could certify that it was received in such a case. Judge Roberts stated that judges have been told that the software that determines whether an e-mail has been opened is unreliable and that, on the receiving end, e-mail can always be set up so that receipt is not acknowledged, whether it was opened or not, and a bounce back message is never received. Similarly, if an attorney sets up his or her e-mail account to respond automatically that he or she is out of the office, under the rule the serving party cannot certify that it was received. Ms. Payne observed that, if she sent a document by e-mail and did not receive a response within a couple of days, she would serve the document by mail as well, and that this is something that careful practitioners will do. She stated that she uses the Gmail program, which does not have the capability to inform her of when an e-mail is opened so, unless a party consents to e-mail service, she will serve them by mail.

Mr. Bachofner noted that this discussion is addressing the same concerns that he has previously expressed. However, he recognized that e-mail service is the wave of the future. He stated that another risk with the proposed amendment is that,



with e-mail programs on mobile devices, there is a high risk of accidentally opening e-mails when scrolling through the in box. This could accidentally indicate that someone had received an e-mail when they had never really seen it. Mr. Crowley stated that these changes in technology will necessitate a change in practice for larger offices that have centralized mail processing because those offices will be getting service to all of their lawyers who are not necessarily used to receiving documents themselves, so they will have to address how they handle their e-mail.

Judge Bailey pointed out that the Odyssey system allows parties to choose to whom their e-mails are to be directed. Mr. Crowley stated that the federal PACER system also does that, but regular e-mail service is going right to the lawyer, not to the staff. Mr. Shields asked whether the amendment is also intended to be the rule for cases that are not required to be eFiled. He asked whether items that are filed conventionally can be served by e-mail. Judge Roberts observed that this is a fairly small category but that this is true. Mr. Bachofner stated that, if the Council feels strongly about it, he is more than happy to stick with the consent to e-mail service, but e-mail seems to be the wave of the future.

Mr. Crowley asked for clarification of the Council's process for public comments. Prof. Peterson explained that, if the Council approves this amendment today, it will go on the agenda for the September meeting where the Council votes on which amendments to publish for public comment. Mr. Crowley stated that he would be interested in hearing public comment, and agreed with Mr. Bachofner that this is the wave of the future. Judge Roberts asked whether the rule would preclude an attorney from setting up a separate service e-mail address and asking opposing counsel to serve all documents to that address. Mr. Bachofner stated that section G states that an attorney must provide his or her name and e-mail address and notify opposing counsel of e-mail address changes, so the rule does allow attorneys to receive e-mail service at a different address. He stated that Judge Roberts' idea is a great one. He stated that his office also creates rules within their e-mail programs that send any e-mails received from the OJD to the paralegals so they can make sure that they are docketing things. He observed that this will probably become a more common practice, since Odyssey does not necessarily allow everything going to an attorney to also go to a separate e-mail address for a paralegal. He stated that he would like to see the ability to add multiple e-mail addresses in the Odyssey system.

Prof. Peterson noted that the committee had concerns early in the process about the reliability of e-mails given the issue of spam, among other issues. He stated that there seems to be a general unease among a lot of attorneys about the reliability of e-mail, and that the amendment before the Council is kind of a compromise that recognizes that concern. If an attorney consents to e-mail, they

take the risk and, if an attorney does not consent, the other party will have to specify that they know the e-mailed document was received.

Judge Bailey asked whether there is a reason that attorneys receiving documents are not required to send an affirmative reply saying they received the e-mail. Mr. Bachofner suggested the possibility that some attorneys might try to manipulate the process by delaying a reply. Ms. Payne wondered when and how an attorney would reply. Mr. Eiva opined that this requirement would cause even more stress. Mr. Bachofner suggested adding language to the end of section G stating that nothing prevents a party by also serving by mail to ensure receipt by the opposing party as a way to suggest a best practice. He stated that he does not believe the Council has ever done this before. Judge Zennaché observed that this is unnecessary and expressed concern about the Council stating "you could do this" throughout the rules. Ms. Payne again pointed out that this is an education issue, and that the best practice to make sure that the opposing party receives a document is to serve it in multiple ways. Mr. Bachofner stated that, even if he mails a document, he will frequently also serve by e-mail as a courtesy so the opposing party receives it sooner.

Ms. Payne observed that, when an attorney serves by e-mail in addition to mail as a courtesy and includes that information on the certificate of service, it might not comply with the rule because the opposing party may not have consented to e-mail service and you may not have proof that they have received it. Mr. Bachofner stated that it would comply because primary service was by mail. Judge Roberts pointed out that there is only a requirement to serve by one method, so Ms. Payne would only need to specify the mail service. Mr. Bachofner stated that he would include both methods on the certificate but the e-mail service does not have any effect. Mr. Keating stated that he only indicates that he serves by mail since the other copy is only a courtesy copy.

Ms. Payne made a motion to put the draft amendment on the agenda for the September publication meeting. Mr. Bachofner seconded the motion, which was approved unanimously by voice vote.

## 2. ORCP 22 Committee

Ms. Payne reported that the committee had met and discussed two pending issues. The first was whether a timeline should be included in the rule. The second was the issue of judicial discretion with regard to extending the time for adding a third-party defendant beyond 90 days. The committee also discussed whether there is enough time left this biennium to address these two issues. Ms. Payne stated that the committee had decided that it would like to defer these two issues

to the next biennium and put forth the draft amendment (Appendix C) that addresses the original issue before the Council: to allow a defendant to bring a cross-claim against a third party defendant. She noted that this simple amendment removes the words "the plaintiff" and replaces them with "any party." She stated that the committee believes that this will remedy the asserted problem, and proposed that the amendment be put on the agenda for the September agenda.

Justice Landau asked whether the issues the committee would like to defer have to do with whether there are any time constraints on asserting that third party claim. Ms. Payne stated that they had to do with that and also with whether a judge should have the authority to allow adding parties beyond the 90 days, regardless of whether both parties agree. She stated that the committee does not feel that there is enough time to figure out why the 90 day bar is in the rule and whether it should be changed. Mr. Eiva stated that there is a lot of history behind the reason for that provision's inclusion and that all available information should be before the Council before any decisions are made in that regard. Mr. Bachofner suggested that replacing the "and" on line 2 on page 2 with "or" would be an easy repair and would allow that judicial discretion. Ms. Payne reiterated that the committee would prefer that the Council really dig into that issue next biennium and put the appropriate legislative history before the Council because the issue came up pretty late in the committee's discussions. Mr. Bachofner opined that, if the Council is going to the trouble of making changes, it seems that it makes sense to give the court the discretion that the court has in any case, despite what the rule says.

Prof. Peterson stated that he noted from the committee's report (Appendix D) that there was discussion about the 90 day time frame and he agreed that it sounds like it was the sense of committee that this is the only place in the ORCP that judicial discretion has been removed and Rule 23 might be the appropriate answer on these cases but, at his first or second Council meeting, this issue was brought up and the former Executive Director, Maury Holland, stated that the issue had been resolved and the matter had been closed, so there clearly were some strong feelings about it at one time.

Judge Gerking stated that he would also prefer "or" rather than "and," but agrees with the committee that the Council should fully vet the issue next biennium. Judge Roberts agreed. Mr. Bachofner has always taken the position that there is nothing that prevents the court from ordering counsel to approve this, but that would be a workaround. Judge Gerking wondered if such an order would be considered an abuse of discretion. Mr. Bachofner stated that perhaps it could be. Prof. Peterson noted that another suggestion was for the court to advise the party

to file an independent action and say that the court will be very receptive to a motion to join. Mr. Bachofner agreed that the issue should be deferred until next biennium. Judge Zennaché stated that he also prefers the word “or,” and that he is not sure what the policy is that would support the denial of judicial discretion. He stated that he is not sure why the Council needs another whole biennium to determine that. Mr. Eiva noted that the policy ideas behind the current rule support not complicating, delaying, and increasing the cost of the trial by adding new parties. Judge Zennaché reiterated that he is not sure why the discussion cannot be had this biennium, but stated that he will respect the committee's process and decision.

Mr. Keating noted that there is still another month left for discussion. Judge Leith stated that this would necessitate sending the issue back to the committee. Judge Zennaché stated that, if this is the case, he would ask the committee to provide the history behind the current state of the rule so that the Council can make an informed decision. Mr. Eiva pointed out that this is a serious undertaking and would be a significant burden on the committee. He stated that, because the Council is considering something that has been considered and rejected numerous times, it needs a serious look. He reiterated that this was not the original issue before the committee and that it came up late. Judge Gerking stated that, if there are any serious concerns about the timing of this motion, we ought to defer it to next biennium. He noted that there is no emergency. Mr. Keating stated that the only suggestion he is making is that the final decision be made at the June 4 meeting out of respect for the Council members that have concern about the issue. That way, there is another month to provide additional information.

Judge Zennaché expressed a policy frustration. He observed that the Council is a biennial group and, even if the topic comes up late, he is not sure why the Council cannot brief it in a timely fashion so that the Council can make an informed decision about it. He expressed concern that, any time something gets complicated, Council members may tend to say that it has been deferred to the next biennium because it is too complicated.

Mr. Brian stated that the Council will decide on Rule 22 and any proposed changes at the June meeting. Ms. Gates suggested that Council members who feel strongly about the issue can submit information to the committee for consideration.

### 3. Electronic Discovery Committee

Judge Zennaché stated that the committee is submitting a proposed amendment to Rule 43 (Appendix E) that adds a conferral requirement. He stated that it appears to be non-controversial, and the committee is asking the Council to take

action on it. He stated that, at the last Council meeting, there were two requested changes: one to add discussion of metadata as a topic to be discussed at the conference; and another to clarify how this rule relates to any other duty to confer that might exist.

Mr. Keating stated that he was not present at the last committee meeting. He noted that the committee has proceeded throughout with both proportionality and the duty to confer and stated that, in his mind, they are utterly linked because the purpose of the duty to confer is to outline the parameters of discovery: what are the issues, what is the cost, what is the burden, all of which are entailed. He pointed out that he is very much in favor of the duty to confer. However, he expressed the concern that it poses a danger if you come in front of a court on a motion to compel or a motion for a protective order and he does not understand why the Council deferred proportionality at the last committee meeting. He stated that he looked closely at the rule with the duty to confer this week on the assumption that it does not bear with it the proportionality requirement and that he became concerned with the language on line 25 that states that failure to comply will be considered by a court when ruling on any motion to compel." He wondered what a "failure to comply" means, and expressed concern that what a party has to do to actually gather the requisite information to share cannot be done in 21 days. He posited a scenario where a lawyer serves a request for production with the complaint, giving the opposing party 45 days to respond to that request for production and, at the same time, says that he or she wants to confer on all of these issues, requiring the opposing party to go to a meeting in 21 days, at a time when the opposing party knows that he or she cannot answer all of these questions. He suggested amending the rule to define "failure to comply," perhaps to state that it is a failure to make good faith efforts to comply. Mr. Keating stated that he envisions the whole process as an evolving discussion that needs to meet a certain level of concurrence but, if you reach the point that you have to go the court, you have to go to the court. He stated that he is a little concerned about someone using the "failure to comply" language in a situation such as where a defendant is a large organization and ESI cannot be gathered in the 21 day time period.

Ms. Payne stated that the rule is not asking a party to provide all of the information requested but, rather, to just begin a conversation with the other side. She noted that it is important to start the conversation early and that it is beneficial to both the plaintiff and the defendant to define the scope of discovery as early as possible. Mr. Keating pointed out that the court will hold it against you if you do not cooperate with the process in good faith but, the way the language reads, you have to have answers to all of these things about which you are required to confer. Judge Gerking asked whether Mr. Keating envisions

circumstances where a 21 day requirement is not reasonable. Mr. Keating stated that he does not oppose 21 days as a time to start the conversation. Mr. Bachofner stated that Mr. Keating appeared to be concerned about a situation where the request for documents comes along with complaint and, as he reads subsection B(2), it talks about not actually producing documents before the expiration of 45 days after service of summons unless the court specifies a shorter time; otherwise, it talks about other related acts before the expiration of the 45 days. He asked whether this conferring would be part of those other related acts. Mr. Keating asked whether the 21 days could be added to the 45 days.

Judge Zennaché noted that the committee had talked about a number of different timelines and, while the Council can re-examine this as a whole, he does not hear Mr. Keating raising a concern about the 21 day timeline but, rather, a concern that compliance will be interpreted as meaning you have completed the conferral. Judge Zennaché clarified that compliance is beginning to talk about these issues and the committee has been clear that this is probably something that is not going to happen in just one meeting but, rather, is a process. Judge Zennaché stated that he is happy to create some legislative history about the Council's intent. He stated that the Council can talk about the merits of a variety of different time frames, but the committee has already done that. He pointed out that the rule talks about the duty to start talking about these things, not to complete them. Judge Armstrong agreed that there is a need to confer and have a discussion, not necessarily to accomplish anything. He pointed out that a party refusing to start that conversation and help the process is what will get that party in trouble. Judge Gerking stated that, in complex cases, 21 days may not be realistic if the request to confer accompanies a request for production of documents. Judge Zennaché noted that all the rule says is that failure to comply is to be considered by the court. Judge Gerking stated that it does say that the parties *shall* meet and confer. Judge Armstrong noted that the meeting may not accomplish much. Judge Zennaché stated that, under Judge Gerking's scenario, if the defendant calls the plaintiff and says they cannot meet within 21 days for a good reason and the plaintiff then files a motion to compel, a judge is not going to hold it against the defendant. Judge Bailey pointed out that there is a smell test when a judge is hearing these motions to comply and that there is a difference between a party stating that they will not meet at all versus a party stating that they want to meet but 21 days will not work and asking for 30. He stated that the latter case is clearly not blowing it off or doing something unprofessional. Mr. Bachofner pointed out that there is nothing that favors plaintiffs or defendants, that the rule says that any party may request a conference, and if he was in that situation, he would ask to confer about what the request says because it will appear to the court that he is making an affirmative step. Judge Bailey stated that this is good practice because, once you get the parameters down, that will let you know how long it will take to

comply and how much it will cost.

Ms. Payne suggested adding the words "in good faith" somewhere. Judge Gerking agreed that it would soften that 21 day obligation. Ms. Payne stated that the words "in good faith" are appropriate because that is the purpose of the proposed amendment. Mr. Crowley stated that, when the committee started talking about the rule, what it meant to him as lawyer at the Department of Justice (DOJ) was a change in the process. He stated that almost all of the cases at the DOJ involve significant quantities of ESI. Some might think that a duty to confer would be a burden, but he looks at it as essential because attorneys must get out in front of these issues and this change makes it happen. He stated that the DOJ will be changing all discovery processes in their cases and this rule suggests that this is the way it should be done. Mr. Brian asked whether Mr. Crowley sees any problems with the "feet to the fire" 21 day time frame in the rule. Mr. Crowley stated that he does not see it like that. He stated that 21 days is pretty early and that the time will sometimes need to be adjusted, but stated that he believes that in general this will change how we approach discovery, instead of dealing with issues after requests for production, objections, and motions to compel way down in the litigation process. Mr. Keating agreed and stated that he likes the requirement to confer and agrees with all of the items listed because, in his experience, these issues all end up getting raised way too late in litigation. Mr. Keating stated that the changes will make everyone do their homework on the issues that are going to be discussed in the beginning and make it much easier to meet requests in a timely way, before depositions. He stated that he is just concerned about what "failure to comply" means because he knows often cannot fully comply in 21 days. Judge Zennaché asked whether Mr. Keating felt that the Council can address his concern by stating on the record that compliance under the rule means actually starting the conferral and having a meeting and scheduling it, or whether Mr. Keating would prefer a language change. Mr. Keating stated that the language "failure to comply in good faith" works.

Mr. Bachofner stated that another reason to include this language is that he can foresee some attorneys trying to be tricky and including the in the original request for production where the other side might not see it within 21 days. He stated that this would be a case of not recognizing that the request to confer was there and not complying in good faith. Prof. Peterson stated that this seems to relate to the discussion at the last Council meeting about the definition of "meet." He stated that there is a good possibility that the entire discovery process cannot be done within 21 days but if, in good faith, a party asked early and started meeting within that time and then expressed a need for more time, a judge would be hard pressed to hold it against that party. Mr. Keating stated that there is no question that a judge looking at the issues would be very supportive of the process.



Judge Bailey stated that he was not sure if the “good faith” language needs to be included, since that is always what judges expect, but he did not object to its inclusion. Ms. Payne made a motion to insert the language "in good faith" after "failure to comply." Judge Gerking seconded the motion, which unanimously passed by voice vote.

Mr. Bachofner wondered whether this discussion raised the question with anyone about whether language should be inserted to state that a party must request a meeting to confer separately so that it cannot just be inserted in an original request for production. Judge Zennaché stated that this would just mean two separate documents. Judge Armstrong noted that, if a party makes this request to confer and does not receive an answer, the party needs to follow up and insist that the other party repudiate it. Mr. Eiva suggested that the request should be required to be in writing. Mr. Bachofner stated, if a party puts the request to confer in the original request for production, that means you have to confer before the response to the request for production is even due. He asked if this was the committee’s intention. Judge Zennaché stated that this was the intention and that both the plaintiffs’ and defense bars had acknowledged that it would save both sides some money if they had ways to identify and address these issues early in the process. He stated that people were positing ways that people can use these processes to another’s disadvantage, but these are difficult issues for both sides and both sides would benefit from meeting early on. Mr. Bachofner stated that he thought it would be a good idea to give a heads up that there is this request to confer so that it meets the goal. If the goal is for people to actually confer and work these issues out, it would make sense that the request to confer should be communicated in a straightforward manner and not buried. Judge Armstrong stated that his assumption is that, if he heard nothing, the other party has not failed to comply because he has not finished that task – “no” is what it takes to finish that task.

Ms. Payne stated that she could not imagine that attorneys would be surreptitiously burying requests. Judge Bailey wondered what attorneys would gain by doing this. Mr. Bachofner stated that, from a practical standpoint, he believes that, if the request to meet and confer is buried in a request for production, good attorneys will start working on it within 10 days, but more realistically within 25 days as they are staring at the deadline. He stated that busy practitioners will not be looking at the request for production within 21 days. Judge Zennaché noted that the whole premise of Mr. Bachofner’s argument is that a lawyer will try to do a “gotcha,” but that the change is an attempt to get both sides to expedite electronic discovery. He stated that the process is beneficial to both sides and that the intention is not to create a trap or a “gotcha” situation. Mr. Bachofner stated that he was not saying that it has to occur that way, and that



it may be best practice to always include the request to confer in a request for production so that it is a reminder.

Mr. Eiva suggested adding the requirement that a request for a meeting to confer not be sent until an attorney appears on the case. Ms. Wray pointed out that a party can send a request to confer with the complaint and, while the plaintiff's attorney may have had the case for a year, it will not accomplish anything for her to show up at a meeting where she cannot address any of the issues because she has not even met her client yet and does not have the file. She stated that she does not believe it is a "gotcha," but she does not feel it is helpful. Ms. Payne pointed out that, with the meeting, the parties can start the conversation, and that no judge would grant a motion to compel without an opportunity for a productive conversation. Ms. Wray stated that she feels that 21 days seems too ambitious. Judge Zennaché asked why, for example, 90 or 120 days would be more appropriate. He stated that it is an arbitrary time frame and that a party has to respond to a request for production within 45 days, like it or not. Mr. Bachofner stated that the Council made a policy decision that a response to a request for production would not be due within 45 days of service of the complaint in recognition of the fact that defendants are not necessarily going to have the opportunity to get an attorney who can look at the file and be able to respond in a competent manner, so why not use the same time frame for the request to compel. Judge Zennaché stated that there is no penalty other than that the judge is going to consider a party's action or inaction. He stated that there is no fine and that nothing is deemed admitted; it just means that a judge gets to consider whether a party tried to confer in good faith. Judge Zennaché pointed out that we are trusting the judiciary to say it is reasonable when you said you could not confer within 21 days.

Mr. Brian asked Mr. Crowley whether he felt that 21 days or 45 days is more appropriate. Mr. Crowley opined that 45 days is more realistic in terms of a deadline but that the DOJ usually meets with its clients within 21 days and is already talking about these issues at that stage. Mr. Eiva made the suggestion to change the timeline so that a party may only request the meeting to confer after 30 days has passed since filing the complaint, since the plaintiff may not even know there is an electronically stored information (ESI) issue and the defendant may need to bring the ESI issue to the plaintiff's attention. Ms. Payne stated that she likes this suggestion as long as we keep the 21 day time period for making the request, because a longer time period such as 45 days could really delay the meeting. Ms. Payne stated that she believes that the 21 days would be reasonable if the request for production is served but the request for a meeting is not made until later. Judge Zennaché again stated that the Council can consider different timelines, but expressed concern that waiting 30 days and then requesting he

meeting means that the response to the request for production was due 45 days after the date the case was initially filed. He pointed out that we rely on courts to rule and exercise some degree of discretion. He stated that, if he sent out a request to an organization where he knew that there would be electronic discovery issues, then he waited 30 days before making the request to confer, the defendant would have only 15 days to file a response, and the meeting may not be able to be scheduled until after the response deadline. Mr. Eiva stated that, if the defendant requests the meeting, the plaintiff will have a hard time with a motion to compel the documents filed on day 45.

Mr. Bachofner pointed out that the goal is not to put the issue before the judge but, rather, for the parties to work it out themselves. He agreed with the committee that it is best to try to find a way that is reasonable for both sides. Ms. Gates stated that it seems easy to establish good faith and opined that leaving the 21 day time frame seems fine. She stated that we need to trust our judges to evaluate that conduct. Mr. Keating stated that this is why he is satisfied by the addition of the "in good faith" language. Judge Bailey stated that, if an attorney has not yet met his or her client, he or she can still meet with opposing counsel and talk about the parameters and search criteria. He stated that the attorney can then meet with the client and let them know that information. He stated that this could occur if the attorney was pushing the rule and trying to gain some advantage. Ms. Wray stated that the reality is that it will happen and it is kind of naive to say that it will not or that judges will always make the right call. She expressed concern that the Council is creating a rule that makes a meeting due before an appearance, and the reality is that sometimes attorneys get hired after the 21 days has passed. She stated that she likes Mr. Eiva's idea of at least giving the defendant the chance to file a first appearance before requiring a meeting on ESI.

Mr. Eiva observed that the rule assumes that the request is coming from an attorney. Ms. Payne stated that, if there is no attorney on the case, she would not know with whom she would be trying to meet and confer. Prof. Peterson stated that the language would apply to self-represented litigants as well as attorneys, and noted that there are many self-represented litigants that never come to see an attorney. Ms. Payne pointed out that no judge would grant a motion to compel if a party has not appeared yet. Ms. Wray wondered why the Council would even set up the rule so that a party has to go to the judge. Mr. Bachofner agreed. He stated that Mr. Eiva's idea is a practical way to give a little bit of leeway so that an attorney does not have butt right up against a deadline the next day.

Mr. Eiva pointed out that there is another month to figure out the details. He stated that nobody disagrees with the rule, just the timing. Mr. Brian suggested

referring the rule back to the committee. Judge Zennaché noted that nobody on committee was advocating for a timing change and that Mr. Eiva was just trying to be accommodating with his suggestion. Mr. Keating stated that he could attempt to draft language addressing the issue. Mr. Brian stated that the Council would table the motion to approve the proposed change in Rule 43, including the previously approved motion to add the words "in good faith," and deal with the entire rule at the June meeting. Prof. Peterson asked the committee and all Council members to carefully look at the staff's suggested formatting changes as well.

Judge Zennaché stated that the committee was not asking the Council to take any action regarding Rule 36 (Appendix F) at this time. He noted that the issue is somewhat divisive among committee members, and stated that the committee would like to give both sides the opportunity to prepare written material to send to the Council so that the Council can consider both sides. Judge Zennaché stated that it was suggested that the Council look at a way to create some mechanism or criteria for electronic discovery and give the court some guidance or factors to consider. He stated that the approach the committee settled on this was, instead of putting something in the rule relating to the scope of discovery, to put something in the rule for motions for protective orders or motions to compel, and had discussed at one point the idea of placing into the rule some factors for the court to consider in deciding what constitutes an undue burden. He stated that it turns out that the phrase "the proportionality of the request for production" and several of these factors were borrowed from a federal rule change that occurred just recently, and some members of the bar are concerned that the Council should not be including the concept of proportionality at all because it would tie an Oregon rule to the federal concept that is not fully defined and that federal litigation will somehow define the state court rules. He noted that other members are concerned that, if the Council does not include the concept of proportionality, we will not achieve the goal of trying to make courts aware that the electronic discovery world is complicated and expensive and we want courts to think about these things. These are the things that the committee would like the Council to consider and, rather than spend a lot of time today debating this issue, the committee will have members submit their respective positions in writing and give the Council the chance to read them before the next meeting.

Mr. Keating noted that he was absent from the last committee meeting, but one of the things said was that this was a brand new rule in the federal courts. He noted that the recent rule change gives more emphasis to proportionality, but pointed out that the concept has been around for a long time. He went through the materials he received from the week-long Sedona Conference in February. The first is a paper called the Sedona Conference Commentary on Proportionality in

Electronic Discovery in which it actually discusses the history of the federal rule and that the recent changes were made basically because judges do not address the issue. He stated that the language that was lifted from the most recent federal rule says that, in deciding on what constitutes an undue burden, the court will consider certain items, one of which is proportionality. The rule does not say you have to consider any item more than any other item, but it does give a history. He stated that one of his impressions from the Conference was that one of the strongest proponents of the obligation to confer and proportionality was the bench because they want everyone to discuss the issue of proportionality while engaging in the conference and that is an issue that the court will consider. He stated that the other document he copied is the Sedona Conference Cooperation Proclamation: Resources for the Judiciary. Its purpose is to strongly emphasize a requirement that the lawyers have to work together in good faith on these issues. He stated that there is a lengthy discussion about this, including a section on proportionality. As long as we have a month to read through the materials, he asked Ms. Nilsson to distribute the documents to the Council.

Ms. Leonard stated that she had reviewed the proportionality rule because it was new to her. She stated that she understands that, in the federal rules, the idea of proportionality started in an electronic discovery rule and that it is now part of overall federal discovery standards. She noted that the draft of ORCP 36 before the Council would also seem to redefine undue burden to include proportionality as part of Oregon's general discovery standards. She stated that she is particularly concerned about the case value factor. She talked to some Oregon Trial Lawyers Association (OTLA) members who do employment discrimination cases where damages are limited by statute, and these are cases that could be negatively impacted because the damage claims are often limited. She stated that she has spoken to practitioners who practice in federal court and those practitioners indicate that, so far, not much is happening due to the recent rule change. The question is how the judges are going to redefine new words in an old rule, and no one is certain how this will happen. Ms. Leonard stated that she is also concerned about other factors that are entirely subjective and stated that, for an injured plaintiff, some of these are the most important things on the planet. She stated that she appreciates cooperation, but some of the issues are difficult for attorneys to resolve among themselves, and she sees the change as a risk of creating more court time for judges on whole raft of new issues.

Ms. Leonard stated that there are also fairly significant differences in federal and state discovery processes. For example, the federal rule in employment cases is that, before you even fight about discovery, the defendant must turn over certain documents that give plaintiffs about 80% of what they need, limiting the range of what discovery remains to fight over. She noted that Oregon does not have such a

rule, and also does not have interrogatories or expert discovery. She opined that, when we start to examine the proposed amendments to Rule 36, we need to consider that kind of paradigm: the federal world versus the state world. Her conclusion is that there are a lot of big unknowns and still a lot of work going on to examine what is happening. Ms. Leonard stated that the Pound institute will be meeting in July and considering the question of whether states should adopt federal rules for discovery, and that there will be materials available from that meeting. She also noted that there is a CLE on May 11 where Judge Papek will talk about the changes in federal rules, including proportionality. She stated that this is a hot and contentious issue that may contain good elements but that will take some study and some thinking about what the Council wants to incorporate. She concluded that the Council needs to think about what it is trying to achieve and noted that the current undue burden standard is pretty effective to resolve the issues at play. Mr. Keating asked Ms. Leonard to provide written materials to the Council. Ms. Leonard agreed. Judge Gerking and Ms. Leonard also joined the Electronic Discovery Committee.

Judge Zennaché noted that the committee is likely to be at impasse on Rule 36 and that it will likely come down to a Council decision, so he asked Council members to carefully read over the materials provided by the committee so that we can have informed discussion.

#### 4. ORCP 45 Committee

Ms. Nilsson noted that she had neglected to include the committee's draft of Rule 45 in the meeting packet. The Council will discuss this draft at the June meeting.

#### 5. ORCP 47 Committee

Ms. Gates stated that the draft before the Council (Appendix G) includes housekeeping changes from section C through the end of the rule. The genesis of the committee's formation was a few communications to the Council that courts were not willing to entertain motions for summary judgment against affirmative defenses because the rule does not mention affirmative defenses as a basis for summary judgment. The committee inserted "any type of claim" in sections A and B, and "any claim or defense" to ensure that affirmative defenses can be subject to summary judgment. Ms. Gates stated that Prof. Peterson had inserted the language "or to oppose any defense" in section A of the draft and that she believes that this insertion is redundant since it refers to the claimant on any claim, and at the end of section A the "against any claim or defense" language is now included.

Prof. Peterson stated that it was his thought that if you are filing a complaint or

counterclaim or any kind of claim that you may be met with a defense and, following the symmetry of how the rule reads, whether you are the plaintiff with a claim or defendant with a counterclaim, you may encounter an affirmative defense so you would be using the summary judgment mechanism to defeat that defense. He agreed that it may be redundant. Prof. Peterson stated that he now understood Ms. Gates' point and that it was not clear during their e-mail discussions. He stated that he has no objection to removing that language. Judge Zennaché clarified that the first part of the sentence in section A says that a party seeking to recover a claim can do these things, one of which is move for summary judgment as to part of any defense, so it is redundant to state that a party that is opposing a defense has the right to file for summary judgment on that defense. Judge Roberts and Judge Armstrong concurred that the language is redundant. Prof. Peterson stated that the lead line makes it clear that section A is for the claimant, and section B is slightly different because it does not have the same time frame; the defendant can move for summary judgment at any time.

Judge Gerking stated that he thought that part of the charge of the Rule 47 committee was to consider adding a new provision that gives a party the right to challenge affidavits or declarations based on hearsay and for other reasons. Prof. Peterson noted that parties are using motions to strike to strike those affidavits, which is not provided for in the rules and compresses the time frame for getting everything to come before the court within the 60 days before trial, and it was suggested that, rather than a motion to strike, parties should simply attack defective affidavits or declarations in their responses to the motion. There are a lot of issues and some are related to the compressed time that puts a burden on the court and the parties to get it all done. Ms. Gates stated that the committee did discuss that issue and that she would send out an e-mail reminding the Council of its conclusion. Judge Zennaché stated that his recollection is that the committee did not want to encourage that independent motion.

Prof. Peterson stated that there are a few housekeeping amendments suggested by the staff, such as using multiples of seven in timelines. He suggested sending the rule back to the committee to make these changes.

6. ORCP 79-85 Task Force

Prof. Peterson stated that Judge Bailey had joined the task force. He stated that the task force had reviewed Rules 82, 83, 84 and was nearly done with some housekeeping amendments. He noted that he had neglected to send out to the task force a memo from the 2009-2011 biennium regarding the Council's prior analysis of the word "must" versus the word "shall." He stated that he was just informed this week of the Oregon Law Commission's (OLC) examination of Rule 80. He noted that the OLC's changes do not become law until the Legislature passes them, and they do not follow the Council's conventions. He stated that he would attempt to have the issue before the task force and see if he can convene a meeting within the week.

V. New Business (Mr. Brian)

Prof. Peterson stated that he and Mr. Brian had received an e-mail from the Oregon State Bar Practice and Procedure Committee (Appendix H) a few days prior to the meeting regarding a suggestion for a change to Rule 15. The Committee apparently believes that it is a little confusing about when things have to be answered. Mr. Shields had told the Committee that it was late in the Council's biennium but to submit the suggestion in any case. Mr. Brian suggested deferring this suggestion to next biennium. Council members agreed.

VI. Adjournment

Mr. Brian adjourned the meeting at 11:53 a.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director





## **Rule 22 Committee Report**

May 23, 2016, 12:00 p.m.

Committee members present: Shenoa Payne, Hon. David Leith, Hon. Curtis Conover, Bob Keating, Travis Eiva, Jay Beattie

Not present: Hon. Sheryl Bachart,

The committee discussed whether the phrase "Otherwise the third party plaintiff must obtain agreement of parties who have appeared *and* leave of court" in ORCP 22 C(1) should be amended to change the "AND" to "OR" to provide judicial discretion. At the May council meeting, the committee recommended to the council that it should kick this issue to the next biennium. The council asked the committee to take another look at this issue and see whether it could make a recommendation this biennium.

Travis Eiva discussed that this issue has been thoroughly discussed by previous councils and the change has been rejected. He stated that we should take the time to put those policies before the council and we don't have time to do that before June.

Bob Keating mentioned that this is the only provision in the rules that denies the Court discretion on the issue.

Judge Leith indicated that he was tentatively inclined to want an amendment to allow discretion. At the same time, he opposed a piecemeal approach and advocated that we ought to take a broader view of the whole rule and look at timelines and judicial discretion. We should not look at one small part of the rule, but take a broad, comprehensive, careful look at the rule. He would rather take up the issue next year and take the rule up as a whole.

Judge Conover agrees that we should take it up next year for a more thorough discussion for a number of reasons.

Shenoa Payne agreed with Judges Leith and Conover and preferred an approach that would allow a careful look at the rule.

Jay Beattie doesn't see any reason for the veto power in section (C)1 but also sees the reason to do things comprehensively. He's conflicted because he'd rather just make the change now but also understands the desire to take a deeper look and kick it to the next biennium. He mentioned the decisions 30 years ago weren't particularly sage. The history of this isn't really particularly formative. It is how it will work today.

The committee ultimately agreed that the best approach would be to wait and take a deeper look at this issue next biennium.

1                                   **COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS**

2   **RULE 22**

3                   **A Counterclaims.**

4                   A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as  
5 such defendant may have against a plaintiff.

6                   A(2) A counterclaim may or may not diminish or defeat the recovery sought by the  
7 opposing party. It may claim relief exceeding in amount or different in kind from that sought in  
8 the pleading of the opposing party.

9                   **B Cross-claim against codefendant.**

10                  B(1) In any action where two or more parties are joined as defendants, any defendant  
11 may in such defendant’s answer allege a cross-claim against any other defendant. A cross-claim  
12 asserted against a codefendant must be one existing in favor of the defendant asserting the  
13 cross-claim and against another defendant, between whom a separate judgment might be had  
14 in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the  
15 complaint; or (b) related to any property that is the subject matter of the action brought by  
16 plaintiff.

17                  B(2) A cross-claim may include a claim that the defendant against whom it is asserted is  
18 liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim  
19 asserted by the plaintiff.

20                  B(3) An answer containing a cross-claim shall be served upon the parties who have  
21 appeared.

22                  **C Third party practice.**

23                  C(1) After commencement of the action, a defending party, as a third party plaintiff,  
24 may cause a summons and complaint to be served upon a person not a party to the action who  
25 is or may be liable to the third party plaintiff for all or part of the plaintiff’s claim against the  
26 third party plaintiff as a matter of right not later than 90 days after service of the plaintiff’s

1 summons and complaint on the defending party. Otherwise the third party plaintiff must obtain  
2 agreement of parties who have appeared and leave of court. The person served with the  
3 summons and third party complaint, hereinafter called the third party defendant, shall assert  
4 any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert  
5 counterclaims against the third party plaintiff and cross-claims against other third party  
6 defendants as provided in this rule. The third party defendant may assert against the plaintiff  
7 any defenses which the third party plaintiff has to the plaintiff's claim. The third party  
8 defendant may also assert any claim against the plaintiff arising out of the transaction or  
9 occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff.  
10 [*The plaintiff*] **Any party** may assert any claim against the third party defendant arising out of  
11 the transaction or occurrence that is the subject matter of the plaintiff's claim against the third  
12 party plaintiff, and the third party defendant thereupon shall assert the third party defendant's  
13 defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and  
14 cross-claims as provided in this rule. Any party may move to strike the third party claim, or for  
15 its severance or separate trial. A third party may proceed under this section against any person  
16 not a party to the action who is or may be liable to the third party defendant for all or part of  
17 the claim made in the action against the third party defendant.

18 C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party  
19 to be brought in under circumstances which would entitle a defendant to do so under  
20 subsection C(1) of this section.

21 **D Joinder of additional parties.**

22 D(1) Persons other than those made parties to the original action may be made parties  
23 to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

24 D(2) A defendant may, in an action on a contract brought by an assignee of rights under  
25 that contract, join as parties to that action all or any persons liable for attorney fees under ORS  
26 20.097. As used in this subsection "contract" includes any instrument or document evidencing a

1 debt.

2 D(3) In any action against a party joined under this section of this rule, the party joined  
3 shall be treated as a defendant for purposes of service of summons and time to answer under  
4 Rule 7.

5 **E Separate trial.** Upon motion of any party or on the court's own initiative, the court  
6 may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to  
7 do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and  
8 expedite the matter.

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PROPOSED LEGISLATIVE HISTORY FOR E-DISCOVERY PROPOSAL FOR  
MEET AND CONFER ((RULE 43))

1. Given the increased amount of e-discovery in many cases and the complexity of the issues (and attendant costs) associated with e-discovery, the committee believes that the parties may be better served by conferring about such matters. The committee decided not to make the meet and confer mandatory since in many cases it would be an unnecessary burden. Rather we gave any party the right to initiate a conference by requesting it.
2. The committee inserted the “in good faith” requirement to insure that “ failure to comply” does not mean that the requested party must be fully ready to respond on all issues within 21 days but rather, that the parties have made good faith efforts to begin the discussion within that time frame. The committee expects that in many, if not most cases, more than one meeting will be required to fully address the issues.
3. The committee provided that the request cannot be made until all parties have appeared or sent notice of intent to appear to insure that a request not be served on any party with service of summons and complaint. This is designed to give the parties a chance to bring counsel on board and thus increase the likelihood that counsel will have some idea of their client’s e-discovery issues.

1 **GENERAL PROVISIONS GOVERNING DISCOVERY**

2 **RULE 36**

3 **A Discovery methods.** Parties may obtain discovery by one or more of the following  
4 methods: depositions upon oral examination or written questions; production of documents or  
5 things or permission to enter upon land or other property[,] for inspection and other purposes;  
6 physical and mental examinations; and requests for admission.

7 **B Scope of discovery.** Unless otherwise limited by order of the court in accordance with  
8 these rules, the scope of discovery is as follows:

9 **B(1) In general.** For all forms of discovery, parties may inquire regarding any matter, not  
10 privileged, [which] **that** is relevant to the claim or defense of the party seeking discovery or to  
11 the claim or defense of any other party, including the existence, description, nature, custody,  
12 condition, and location of any books, documents, or other tangible things, and the identity and  
13 location of persons having knowledge of any discoverable matter. It is not **a** ground for  
14 objection that the information sought will be inadmissible at the trial if the information sought  
15 appears reasonably calculated to lead to the discovery of admissible evidence.

16 **B(2) Insurance agreements or policies.**

17 B(2)(a) **Requirement to disclose.** A party, upon the request of an adverse party, shall  
18 disclose:

19 B(2)(a)(i) the existence and contents of any insurance agreement or policy under which  
20 a person transacting insurance may be liable to satisfy part or all of a judgment [which] **that**  
21 may be entered in the action or to indemnify or reimburse for payments made to satisfy the  
22 judgment; and

23 B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the  
24 provisions in any insurance agreement or policy upon which such coverage denial or  
25 reservation of rights is based.

26 B(2)(b) **Procedure for disclosure.** The obligation to disclose under this subsection shall

1 | be performed as soon as practicable following the filing of the complaint and the request to  
2 | disclose. The court may supervise the exercise of disclosure to the extent necessary to insure  
3 | that it proceeds properly and expeditiously. However, the court may limit the extent of  
4 | disclosure under this subsection as provided in section C of this rule.

5 |       B(2)(c) **Admissibility; applications for insurance.** Information concerning the insurance  
6 | agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes  
7 | of this subsection, an application for insurance shall not be treated as part of an insurance  
8 | agreement or policy.

9 |       B(2)(d) **Definition.** As used in this subsection, “disclose” means to afford the adverse  
10 | party an opportunity to inspect or copy the insurance agreement or policy.

11 |       **B(3) Trial preparation materials.**

12 |       **B(3)(i) Materials subject to a showing of substantial need.** Subject to the provisions of  
13 | Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable  
14 | under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for  
15 | another party or by or for that other party's representative (including an attorney, consultant,  
16 | surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has  
17 | substantial need of the materials in the preparation of such party's case and is unable without  
18 | undue hardship to obtain the substantial equivalent of the materials by other means. In  
19 | ordering discovery of such materials when the required showing has been made, the court shall  
20 | protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of  
21 | an attorney or other representative of a party concerning the litigation.

22 |       **B(3)(ii) Prior statements.** A party may obtain, without the required showing, a  
23 | statement concerning the action or its subject matter previously made by that party. Upon  
24 | request, a person who is not a party may obtain, without the required showing, a statement  
25 | concerning the action or its subject matter previously made by that person. If the request is  
26 | refused, the person or party requesting the statement may move for a court order. The

1 provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For  
2 purposes of this subsection, a statement previously made is [(a)] **either:** a written statement  
3 signed or otherwise adopted or approved by the person making it[,]; or [(b)] a stenographic,  
4 mechanical, electrical, or other recording, or a transcription thereof, [which] **that** is a  
5 substantially verbatim recital of an oral statement by the person making it and  
6 contemporaneously recorded.

7 **C Court order limiting extent of disclosure.**

8 **C(1) Relief available; grounds for limitation.** Upon motion by a party or by the person  
9 from whom discovery is sought, and for good cause shown, the court in which the action is  
10 pending may make any order [which] **that** justice requires to protect a party or person from  
11 annoyance, embarrassment, oppression, or undue burden or expense, including one or more of  
12 the following: [(1)] that the discovery not be had; [(2)] that the discovery may be had only on  
13 specified terms and conditions, including a designation of the time or place; [(3)] that the  
14 discovery may be had only by a method of discovery other than that selected by the party  
15 seeking discovery; [(4)] that certain matters not be inquired into, or that the scope of the  
16 discovery be limited to certain matters; [(5)] that discovery be conducted with no one present  
17 except persons designated by the court; [(6)] that a deposition after being sealed be opened  
18 only by order of the court; [(7)] that a trade secret or other confidential research, development,  
19 or commercial information not be disclosed or be disclosed only in a designated way; [(8)] that  
20 the parties simultaneously file specified documents or information enclosed in sealed  
21 envelopes to be opened as directed by the court; or [(9)] that to prevent hardship the party  
22 requesting discovery pay to the other party reasonable expenses incurred in attending the  
23 deposition or otherwise responding to the request for discovery. **In deciding what constitutes**  
24 **an undue burden, the court shall consider, among other things, the proportionality of the**  
25 **request for production to the needs of the case including the importance of the issues at**  
26 **stake in the action, the amount in controversy, the parties' relative access to relevant**



1 information, the parties' resources, the importance of the discovery, and the burden or cost  
2 of producing the information.

3 **C(2) Denial of motion.** If the motion for a protective order is denied in whole or in part,  
4 the court may, on such terms and conditions as are just, order that any party or person provide  
5 or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in  
6 relation to the motion.

1                                   **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**  
2                                   **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

3                                   **RULE 43**

4                   **A Scope.** Any party may serve on any other party [*a request*] **any of the following**  
5 **requests:** [(1)]

6                   **A(1) Documents or things. A request** to produce and permit the party making the  
7 request, or someone acting on behalf of the party making the request, to inspect and copy any  
8 designated documents (including electronically stored information, writings, drawings, graphs,  
9 charts, photographs, sound recordings, images, and other data or data compilations from which  
10 information can be obtained and translated, if necessary, by the respondent through detection  
11 devices or software into reasonably usable form) or to inspect and copy, test, or sample any  
12 tangible things [*which*] **that** constitute or contain matters within the scope of Rule 36 B and  
13 [*which*] **that** are in the possession, custody, or control of the party upon whom the request is  
14 served; [*or* (2)]

15                   **A(2) Entry upon land. A request** to permit entry upon designated land or other property  
16 in the possession or control of the party upon whom the request is served for the purpose of  
17 inspection and measuring, surveying, photographing, testing, or sampling the property or any  
18 designated object or operation thereon, within the scope of Rule 36 B.

19                   **B Procedure.**

20                   B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the  
21 action and on any other party with or after service of the summons on that party. The request  
22 shall identify any items requested for inspection, copying, or related acts by individual item or  
23 by category described with reasonable particularity, designate any land or other property upon  
24 which entry is requested, and shall specify a reasonable place and manner for the inspection,  
25 copying, entry, and related acts.

26                   B(2) **Time for response.** A request shall not require a defendant to produce or allow

1 inspection, copying, entry, or other related acts before the expiration of 45 days after service of  
2 summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a  
3 request in accordance with subsection B(1) of this rule, or such other time as the court may  
4 order or **to which** the parties may agree [*upon*] in writing, a party shall serve a response that  
5 includes the following:

6 B(2)(a) a statement that, except as specifically objected to, any requested item within  
7 the party's possession or custody is provided, or will be provided or made available within the  
8 time allowed and at the place and in the manner specified in the request, [*which items*] **and**  
9 **that the items are or** shall be organized and labeled to correspond with the categories in the  
10 request;

11 B(2)(b) **a statement that, except as specifically objected to, a reasonable effort has**  
12 **been made to obtain** [*as to*] any requested item not in the party's possession or custody, [*a*  
13 *statement that reasonable effort has been made to obtain it, unless specifically objected to,*] or  
14 that no such item is within the party's control;

15 B(2)(c) **a statement that, except as specifically objected to, [*as to*] entry will be**  
16 **permitted as requested to** any land or other property[, *a statement that entry will be permitted*  
17 *as requested unless specifically objected to*]; and

18 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

19 B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule  
20 is waived. Any objection to only a part of a request shall clearly state the part objected to. An  
21 objection does not relieve the requested party of the duty to comply with any request or part  
22 thereof not specifically objected to.

23 B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is  
24 under a continuing duty during the pendency of the action to produce promptly any item  
25 responsive to the request and not objected to [*which*] **that** comes into the party's possession,  
26 custody, or control.

1 B(5) **Seeking relief under Rule 46 A(2)**. A party who moves for an order under Rule 46  
2 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry,  
3 or related acts as requested, shall do so within a reasonable time.

4 **C Writing called for need not be offered.** Though a writing called for by one party is  
5 produced by the other, and is inspected by the party calling for it, the party requesting  
6 production is not obliged to offer it in evidence.

7 **D Persons not parties.** A person not a party to the action may be compelled to produce  
8 books, papers, documents, or tangible things and to submit to an inspection thereof as  
9 provided in Rule 55. This rule does not preclude an independent action against a person not a  
10 party for permission to enter upon land.

11 **E Electronically stored information (“ESI”).**

12 **E(1) Form in which ESI is to be produced.** A request for [*electronically stored*  
13 *information*] **ESI** may specify the form in which the information is to be produced by the  
14 responding party but, if no such specification is made, the responding party must produce the  
15 information in either the form in which it is ordinarily maintained or in a reasonably useful  
16 form.

17 **E(2) Meetings to resolve issues regarding ESI production; relevance to discovery**  
18 **motions. In any action in which a request for production of ESI is anticipated, any party may**  
19 **request a meeting to confer about ESI production in that action. No meeting can be**  
20 **requested until all of the parties have appeared or have provided written notice of intent to**  
21 **file an appearance pursuant to Rule 69 B(1). The court may require that the parties meet to**  
22 **confer about ESI production. Within 21 days of the request for a meeting, the parties shall**  
23 **meet and confer about the scope of the production of ESI; data sources of the requested ESI;**  
24 **form of the production of ESI; cost of producing ESI; search terms relevant to identifying**  
25 **responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues pertaining to**  
26 **metadata; and any other issue a requesting or producing party deems relevant to the request**

1 for ESI. Failure to comply in good faith with this subsection shall be considered by a court  
2 when ruling on any motion to compel or motion for a protective order related to ESI. The  
3 requirements in this subsection are in addition to any other duty to confer created by any  
4 other rule.



April 9, 2014

Via Electronic Mail to [rules\\_comments@ao.uscourts.gov](mailto:rules_comments@ao.uscourts.gov)

Honorable David G. Campbell, Chair  
Civil Rules Advisory Committee

Dear Judge Campbell:

On March 21, 2014, the Agenda Book for the spring meeting of the Advisory Committee on Civil Rules was released, including the reports of the Duke Subcommittee, the Discovery Subcommittee, and the Rule 84 Subcommittee discussing their recommendations on the proposed amendments to the Federal Rules of Civil Procedure. While the Duke Subcommittee recommends the withdrawal of several of the most controversial proposed amendments to the Civil Rules, it recommends adoption of several other controversial amendments with some revisions. The Rule 84 Subcommittee recommends the abrogation of Rule 84 and most of the Official Forms.

I understand and appreciate the tremendous time and energy that the Advisory Committee and its subcommittees have devoted to the proposed amendments. The reports of the subcommittees demonstrate that members have listened to and considered the comments and testimony on the proposals, and have tried to address them. The recommended withdrawal of the proposed presumptive limits is responsive to the overwhelming majority of the commentary on the proposed amendments to Rules 30, 31, 33 and 36. If the Advisory Committee approves the Duke Subcommittee's recommendation to withdraw these proposals, the bench and bar will be relieved. However, several of the remaining recommendations are problematic and do not adequately respond to the comments and testimony that largely opposed the draft amendments.

#### **I. RULE 4(m)**

More than 90% of the written comments on the proposal to reduce the time for service from 120 days to 60 days opposed it. Opposition to this proposal came from across the spectrum, including plaintiffs' attorneys and organizations, attorneys who represent plaintiffs and defendants, legal service providers who assist *pro se* and *in forma pauperis* litigants, the Department of Justice, the U.S. Commodity Futures Trading Commission, federal judges and the Federal Magistrate Judges Association, legal academics, members of Congress, the Cities of New York, Chicago, and Houston, and the Illinois Association of Defense Trial Counsel.

After reviewing the public comments, the Duke Subcommittee reached the "tentative conclusion" that the time for service should be moved up from 60 days to 90 days.<sup>1</sup> In addition, it recommended additional language in the Committee Note recognizing that the 90-day limit "will

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<sup>1</sup> Advisory Committee on Civil Rules, Portland, OR, Apr. 10-11, 2014, Agenda Book ("Agenda Book"), at 92.

increase the frequency of occasions to extend the time for good cause.”<sup>2</sup> In making these adjustments, it appears the Duke Subcommittee was persuaded in particular by the concern that a 60-day period would interfere with requests to waive service.<sup>3</sup>

While 90 days for service is better than 60 days, and the draft amendment to the rule recommended for publication will help clarify a particular ambiguity, the Duke Subcommittee has yet to explain why it believes that a 30-day reduction in time would make any real difference in the overall length of litigation, or how this shorter timeframe would save costs. Whether the time for service is 120, 90, or 60 days, neither the courts nor defendants are expending resources prior to service. If anything, the reduction from 120 days to 90 days will increase court costs and consume court resources because, as the Subcommittee recognizes, the new limit will increase requests for extensions of time. Plaintiffs will be forced to assume the cost of this motion practice.

There is no empirical evidence to support any alteration in the existing time for service. Even absent hard data, however, it is difficult to discern any benefits from the 90-day proposal; that costs will increase due to additional motions practice, on the other hand, is apparent. Given this, the Advisory Committee should consider retaining the existing 120-day rule.

At a minimum, the Committee should consider republication, if it is going to consider a 90-day time frame. The public was never asked to consider this specific allotment of time, and only three comments even mentioned the possibility. Since the Duke Subcommittee recommends publishing another amendment to Rule 4(m), the new draft can include the Subcommittee’s 90-day recommendation.

## **II. RULE 26(b)(1)—SCOPE OF DISCOVERY**

The overwhelming majority of the comments opposed the proposed changes to the scope of discovery, particularly the addition of proportionality to the definition of what information is discoverable. In response to the comments and testimony, the Duke Subcommittee recommends that the Advisory Committee propose that the Standing Committee forward Rule 26(b)(1) for adoption, with a few revisions in the rule text and with “considerably expanded Committee Notes.”<sup>4</sup> The justifications for the recommended draft rule and the text of the draft rule and Committee Note do not adequately address the concerns raised in opposition to the proposed rule.

### **A. “Proportionality” was Opposed by the Majority of the Public Commentary.**

While noting that this proposal provoked a stark division in the comments, the Duke Subcommittee describes the opposition to the proposal as coming from those “representing

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (calling this point “particularly persuasive”).

<sup>4</sup> *Id.* at 80.

plaintiffs.”<sup>5</sup> At its most recent meeting by teleconference, the Duke Subcommittee asserted that “Proportionality has not been opposed by the comments from the organized bar, nor by the Department of Justice or the EEOC.”<sup>6</sup>

With respect, this view of the opposition to the proposed addition of proportionality to the scope of discovery is too narrow, and it overlooks the complexity of the opposition to this proposal. This proposal was opposed by more than two-thirds of the comments on it, and it was opposed by the majority of those who testified about it, including by the vast majority of scholars and judges who commented upon it. While attorneys, law firms, and non-profit organizations who represent plaintiffs, and organizations of attorneys who represent plaintiffs did register a large and strong opposition to the proposed addition of “proportionality” to the scope of discovery, those who represent plaintiffs are not a narrowly defined group. Attorneys and organizations who opposed this proposed amendment came from across the civil litigation spectrum, and included legal aid providers, environmental justice groups, the civil rights community, consumer rights attorneys, as well as attorneys who represent injured individuals and small businesses in civil litigation against larger entities, including employers, product and pharmaceutical manufacturers, insurance companies, and government entities.

Attorneys who represent the interests of individuals and small businesses, not just as plaintiffs, but as defendants and as third parties, in a wide array civil litigation against larger entities, responded to this proposed amendment with emphatic opposition, with only one notable exception—the U.S. Equal Employment Opportunity Commission.<sup>7</sup> Even though the EEOC wrote that it supported this proposal, it did not say why. The EEOC’s testimony at the public hearing in January demonstrated that its support for the proposal was tentative. This is not a strong basis on which to support a draft rule that is opposed by the vast majority of those who commented on it.

Moreover, the proposed amendment was opposed by the overwhelming majority of legal academics and current and former federal judges who commented on it. Almost 20 written comments on this proposal were submitted by law professors, one of which was signed by 171 professors. Only three law professors wrote in support of this amendment. None of the professors who testified on this proposal supported it. Professor Arthur Miller, who was reporter for the Advisory Committee when the concept of “proportionality” was added to Rule 26 testified and

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<sup>5</sup> *Id.* at 81.

<sup>6</sup> *Id.* at 130.

<sup>7</sup> While the Department of Justice, which frequently represents the federal government as a plaintiff, supported this proposal, it also frequently represents the federal government as a defendant against the very attorneys and organizations that opposed this proposal. Moreover, the Department of Justice’s support was tempered by its request for a Committee Note to “clarify that the transfer and placement of the ‘proportionality’ factors from Rule 26(b)(2)(C) to Rule 26(b)(1) does not modify the scope of relevant discovery under the rule.” Department of Justice Comment (Jan. 28, 2014), at 3.



submitted comments opposing this proposal. The academics and federal judges who commented on this proposed amendment strongly opposed it.

Finally, the organized bar was largely absent from this debate. Very few bar groups submitted written comments, and even fewer addressed this specific proposal. At least three bar associations opposed this proposal, while many others remained silent. Notably, neither the American Bar Association nor its Section of Litigation took a position on this, or any other, proposal. One bar association said that it supported the proposal “with caution,” and one bar association suggested lengthy Committee Notes to address the concerns raised by its own members who oppose the proposal. Even within the organized bar, there is no consensus on this proposal. The lack of uniform support for this proposal by bar groups speaks much louder than the very few bar groups that do support this proposal. It is hard to divine support for this proposal from the dearth of commentary by the organized bar.

## **B. Recommended Revised Draft of Rule 26(b)(1) Incorporating “Proportionality”.**

The Duke Subcommittee states that it considered the comments opposing this proposal “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] would constitute a significant improvement to the rules governing discovery.”<sup>8</sup> The Duke Subcommittee reaches this conclusion for three reasons: (1) the findings from the Duke Conference; (2) the history of proportionality and Rule 26(b)(1); and (3) proposed adjustments to the draft amendment that would invert the first two factors of the proportionality test and that would add a factor to the proportionality test to examine “the parties’ relative access to relevant information,” as well as greatly expand the content of the Committee Note.

### **i. The History of Proportionality and Rule 26(b)(1).**

The Duke Subcommittee states that the “proportionality” factors are not new, but were added to Rule 26(b)(1) in 1983.<sup>9</sup> The Subcommittee cites to the Committee Note to the 1983 rule, which stated that the additional language, which included much of what is now in Rule 26(b)(2)(C), was meant “to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery,” and “to encourage judges to be more aggressive in identifying and discouraging discovery overuse.”<sup>10</sup> The new draft of the Committee Note states that the amendment “restores the proportionality factors to their original place in defining the scope of discovery.”<sup>11</sup>

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<sup>8</sup> *Id.* at 82.

<sup>9</sup> *Id.* at 84.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 101.

While the Duke Subcommittee relies on the Committee Note to the 1983 version of the rule, it neglects to include the relevant text of the rule. In 1983, the following text was added to Rule 26(b)(1), *after* the statement defining the scope of discovery:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

See Edward D. Cavanaugh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery through Local Rules*, 30 Vill. L. Rev. 767, 787-88 (1985).

The text of the 1983 version of Rule 26(b)(1) bears little resemblance to the proposed draft rule that the Duke Subcommittee recommends be adopted. There are many differences, but there are two very important distinctions between the 1983 rule and the Duke Subcommittee's recommended draft.

First, even though the concept originally resided in Rule 26(b)(1), "proportionality" was not then and never has been a part of the definition of the scope of discoverable information. Rather, it has always operated as a limit on the breadth of relevant discovery otherwise allowable under the definition of the scope. Many critics of the proposed amendment, including Professor Arthur Miller, have opposed the redefinition of discovery from "relevant" information to "relevant and proportional" information, as that has never actually been the definition of the scope of discovery.

Second, "proportionality" has always been a limit enforced by the court. While the concept must be observed by the parties under Rule 26(g), that rule requires a party to certify "that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry . . . [a discovery request] is . . . neither unreasonable nor unduly burdensome or expensive," *inter alia*. Under Rule 26(g), a court may make a finding that a party knowingly propounded unduly burdensome discovery and sanction that party, but the rule does not permit a party to unilaterally decide that the discovery requested is not permitted because it is unduly burdensome or expensive. Many of the comments and testimony opposing this proposed amendment argued that the redefinition of the scope in the way proposed by the Duke Subcommittee will enable parties to make a unilateral decision that requested discovery is not "proportional," and withhold it on that basis. Even attorneys who represent defendants asserted that they would use the rule that way because the text allows them to. Although the Duke Subcommittee proposes adding a Committee Note stating that parties cannot unilaterally withhold discovery on this ground, there

is nothing in the text or structure of the rule to prevent them from doing so. The Committee can better address this concern in the text and structure of the rule itself.

If the Advisory Committee wishes to serve the purpose stated by the Duke Subcommittee of making the “proportionality” factors “more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and deciding discovery disputes,”<sup>12</sup> and “restore[ them] to their original place” in Rule 26(b)(1), the Committee can do so by simply using a formulation similar to the actual text of the 1983 version of the rule rather than attempting to incorporate the factors into the definition of the scope. This suggestion is in line with one made by Professor Alan Morrison in his written comments. Making the “proportionality” test a separate clause in the rule would go further than a lengthy Committee Note to resolve the substantial concerns about the proposed draft. Adding proportionality to Rule 16 and/or Rule 26(f) would similarly raise the “prominence” of the concept, and would “encourag[e] parties and courts alike to remember them and take them into account” without creating the problems that are likely under the text and structure of the proposed draft.

## ii. Adjustments to the 26(b)(1) proposal.

To the extent that there will be a “proportionality” test in Rule 26(b)(1), the Duke Subcommittee’s recommended addition of a factor considering “the parties’ relative access to relevant information” will help counterbalance the problem identified by many in cases where this access is asymmetrical. However, because this is a new factor that is not present in the current rule, there is no federal case law interpreting how courts should apply this factor. The Committee Note on this should help.

Similarly, inverting the first two factors of the “proportionality” test so that the “importance of the issues at stake” comes first and the “amount in controversy” comes second will take the emphasis off of “the amount in controversy,” to the relief of many critics. This revision does not, however, respond to the widespread criticism of “the importance of the issues at stake” factor. Opponents of the proposed draft criticized this factor and the “proportionality” test as a whole for being subjective and incapable of principled application. They argued that it is likely to lead to unpredictable and inconsistent results. Inverting the first two factors of the test does not answer these criticisms.

More significant, though, is how the Duke Subcommittee proposes to resolve the concerns raised by many of the comments that the text and structure of the rule shifts the burden to the party seeking discovery of proving that the discovery sought is *both* relevant *and* proportional. The Duke Subcommittee states that it does not intend for the proposed draft to shift the burden of proving proportionality to the requesting party.<sup>13</sup> The Subcommittee recommends an extended Committee Note to address this concern raised by the text and structure of the rule.

The proposed Committee Note will not assuage the concerns of the many comments and witnesses that they will bear the burden of showing that the discovery they request is both

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<sup>12</sup> *Id.* at 84.

<sup>13</sup> *Id.* at 84.

relevant *and* proportional. It simply states that “the change does not place on the party seeking discovery the burden of *addressing all proportionality considerations*.”<sup>14</sup> It states very generally that the parties may not appreciate whether the discovery needed is “proportional” at the outset of the litigation, and that some parties may have more information about particular factors than others. The Committee Note states, “[a] party requested to provide information may have little information about the importance of the discovery in resolving the issues,”<sup>15</sup> but it ignores the fact that *the requesting party* frequently does not know the importance of the discovery to resolving the issues without first seeing the discovery, as many comments and witnesses insisted. Although the Committee Note directs the court to consider the information provided by both parties on this issue, it does not require the party who possesses the relevant information to demonstrate why it should not be disclosed. The Committee Note is insufficient to address the issue of burden raised by a significant number of comments on the proposal.

In fact, a simple statement in the text of the rule would be more effective in addressing this problem. The Committee could add text to the draft rule similar to the text in current Rule 26(b)(2)(B) stating “On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not proportional to the needs of the case.” Alternatively, the Committee could add similar text to Rule 37(a). One short sentence would accomplish more than an extended and equivocal Committee Note.

### iii. The findings from Duke.

Several thorough written comments addressed the lack of empirical support for this proposal. I will not attempt to restate them here. However, it is worth noting that general support for the concept of proportionality in discovery and the desire to have hands-on case management to ensure proportionality is not unconditional support for redefining the scope of discovery to incorporate “proportionality.” After the Duke Conference, the Advisory Committee’s Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation (the “Duke Conference”), stated:

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. **But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform.**

There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. **Again, however, there was no suggestion that this rule language should be changed.**

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<sup>14</sup> *Id.* at 101 (emphasis added).

<sup>15</sup> *Id.*

Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf> (emphases added). It is troubling that the Duke Subcommittee now asserts that the findings from the Duke Conference support the change to Rule 26(b)(1) that it recommends. Whatever general support there is for the general proposition that discovery should be “proportional to the needs of the case,” that support does not necessarily translate into support for revising the *scope of discovery* to incorporate a “proportionality” requirement or for the specific draft rule proposed by the Duke Subcommittee.

### **C. Deletion of Discovery Relevant to the Subject Matter of the Action.**

The Duke Subcommittee stated that this proposal “has not generated much excitement.”<sup>16</sup> The Duke Subcommittee recommends that the proposed elimination of discovery related to the “subject matter” of the action go forward with an expanded Committee Note describing information that would be discoverable as relevant to the claims or defenses.

Although there were far fewer comments on this proposed amendment than on the “proportionality” amendment, the comments that did address it were about evenly divided in support of and opposed to it. Corporations, their legal counsel, and organizations that represent their interests, as well as government entities supported this proposal. The proposal was opposed by all the federal judges who commented on it, and a majority of the legal academics who commented on it. It was also opposed by attorneys and organizations who represent individuals in litigation against larger entities.

As noted above, the Advisory Committee’s Report to the Chief Justice on the Duke Conference stated that there “was no demand at the Conference for a change to the rule language; there is no clear case for present reform.” Many comments criticized the Committee’s justification for the abrogation of language that has been a part of the scope of discovery for more than seventy-five years and argued that there is no empirical evidence to support this proposal. Some professors pointed out that removal of this language will likely result in a lot more disputes about whether discovery sought is “relevant,” increasing litigation costs and burdens on the parties and the courts. There was no consensus on whether this proposal would be beneficial, and adopting this change could do more harm than good.

### **D. Deletion of “Reasonably Calculated” Language.**

The Duke Subcommittee in its Report to the Advisory Committee and in its meeting minutes stated that “the notion 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.”<sup>17</sup> The comments opposing this amendment were considered to be “empirical evidence” of the need for reform.<sup>18</sup> The Duke Subcommittee stated that the proposal

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<sup>16</sup> *Id.* at 120.

<sup>17</sup> *Id.* at 87, 121.

<sup>18</sup> *Id.* at 121.

to substitute this language, which dates back to 1946, with a new sentence was supported by “many thoughtful bar groups and others,” without specifying which comments or testimony they rely on, or how many bar groups support this proposal.<sup>19</sup>

In reality, very few bar groups commented on this proposal, and they were about evenly divided on it. One group even submitted one comment opposing the proposal, and a later comment supporting it without explaining why it had changed positions. Even the Department of Justice, commenting on the draft rule prior to publication questioned why the Committee would propose to change this “long-standing and well-known aspect of the rule, which expresses an important principle defining the appropriate scope of discovery.” The Department of Justice later changed its position. The Equal Employment Opportunity Commission also opposes this proposed amendment because it contains limiting language that does not appear in the sentence the Committee proposes to substitute for it. Without the “reasonably calculated” language, the EEOC argued, all inadmissible information would be discoverable as long as it is relevant, regardless of whether the discovery is reasonably calculated to lead to the discovery of admissible evidence. Finally, the majority of federal judges and legal academics who commented on this proposal also opposed it.

A couple of defense attorneys offered a suggestion: retain the “reasonably calculated” language, but highlight the fact that all discovery sought must be relevant. Thus the rule could be amended to provide: “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.” Such a revision would preserve the decades of case law interpreting the “reasonably calculated” language, and at the same time limit discovery of inadmissible evidence that is not reasonably calculated to lead to the discovery of admissible evidence.

#### **E. Deletion of Description of Discoverable Matters**

In response to comments and testimony on this proposals, the Duke Subcommittee recommends that the Committee Note to the rule be revised to include a statement about the purpose of the deletion, and to make clear that the deletion does not mean that these matters are no longer within the scope of discovery, as some supporters of the amendment have suggested:

Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case.<sup>20</sup>

Although very few comments and witnesses addressed this specific proposal, the vast majority of them opposed it, including comments from federal judges, legal academics, and practitioners, as well as the Department of Justice. Although some argued that the language should at least be included in the Committee Note, they argued that there was no reason to delete

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 85, 103.



the text from the rule, and that the deletion could have unintended consequences. Putting the language in the Committee Note does not resolve this problem. There is no need to delete this language from the text of the rule.

### **III. RULE 26(c)—COST ALLOCATION**

More than half of the public commentary on this proposed amendment opposed it. It was opposed by attorneys who represent individuals and small businesses against larger entities, as well as two federal judges and a slight majority of the legal academics who addressed it. Support for this proposal came largely from corporations, their legal counsel, and the organizations that represent their interests, as well as government entities and a majority of the few bar associations to comment on this specific proposal.

In response to the comments and testimony on this proposed amendment, the Duke Subcommittee recommends that the Committee Note be revised to clarify that recognition of the authority to allocate costs “does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”<sup>21</sup> While the Duke Subcommittee’s recommendation answers many of the comments filed in opposition to the proposal, the Duke Subcommittee provides little justification for the amendment to the rule. The recommended text of the rule has been interpreted by many as encouraging courts to use this authority, not simply making that authority explicit. Similar past proposed amendments that simply made the court’s authority to allocate costs “explicit” have been rejected by the Judicial Conference. There is simply no need to make explicit the authority that is already well understood and exercised by the courts.

### **IV. RULE 84**

Although few comments focused on this proposal, the comments filed were largely disapproving. Of the few comments in support of this proposal, only a couple of individual practitioners supported it.

Several comments asserted that the forms still serve their original useful function and argued that there was no benefit to discontinuing their inclusion now. Attorneys who work with *pro se* litigants, and those litigants who are incarcerated argued that these litigants use and need the forms, and many of them do not have access to the internet to access other sources of example pleadings. Several comments argued that forms available to litigants from alternative sources are not an adequate substitute because they are not necessarily legally sufficient. Some argued that there is no pressing need to abrogate the forms now, and that the Committee should table the abrogation of Rule 84 and most of the Forms until a later date. They expressed concern that the abrogation of Rule 84 was largely ignored by the bench and bar because of the focus on the other published proposed amendments. Only a few bar associations weighed in, with some noting their support, and one noting that its membership was divided for and against the proposal. In addition, more than 275 legal academics signed onto letters opposing this proposal.

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<sup>21</sup> *Id.* at 87, 104.

Following a review of this commentary, the Rule 84 Subcommittee reaffirmed its recommendation that the rule and most of the Official Forms be abrogated. The Subcommittee stated that abrogation was still warranted, in large measure, because it does not have the time for regular review or revision of the Official Forms. Responding to the academics, the Subcommittee stated that it was “troubling that so many of those who devote their professional work to thinking about the deep principles of procedure challenge the proposal,”<sup>22</sup> but the Subcommittee was not moved by the academic community’s arguments regarding the interrelationship of the forms and pleading standards discussed in *Iqbal* and *Twombly*. Finally, the Rule 84 Subcommittee decided that full publication of the proposed abrogation of Rule 84 with the opportunity to comment was sufficient to satisfy the demands of the Rules Enabling Act.

A better course would be to recommend that the abrogation of Rule 84 and most Official Forms be withdrawn at this time. There is no pressing need to abrogate the rule or the Forms right now, and tabling the proposal now would enable the Rule 84 Subcommittee to gather more information about who uses the Forms and how often. It is not surprising that seasoned practitioners do not use or rely on the Forms, but new practitioners and other litigants do. The Subcommittee offers no empirical information about the use of the Forms or whether certain types of claims or litigants will be harmed by the abrogation most of the Forms. Abrogation of the rule and the Forms may be more significant in practice than the Subcommittee understands, but it has little information to go on. Given the amount of opposition to this proposal, on both practical and legal grounds, and the fact that the proposal was eclipsed by the other, more controversial proposed amendments to the Civil Rules that were published at the same time, the proposal should be withdrawn and reconsidered at a later date.

## V. CONCLUSION

The reports of the subcommittees demonstrate that consideration has been given to many of the concerns and suggestions raised by the extraordinary number of comments on the proposed amendments. I offer these comments simply to highlight a few areas of concern that may not be adequately addressed by the recommendations of the subcommittees. I appreciate your consideration of these comments as you prepare to move forward on the proposed rule amendments.

Sincerely, \_\_\_\_\_



Valerie M. Nannery  
Senior Litigation Counsel

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<sup>22</sup> *Id.* at 557-58.



**STATEMENT OF**

**ARTHUR R. MILLER**

University Professor  
New York University School of Law

Before the  
Advisory Committee on Civil Rules

Thursday, January 9, 2014

By way of introduction, I am a University Professor at New York University; before that I was the Bruce Bromley Professor of Law at Harvard Law School for over 35 years. I have taught the first year civil procedure course and advanced courses in complex litigation for more than fifty years. Beginning in the late 1970s, I served as the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and then as a member of the Committee (by appointment of Chief Justice Burger and reappointment by Chief Justice Rehnquist) and some years later I was the Reporter for the American Law Institute's Project on Complex Litigation. I have argued cases involving issues of federal procedure in every United States Court of Appeals, numerous district courts, and in the United States Supreme Court on several occasions and I have been co-author of the multivolume treatise *Federal Practice and Procedure* for almost fifty years.

When the Federal Rules of Civil Procedure were promulgated in 1938, they reflected a policy favoring citizen access to the federal courts and sought to promote the resolution of civil disputes on their merits rather than on the basis of the technicalities that plagued earlier procedural systems. Federal judges applied that philosophy for many, many years. However, the last quarter century has seen a dramatic shift in the way the courts, especially the United States Supreme Court, have interpreted and applied the Federal Rules, as well as a number of other procedural matters, and the same is reflected in the character of many of the proposals advanced during that period by the Advisory Committee on Civil Rules. This shift has led to the increasingly early termination of cases prior to trial, often without any real consideration of the merits. This has been the result of the erection of a series of procedural stop signs that now dot the pretrial process. These have contributed to the fact that civil trials, especially jury trials, are

now very few and far between. Not surprisingly, one of today’s clichés refers to “The Vanishing (Jury) Trial,” partially reflecting this early termination phenomenon. The ability of a citizen to get a meaningful day in federal court is now being questioned by many within and without the legal profession.

The shift in judicial attitude can be traced back to three summary judgment decisions by the Supreme Court in 1986 that have been applied promote the use of this pretrial dispositive motion.<sup>1</sup> Additional procedural stop signs that impede the pathway to a resolution of the merits—often justified in the name of judicial gatekeeping—and that have increased pretrial litigation transaction costs and delays include (1) the increased screening of expert testimony,<sup>2</sup> (2) the establishment of several obstacles to securing class action certification,<sup>3</sup> (3) the enforcement of arbitration clauses in an extraordinary array of consumer and other contracts entered into by average Americans (many adhesive in character), most of them effectively prohibiting aggregate arbitration, thereby rendering the arbitration option economically unviable,<sup>4</sup> (4) the Supreme Court’s abandonment of notice or simplified pleading and its substitution of “plausibility” pleading (which, in effect, is a return to the burdensome code fact pleading of the Nineteenth Century),<sup>5</sup> (5) the promulgation of a number of limitations on pretrial discovery that have resulted from Rule amendments during the last twenty-five years,<sup>6</sup> and (6) the opinion of four Supreme Court Justices that would narrow the reach of in personam jurisdiction in a way that will prevent citizens from bringing suit in a convenient forum.<sup>7</sup> In addition there has been an increased judicial receptivity to various threshold matters such as standing, pre-emption,

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1 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); See generally Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3 *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011). See also *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (detailing the recent disturbing trends in class action jurisprudence and urging a more balanced approach to Rule 23)..

4 See, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). There has been an extraordinary expansion of the Federal Arbitration Act’s application far beyond its original scope, by the Supreme Court.

5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). One should ask why JP Morgan is willing to settle with the government for thirteen billion dollars for its conduct relating to the mortgage crisis but many lawsuits for compensation by the actual victims of that conduct (and comparably conduct by other institutions) have been dismissed without ever reaching trial, often on basis of the complaint alone?

6 See the discussion below at notes 13-28, *infra*.

7 *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)(a plurality of four Justices departed from sixty-five years of personal jurisdiction jurisprudence in a way that would contract that jurisdiction and might well force plaintiffs to litigate in a distant forum – possibly foreign countries – or abandon their claims)(two-Justices concurred in result; three Justices dissented).

exhaustion of remedies, statutes of limitation and repose, and immunity. I have written about these matters at length.<sup>8</sup>

All of these stop signs with their attendant costs and delays often restrict the ability of plaintiffs to obtain a determination of the merits of their claims, which has resulted in a narrowing of citizen access to a meaningful day in court, jeopardizing our procedural gold standard, trial and when appropriate jury trial. Beyond that, but certainly of equal, if not greater, importance, these restrictive procedural developments work against the effectiveness of private litigation to assist in the enforcement of various significant public policies and Congressional enactments involving such matters as civil rights, antitrust, employment discrimination, consumer protection, defective products, pension protection, and securities regulation. Cases involving several of these subjects are dismissed at an alarming rate by some federal courts leading to the under-enforcement of important statutes and judicial doctrines. **The current proposals limiting the availability of discovery are the latest impediment to meaningful merit adjudication in our federal courts.**

Throughout the past twenty-five years claims of abusive and frivolous litigation, extortionate settlements, and the high cost of today's large-scale lawsuits have been asserted by defense interests and repeated in a number of judicial opinions to justify the erection of these procedural stop signs.<sup>9</sup> I have heard these arguments throughout my professional life. But these voices rarely acknowledge other systemic values, and their claims are speculative, not empirically justified, and overstated. They simply reflect the self-interest of various groups that seek to terminate claims against them or their clients as early as possible to avoid both discovery and a trial. They are undocumented assertions that have been refuted by several studies and other sources<sup>10</sup> and properly characterized as "myth."<sup>11</sup> Some of these themes are being sounded again by proponents of the proposed Rule changes.

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8 Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

9 See, e.g., the opinion for the Court by Justice Souter in *Twombly*, 550 U.S. 544 (2007).

10 Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010); EMERY G. LEE III & THOMAS E. WILLGING, NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 27–33 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (median costs, including attorney's fees are between 1.6% and 3.3% of defendants' reported stakes).

11 Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C.L.REV. 603 (1998). See generally Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116–23 (2012)(a comprehensive critique of repeated complaints about discovery).

Yet, important hard questions about these assertions that bear on whether there is a need for several of the proposed rule changes as well as a number of the other procedural changes made in the recent past have not been studied with the requisite intensity. For example: What are the sources of litigation costs and who is causing them? To what extent is it defendants, who generate motion practice and resist discovery, who are the source of cost and delay? What would a true cost-benefit analysis of these, and earlier amendments, show given the transaction costs that may well accompany them? Why haven't alternative mechanisms for cost and delay containment been considered by the courts and studied in depth by the rulemakers rather than simply using the blunt instruments of erecting procedural stop signs and constricting discovery?<sup>12</sup> What legislative changes might be requested of Congress to ameliorate the proposed concerns should careful analysis show they are significant? Even if one acknowledges that federal substantive law and litigation have changed dramatically in recent decades, there remains a serious question as to why the procedural changes during this period have operated to impair or impede the ability of claimants to reach the merits. Some restoration of the earlier philosophy of the Federal Rules seems necessary if we are to preserve the procedural principles that should underlie our civil justice system, avoid the under- or non-compensation of citizens with legitimate claims, and maintain the viability of private litigation as an adjunct to government regulation for the enforcement of important societal policies and values.

For the reasons advanced below, I urge the Committee to reevaluate several of their proposed Rule changes in light of the background of what has happened in the past quarter of a century and the negative effect they may have on access to a meaningful merit adjudication in our federal courts.

Several of the current proposals to amend the discovery rules continue the pattern I have described. They reflect the significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime—a true commitment to “equal access to all relevant data” so critical to the effective resolution of disputes. They also extend the series of periodic amendments to the Rules in recent years that supposedly were motivated by a desire to reduce the density and cost of discovery. That objective seems unobjectionable—the same also may be said to describe the current proposals. But that statement of justification is

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<sup>12</sup> The materials cited in notes 10 and 11 cast doubt on the claim that discovery costs represent the lion share of litigation costs. Clearly, litigation costs reflect a variety of economic, tactical, and human factors other than discovery costs. See Charles Silver, *Does Civil Justice Cost too Much?*, 80 TEXAS L. REV. 2073 (2002).

deceptive; the past and proposed changes are not benign, let alone neutral. They also appear to have been motivated, at least in part, by the ongoing concern of defense interests that broad discovery allows plaintiffs to look behind their clients' curtains, thereby providing access to otherwise unobtainable oral and documentary information that may well cut too close to the substantive bone and endanger the defense because it may well reveal a claim's merits, thereby increasing the risk of liability and enhancing the case's settlement value. Vulnerability to discovery, after all, always has been a *bête noire* of both business and government defendants.

The changes in the discovery regime I am referring to began in 1983, during my service as Advisory Committee Reporter, when Rule 26 was amended to eliminate a sentence that stated: "Unless the court orders otherwise . . . , the frequency of use of these [discovery] methods is not limited."<sup>13</sup> The deletion of that sentence was designed to eliminate any lingering notion that discovery was limitless.<sup>14</sup> As the Advisory Committee's Note accompanying the amendment makes clear, the deletion was only a signal that "excessive" and "needless" discovery was to be curtailed.<sup>15</sup> That message was reinforced by the simultaneous addition of the language now found in Rule 26(b)(2)(C) directing district judges to avoid discovery that is unreasonably cumulative, duplicative, or obtainable from some other source, as well as discovery that is unduly burdensome or expensive given the needs of the particular case. Thus, it has been said, was born the concept of "proportionality" in discovery.<sup>16</sup> The amendment also emphasized the importance of judicial involvement in the discovery process and was intended to work in tandem with the simultaneous revision of Federal Rule 16, which validated and promoted judicial management as a method of improving litigation efficiency and economy. Many believe that greater and more effective judicial management—rather than limiting discovery—is the key to cost and delay containment.<sup>17</sup>

In describing the 1983 amendments at that time, I remarked on several occasions that the changes represented a "180-degree shift" in thinking about discovery.<sup>18</sup> On occasion I would

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<sup>13</sup> FED. R. CIV. P. 26(a) advisory committee's note, *reprinted in* 97 F.R.D. 165, 216 (1983). *See generally* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2003.1 (discussing the 1983 amendments).

<sup>14</sup> *See, e.g., In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

<sup>15</sup> 97 F.R.D. at 216.

<sup>16</sup> *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008.1 (discussing the meaning and application of the principle of proportionality in discovery). The Advisory Committee Note also urged judges to be more "aggressive" in "discouraging discovery overuse." 97 F.R.D. at 216.

<sup>17</sup> That note was sounded, for example, by several participants and the 2010 Duke Conference on the Federal Rules. *See, e.g.,* John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 542 (2010) (noting substantial agreement at the Conference of the need for active judicial management).

<sup>18</sup> ARTHUR R. MILLER, THE AUGUST 1883 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE

give the following example: “In a \$10,000 damage case, spending \$50,000 on discovery is disproportionate.”<sup>19</sup> I must confess, from my Reporter’s vantage point I did perceive the need for imposing some restraint on cumulative and excessive discovery. Discovery’s cost seemed to be rising (which at least in part appeared to be a product of it having become a “profit-center” for many law firms billing on an hourly-fee basis, especially in the large-scale cases that had emerged in that period), the overuse and high cost of experts was becoming apparent, and discovery activity was thought by some to be causing occasional marginal, unnecessary, and even unethical lawyer behavior,<sup>20</sup> the latter was dealt with simultaneously in Rule 26(g).<sup>21</sup> But the 1983 provision was designed to have limited application, as my example indicates. Rule 26(b)(2)(C) was viewed as a modest exception to the basic and fundamental principle that all parties should have access to anything relevant to the “subject matter” of the action (now the parties’ claims or defenses). It was not intended to and did not undermine the basic scope-of-discovery provision. Nor was it expected to raise an issue in more than a small number of cases. Nonetheless, it was a discovery limitation—the first in a series of such amendments.

In retrospect, the Committee’s and my collective judgment was impressionistic, not empirical.<sup>22</sup> The practice of invoking the aid of the Federal Judicial Center to study and report on matters being considered by the Advisory Committee and the development of sophisticated research techniques were to come later. Also the stimulus for the 1983 changes may have reflected too narrow a range of cases and a number of undocumented assumptions about discovery practice. In my judgment, time has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26.<sup>23</sup> Those doubts continue to be applicable to the comparable assertions one hears today.

The Committee and I may have failed to put enough weight on the fact that in the vast array of lawsuits discovery did not (and do not) pose any particular difficulty. But certainly we did not intend to limit let alone impair the ability of parties whose access to relevant data is essential to

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MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984).

19 Ibid.

20 See Am. Bar Ass’n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 141–42 (1980) (“Discovery . . . is too easily abused . . .”). The Special Committee’s First Report is reprinted as an appendix to the Second Report. *Id.* at 149. See generally David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

21 The Advisory Committee Note to Rule 26(g) clearly shows the amendment was designed to counteract discovery abuse taking the forms of “excessive discovery and evasion.” (Italics added.) See generally 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2052.

22 The one discovery study relied on by the Committee and cited in its Note did not indicate that anything was fundamentally wrong with the discovery system. PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 35 (1978).

23 Advisory Committee composition also may have contributed to its willingness to accept the representations concerning discovery hyperactivity and cost.



establishing the bona fides of their claims to employ the discovery regime fully. That remained a fundamental philosophical principle. In particular, we recognized the very serious problem of parties having asymmetrical access to relevant data. In many litigation contexts critical information is in the defendant's possession and is unavailable to the plaintiff. That problem is even greater today because it is a natural aspect of the complexity of contemporary litigation and because the Supreme Court has increased the plaintiffs' pleading burden, which requires access to facts to establish "plausibility", and barred discovery until the almost inevitable motion to dismiss is denied and the complaint upheld. Some of the proposed amendments will exacerbate this problem.<sup>24</sup>

The attack on discovery has continued over the years. In 1993, Rule 30 was amended to limit the number and duration of depositions that can be taken without judicial authorization,<sup>25</sup> and Rule 33 was amended to create a presumptive limitation on the number of interrogatories that can be propounded.<sup>26</sup> (I have often wondered why these changes were necessary.) Then, in 2000, Rule 26(b)(1) was modified to limit the scope of discovery to material "relevant to any party's claim or defense" rather than to the more open-ended "subject matter" of the action as it had been since 1938.<sup>27</sup> I think this change, which is a textual limitation on the scope of discovery, sends an unfortunate restrictive signal despite the uncertain purpose of that "signal." This sequence of amendments was promulgated even though there is considerable reason to believe that in the vast majority of cases discovery usually works well, is quite limited (indeed, it is nonexistent in many cases), and its burdensomeness poses problems in a relatively thin band of complex and "big" cases.<sup>28</sup> Yet the past discovery amendments and the current proposals indiscriminately apply to all cases.

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<sup>24</sup> See the citations in notes 5-8, *supra*.

<sup>25</sup> Compare FED. R. CIV. P. 30 (1992) (requiring leave of the court to take more than thirty depositions), with FED. R. CIV. P. 30 (1993) (requiring leave of the court to take more than ten depositions). See 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2104, 2113 (discussing this change).

<sup>26</sup> Compare FED. R. CIV. P. 33 (1992) (permitting service of interrogatories by each party without limitation), with FED. R. CIV. P. 33 (1993) (permitting service of up to twenty-five interrogatories by each party).

<sup>27</sup> See 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008 (explaining the 2000 amendment and its impact); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875 (2001) (analyzing the amendment); see also Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001) (warning that the 2000 amendment will increase procedural barriers to relief without curbing litigation costs). The shift in orientation of the Advisory Committee and other participants in the rulemaking process is evidenced by the fact that in 1978 a virtually identical proposal was rejected. See Memorandum from Walter R. Mansfield, Chairman of the Advisory Comm. on Civil Rules to the Comm. on Rules of Practice and Procedure 6-8 (June 14, 1979). Rule 26(b)(1) currently does provide that on a showing of "good cause," the court may expand discovery to cover "any matter relevant to the subject matter" of the action. As discussed below, the Committee is now proposing to eliminate this useful safety valve.

<sup>28</sup> See Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684-86 (1998) (reviewing studies showing that one-third to one-half of all litigations involve no discovery). *But cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (arguing that discovery is "dysfunctional, with litigants utilizing discovery excessively and abusively").

Although one might argue that these amendments (and some might say even the current proposals) do not represent a fundamental undermining of federal discovery, they clearly depart from the philosophy of the original rules and their cumulative effect is significant. All of the enumerated rule alterations were designed to and do limit discovery.<sup>29</sup> The Committee’s present proposals would magnify these limitations. It must be remembered that discovery restrictions can negatively impact a citizen’s meaningful access to civil justice, exacerbate problems of information asymmetry, and impair the enforcement of many important public policies embedded in federal statutes. Rule amendments should be undertaken only with great caution, respond to a demonstrated need, and be adopted only in the absence of less Draconian solutions.<sup>30</sup> Broad access to discovery is a necessity because in many substantive contexts we are quite dependent on private litigation to augment governmental enforcement of federal normative standards. Recent events in the financial, real estate, pharmaceutical, and other markets, for example, have laid bare the consequences of the under-enforcement of federal regulatory policies.

It seems inappropriate, therefore, to be limiting the availability of an important procedure for effectuating national as well as state policies and providing people with a meaningful day in court. Discovery is often the key that opens the door to information critical to the remediation of violations of important constitutional, statutory, and common law principles as well as providing compensation for injuries sustained by citizens because of those violations. Effective discovery is the lifeblood for proving one’s case or defense. As the Supreme Court said in its seminal decision in *Hickman v. Taylor*:<sup>31</sup> “Mutual knowledge of all the relevant facts by both parties is essential to proper litigation.” Without it, even meritorious cases may fail or not even be instituted. Therefore it is imperative that limitations on the availability of discovery, such as those imposed by the Supreme Court in the pleading cases (*Twombly* and *Iqbal*) and on the scope of discovery (the Rule amendments)—particularly those that are inconsistent with the underpinnings of the 1938 Rules—be shown to be justified and carefully balanced against the importance of preserving the enforcement, compensation, and deterrence roles performed by civil litigation. Moreover, any restrictions on access to discovery or its scope must be limited to take account of the negative effects that they may have and the significant differences in the

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<sup>29</sup> The discovery rules were amended on several other occasions during the period under discussion in ways that are not presently relevant.

<sup>30</sup> See generally Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981) (explaining that discovery is essential to “the evolution of substantive law”).

<sup>31</sup> 329 U.S. 495, 507 (1947).



needs presented in various substantive contexts.<sup>32</sup>

To be specific about several of the current proposals. Some of them lack any empiric support and the justification for them has not been made. Moving present Rule 26(b)(2)(C), which is now under the caption “Limitations on Frequency and Extent,” to Rule 26(b)(1), which is the critical scope of discovery provision, ostensibly to give it greater prominence, is not merely a neutral or benign relocation as some proponents suggest. It effectively converts the provision into an independent limitation on the scope of discovery as the proposed Advisory Committee Note explicitly acknowledges. The Bench and Bar know of the existing provision and the public discussion of the proposal accentuates that. Greater attention to Rule 26(b)(2)(C) could be achieved by a revised Advisory Committee Note or by including a reference to it in Rule 16, thereby making it an aspect of judicial management. The proposed amendment to Rule 26(b)(1) represents a potential threat to the jugular of the discovery regime as we have known it. It would replace the longstanding—since 1938—single principle that the scope of discovery embraces anything that is relevant to a claim or defense (“subject matter” of the action until 2000) with dual requirements that the material sought be both relevant and proportionate according to five criteria that are both highly subjective and fact dependent. That is made clear by the use of the conjunctive “and” in the proposal. The Advisory Committee Note also makes it clear that the proponent of discovery must show the request’s relevance and proportionality. This is a dangerous potential reduction in the existing scope of discovery. It may well produce a wave of defense motions to restrict discovery on the ground that one or more of the five proposed proportionality criteria is absent, generating litigation costs and delays that offset any efficiency and economic values the proposals are thought to have. Concepts such as “the needs of the case”, “the importance of the issues at stake,” “the parties’ resources,” “the importance of the issues,” whether the proposed discovery’s “burden or expense” “outweighs” its “benefit” are quite likely to generate factually detailed briefing and argumentation with unpredictable results. Moreover, it is difficult to understand how a district judge is to evaluate the proportionality factors when the challenge comes before the discovery itself. Given their subjective character and the abstractness of the inquiry, the proposed amendment is fertile ground for increased costs and delays.

Although Rule 26(b) retains the same scope of discovery language as it has had since 2000, it eliminates the provision enabling the court—for good cause shown—to expand discovery to

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<sup>32</sup> The Honorable Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751-52 (2010).

include “any matter relevant to the subject matter involved in the action”—the 1938 to 2000 discovery standard. The Advisory Committee Note fails to justify this deletion of language that effectively has been in the Rule for over 75 years and has not been shown to produce deleterious effects; it simply asserts that relevant proportional discovery “suffices.” The effect of the proposal is to eliminate an important source of judicial discretion that could prove useful in particular cases.<sup>33</sup>

Because this safety valve has existed, the determination of what “is relevant” has not been onerous because the judge always could employ the “subject matter” provision to embrace the challenged matter. That no longer will be an option, and defendants will be motivated to contest relevance much more aggressively, obliging judges to decide that question, often at an early stage of the case when relatively little is known about the legal and factual issues in the case. Moreover, the amendment will create incentives for defendants to resist discovery; the result will be to impose delays and added costs, even if the court eventually finds the challenged material to be relevant and proportional. In short, the proposals may prove self-defeating.<sup>34</sup>

The proposals that would once again reduce the number of as of right depositions and interrogatories also seem quite unnecessary. As some of the witnesses before the Committee in its first hearing on these proposals testified, many if not most, plaintiffs, at least, only take those depositions they deem important and have learned to function within the current presumptive limit of ten. But they expressed the view that five was arbitrarily too restrictive. It is no answer to say, that the court may allow more. That simply generates motion practice with inevitable cost and delay as well as the possibility of inconsistent application. Why should that be promoted? Also these two proposals send a restrictive message regarding discovery to the Bench that will be heard and exploited by resource consumptive and dilatory conduct by counsel, thereby favoring the economic advantages of defense litigants.

The reduction of presumptive Interrogatories from 25 to 15 is particularly questionable. Interrogatories usually are not burdensome and are an inexpensive means of obtaining limited, but specific items of information that are useful for building a claim or defense. There are very few cases, if any, in which interrogatories are the source of discovery abuse. That was true even before there were any numerical limits on their use. And if an interrogatory seems too onerous, a

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<sup>33</sup> Also eliminated without any clear justification are the time-honored words “reasonably calculated to lead to the discovery of admissible evidence.” That deletion also is portrayed by the Advisory Committee Note as a limitation on the scope of discovery. What is the purpose of this change?

<sup>34</sup> Nothing is cited in the Committee Note that provides any empiric justification for any of the proposed limitations on discovery.

party can reply as best he or she can after a reasonable search, and allow the judge to decide whether anything else should be required.<sup>35</sup>

It is difficult to understand the utility of this type of tinkering with the Rules.<sup>36</sup> The discovery proposals are not paper cuts, and when they are added to the 2000, 1993, 1983 amendments, and the restrictive pleading, summary judgment, class action, expert testimony, and arbitration decisions by the Supreme Court, one has to be concerned that meaningful access to enable citizens to present their grievances is being seriously compromised.

In the aggregate, I fear that the proposed amendments could produce increased motion practice costs, delays, consumption of judicial time better spent in other ways, fact-dependent hearings, possible inconsistent application, and potential restrictions on access to information needed to decide cases on their merits. These effects will fall most heavily on important areas of public policy—discrimination, consumer protection, and employment, for example. If promulgated these changes may well deter the institution of potentially meritorious claims for the violation of statutes enacted by Congress or state legislatures or established by the courts. In short, the current proposals represent yet another procedural stop sign, and like the earlier discovery amendments there is considerable doubt they will have any constructive effect on the alleged discovery deficiencies that supposedly motivate them.

Debates about the positives and negatives of wide-angle discovery have gone on for decades—often with great intensity—and they undoubtedly will continue; discovery always has been an attractive target for defense interests. The focal point of contention occasionally changes: Sometimes it is the scope of discovery, or the number or length of depositions, or alleged excessive or intrusive document discovery. At present, discovery relating to electronically stored information is raising issues that some think may dwarf all that has come before; it already is dramatically altering today’s discovery debate and certainly will impact future discussions. It has become the 800 pound gorilla in the debate in an attempt to justify the latest discovery limitations that have been put forth by the Advisory Committee. Once again one hears Chicken Little crying that the sky is falling. It is not.

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<sup>35</sup> As an aside, I note that the amended Rule 36 allows 25 Requests for Admission (exclusive of requests relating to the authentication of documents). Assuming that there is a basis for placing a limit on requests under Rule 36, there is no reason for that limit to be different for discovery sought under Rule 33.

<sup>36</sup> When I became the Reporter to the Committee, the late Professor Charles Alan Wright, with whom I worked for 45 years on *the Federal Practice and Procedure* treatise, and a veteran of the rulemaking process, advised me “do not tinker, it destabilizes, and confuses, and creates procedural traps.” Regretfully, I believe certain of the other current proposals fall into that category. E.g., Rule 1.

The burdens and challenges of e-discovery are being confronted by various groups including the Advisory Committee on Civil Rules, several forward looking district judges, and the Sedona Conference. In 2006, for example, Rules 26(f), 33(d), 34, and 37(f) were amended to deal with certain aspects of electronic information.<sup>37</sup> Rulemaking and other e-discovery efforts continue, and a second generation of Federal Rule amendments seems contain. Some relief from the rigors and expense of electronic discovery as well as greater accuracy of retrieval apparently can be achieved, ironically, by the growing availability of sophisticated digital search techniques.<sup>38</sup>

There is every reason to believe that information retrieval science and the technology itself will prove to reduce costs, accelerate the e-discovery process, and enhance the accuracy of retrieval. Recent experience in a number of cases has shown that a combination of statistics, linguistics, and computer science can produce these desirable results through the development of customized discovery protocols that can employ sampling and iterative search strategies.

One hopes that the current, almost crisis environment concerning e-discovery and its cost and other issues will abate. The subject actually may prove to be a relatively short-term matter that calls for a bit of patience and retooling of discovery methodology by the profession. To be sure, this will require considerable patience and cooperation and education of the Bench and Bar. But that process, aided by a burgeoning investment by various companies in sophisticated information retrieval science is well underway. That seems to be a far preferable pathway than premature rulemaking that may completely miss the mark.

Another indication of what some see as the non-neutrality of the current proposals is the suggested elimination of Rule 84 and the forms. It is true that they are out of date, but eliminating the forms, including those showing the intended simplicity of pleading under the Federal Rules, will be construed as the rulemakers' acceptance—or implicit codification—of plausibility pleading under *Twombly* and *Iqbal* when in reality there has not been any fundamental re-examination of the possible deleterious effects of those cases' return to fact pleading, or any comprehensive or penetrating empiric research on the subject, or an exploration

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<sup>37</sup> See generally 8, 8A & 8B WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2003.1, 2051.1, 2178, 2218–19, 2284.1 (explaining the process and impact of the amendments).

<sup>38</sup> See *Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at \*1 (S.D.N.Y. Feb. 24, 2012), *adopted sub nom. Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (holding that computer-assisted document review can be appropriate in large-data-volume cases). See generally Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf> (analyzing and comparing automated and manual document review techniques).

of other possible Rule amendments to meet the concerns defense interests have voiced over the years but which have not been established. There really is no reason to take this action at this time; it is premature.

The increased pretrial termination of cases and the limitations on discovery in recent years has downgraded our commitment to the day-in-court principle, diminished the status of the jury trial right, and substituted accelerated decision-making by judges—or arbitrators—for adversarial trials of a dispute’s merits. It should be obvious that procedural stop signs primarily favor defendants particularly those who are repeat players in the system—large businesses and governmental entities. And I do not think it unfair to say that creating more of them plays into the hands of those who wish to limit litigation by burdening it, which negatively impacts citizen access and works against those in our lower and middle classes seeking entry to the system.

I do not think the current focus on gatekeeping, early termination, and posting procedural stop signs befits the American civil justice system. To me this is a myopic field of vision that completely fails to undertake a full and sophisticated exploration of other possibilities for dealing with assertions of “cost,” “abuse,” and “extortion”; unfortunately the current proposals have been presented without making an in depth evaluation of how real these charges are, which one would have assumed would precede proposing rule amendments. **The Committee should focus more on how to make civil justice available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged by their violation.**

I urge the Advisory Committee to see the current discovery and Rule 84 proposals against the background of the last twenty-five years, to recognize that our civil justice system has lost some of its moorings, and to see that the proposed diminutions on discovery lack any demonstrated justification. There are a myriad of possibilities other than the blunt instrument of erecting stop signs to curtail truly unnecessary discovery other than the blunt instrument of erecting stop signs that have the potential of impairing effective access to our courts. I believe much can be achieved, for example, through more extensive and sophisticated judicial management as seems to be favored by many members of the profession and by promoting cooperation between and among counsel. The rulemakers should fully explore other options to deal with the relatively small band—at least in terms of numbers—of complex cases that need

special treatment by our federal judges. This might well include the possibility of asking for Congress' help regarding the current text of the Rules Enabling Act.<sup>39</sup>

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<sup>39</sup> Consideration might be given to the desirability of eliminating the concept of “general” rules now found in the Rules Enabling Act, 28 U.S.C. § 2072, so that special approaches might be formulated to deal with different categories of cases, perhaps in terms of dimension or complexity or substantive area. It simply may be time to recognize that one set of procedural rules no longer fits all cases.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURTHOUSE  
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SHIRA A. SCHEINDLIN  
UNITED STATES DISTRICT JUDGE

January 13, 2014

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Thurgood Marshall Building  
One Columbus Circle, Room 7 - 240  
Washington, D.C. 20544

Re: Comments on Proposed Rules

Dear Committee Members:

Thank you for the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure. As background to these comments I note the following: I have served as a United States District Judge for nineteen years, and previously served as a United States Magistrate Judge for almost five years. I am also a former member of the Advisory Committee on Civil Rules having served from 1999 through 2006. I attended the Duke Conference in 2010, participating in a panel that addressed a potential rule on preservation, and subsequently attended two mini-conferences in Dallas sponsored by the Advisory Committee, again focusing on the issue of preservation. Finally, I have authored a number of opinions in the area of electronic discovery, co-authored the first casebook on that subject, and frequently write and lecture on that topic.

Many of the new proposals have great merit and I support them fully. I will only comment on those rules that I believe should not be adopted – or at least not as currently drafted.

## 1. Proposed Rule 26(b)(1): Scope in General

The Committee has made several significant changes to Rule 26(b)(1), the rule that governs the permitted scope of discovery in civil actions. The biggest change is to define the scope of discovery in a new way. In the current rule scope is defined as that which is relevant to a claim or defense and, upon a showing of good cause, relevant to the subject matter of the action. The proposal would re-define scope to include two elements: relevant to a claim or defense *and* proportional to the needs of the case. The proposal eliminates the ability to reach subject matter upon a showing of good cause.

There is no question that this proposal is intended to narrow the scope of permissible discovery. The first change, eliminating even the possibility of expanding the scope of discovery to the subject matter of the action, is unnecessary. In the seven years since the adoption of the 2006 amendments which established the two-tier scope standard, I have not heard any disputes regarding the scope of permissible discovery. I suspect that the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not. The sole purpose of eliminating the second tier is to send a signal that the permissible scope of discovery is being narrowed – although there is no evidence that the current definition of scope is causing any problems.<sup>1</sup> Indeed, the Committee provided no explanation for its decision to drop the second tier other than that the first tier is “sufficient.” Respectfully, this is not a sufficient explanation to warrant a change that contracts the scope of discovery.

The second change adds a proportionality assessment to the definition of scope. This change raises several concerns. *First*, the rule invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional to the needs of the case. This could become a common practice, requiring requesting parties to routinely move to compel the production of the withheld materials. This, in turn, will increase costs and engender delay. **The courts could experience a rise in motion practice as requesting parties are forced to make motions based on the**

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<sup>1</sup> Some experts in e-discovery have expressed concern that restricting discovery to that which 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.



routine assertion of a proportionality objection. Courts are overburdened with motion practice as it is – given the rise in motions to dismiss arising from the decisions in *Twombly* and *Iqbal*. This new proportionality motion may take a busy court months to decide – not to mention that it takes parties anywhere from six to ten weeks (in my experience) to brief any motion. And motions are expensive. I suspect that any motion of substance costs \$25,000 at today’s hourly rates.

*Second*, the proposed rule does not specify which party bears the burden of proof. It appears to me that if a producing party makes a “proportionality” objection, the burden of proof will be on the requesting party to show that the requested information is proportional to the needs of the case. This is burdensome and unfair at the outset of a case, and this burden is more likely to fall on plaintiffs than on defendants. As just noted, all motion practice is expensive and all motions result in delay. If the burden of proof falls on plaintiffs, given that they typically (albeit not always) have less resources than defendants, this is a significant new expense to be considered when bringing a case in federal court. I understand from comments by Committee members at the first public hearing on the proposed rules that some believe that the burden of proof will fall on the producing (or objecting) party rather than on the requesting party, finding support for this conclusion in Rule 26(g)(3). If this is indeed the case – a proposition that seems dubious to me – then it would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party.

*Third*, the rule specifies that proportionality should be assessed by considering “the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Addressing five factors in every motion will be burdensome and may not be particularly informative to the court in making an assessment of proportionality. The requesting party will say the case is worth one million dollars, and the producing party will say it is worth ten thousand dollars. How will a court fairly decide the true amount in controversy at the very outset of the case? The producing party will say the burden or expense of the proposed discovery is great – it will cost us millions of dollars to retrieve the requested information – and the requesting party will say the producing party is exaggerating and the search and review can be done for far less if the requesting party uses less expensive and more efficient means to conduct the search. What a nightmare for the court! Does a

court then appoint an expert to determine the true burden or expense of responding to the request? Does the court investigate the sources on which records reside and perhaps arbitrarily decide the number of custodians whose records must be collected, retrieved, and reviewed? And then the court must balance the alleged burden and expense against the potential benefit. **How, exactly, can a court assess the benefit of materials that have not been identified – except in the most general way – at the very outset of the case? The proposal is not realistic.** Indeed, in an article repeatedly cited by the United States Supreme Court in its landmark *Twombly* opinion,<sup>2</sup> Judge Frank Easterbrook noted that “[t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow.”<sup>3</sup>

The current definition of scope has been working well. Most studies show that in the vast majority of cases the lawyers and parties believe that the amount of discovery requested and taken is just about right.<sup>4</sup> Requiring this new

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<sup>2</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (citing the Easterbrook article twice in the majority opinion and once in the dissent).

<sup>3</sup> Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-39 (1989) (further noting that “[j]udicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. . . . We [referring to judges] cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice *we lack essential information*. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole . . . from a request that was not justified at the time?)(emphasis added). *See also* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 899-900 (2009) (“Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of litigation.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603-04 (2001) (arguing that proportionality limits are impractical because the trial court is not in a good position to assess whether the desired information is worth the cost).

<sup>4</sup> Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009), at 27, available at

assessment at the very *outset* of the case may result in the unintended consequence of increasing cost and delay instead of reducing it. Both the parties and the court have had the proportionality tool available for years. It was not often raised, but when it was, it was raised at a time in the case when both the parties and the court had developed significant information about the case that allowed the court to deal intelligently with the objection. A proportionality assessment at the outset of a case may be useful in a mega case, but given that the rules are trans-substantive, it is unfortunate to impose this new requirement in every case and with respect to every discovery request.

The third change in the proposed rule eliminates the following language in the current rule: “parties may obtain discovery . . . 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.” This language, in substance, has governed the use of all discovery devices for forty-four years – since 1970 – and depositions in particular before that. The language is useful because it encourages the early identification of sources of information and of persons with knowledge of the location of discoverable information. Such discovery is particularly important when dealing with voluminous electronic records. When language is eliminated lawyers tend to argue that the act has a meaning and is not without consequence. I am concerned that some lawyers will argue that the rule no longer contemplates that such information is within the scope of permissible discovery. I see no harm in leaving the language in the rule and, once again, the Committee provides no explanation justifying its deletion.

The fourth and final change eliminates the long-standing language that follows: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” There is no empirical evidence that this language has caused any real problems – it appears, however, that the Committee instinctively believes (or speculates) that courts have used this language to expand the definition of relevance. But this ignores the words in the current rule. The language now is qualified by the word *relevant*. All it says is that *relevant information* (*i.e.* relevant to a claim or defense) need not be admissible at trial if it is likely to lead to the

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[http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

discovery of admissible evidence. It does *not* expand the scope of relevance or create an exception that swallows the rule. The Committee proposes the following language to replace the current rule: “Information within this scope of discovery [*i.e.* relevant and proportional] need not be admissible in evidence to be discoverable.” The change will be seen as another signal to the court that the scope of discovery is to be narrowed. The meaning is the same – admissibility is not the test of relevance. But the deletion of the phrase “likely to lead to the discovery of admissible evidence” is unnecessary and leads to the conclusion that the Committee meant to narrow the scope of discovery by this change, thereby adding an arrow to the quiver of objecting producing parties.

In sum, there is no basis for this change in the rule defining the scope of discovery. The rule was amended just seven years ago. It is too soon and too often to once again revise this rule and to further contract the scope of discovery. This change appears to be weighted in favor of defendants (generally the producing party) and against plaintiffs (generally the requesting parties) and does not have the appearance of fairness and neutrality. I view it as 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 position in the world of international commerce. The Committee should not respond to this interest group in formulating rules governing all civil cases in the federal courts.

## 2. Rule 26(c)(1)(B): Protective Orders - in General

This is a small but important change. For years, the Committee has been urged to write a cost-shifting rule. The pressure to do so has been repeatedly resisted. But cost-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, where each party bears its own costs, absent a sanction for wrongful conduct. In 2006, a change was made in Rule 26(b)(2)(B) permitting a party to obtain discovery of information that is “reasonably accessible” but also permitting a party to obtain discovery of information that is “not reasonably accessible” if it can show “good cause” to reach the second tier of information, and if such discovery satisfies the proportionality rule of 26(b)(2)(c). The rule then states “the court may specify conditions for the [second tier] of discovery.” The Advisory Committee Notes explain that one such condition is cost-shifting. In other words, if a court permits a requesting party to obtain information that is not reasonably accessible, it can also require that party to pay for such discovery. Now, the Committee proposes that in

issuing an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, the court may “specify[] terms, including time and place *or the allocation of expenses*, for the disclosure or discovery.” This is another effort to shift the costs of discovery to the requesting party. In combination, these two rules may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without. That has not been our system of civil justice – and I hope it does not become the default position.

### 3. Rule 30: Depositions by Oral Examination

Two changes to Rule 30 are proposed as follows: the presumptive number of depositions is reduced from 10 to 5, and the presumptive time limit remains one day which is now defined as 6 hours instead of 7 hours. Neither of these changes is wise or necessary. In my experience, lawyers work well together to determine the number of depositions needed in a case. It is very rare that I hear a dispute on this issue. Parties in large cases routinely agree to more than 10 depositions per side; in smaller cases the parties take no more depositions than are necessary – usually less than 10 per side. The arbitrary reduction from 10 to 5 is just another signal that the Committee believes discovery must somehow be narrowed or curtailed based on the unsubstantiated premise that the system is subject to abuse. In fact, as I noted earlier, a 2009 survey by the Federal Judicial Center revealed that most lawyers believe that the amount of discovery in their case was just about right.<sup>5</sup> An ancillary concern is that the cost of resolving objections to the number of depositions will fall disproportionately on parties in smaller cases. In large cases the parties will inevitably agree to more than five depositions per side. But in smaller cases, if an objection is made, the parties will spend money raising the dispute with the court – which must then be resolved – both of which increase cost and delay. The proposal to reduce the presumptive time limit on depositions by one hour is even worse. This will again lead to unnecessary disputes that must be decided by a telephone call to chambers. The 6 hours will be measured with a chess-clock approach to every rest break, meal break, or colloquy. Lawyers will try to “run the clock” to protect a witness. The 7-hour rule was generally viewed as a full day. There is no need to make this change. It cannot be viewed as an improvement, but only as an invitation to mischief and gamesmanship.

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<sup>5</sup> See *supra* n. 4.



#### 4. Rule 33: Interrogatories to Parties

The proposed rule would reduce the presumptive number of interrogatories from 25 to 15. I oppose this change for the same reasons I oppose the changes to Rule 30 governing depositions. There is no empirical evidence that 25 interrogatories has caused any problems or that it is resulting in undue cost or delay. It is a change only for the purpose of signaling a narrowing of the scope of discovery and will lead, once again, to an increase in both cost and delay based on the transactional cost of resolving a dispute regarding the appropriate number of interrogatories. As with the deposition limits, these disputes are more likely to be raised in smaller cases than in the larger cases where the parties will stipulate to more than 15 interrogatories. There is simply no proof that this change is necessary.

#### 5. Rule 37(e): Failure to Preserve Discoverable Information

The proposed rule was designed to address the perceived problem of over-preservation but in the end does no such thing. The Committee sought input regarding the possibility of drafting a rule addressing preservation but in the end determined that they could not propose such a rule. Instead, they decided to address the preservation problem through the retrospective lens of whether a sanction should be imposed for the loss of information. The second purpose of the proposed rule was to create a national standard for the imposition of sanctions for the loss of information. At the moment, the Circuits are in disarray as to what state of mind on the part of the spoliating party warrants any particular sanction. The second goal is laudable. I agree that a single national standard for the federal courts is advisable although I note that this standard will not bring national uniformity as the fifty state courts may adopt diverse standards that may differ from that adopted in the rules governing the federal courts.

The proposed rule makes a distinction between curative measures and sanctions – although it fails to clearly draw the line between the two. Curative measures may be ordered without regard to the spoliating party's state of mind. Rule 37(e)(1)(A) provides that such measures may be imposed “if a party fails to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation” and can include additional discovery, any expenses incurred by the failure to preserve including attorneys' fees and “curative measures,” which is not a defined term. Rule 37(e)(1)(B) then provides that a

court may impose any sanction listed in Rule 37(b)(2)(A) (adverse inference, preclusion, striking pleadings, staying proceedings until violation is remedied, dismissing the action, entering a default judgment, or issuing a contempt citation), only if the court finds that the loss of evidence “caused substantial prejudice” *and* was done “willful[ly]” *or* “in bad faith” or “irreparably deprived a party of any meaningful opportunity” to present a claim or defend against it. The Advisory Committee Notes make clear that the second alternative should rarely be used. The Note also advises that this rule is meant to eliminate a court’s ability to use its inherent authority to impose a sanction. I oppose the proposed Rule 37(e) for the following reasons.

*First*, the extent of permissible curative measures is unclear. In *Mali v. Federal Insurance Co.*<sup>6</sup> the Second Circuit held that 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, then the jury could infer that the lost information was unfavorable to that party. The Court clarified that this was not a sanction and therefore neither the court nor the jury was required to make the preliminary finding that the lost material was relevant or that the alleged spoliating party acted with a culpable state of mind. The holding in *Mali* sounds very much like a “curative measure” under the proposed new rule – in that there is no need to determine culpable state of mind and the result would be to “cure” the damage caused by the loss of information. But how many judges would think this jury instruction is a curative measure?

*Second*, in order to impose a sanction listed in Rule 37, the court must find that the spoliating party’s action caused “substantial prejudice” and was “willful” or in “bad faith.” This language is fraught with problems. 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 “willful” mean? My research shows that it varies depending on the context in which it is used. Is it merely any intentional act or does it require some level of malevolence (*i.e.* wrongful intent)? I would not like to see this problem cured by eliminating “willful” and leaving only “bad faith.” That sets the bar too high. If only bad faith conduct can be sanctioned then why should any party be careful about preservation and make a real effort to preserve

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<sup>6</sup> 720 F.3d 387 (2d Cir. 2013).

relevant non-privileged information. 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.”

*Third*, I am very concerned about the burden of proof. Once again, it appears that the burden of proof is placed on the innocent party to show “substantial prejudice” or that it has been “irreparably deprived of any meaningful opportunity” to present a claim or defend against one. The innocent party may well be required to prove that the spoliating party acted with a culpable state of mind but it is unreasonable to ask that party to prove prejudice or its inability to prove its case when it cannot know the value of the information that it does not have. The better approach – and one which has been successfully used for some time – would presume that the loss of information would cause substantial prejudice (or has irreparably damaged the innocent party) *if* the culpable conduct was done with a sufficiently egregious state of mind. This presumption can then be rebutted by the spoliating party if it can show that despite the loss of information the innocent party has not been harmed. This is a fair approach and ought to be retained.

*Fourth*, in determining whether a failure to preserve was willful or in bad faith the proposed rule directs the court to consider five factors. But a review of these factors reveals that they have little or nothing to do with 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 given the high bar of “willful” or “bad faith” the factors are not helpful.

In sum, the proposed Rule 37(e) will only create new problems instead of curing old ones. Magistrate Judge James C. Francis has submitted an alternative rule proposal.<sup>7</sup> I agree with his proposal and with all of his comments concerning the proposed rule circulated for public comment.

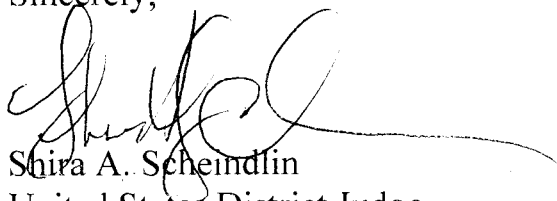
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<sup>7</sup> The Hon. James C. Francis IV, *Comment on Proposed Changes to Rule 37(e) of the Federal Rules of Civil Procedure* (Jan. 10, 2014).



I thank the Committee for the opportunity to comment on the proposed amendments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shira A. Scheindlin', with a long horizontal flourish extending to the right.

Shira A. Scheindlin  
United States District Judge

**Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert,  
Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed  
Amendments to Federal Rules of Civil Procedure**

**Submitted February 5, 2014**

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

To the Committee on Rules of Practice and Procedure:

We write to urge this Committee to reject the proposed amendments that redefine the scope of discovery, lower presumptive limits on discovery devices, and eliminate Rule 84 and the pleading forms. The undersigned are law professors who teach and write in the area of federal civil procedure. Each of us also litigated in the federal courts prior to entering the academy, and remain actively involved in professional practice.

In our judgment, two key issues bear close consideration by the Committee as it considers how to proceed: (1) What problem does the Committee seek to solve? (2) On balance, how likely is it that the proposed amendments will improve the status quo? As in 1993 and 2000, the Committee is focused on addressing a perceived problem of excessive discovery costs. In supporting the current proposed amendments, the Committee recognizes that empirical data show no widespread problem, but nevertheless hopes that new across-the-board limits on discovery will lessen discovery costs in the small number of complex, contentious, high stakes cases where costs are high. The Committee is correct about the data: most critically, the Federal Judicial Center's ("FJC") 2009 closed-case study shows that in almost all cases discovery costs are modest and proportionate to stakes. As in 1993<sup>1</sup> and in 2000,<sup>2</sup> evidence of system-wide, cost-multiplying abuse does not exist, and the proposed amendments are not designed to address the small subset of problematic cases that appear to be driving the Rule changes. We anticipate that,

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<sup>1</sup> Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1411-43 (1994) (strongly criticizing the "soft social science" opinion evidence used by the rulemakers behind the 1993 reforms, while noting that the findings of the methodologically sound empirical studies did not support the reforms).

<sup>2</sup> James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (evaluating the RAND corporation study of the 1993 reforms, which found that under that set of rules lawyer work hours on discovery were 0 for 38% of general civil cases, and low for the majority of cases.); see also *id.* at 640 (table 2.10 shows that while discovery costs grow with size and complexity of case, the proportion of total costs they represent does not dramatically increase; the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively); Thomas E. Willging, Donna Stienstra, John Shepard, and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531-32 (1998) (finding that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%).

as with past Rule changes, untargeted amendments will fail to eliminate complaints about the small segment of high-cost litigation that elicits headlines about litigation gone wild; instead they will create unnecessary barriers to relief in meritorious cases, waste judicial resources, and drive up the cost of civil justice. The amendments are unnecessary, unwarranted, and counterproductive.

In our view, those who support major change to the Federal Rules are responsible for demonstrating that proposed amendments will, on balance, make the overall system fairer and more efficient. Perceptively, Judge Lee Rosenthal has noted that “[s]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens.”<sup>3</sup> Even assuming that a small subset of cases presents a problem that should be solved, the proposed amendments will do little, if anything, to decrease costs in these cases. As the two authors of the FJC’s 2009 empirical study commented:

Instead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues. . . . Otherwise, we may simply find ourselves considering an endless litany of complaints about a problem that cannot be pinned down empirically and that never seems to improve regardless of what steps are taken.<sup>4</sup>

Our concern is not just that the proposed amendments will be ineffectual. Our greater worry is that they will increase costs to litigants and the court system in those average cases that operate smoothly under the current rules. In our view, the amendments are likely to spawn confusion and create incentives for wasteful discovery disputes. Even more troubling, by increasing costs and decreasing information flow, the proposed amendments are likely to undermine meaningful access to the courts and to impede enforcement of federal- and state-recognized substantive rights.

We begin by discussing the relevant data regarding costs of discovery. We then turn to the proposed amendments regarding Rule 26, the proposed restricted uses of various discovery devices in Rules 30, 31, 33 and 36 and, finally, the proposed elimination of the Forms and Rule 84.

## **I. Relevant Data Regarding Costs of Discovery**

### **A. Most Cases Involve Minimal or No Discovery**

Before considering each of the proposals in more detail below, it is important to begin with a discussion of the best available empirical evidence. Thanks to research conducted by the

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<sup>3</sup> Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228 (2010).

<sup>4</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010).

ablest of researchers, what we know is that discovery costs are not disproportionate in the vast majority of cases.<sup>5</sup> We will focus on one of the most recent and comprehensive studies that, as it turns out, was undertaken by the Federal Judicial Center at the behest of this Committee.<sup>6</sup>

In late 2008, this Committee asked the FJC to look closely at discovery costs in civil cases and to report its findings to the May 2010 conference on civil litigation at Duke University Law School. To do so, the researchers were very careful to frame their research to find cases that involved as much discovery as possible. Thus, they systematically excluded from their study any cases in which discovery was unlikely to take place. The researchers also eliminated any case that was terminated less than 60 days after it had been filed. What was left, then, was a study that likely over-represented how much discovery takes place in a typical civil case in federal court. The result is acknowledged to be a careful and exhaustive study.

The FJC analyzed thousands of closed civil cases, revealing that the median cost of litigation, including attorneys' fees was \$20,000 for defendants and \$15,000 for plaintiffs. These figures came as a surprise to many, particularly those proponents of reform who had long assumed that litigation costs routinely careen out of control in federal civil cases. Just as significant—and perhaps just as surprising to many observers—were the FJC's findings with regard to the overall percentage of total litigation costs attributable to discovery. Discovery costs were reported by plaintiffs' lawyers to account, at the median, for only 20% of the total litigation costs; the median figure reported by defendants' lawyers was 27%. Standing alone, these findings undercut the conventional wisdom, repeated in headlines and sound bites, that discovery costs are far-and-away the most significant part of total litigation costs in federal cases. And linked to these findings was, perhaps, the most important finding of all. At the median, the reported costs of discovery, including attorney's fees, amounted to just 1.6% of stakes of the case for plaintiffs and only 3.3% of the case's value for defendants. This means, of course, that in half of all civil cases, the costs of discovery amounted to even less than 1.6% of the case's value for plaintiffs and less than 3.3% of its value for defendants.

It is hard to overstate the importance of these data regarding discovery costs relative to stakes. The real concern with discovery costs, after all, is not that they are too high in some absolute sense. Given how widely case values vary, one cannot compare discovery costs in a \$100,000 case with those incurred in a case worth \$10 million or more. The real worry is discovery costs that are disproportionate to a case's value—a point that surely needs no further defending here in light of the Committee's own recognition of the critical role that proportionality plays in evaluating discovery. But the data fail to demonstrate that disproportionality is a systemic problem.

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<sup>5</sup> For a helpful recent summary of the available empirical evidence, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088-89 (2012).

<sup>6</sup> Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). See also Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010) [hereafter "Defining the Problem"].

## **B. The Minority of Cases in Which Discovery Costs Are High Will Not Be Affected by the Proposed Amendments**

While there is a persistent feeling in some quarters that litigation costs are high, and that discovery costs are the biggest driver of that cost, the actual problem to be attacked is not well defined. Without more clarity about the nature or causes of the problem, untargeted changes are unlikely to succeed.

As noted above, the FJC's study found little problem in the average case. It also identified characteristics that are associated with high litigation costs. The most significant is the amount of money at stake in the litigation, with factual complexity also highly correlated with more expense.<sup>7</sup> Law firm economics also have an important impact on litigation costs. When other variables are controlled for, law firm size alone more than doubles the costs, and hourly billing also tends to make costs higher.<sup>8</sup> These findings are consistent with the results of earlier empirical studies.

Complex, high-stakes cases may be riddled with high discovery costs. Whether these costs are unjustifiably high has not been demonstrated. What is clear is that these are the cases least likely to be affected by very low presumptive limits on discovery devices or by enhanced focus on the proportionality rules. Many of the factors associated with high discovery costs will not be sensitive to changes in the procedural rules. Some disputes will always have very high stakes, making expenditures on those disputes rational. Some disputes will always be factually complex, requiring time and effort to ascertain and share relevant facts in a way that allows the parties to adequately price claims and bargain toward settlement. Some parties will always hire large law firms that bill by the hour at very high rates.

As the FJC's own researchers have noted, previous changes in the discovery rules "may have failed to reduce costs because [they did] not address the actual drivers of cost. Perhaps the procedural reforms have not reduced the purportedly high costs of litigation because those costs have a source other than the Federal Rules themselves."<sup>9</sup> Problems that arise outside the procedure rules cannot be eliminated through rule changes.

In summary, the data establish that there is *not* a widespread problem with discovery costs and that the traits most strongly associated with increased costs are not sensitive to procedure rules. Neither conclusion supports a major package of rule amendments, particularly when those amendments may increase costs in other ways.

## **II. Rule 26: Proposed Amendments Re-Defining the Scope of Discovery**

Three of the proposed amendments would change the way Rule 26 defines the scope of discovery: eliminating the trial judge's discretion to allow discovery relevant to the "subject matter" of the action; eliminating the well-established "reasonably calculated to lead to the

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<sup>7</sup> Lee & Willging, Defining the Problem, *supra* note 6, at 783.

<sup>8</sup> *Id.* at 784.

<sup>9</sup> *Id.* at 783.

discovery of admissible evidence” language; and inserting proportionality limits into the very definition of matter within the scope of discovery. All three proposals 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, making the amendments unnecessary. Vague complaints that the proportionality rules are underutilized hardly establish that judges are balancing improperly or are unaware of the need to do so. Yet implicit criticism of the way trial judges are managing cases and ruling on discovery issues animates the proposed rule changes, many of which claim to make little or no change in the substance of Rule 26. This is no substitute for a coherent explanation of the need for change or why the proposed changes are the appropriate tool to fix the perceived problem.

**A. Rule 26(b)(1): Elimination of a district judge’s discretion to order discovery relevant to the “subject matter” of the action**

The Committee’s current proposal to amend Rule 26(b)(1) eliminates the power of courts to grant—upon a showing of good cause—access to discovery relevant to the subject matter of the action. This proposed change is without basis, would narrow judicial discretion, and make it more—not less—difficult to carry out reasonable case management. Moreover, these changes would unduly narrow the scope of discovery and lead to additional and complex discovery disputes, while giving courts minimal guidance for resolving them.

Some historical background about Rule 26 can inform this discussion. For the first six decades of the Federal Rules of Civil Procedure, parties were permitted to seek and obtain discovery that was relevant to the “subject matter” of the action.<sup>10</sup> The 2000 Amendments altered this formulation, permitting discovery relevant to the “claims or defenses” in the action, with broader “subject matter” discovery available only upon a showing of good cause. Giving district judges the power to broaden discovery was recognized as necessary to ensure flexibility and encourage judicial involvement in discovery management. The Committee also recognized that defining which information is relevant to subject matter but not to claims or defenses could be difficult.<sup>11</sup> Accordingly, the Committee thought it important to maintain the possibility of court involvement to “permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.”<sup>12</sup>

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<sup>10</sup> In 1978, the Committee considered a proposal nearly identical to the current one, but ultimately rejected it for reasons that resonate today. The Committee reasoned that deleting the term “subject matter” would simply invite litigation over its distinction from “claims or defenses.” Moreover, although the Committee was aware of no evidence that discovery abuse was caused by the broad term “subject matter,” it also was doubtful “that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language.” Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 627-28 (1978).

<sup>11</sup> Commentary to Rule Changes, Court Rules, 192 F.R.D. 340, 389 (2000) (“The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.”).

<sup>12</sup> *Id.*



The Committee's current proposal gives little consideration to the principles that guided its decision fourteen years ago. The explanation for eliminating the discretionary power of the court is inadequate, based centrally on the conclusory assertion that "[p]roportional discovery relevant to any party's claim or defense suffices."<sup>13</sup> The Committee has offered no substantive reason for moving away from the discretion currently afforded the parties and the court to shape discovery according to "reasonable needs of the action."<sup>14</sup> We urge this Committee to reject this kind of unsupported assertion. Had there been a pattern of judicial abuse of the discretion afforded them by the current Rule 26(b)(1), one would expect that it would be evident in the case law. However, the decisions applying this aspect of Rule 26(b)(1) suggest that courts have exercised their discretion sparingly and appropriately.<sup>15</sup> Perhaps the Committee has a different understanding of how courts have exercised discretion under Rule 26(b)(1) but, if so, the basis for that alternative view has not been shown. Nothing suggests that the authority to allow such discovery—upon a showing of good cause—plays any role in the "worrisome number of cases" where "excessive discovery" is thought to occur.<sup>16</sup>

Not only is the existing evidence insufficient to justify making this change to Rule 26(b)(1), but we believe that the Committee underestimates the potential disruption the proposed rule would have on litigation. For instance, the proposed Advisory Committee Notes state that "[i]f discovery of information relevant to the claims and defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate."<sup>17</sup> But this is precisely the opposite of what the 2000 Committee believed would be

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<sup>13</sup> See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 297 (Aug. 2013) [hereafter "Preliminary Draft of Proposed Amendments"].

<sup>14</sup> 192 F.R.D. at 389.

<sup>15</sup> Of the reported district court cases we reviewed interpreting the "good cause" standard, none suggests unreasonable decisionmaking. See, e.g., *Jones v. McMahon*, 2007 WL 2027910 \*15 (N.D.N.Y. July 11, 2007) (finding good cause to permit a limited deposition regarding matter relevant to the subject matter of the action, but denying request in large part because of lack of good cause showing); *Rus, Inc. v. Bay Indus., Inc.*, No. 01 Civ. 6133, 2003 WL 174075, \* 14 (S.D.N.Y. Apr. 1, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not make "any showing of need"); *RLS Assoc., LLC v. United Bank of Kuwait, PLC*, No. 01 Civ. 1290, 2003 WL 1563330, \*8 (S.D.N.Y. March 26, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not show that "production would serve the reasonable needs of the action"); *Johnson Matthey, Inc. v. Research Corp. et al.*, No. 01 Civ. 8115, 2002 WL 31235717, \*2 (S.D.N.Y. Oct. 3, 2002) (finding no good cause for disclosure of documents relevant to subject matter, but not to claims or defenses); *Hill v. Motel 6*, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (good cause not shown for broad discovery of personnel files in disparate treatment case, where discovery would relate to disparate impact, but finding good cause for the disclosure of specified employees' personnel files); *Cobell v. Norton*, 226 F.R.D. 67 (D.D.C. 2005) (rejecting request for discovery beyond the scope of plaintiff's statutory claim in a suit seeking an accounting of Indian trust funds. Discovery related more generally to asset management was not permissible as it was beyond the scope of plaintiffs' statutory claim); *Jenkins v. Campbell*, 200 F.R.D. 498 (M.D. Ga. 2001) (breach of contract plaintiff was entitled to discovery only on those claims remaining after the entry of partial summary judgment against him, although court retained authority to revise partial summary judgment order at any time prior to the entry of final judgment).

<sup>16</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

<sup>17</sup> *Id.* at 255-56.

achieved by limiting discovery to claims and defenses asserted in the pleadings.<sup>18</sup> 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. Thus the elimination of “subject matter” discovery eliminates a tool necessary to address the problem of information asymmetry that is so common when an individual or small business faces a large entity in litigation. If Rule 26(b)(1) were amended to prevent judges from ordering discovery relevant to the “subject matter” of the action, the ability to balance this informational asymmetry would be more severely limited. For example, a plaintiff who has a valid § 1983 claim against a municipal official would be hard-pressed to seek discovery relevant to a potential *Monell* claim against the municipality, absent the power of a court to grant access to material relevant to the subject matter of the action. And the plaintiff with a valid claim against the municipality may have little additional opportunity to develop information necessary to support her claim. Finally and relatedly, we have great concerns that the uncertainties that will follow from this amendment will create incentives for parties resisting discovery to file more motions to litigate relevance, increasing discovery costs and forcing judges to spend time ruling on a new group of motions. We have seen how past changes to Rule 11 increased satellite litigation pertaining to sanctions rather than improving the efficiency or fairness of the civil justice system.

In sum, the Committee has articulated no specific benefit that will outweigh the costs of altering the current framework of Rule 26(b)(1). The existing text requires an affirmative showing of good cause to justify discovery that is relevant to the “subject matter involved in the action” but not to “any party’s claim or defense.” Even when good cause is shown, such discovery is subject to the limits already articulated in Rule 26(b)(2)(C), and may be limited by a protective order under Rule 26(c). No adequate explanation has been offered for why these existing protections are insufficient to ameliorate any negative consequences of permitting occasional discovery regarding the subject matter of the litigation. There is no basis for believing that the proposed amendment would, on balance, produce more good than harm, and so we urge the Committee not to adopt this proposed change to Rule 26(b)(1).

## **B. Rule 26(b)(1): Admissibility and Relevance**

As the Committee recognizes, it has long been the case that discovery is permitted even as to information that—standing alone—would not be admissible at trial.<sup>19</sup> Yet the Committee’s current proposal to amend Rule 26(b)(1) would eliminate an important sentence that has guided courts for decades: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>20</sup> Again the Committee’s proposed amendment does not target a documented problem and runs the risk of creating wasteful satellite litigation.

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<sup>18</sup> 192 F.R.D. at 389 (“The rule change . . . signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”).

<sup>19</sup> See Preliminary Draft of Proposed Amendments, *supra* note 13, at 266.

<sup>20</sup> In its place, the proposal would add a sentence that omits the phrase “reasonably calculated to lead to the discovery of admissible evidence.” See *id.* at 289-90 (“Information within this scope of discovery need not be admissible in evidence to be discoverable.”).



The Committee explains that this change is not meant to modify the definition of “relevance,” but rather to prevent improper use of the “reasonably calculated” language to allow discovery into information that is not, in fact, relevant.<sup>21</sup> As an initial matter, these concerns appear to be based on nothing more than anecdotal impressions.<sup>22</sup> There is no empirical evidence that this language has had the effect hypothesized by the Committee. The current Rule already makes clear that the “reasonably calculated” language applies only to “[r]elevant information”; that was the point of the 2000 amendment.<sup>23</sup>

Even if viewed in isolation, however, the phrase “reasonably calculated to lead to the discovery of admissible evidence” cannot permit discovery beyond what is otherwise authorized by Rule 26(b)(1). Under the Federal Rules of Evidence, evidence is only admissible if it *is* relevant.<sup>24</sup> The need to obtain information that is “reasonably calculated” to lead to the discovery of admissible, relevant evidence is especially crucial in the context of pretrial discovery. As the Committee recognized in 2000:

A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.<sup>25</sup>

The “reasonably calculated” language does not give parties *carte blanche*, of course. All discovery is subject to the limits articulated in Rule 26(b)(2)(C), and may be limited by a Rule 26(c) protective order.

To delete the “reasonably calculated” language, by contrast, will send courts and litigants a misguided and fundamentally incorrect message: that there is some category of information that *is* “reasonably calculated to lead to the discovery of admissible evidence” but is *not* relevant to the claims or defenses and, therefore, wholly outside of the permissible scope of discovery. This will almost certainly be perceived as narrowing the definition of relevance and mandating a

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<sup>21</sup> *Id.* at 266 (expressing concern that the “reasonably calculated” language is being improperly invoked “as though it defines the scope of discovery” and as setting “a broad standard for appropriate discovery”).

<sup>22</sup> Minutes of the April 2013 Meeting make reference to a survey that revealed “hundreds if not thousands of cases that explore” the language “reasonably calculated to lead to the discovery of admissible evidence,” with “many” of these cases suggesting that courts thought this phrase “defines the scope of discovery.” Committee on Rules of Practice and Procedure Agenda Book, June 3-4, 2013, at 147 (draft minutes of April 2013 Advisory Committee meeting). There is no indication that any analysis of the cases was made to determine whether they permitted discovery that would not be considered “relevant” under the current or proposed Rule.

<sup>23</sup> 192 F.R.D. at 390 (“Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.”).

<sup>24</sup> See FED. R. EVID. 402 (“Relevant evidence is admissible . . . . Irrelevant evidence is not admissible.”).

<sup>25</sup> 192 F.R.D. at 389.

more restrictive approach to discovery that is wholly unjustified. This proposal is a particular cause for concern because it affects the meaning of a word—“relevant”—that has been called by a leading treatise in the field as “[p]erhaps the single most important word in Rule 26(b)(1).”<sup>26</sup> At a minimum, the proposed change will invite wasteful satellite litigation over the amendment’s purpose and effect—an unintended outcome that would undermine the goal of reducing unnecessary costs and delay.

**C. Rule 26(b)(1) & (b)(2)(C): Proposal to incorporate the “proportionality” factors into the “scope of discovery”**

We also oppose the proposal to move the cost-benefit considerations that are currently set forth in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). There is a serious risk that the amendment will be misread to impose a more restrictive discovery standard across the board, contrary to the Committee’s intent and without any empirical justification for a more restrictive approach. There is also a danger that the rewritten rule would be misinterpreted to place the burden on the discovering party, in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability. This would improperly shift the responsibility to show burdensomeness from the party resisting discovery to the party seeking discovery, which in turn will encourage a higher degree of litigation over the scope of discovery and increase costs both for litigants and the court system. Moreover, the rule change does not explain how the cost-benefit analysis is to be undertaken or shown, and we are concerned that the requirement will create perverse incentives for the hiring of experts, the holding of additional court conferences, and the over-litigation of discovery requests.

We recognize that the Committee has not expressed the view that the cost-benefit considerations that now appear in Rule 26(b)(2)(C)(iii) should be re-balanced to make discovery harder to obtain. Rather, the proposed Committee Note states that the proposal will merely “move” Rule 26(b)(2)(C)(iii)’s already “familiar” considerations to Rule 26(b)(1).<sup>27</sup> During public hearings on these proposals, Committee members emphasized repeatedly that this change will not alter the burdens that currently exist.<sup>28</sup>

The Committee appears to believe that the cost-benefit provisions are underutilized and that they will acquire greater attention, use, and citation if relocated to an earlier portion of Rule 26. The Committee provides no evidence that lawyers and judges are unaware of the provision’s current existence. It seems far more likely that the standards for proportionality are infrequently cited because—as the empirical evidence suggests—discovery is usually proportional and appropriate. Rule 26 is already crystal clear about a party’s obligation to respect Rule 26(b)(2)(C)(iii)’s considerations when making discovery requests, a party’s ability to object to discovery requests that it believes are excessive in light of Rule 26(b)(2)(C)(iii)’s considerations, and the court’s obligation to limit discovery requests that run afoul of Rule 26(b)(2)(C)(iii)’s

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<sup>26</sup> CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, 8 FEDERAL PRACTICE & PROCEDURE § 2008.

<sup>27</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

<sup>28</sup> See Transcript of Nov. 7, 2013 Hearing [hereinafter “Nov. 7 Hearing”], at 32, 139-40, 154-56, 180-81.

considerations. Although the proposed Committee Note states that moving these considerations to Rule 26(b)(1) will require parties to observe them “without court order,”<sup>29</sup> that obligation already exists under Rule 26(g).<sup>30</sup>

Relatedly, the Committee asserts that these cost-benefit considerations are “not invoked often enough to dampen excessive discovery demands.”<sup>31</sup> But this assertion also lacks empirical support. If the lawyers who expressed concerns about “excessive discovery” in response to the survey questions are the same ones who are “not invoc[ing] Rule 26(b)(2)(C) often enough,”<sup>32</sup> then it is their advocacy on behalf of their clients—not Rule 26—that requires improvement. It seems especially improbable that the cases about which the Committee is most concerned—“those that are complex, involve high stakes, and generate contentious adversary behavior”<sup>33</sup>—are the same ones in which parties are not “invok[ing]” cost-benefit considerations often enough. More likely, lawyers complaining about excessive discovery are fully aware of Rule 26(b)(2)(C)(iii)’s considerations, but they are not uniformly successful in limiting discovery requests that *they* view as excessive.<sup>34</sup>

Admittedly, judges may sometimes make mistakes in concluding that a particular discovery request should not be limited pursuant to Rule 26(b)(2)(C)(iii)—just as they may sometimes make mistakes in concluding that a particular discovery request *should* be limited pursuant to Rule 26(b)(2)(C)(iii). But there is no empirical support for the idea that transplanting the same considerations one subsection earlier in Rule 26(b) will improve the discovery process. It is difficult to believe that judges and attorneys regularly fail to read past Rule 26(b)(1) and that, even when they make it that far, they deliberately ignore its explicit reference to “the limitations imposed by Rule 26(b)(2)(C).”

It would also be unwise for the Committee to proceed with this proposal on the view that, because it makes no substantive change to the discovery standard, the amendment at least would do no harm. In fact, the amendment could have serious, unfortunate consequences. The puzzling justification for the proposal is precisely why so many who have commented on it perceive it to make the overall discovery standard more restrictive than it currently is. For there is no other logical purpose for making the proposed change: judges would be hard-pressed to imagine that the goal is simply to remind them of the existence of a provision within Rule 26 that is already

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<sup>29</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

<sup>30</sup> Fed. R. Civ. P. 26(g)(1) (“By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry, [any] discovery request . . . is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and . . . 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 action.”). *See also* Nov. 7 Hearing, at 139, 154, 172-73 (discussing Rule 26(g)).

<sup>31</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Cf.* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 361 (2013) (“[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.”).

known and employed. Because the Committee's proffered explanation for the transition is so difficult to comprehend, there is a real danger that judges will mistakenly infer that the Committee must have intended a more restrictive discovery standard, or at least one that places greater burdens on the requesting party. This would be a perverse result; but it is a quite predictable one, and one that can and should be avoided.

Accordingly, the Committee should leave Rule 26(b)(2)(C)(iii)'s cost-benefit factors where they currently reside. If there is concern that litigants are failing to realize that those considerations must be "observed without court order,"<sup>35</sup> then an alternative would be to suggest discussion of these factors at the preliminary discovery conference already contemplated under Rule 26(f).

### **III. Restricted Use of Discovery Devices: Rules 30, 31, 33 & 36 and Lower Presumptive Limits**

The Committee defends proposed limits to the presumptive number of discovery devices each party can use as a way to reduce cost and increase efficiency. However, like the Committee's proposed amendments to Rule 26, they are insufficiently supported by relevant empirical evidence, and they will likely spawn more discovery disputes and undermine the Rule's goal of achieving just outcomes in individual cases. The most problematic proposal in the current package of reforms is the change from a presumptive limit of ten depositions per party to a presumptive limit of five. In certain types of cases, depositions are the most important discovery device that parties use. Thus, especially as to this discovery device, limiting access should be justified only if there is a strong basis to believe that this reform is needed and that desired benefits will follow.

It is helpful to begin this discussion by exploring the reasons that the Committee has offered thus far in support of imposing stricter presumptive discovery limits. As for the proposed limits on the presumptive numbers of interrogatories (reducing the number from 25 to 15) and requests for admission (limiting them to 25, except for requests to admit the genuineness of documents), the Committee does not purport to provide any empirical justification.<sup>36</sup> As for the proposal to reduce the presumptive limit on depositions, the Committee relies almost entirely on a single finding from a memorandum prepared for the Committee's April 2013 meeting by Emery Lee of the FJC. Specifically, the Committee notes that in a survey of lawyers, 40-45% said the costs of discovery become disproportionate to the value of the case when the number of depositions exceeds five.<sup>37</sup>

It is a mistake to rely on this single point of datum to support the proposed reduction in the presumptive number of depositions allowed during discovery. As the Committee recognizes, these data do not establish a causal relationship between disproportionate costs and more than

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<sup>35</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

<sup>36</sup> *See id.* at 268-69.

<sup>37</sup> *Id.* at 267.

five depositions.<sup>38</sup> Lee himself cautioned the Committee against drawing conclusions about the merits of reducing the presumptive limit as a way of reducing unnecessary discovery costs, in large part because his 2013 memorandum analyzed data from a broader FJC study that was not focused on the precise relationship between depositions and costs. As Lee said, “the proportionality question [in the 2009 survey] asked about the costs of discovery in general and not about deposition costs.”<sup>39</sup> Thus, attorneys who reported that discovery costs were excessive “may have responded based on the cost of other types of discovery, even in deposition cases.”<sup>40</sup> Moreover, even if one could extrapolate from the general perceptions of discovery reported in the 2009 survey to the specific costs imposed by depositions, “the relationship between the number of depositions and attorney perceptions of the proportionality of discovery is not necessarily causal in nature. Instead, it is possible that one or more antecedent variables underlie the relationship between these two variables.”<sup>41</sup>

To understand why the data relied upon by the Committee do not support the proposed change, it is necessary to understand the precise information that would help to evaluate the question whether changing the presumptive limits on depositions will meaningfully reduce excessive discovery costs. Given that there already is a presumptive limit of 10 depositions, the relevant question is whether there is a correlation between disproportionate discovery costs and cases in which there are between 6 and 10 depositions. The data reported by Lee in his 2013 memorandum do not provide this information, however. They only suggest that, in cases that exceeded 5 depositions, attorneys were more likely to report that discovery costs were “too much” in comparison to their client’s stake in the case. Notably, in every category, more than half of respondents perceived discovery costs to be “just right” regardless of the amount of depositions.<sup>42</sup> More importantly, assuming that perceptions of costs are reliable indicators of actual costs, the data do not distinguish perceptions of costs in cases depending on whether depositions exceeded 10 or were between 6 and 10. Thus, it is quite possible that the perceptions of high costs are concentrated in those cases in which depositions exceeded 10, a concern that already is accounted for in the existing rule.

The more fundamental flaw in the Committee’s reliance on the lawyer-survey finding is that by focusing only on a single finding from the cited memorandum the Committee overlooks the real lessons to be learned from the available empirical evidence. That evidence shows, as noted above, that in the vast majority of cases discovery costs are not disproportionate to the value of the case. As far as depositions are concerned, only about half of lawyers (roughly 55%) reported one or more depositions of non-expert witnesses. To repeat: about 45%, or nearly half of all lawyers, reported that not a single deposition had been taken by anyone in their case. The FJC then asked just those lawyers who had been involved in a case in which at least one deposition of a non-expert witness was taken to report what the total number of depositions had been in their case. It turns out that among the bare majority of cases in which any deposition at

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<sup>38</sup> *Id.* (noting that “a causal relationship cannot be established”).

<sup>39</sup> Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 131.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 132.



all was taken, the mean number of depositions by plaintiffs was just under 4 (the median was 3); and the mean number of non-expert depositions by defendants was just under 3 (median was 2). Expert depositions were an infrequent occurrence as well. Fewer than 1 in 7 lawyers responding to the survey reported that one or more expert witness depositions were taken by any party. That is, approximately 85% of both plaintiff and defense lawyers reported no expert depositions were taken at all in their cases.

The Committee is aware of the fact that discovery costs are not a problem for the vast majority of cases; at the least, its discussion defending a lowering of the presumptive limit for depositions references a finding from the FJC study and its memorandum states that “less than one-quarter of federal court civil cases result in more than five depositions, and even fewer in more than ten.” Yet the Committee’s proposal is at odds with the key lesson of the FJC study—that for most cases discovery costs are not disproportionate to case values. In addition, the FJC study provides ground for concern that changing the presumptive discovery limits will have adverse effects in the small percentage of cases in which more than five depositions are sought. First, a change in the limit will predictably have unequal effects on parties, tilting in favor of a typical defendant, as in a civil rights, tort, consumer, or employment discrimination case, who starts the lawsuit with greater access to relevant information than a typical plaintiff. There is little reason to think a defendant in this situation will extend the courtesy of consenting to waive the presumptive limit, because counsel will rarely need to take more than five depositions, leaving the plaintiff to seek relief from the court and increasing litigation as well as court costs.

The proposal thus will have many consequences that are unfair and inefficient. First, it will lead to increased litigation over the entitlement to seek more than five depositions. Judges will be asked to resolve disputes over the number of depositions much more frequently. Second, there is ample reason to believe, contrary to the Committee’s assumption, that the change in presumptive limits will change how courts adjudicate requests for exceptions to those limits. Well-established cognitive science literature establishes that numerical presumptions such as those reflected in the proposal create “anchors” for judicial decisionmaking.<sup>43</sup> By shifting the presumption from 10 to 5 the Committee is suggesting that in most cases, seeking more than 5 depositions is unreasonable. This “anchor” will then affect how judges perceive requests to go beyond those limits. For instance, a judge faced with a motion seeking permission to take 12 depositions will view the request quite differently depending on whether the presumptive limit on depositions is 10 versus 5. In the former case, the party is seeking an additional 20% beyond the presumptive limit; in the latter case, the party will be seeking an additional 140% beyond the

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<sup>43</sup> See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19-22 (2007) (reviewing data showing that judicial decisionmaking is influenced by numerical anchors); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing anchoring biases, among others); Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1979-80 (2013) (summarizing data showing that judges are susceptible to anchoring effect); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013) (summarizing literature); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification--and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 748 (2011).

presumptive limit. It is likely that some judges will perceive the requests differently, based simply on the fact that the presumptive limit has changed.

The Committee, however, seems to assume that “reasonable” judges will liberally grant requests to exceed the presumptive limits. Aside from the anchoring effect referenced above (and the fact that parties seeking between 6 and 10 depositions will now incur the increased litigation cost of having to seek consent or judicial approval), the Committee’s assumption does not accord with our reading of the case law that has developed since the 2000 Amendments. Far from reflecting a liberal approach to requests to exceed the presumptive limits, most reported court decisions apply an extremely strict analysis.<sup>44</sup> As some courts put it, the party seeking additional depositions “must demonstrate the necessity for each deposition she took without leave of court pursuant to the presumptive limit of Rule 30(a)(2)(A).”<sup>45</sup>

Under the presumptive limit proposed by the Committee, litigants would have to first cull a potentially long list of witnesses “to guess which of the . . . deponents are most knowledgeable” and then depose 5 of them.<sup>46</sup> It may generate gamesmanship on the part of those opposing deposition discovery to put forward a less-than-informed deponent in the guise of meeting the discovery request. But civil litigation should not depend on guesses or games. Guessing wrong could very well prejudice a request for additional depositions, because it might appear to a reviewing court that the party did not use the allocated five depositions wisely. But it will be precisely those litigants who guess wrong who will have the most need to seek additional depositions. Encouraging this kind of guesswork, at the same time that the Committee proposes to reduce access to other potentially informative discovery devices such as interrogatories and requests to admit, seems guaranteed to lead to outcomes that do not reflect the merits of the dispute. It was precisely this approach to adjudication that the Rules were meant to avoid when they were enacted in 1938; although we have traveled some distance from the principles that informed the Rules 75 years ago, certainly the Rules should not detract from the merits.

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<sup>44</sup> *See, e.g.*, Estate of Smith v. Marasco, 318 F.3d 497, 522 (3d Cir. 2003) (finding that district court did not abuse discretion in limiting plaintiff to 10 depositions in case involving 46 defendants); Raniola v. Bratton, 243 F.3d 610, 628 (2d Cir. 2001) (finding that record was insufficient to determine whether district court inappropriately limited discovery in multi-defendant case where court limited plaintiff to 3 depositions, “and that after defendants failed to produce one of the subpoenaed witnesses, the court reduced the number of permitted depositions to two”); Gordilis v. Ocean Drive Limousines, Inc., 2013 WL 6383973, \*2 (S.D. Fla. 2013) (finding insufficient grounds to depart from deposition limits). Where courts have granted requests for additional depositions, it has been in extreme cases. *See, e.g.*, Thykkuttathil v. Keese, 2013 WL 6008459, \*2 (W.D. Wash. 2013) (“As Plaintiffs have disclosed in excess of thirty potential lay witnesses as well as nine expert witnesses, Defendants’ request to depose an additional seven witnesses is reasonable.”); In re Weatherford Intern. Securities Litigation, 2013 WL 5762923, \*3 (S.D.N.Y. 2013) (granting additional depositions for plaintiff because of complexity and value of case); El Dorado Energy, LLC v. Laron, Inc. 2013 WL 2237580, \*3 (D. Nev. 2013) (granting additional depositions to defendant where plaintiff disclosed three experts and seven employee witnesses, interim status report contemplated 15-20 depositions and was not objected to by plaintiff, and where case was complex).

<sup>45</sup> Barrow v. Greenville Independent School Dist., 202 F.R.D. 480, 482 (N.D. Tex. 2001) (emphasis added); *Accord* Lebron v. ENSCO Offshore Co., 2013 WL 3967165, \*5 (W.D. La. 2013).

<sup>46</sup> El Dorado Energy, LLC v. Laron, Inc., 2013 WL 2237580, \*3 (D. Nev. 2013).

As for the proposal to reduce the number of interrogatories and requests to admit, the Committee ignores that both of these discovery devices serve cost-saving functions. For instance, interrogatories can provide a low-cost alternative to high-expense devices such as depositions. For parties with limited resources, limiting access to interrogatories may substantially limit access to court. Even when interrogatories are limited in scope by local rule,<sup>47</sup> they can be useful for helping parties identify whom to depose. As noted above, reducing access to interrogatories at the same time that the Committee proposes to increase the stakes in choosing whom to depose may have a perverse effect on the just resolution of cases. Reducing access to requests to admit is even more problematic, because this device is particularly useful in *narrowing* the scope of disputed issues, reducing trial costs, focusing parties on relevant discovery, and encouraging settlement. The Committee presents no basis for any concern that this device is being abused, overused or imposing excessive costs.

#### IV. Elimination of the Forms

Finally, we turn to a proposed change that is perhaps the simplest but most significant: the abrogation of Rule 84 and the elimination of the Forms. The Forms were once described as “the most important part of the rules,” particularly for pleading, because “when you can’t define you can at least draw pictures to show your meaning.”<sup>48</sup> The Committee offers two principal reasons for abandoning them: (1) according to “informal inquiries that confirmed the initial impressions of . . . members,” lawyers and pro se litigants do not tend to rely on the Forms; and (2) the current Forms “live in tension with recently developed approaches to general pleading standards.”<sup>49</sup> The Committee’s first justification is wholly lacking in empirical rigor and, moreover, ignores the fact that federal judges at every level *do* look to the Forms for assistance. The second justification is certainly accurate—*Twombly* and *Iqbal* create tension with the Forms—but that tension is not insurmountable and, even if it were, one still needs a rationale for choosing one over the other. The Committee has provided no explanation for opting to abandon the Forms rather than to reexamine plausibility pleading.

The Committee’s first explanation for why it is abandoning the Forms is based on casual empiricism and self-evident bias. As we understand it, a Subcommittee to study the Forms apparently started with the intuition that lawyers tend not to rely on the Forms, and then conducted an informal survey of undisclosed lawyers—unsurprisingly concluding that their initial intuitions were correct.<sup>50</sup> Needless to say, this is not a valid way to answer the question of whether lawyers rely on the Forms to construct their complaint. If one starts with a bias in one direction or another, one should be extremely cautious in conducting empirical research so as to ensure that the initial bias does not influence the ultimate interpretation of the results. Given the Committee’s description of its research, we are not comforted that any steps were taken to reduce the potential for this confirmatory bias.

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<sup>47</sup> See, e.g., S.D.N.Y. Local R. Civ. P. 33.3(a); D. Or. Local R. Civ. P. 33-1(d).

<sup>48</sup> Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

<sup>49</sup> Advisory Committee on Civil Rules, Report to Standing Committee at 60 (May 8, 2013).

<sup>50</sup> It is unclear how the Committee concluded that pro se litigants do not rely on the Forms. They provide no indication as to how or whether they collected data related to that question.



Furthermore, it is surprising that the Advisory Committee would rely on the supposed irrelevance of the forms, when its own staff prepared a memo for the April 2013 Meeting that summarized in great detail the numerous lower courts that have grappled with the ongoing viability of the forms after *Iqbal* and *Twombly*.<sup>51</sup> Although we do not claim to have conducted a rigorous survey, our examination of the case law is consistent with the material already presented to the Committee. We note that the Supreme Court has relied on the Forms in the pleading context numerous times—perhaps most significantly in *Twombly* itself.<sup>52</sup> Moreover, lower court opinions cite to the forms often, relying on them as indicative of the pleading required under the Federal Rules, even after *Twombly* and *Iqbal*.<sup>53</sup> If federal judges have found the Forms illustrative of the relevant pleading standard, as our and the Committee’s research suggests, it stands to reason that practicing lawyers have done so as well. Indeed, practitioner “blogs” indicate that lawyers pay close attention to lower courts’ reliance on the Forms, particularly in the area of intellectual property.<sup>54</sup>

The Committee’s second explanation, that the Forms cannot be squared with the Supreme Court’s decisions in *Twombly* and *Iqbal*, prematurely resolves a question that the Committee has yet to fully consider. As the Committee is aware, the conflict between the rulemaking contemplated under the Rules Enabling Act and the Court’s decisions in *Twombly* and *Iqbal* is a live one. Indeed, the Committee has noted in the past that it will be open to considering instituting rulemaking if it is shown that plausibility pleading is having a significant impact on the business of federal courts. It is premature to call an end to the debate, especially in light of recently emerging empirical data.<sup>55</sup> Given that the Committee has yet to take a definitive position on plausibility pleading, striking the Form Complaints commits the Committee to a position that implicitly adopts plausibility pleading as the standard going forward. 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 rather than through case adjudication.<sup>56</sup> If the Committee adopts this proposal, the door will be effectively shut and the pleading rules will have been altered without any of the participatory deliberation that legitimizes the Federal Rules.

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<sup>51</sup> See Memorandum by Andrea L. Kuperman at 8-26 (July 6, 2012), in Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 230-248.

<sup>52</sup> See *Twombly*, 550 U.S. at 565 n.10 (arguing that there was no conflict between Form 9 (now Form 11) and plausibility pleading); see also *Mayle v. Felix*, 545 U.S. 644, 660 (2005); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 n.4 (2002).

<sup>53</sup> See, e.g., *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1288 (Fed. Cir. 2013) (resolving tension between Form 18 and *Twombly* and *Iqbal*); *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (relying on Form 13); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) (drawing analogy from Form 9).

<sup>54</sup> See, e.g., Charles J. Hawkins, *Iqbal And Twombly Notwithstanding: Form 18 Is The Standard For Direct Infringement Allegations*, available at <http://www.mondaq.com/unitedstates/x/243158/Patent/Iqbal+And+Twombly+Notwithstanding+Form+18+Is+The+Standard+For+Direct+Infringement+Allegations> (last visited January 23, 2014) (posting “practice note” related to intellectual property).

<sup>55</sup> See, e.g., Kevin M. Clermont and Stuart Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PENN. L. REV. \_\_\_ (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347360](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360).

<sup>56</sup> See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514-15 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

Moreover, the Committee’s explanation of its proposal to abrogate Rule 84 and the Forms seems strikingly inconsistent. For although it acknowledges the tension in its report to the Standing Committee, it states in the proposed Committee Notes that “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.”<sup>57</sup> This public explanation, however, flies in the face of its description of the conflict between the Forms and plausibility pleading. The real problem may be that the plausibility standard articulated by the Court is so vague, standardless, and subjective that it is at odds with efforts to provide examples of pleadings that are sufficient. At times, the Committee’s report to the Standing Committee suggests this conclusion.<sup>58</sup> This, however, is an indictment of the plausibility standard of pleading, not of the Form Complaints. Eliminating the Forms may eliminate the conflict, but in this case conflict avoidance may amount to a derogation of the Committee’s institutional obligations.

## CONCLUSION

In conclusion, we urge the committee to closely attend to the two key questions that we think must be answered as it considers how to proceed. As to the first—whether the Committee is solving a well-identified problem—the empirical evidence is clear that in the vast majority of cases discovery costs are not disproportionate to their estimated value. Given the available empirical record, it appears to us that a key underlying assumption made by those who support these amendments is fundamentally called into question.

As to second inquiry—whether proponents have shown that the proposed amendments will make things better—we believe that their burden has not been satisfied. Indeed, quite to the contrary, in our judgment the proposed amendments unnecessarily risk a host of adverse consequences, including that they are likely to spawn confusion and wasteful satellite litigation, outcomes that, perversely, are contrary to the Committee’s expressed intent to reduce costs and improve judicial efficiency.

Perhaps most perplexing to us is that many of the proposed amendments are predicated on a lack of faith in the ability or willingness of trial judges to manage the cases that come before them. We are aware that a majority of Supreme Court Justices in both *Twombly* and in *Iqbal* expressed their belief that “careful case management” has been beyond the ability of most district judges.<sup>59</sup> That view is at odds with the best current empirical evidence suggesting that trial judges are managing the vast majority of their dockets well.<sup>60</sup> Even assuming that a small subset of cases present problems that the current rules cannot solve, the proposed changes do not address and so cannot resolve these problems. Rather, the amendments will generate different problems and shift costs to litigants in cases where the rules are working well. We urge the Committee to reconsider and to reject the package of proposed amendments.

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<sup>57</sup> Preliminary Draft of Proposed Amendments, *supra* note 13, at 329.

<sup>58</sup> See Preliminary Draft of Proposed Amendments, *supra* note 13, at 276-77 (“Attempting to modernize the existing forms . . . would be an imposing and precarious undertaking.”).

<sup>59</sup> *Iqbal*, 556 U.S. at 685 (citing *Twombly*, 550 U.S. at 559).

<sup>60</sup> See, e.g., Lee & Willging, Defining the Problem, *supra* note 6, at 779-81 (summarizing empirical literature demonstrating that discovery costs are generally low).

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**PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO  
FEDERAL RULES OF CIVIL PROCEDURE**

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## **BACKGROUND INFORMATION**

The Advisory Committee on Civil Rules (“Advisory Committee”), which studies the operation and effect of the rules that govern procedure in civil litigation in federal courts, proposed amendments to a large number of those rules last year. The proposed rule amendments, which would apply to all civil suits filed in federal court, cover a wide range of topics, including time for service of the summons and complaint, scheduling conferences, discovery, and sanctions for failure to preserve discoverable information. If adopted, they would significantly change practice and procedure in federal cases.

Many of the proposed amendments were developed in response to issues that were discussed at a conference held at Duke Law School in May 2010 (“Duke Conference”). A subcommittee of the Advisory Committee, the Duke Subcommittee, released sketches of proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 of the Federal Rules of Civil Procedure in late 2012. These “rule sketches” were discussed at the January 2013 meeting of the Judicial Conference’s Committee on Rules of Practice and Procedure (“Standing Committee”).

In between January and April 2013, the chairs of the Standing Committee, the Civil Rules Advisory Committee and the Duke Subcommittee heard from hundreds of attorneys on the “rule sketches.” The overwhelmingly majority of the comments opposed most of the draft rules, especially the proposed changes to the scope of discovery and the presumptive limits on discovery devices.

Despite the early commentary opposing the “rule sketches,” the Advisory Committee recommended that draft rules be published, and the Standing Committee approved them for publication. While the draft rules made some modifications from the initial rule sketches, many of the draft rules remained unchanged. They were published on August 15, 2013, along with proposed amendments to Rules 6, 37(e), 55, 84, and Appendix of Forms.

After the proposed amendments were published, the Advisory Committee received more than 2,300 additional comments on the proposals and heard testimony from more than 120 witnesses at three public hearings around the country. More than 1,000 comments were submitted in the last week of the public comment period, after the final public hearing. The number of comments and witnesses far surpassed the public commentary on previous amendments, even those that were considered controversial at the time. The various subcommittees of the Advisory Committee began deliberating and reaching tentative conclusions immediately after the final public hearing, before the public comment period closed. The subcommittees reported their recommendations before the Reporter to the Advisory Committee completed summaries of the comments. The proposed amendments were discussed at the Advisory Committee Meeting on April 10th and 11th in Portland, Oregon. The Advisory Committee recommended adoption of several draft amendments, some of which were revised from the versions that were published.

Attorneys at the Center for Constitutional Litigation, P.C. (“CCL”), attended each of the public hearings and read the transcripts, and reviewed each of the more than 2,300 comments filed on the proposed amendments. CCL assessed the types of people and organizations that submitted comments, as well as how many of them commented, which proposals they opposed or supported and why. Based on this review, CCL has prepared the following report, providing an estimate of the numbers of comments and testimony on the proposals,<sup>1</sup> and summarizing the comments and testimony on the proposed amendments.<sup>2</sup>

## **SUMMARY BY THE NUMBERS**

### **WHO COMMENTED AND TESTIFIED?**

- More than 1,000 written comments and testimony of almost 50 witnesses came from attorneys and organizations that represent individuals and small businesses in a wide variety of litigation against larger entities such as corporations, governments, and their insurers. These attorneys and organizations included:
  - the organized plaintiffs’ bar, including the American Association for Justice, its leaders, sections and litigation groups, and state trial lawyers associations;
  - the National Employment Lawyers Association and its state affiliates;
  - civil rights organizations like the NAACP Legal Defense Fund, the Lawyers’ Committee for Civil Rights Under Law, MALDEF, and Legal Momentum;
  - legal aid groups and non-profit organizations that provide legal services to civil litigants who are impoverished, elderly, or disabled;
  - non-profit organizations that provide legal services to incarcerated and institutionalized individuals;
  - non-profit organizations and law firms who represent consumers;
  - non-profit organizations that litigate environmental law and environmental justice issues; and
  - hundreds of individual attorneys and law firms.

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<sup>1</sup> Because of the sheer volume of comments and the short timeframe, a precise empirical measurement was not possible, and this Report does not purport to be an empirical study. Rather, CCL tracked the comments to note trends in general terms rather than precise ones.

<sup>2</sup> In this preliminary draft, CCL summarizes several proposed amendments, but not all of them. Later drafts of this Report will include discussion of more of the proposals.

- More than 375 separate written comments and testimony of more than 55 witnesses came from corporations, their legal counsel, and organizations that represent their interests, including:
  - Altria, Ford, General Electric, Johnson & Johnson, Microsoft, Merck, Pfizer, GlaxoSmithKline, and hundreds of other corporations that submitted comments of their own or signed onto written comments;
  - the organized defense bar, including Lawyers for Civil Justice and DRI;
  - the U.S. Chamber of Commerce Institute for Legal Reform, the Washington Legal Foundation, the International Association of Defense Counsel, the Association of Corporate Counsel; and
  - more than 200 individual attorneys and law firms.
- Several dozen separate comments were filed by legal academics, including two former reporters of the Advisory Committee on Civil Rules. Two of the written comments from legal academics were each signed by more than 100 law professors. Almost a dozen legal academics testified at the public hearings.
- Attorneys that represent governments and government agencies also submitted written comments, including:
  - the Department of Justice, Civil Division;
  - the U.S. Equal Employment Opportunity Commission;
  - the U.S. Commodity Futures Trading Commission;
  - the Cities of New York, New York, Phoenix, Arizona, Chicago, Illinois, and Houston, Texas, and the International Municipal Lawyers Association; and
  - the attorneys general of Arizona and Washington State.
- Fewer than 20 bar associations or their sections filed written comments. Some individual members of the leadership of a few bar associations also submitted written comments and testimony, although they did not represent the views of the bar associations of which they were a part.
- More than a dozen current and former federal judges submitted written comments, as did the Federal Magistrate Judges Association.
- Almost 30 individual members of Congress submitted written comments, including members of the House and Senate Judiciary Committees, and members of the Congressional Black Caucus.



- More than 700 written comments were not readily categorized (“uncategorized comments”). These written comments lacked enough specific information saying whether the author was an attorney or litigant, or whether they represented a certain type of party. While the comments expressed certain viewpoints, if the author did not specify whether he or she was an attorney, academic, judge, layperson, etc., they were left uncategorized.

## **WHAT POSITIONS DID THE COMMENTS AND WITNESSES TAKE?**

### **General Comments**

The majority of general comments—more than 800 of them—expressed general opposition to the proposed amendments or to the proposed discovery rule amendments.

- Several hundred of these comments expressed general opposition, but focused their discussion on specific proposals.
- Almost 500 of these written comments simply expressed general opposition without focusing on any specific proposal.
- The number of comments expressing opposition to the proposed amendments in general or to the discovery proposals specifically, outnumbered the number of comments filed in support of any specific proposed amendment.
- Generalized opposition to the proposals came from organizations and attorneys who represent individuals and small businesses in a wide variety of civil litigation against corporations, governments, and their insurers.
- A large number of comments expressing opposition to the proposals in general or to the discovery proposals specifically came from uncategorized comments.
- Generalized opposition to the proposals also came from several legal academics, many of whom write and teach civil procedure at the nation’s law schools.
- A couple of federal judges also opposed the proposed amendments across the board.

### **Rule 4(m)—Time For Service**

More than 90% of the written comments on the proposed amendments to Rule 4(m) opposed them.

- More than 350 written comments addressed this specific proposal.
- Opposition to this proposal came from across the spectrum, including plaintiffs’ attorneys and organizations, attorneys who represent plaintiffs and defendants, legal service providers who assist *pro se* and *in forma pauperis* litigants, the Department of Justice, the U.S. Commodity Futures Trading Commission, federal judges and the Federal Magistrate



Judges Association, legal academics, members of Congress, the Cities of New York, Chicago, and Houston, and the Illinois Association of Defense Trial Counsel.

### **Rule 26(b)(1)—The Scope of Discovery**

The majority of the written comments on the proposed changes to the scope of discovery in Rule 26(b)(1) opposed them.

- Hundreds of written comments generally opposed all of the proposed changes to the scope of discovery.
  - Most of these comments expressed opposition to the proposed amendments to Rule 26 or Rule 26(b)(1), but also discussed one or more particular amendments to the rule.
  - Some of these comments simply voiced generalized opposition to the amendments to Rule 26 or Rule 26(b)(1) without commenting on any specific amendment to Rule 26(b)(1).
  - Most of these comments came from attorneys and organizations that represent individuals and small businesses against larger entities in civil litigation.
  - A large number of uncategorized comments also generally opposed the amendments to Rule 26 or 26(b)(1).
  - 4 out of 5 current and former federal judges who commented generally on the proposed amendments to Rule 26(b)(1) opposed them across the board.
  - Several members of Congress also opposed the proposed changes to the scope of discovery across the board.

### **Adding “Proportionality” to the Scope of Discovery**

Two-thirds of the written comments and a majority of the testimony on the proposed transposition of the cost-benefit “proportionality” analysis from Rule 26(b)(2)(C)(iii) into the scope of discovery in Rule 26(b)(1) opposed the amendment.

- This proposed amendment was specifically addressed by more than 1,000 separate written comments and more than 60 witnesses at the public hearings.
- This amendment was specifically opposed by two former reporters for the Civil Rules Advisory Committee, Paul Carrington and Arthur Miller; Professor Miller was the reporter for the committee at the time the concept of “proportionality” was first referenced in the rule.

- This specific amendment was also opposed by 9 active and retired federal judges—a large majority of the individual federal judges that commented on this proposal.
- A large group of law professors—more than 175—also opposed this specific proposal. The overwhelming majority of legal academics who commented and/or testified on this specific proposal opposed it.
- More than 475 separate written comments opposing this proposal came from attorneys and organizations who represent individuals and small businesses in a wide range of civil litigation against larger entities.
- More than 125 separate uncategorized comments also opposed this specific proposal.
- A few bar associations specifically opposed this proposed amendment, as did several attorneys who represent plaintiffs and defendants, and a couple of attorneys who work for a corporate defense firm.
- Every member of Congress who submitted comments opposed this proposal.

#### **Deleting “Reasonably Calculated” Language**

The comments that specifically addressed the proposed deletion of the penultimate sentence of Rule 26(b)(1) which says: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” were about evenly divided.

- More than 400 separate written comments addressed this specific proposal.
- Approximately 20 witnesses testified about this specific proposal, and the majority of them supported it.
- Most of the support for this proposal came from corporations, governments, their counsel, and organizations that represent their interests.
- The Department of Justice originally opposed this proposal, but later wrote comments in support of it with a suggested revision to the Committee Note.
- Opposition to the proposal largely came from attorneys and organizations that represent individuals and small businesses against larger entities, more than 40 uncategorized comments, and the U.S. Equal Employment Opportunity Commission.
- The vast majority of judges and academics who commented on this proposal opposed it.
- Very few bar associations commented on this specific proposal, but those that did were about evenly divided.

### **Removing Availability of Discovery Relevant to the “Subject Matter”**

The majority of comments and testimony on the proposed deletion of the sentence permitting the court to allow discovery of information “relevant to the subject matter of the action” upon a showing of good cause supported it.

- Around 250 comments discussed this proposal, and about 10 witnesses testified on this specific proposal.
- Most of the support for this proposal came from corporations, their legal counsel, and organizations that represent their interests. It was also supported by more than two dozen uncategorized comments and several bar associations.
- The proposal was opposed by attorneys and organizations that represent individuals and small businesses against larger entities, and more than a dozen uncategorized comments.
- The strongest opposition to this proposal appeared to come from legal academics and from federal judges, including two former members of the Civil Rules Advisory Committee and the Federal Magistrate Judges Association.

### **Deleting Language Illustrating Types of Discoverable Information**

Although the proposed deletion of part of Rule 26(b)(1) that describes certain types of information that are encompassed in the scope of discovery elicited very little commentary, the majority of the comments and all of the testimony on this amendment opposed it.

- Approximately 20 written comments and 2 witnesses addressed this specific proposal.
- Two-thirds of the comments on this proposed amendment opposed it, as did both witnesses who testified about it.
- Opponents to the deletion of this language included 2 federal judges, a legal academic, attorneys who represent plaintiffs and defendants, including the Department of Justice, attorneys who represent individuals and small businesses against larger entities, and an attorney who works on eDiscovery issues.

### **Rule 26(c)(2)(B)—Cost-Allocation in Protective Orders**

The majority of comments on the proposed amendment to Rule 26(c)(1)(B) opposed it.

- Almost 200 written comments addressed this specific proposal, and 6 witnesses addressed it in testimony. The majority of the witnesses supported the proposed amendment, but about 60% of the written comments opposed it.
- Opposition to the proposal came largely from attorneys who represent individuals and small businesses against larger entities, as well from the uncategorized comments.

- Two federal judges opposed it, while the Federal Magistrate Judges Association supported it.
- Fewer than ten law professors commented on this specific proposal and a slight majority of them opposed it.
- Support for this proposal came largely from corporations, their legal counsel, and the organizations that represent their interests, as well as government entities and a majority of the very few bar associations to comment on this specific proposal.

### **Rules 30, 31, 33, and 36—Presumptive Numerical Limits**

The overwhelming majority of comments and testimony on the proposed numerical limits on discovery devices in Rules 30, 31, 33, and 36 opposed them.

- Each of the proposed amendments to these rules garnered a high volume of written comments.
- More than 1,100 written comments addressed the proposed amendment to Rule 30(a)—the most written commentary on any of the proposed amendments. Almost 90% of these comments opposed the proposal.
- Opposition to these proposals came from a wide swath of the legal community, including attorneys and organizations that represent individuals and small businesses against larger entities in a wide variety of civil litigation, organizations of plaintiffs’ lawyers, bar associations, legal academics, current and former federal judges, hundreds of uncategorized comments, members of Congress, the U.S. Commodity Futures Trading Commission, the U.S. Equal Employment Opportunity Commission, and the Department of Justice.

### **Rule 37(e)—Sanctions for Failure to Preserve Discoverable Information**

The published draft of Rule 37(e) was supported by slightly more than 10% of the almost 700 written comments on it, and 8 of the 48 witnesses who testified about it.

- The majority of the comments and testimony on the proposed draft of Rule 37(e) came from corporations, their counsel and organizations that represent their interests. They supported the goal of the draft rule, but not the substance of the draft.
- Approximately 250 comments and 15 witnesses opposed the proposed draft rule entirely.

### **Proposed Abrogation of Rule 84 and Most Forms**

Three-quarters of the written comments and all of the testimony on Rule 84 opposed the proposed abrogation of the Rule and most of the Official Forms.

- The majority of the opposition came from legal academics, including two written comments signed by more than 100 legal academics each.
- Opposition also came from attorneys who work with pro se litigants and those litigants who are incarcerated, some plaintiffs' attorneys, and the Illinois Association of Defense Trial Counsel.

### **Support for Some Proposals**

The majority of comments and testimony on the proposed amendments to Rules 16(b) and 34(b) expressed support. There was also support for the proposed amendment to Rule 26(d)(2).

### **REPORT**

At the April meeting of the Advisory Committee on Civil Rules, the Advisory Committee unanimously approved the recommendations of the Duke Subcommittee, the Discovery Subcommittee, and the Rule 84 Subcommittee that certain amendments to the Federal Rules of Civil Procedure be adopted. With the exception of the Discovery Subcommittee, the draft amendments approved by the Advisory Committee are in the Agenda Book for the Spring meeting of the Civil Rules Advisory Committee that was released on Friday, March 21, 2014.<sup>3</sup> The Advisory Committee also approved the recommendation in the Duke Subcommittee report that several of the proposed amendments that generated the most commentary and controversy be withdrawn.<sup>4</sup> The Discovery Subcommittee presented and the Advisory Committee approved a different draft of Rule 37(e) than the version that was published and the version that was in the Agenda Book.<sup>5</sup> CCL has limited its Preliminary Report to a summary of the commentary on some of the rule amendments that the Advisory Committee recommends be adopted.

The proposed amendments to Rules 26(b)(1), 26(c)(1)(B), 4(m), and 84 were each strongly opposed by the majority of the commentary on them. The number of comments on some of these proposals was enormous, while other proposals generated fewer written comments and even less testimony. But each of them provoked a sharp divide in the commentary. Many times this divide was between corporations, their counsel, organizations that represent their interests,

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<sup>3</sup> See Agenda Book for the April 10-11, 2014 Meeting of the Advisory Committee on Civil Rules, at 109-13 available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>

<sup>4</sup> Agenda Book for the April 10-11, 2014 Meeting of the Advisory Committee on Civil Rules, at 79, 89-90 (recommending that the Committee withdraw proposed amendments to Rule 30, 31, 33, and 36 that would have imposed new or lower numerical limits on the presumptive number of discovery requests and devices, as well as the time for deposition by oral examination). A large majority of comments opposed the proposed presumptive limits on the discovery devices in proposed Rules 30, 31, 33, and 36.

<sup>5</sup> There was little support for the published version of draft Rule 37(e), as written, in the written commentary and the live testimony.

and attorneys for governmental parties on one side, and attorneys for individuals and small businesses, who litigate cases against these larger entities, on the other. Some of these proposals also generated a lot of opposition from legal scholars, including two former reporters for the Advisory Committee, and some proposals were sharply criticized by current and former members of the federal bench, including a former member of the Advisory Committee. Several members of Congress also voiced opposition to some of the proposals. Thus, the divide in the commentary is not simply one between plaintiffs' attorneys and defendants and their counsel.

This preliminary report discusses the general commentary on the proposed amendments, as well as the specific commentary on the published versions of the proposed amendments to Rules 26(b)(1), 26(c)(1)(B), 4(m), and the proposed abrogation of Rule 84 and most of the Official Forms. This preliminary report does not respond to the reports published in April or the recommendations of the subcommittees adopted by the Advisory Committee in Portland.

## **I. GENERAL COMMENTS**

Consideration of the specific proposed amendments would be incomplete without consideration of the hundreds of more general comments on the proposed amendments.

There were hundreds of generalized comments on the proposed rule amendments. While many of these more general comments tended to focus on the proposed changes to the rules of discovery, not all of them focused on the discovery proposals exclusively. Hundreds of written comments voiced general support for or opposition to the proposed amendments without specifically opposing or supporting any particular proposed amendment. Almost 90% of these general comments opposed the proposed amendments or the discovery amendments across the board. Hundreds of additional written comments expressed general support of or general opposition to the proposed amendments, but specifically supported or opposed at least one specific proposed amendment. The overwhelming majority of these comments, too, expressed general opposition to the proposed amendments to the rules of discovery or to all of the proposed amendments across the board. **Taken together, the number of written comments—more than 800<sup>6</sup>—that expressed general opposition to the proposed amendments outnumbered the number of comments submitted in support of any specific proposed amendment.**

Generalized opposition to the proposals came from organizations and attorneys who represent individuals and small businesses in a wide variety of civil litigation against corporations, governments, and their insurers. A large number of comments expressing opposition to the proposals in general or to the discovery proposals in particular came from uncategorized comments. Generalized opposition to the proposals also came from several legal academics. A couple of federal judges also opposed the proposed amendments across the board.

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<sup>6</sup> This calculation estimates only the number of written comments and does not count the number of signatories to each comment. Some comments both in favor of and opposing the amendments and each specific proposal were signed by more than one person or entity. Some of these comments are specifically discussed in the context of the draft rules that they support or oppose.



While many of these comments were very general, simply voicing opposition, there were a number of written comments, largely by legal academics, that challenged the basis for the proposed amendments. For instance, Professor Patricia Moore submitted a detailed, 8-page comment challenging the assertion that federal civil litigation “takes too long and costs too much,”<sup>7</sup> which was the proffered basis for many of the proposed amendments.<sup>8</sup> She offered four observations: (1) the most objective and reliable measure of “cost” available to the Advisory Committee in the 2009 study by the Federal Judicial Center shows neither out-of-control costs nor an increase in costs over time;<sup>9</sup> (2) the statistics maintained by the Administrative Office of the Courts show that the median disposition time for federal civil cases has maintained stability for twenty-five years;<sup>10</sup> (3) lawyers and judges are well aware of the concept of “proportionality” in discovery, and apply it frequently; and (4) federal courts are widely perceived to favor defendants, and the adoption of the proposals will intensify that perception because they favor defendants.<sup>11</sup> Professor Moore questioned how the Advisory Committee could interpret the FJC findings as a mandate for restricting discovery or as a failure to apply “proportionality.” Citing the FJC 2009 Report, she pointed out that “[a]bout 90% of all attorneys surveyed—not just plaintiffs’ attorneys—believed that discovery had yielded ‘just the right amount’ or even ‘too little’ information.”<sup>12</sup>

Professor Moore’s assertions were echoed by many others who pointed to the 2009 FJC Report showing that the rules of discovery work well in most cases, and that change is not needed.<sup>13</sup> Like Professor Moore, some opponents also cited other government statistics and

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<sup>7</sup> Comment of Professor Patricia W. Moore, St. Thomas Univ. School of Law, USC-RULES-CV-2013-0002-0491 (Jan. 31, 2014). All comments may be found searching their comment number on the Regulations website, at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-CV-2013-0002-0002>.

<sup>8</sup> Committee on Rules of Practice and Procedure of the Federal Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (August 2013) (hereinafter “Proposed Amendments”) at 270, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0002-0001>.

<sup>9</sup> Moore, cmt. 0491, at 2-3 (citing Emery G. Lee & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center, Oct. 2009) (hereinafter “FJC 2009 Report”).

<sup>10</sup> Moore, cmt. 0491, at 3-5 (citing 1986 Annual Report of the Director of the Administrative Office of the United States Courts; Judicial Business of the United States Courts: 2012).

<sup>11</sup> Moore, cmt. 0491, at 6-8 (citing FJC 2009 Report).

<sup>12</sup> Moore, cmt. 0491, at 6.

<sup>13</sup> *E.g.*, Comment of Brett Nomberg, Brand Brand Nomberg & Rosenbaum LLP, USC-RULES-CV-2013-0002-1023 (Feb. 12, 2014), at 5; Comment of Professor Beth Thornburg, SMU, Dedman School of Law, USC-RULES-CV-2013-0002-0499 (Feb. 1, 2014); Comment of Professor Danya Shocair Reda, New York Univ. School of Law, USC-RULES-CV-2013-0002-2222 (Feb. 18, 2014); Comment of Professor Stephen B. Burbank, Univ. of Pennsylvania Law School, USC-RULES-CV-2013-0002-0729 (Feb. 10, 2014); Comment of Professor Stephen Yeazell, UCLA School of Law, USC-RULES-CV-2013-0002-0342 (Nov. 22, 2013), at 1.

reports to show that the proposed amendments lack an empirical basis.<sup>14</sup> Some of the opponents also criticized the opinion surveys performed by the Lawyers for Civil Justice, the American Bar Association Section of Litigation, and others as providing an unsound basis for reform of the Civil Rules.<sup>15</sup>

Professors, judges, and others who voiced general opposition to the proposed amendments also argued that they will not solve the concerns that sparked the proposals, namely the costs in high-stakes, complex litigation where there is contentious adversary behavior.<sup>16</sup> Moreover, they argued that the proposed amendments would create a host of new problems, including increased costs and delays, in a much larger number of cases.<sup>17</sup> Some critics of the proposals also argued that the proposed amendments ignore the problems of discovery avoidance and under-discovery,<sup>18</sup> and minimize the benefits of discovery and of civil litigation.<sup>19</sup> The concerns raised in the more general comments were also raised by many of the witnesses and the written comments on specific proposed amendments.

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<sup>14</sup> *E.g.*, Nomberg, cmt. 1023, at 5.

<sup>15</sup> *E.g.*, Nomberg, cmt. 1023, at 4; Reda, cmt. 2222 (opinion surveys are out of step with the hard data); *see also* Comment of Burton LeBlanc, American Association for Justice (“AAJ”), USC-RULES-CV-2013-0002-0372 (Dec. 19, 2013), at 27-31; Testimony of Dennis Canty, Kaiser Gornick, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Phoenix, January 9, 2014) (hereinafter “January Hearing”), at 225-32, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>; Comment of Senator Christopher A. Coons, et al., on behalf of 5 members of the Senate Judiciary Committee, USC-RULES-CV-2013-0002-0392 (Jan. 8, 2014), at 2.

<sup>16</sup> *E.g.*, Thornburg, cmt. 0499, at 2; Comment of Judge James Carr, U.S. District Court, Northern District of Ohio, USC-RULES-CV-2013-0002-0854 (Feb. 12, 2014), at 2. *See also* Comment of Prof. Helen Hershkoff, et al., on behalf of 6 civil procedure law professors, USC-RULES-CV-2013-0002-0622 (Feb. 5, 2014), at 4; Testimony of Joseph Sellers, Cohen Milstein Sellers & Toll PLLC, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Washington, D.C., Nov. 7, 2013) (hereinafter “November Hearing”), at 307-13, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>; Coons, cmt. 0392, at 2.

<sup>17</sup> *E.g.*, Carr, cmt. 0854, at 2; Judge Donald Molloy, U.S. District Court, District of Montana, USC-RULES-CV-2013-0002-1368 (Feb. 14, 2014), at 2; Thornburg, cmt. 0499, at 5-8; Burbank, cmt. 0729, at 15; Comment of Professor Suzette Malveaux, The Catholic Univ. Columbus School of Law, USC-RULES-CV-2013-0002-1650 (Feb. 15, 2014), at 3. *See also* Coons, cmt. 0392, at 3.

<sup>18</sup> *E.g.*, Testimony of Professor Danya Shocair Reda, New York Univ. School of Law, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Dallas, Feb. 7, 2014) (hereinafter “February Hearing”), at 349-55, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf>; Comment of Stuart Ollanick, Public Justice PC and the Public Justice Foundation, USC-RULES-CV-2013-0002-1164 (Feb. 13, 2014).

<sup>19</sup> *E.g.*, Burbank, cmt. 0729, at 12-15; *see also* Thornburg, cmt. 0499, at 2.



Fewer witnesses and comments voiced general support for the proposed amendments. Many of the comments in support focused on particular proposed amendments. The general support for the proposals tended to come from corporations, their legal counsel, and organizations that represent their interests. For example, the Washington Legal Foundation argued in testimony that the *status quo* is completely unacceptable.<sup>20</sup> Comments and witnesses who offered general support argued that the civil justice system is in serious need of repair because it takes too long and costs too much,<sup>21</sup> often citing to one or two surveys on litigation costs.<sup>22</sup> Many of them argued that the Civil Rules have not kept up with the explosion of electronically stored information (“ESI”) that is created and maintained by businesses.<sup>23</sup> These comments sometimes offered anecdotal or internal company information regarding the amount of ESI preserved and the costs of such preservation.<sup>24</sup> The assertions made in support of the proposed amendments generally were also raised by many comments that supported particular proposals.

## **II. PROPOSED REDEFINITION OF THE SCOPE OF DISCOVERY: RULE 26(b)(1)**

The Advisory Committee has proposed a large number of substantive changes to the definition of the scope of discovery. Because of the number of substantive changes proposed to Rule 26(b)(1), we have broken the proposal out into its four separate substantive parts to examine and analyze the comments and testimony on each of them. The following examination of the comments on each of the four proposed substantive amendments to Rule 26(b)(1) focus only on those comments and testimony that specifically supported or opposed each separate proposal. But first a note about the general comments on the amendments to Rule 26(b)(1).

Several hundred comments expressed general support of or opposition to Rule 26 or Rule 26(b)(1). Many of these comments objected to or supported the proposed changes, but focused

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<sup>20</sup> Testimony of Cory Andrews, Washington Legal Foundation, November Hearing, at 42-70.

<sup>21</sup> Comment of Rebecca Kourlis, on behalf of the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers Task Force on Discovery (“IAALS & ACTL”), USC-RULES-CV-2013-0002-0473 (Jan. 28, 2014), at 1.

<sup>22</sup> IAALS & ACTL, cmt. 0473, at 1 n.1; Comment of William W. Large, Florida Justice Reform Institute, USC-RULES-CV-2013-0002-0634 (Feb. 6, 2014) (citing Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for Advancement of the Am. Legal Sys., Interim Report (including 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers) on the Joint Project 1 (2008), at [http://iaals.du.edu/images/wygwam/documents/publications/Interim\\_Report\\_Final\\_for\\_web.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf)); Comment of Bruce Kuhlik, Merck & Co., Inc., USC-RULES-CV-2013-0002-1073 (Feb. 13, 2014) (citing Lawyers for Civil Justice, Litigation Cost Surveys for Major Companies (2010)).

<sup>23</sup> *E.g.*, Testimony of David M. Howard, Microsoft Corp., January Hearing, at 78-88; Merck & Co., cmt. 1073.

<sup>24</sup> Testimony of Robert L. Levy, ExxonMobil Corp., November Hearing, at 158-68; Microsoft Corp., January Hearing, at 79-83; Comment of Alex Dahl, Lawyers for Civil Justice, USC-RULES-CV-2013-0002-0540 (Feb. 4, 2014) (hereinafter “LCJ Supp.”) (summarizing testimony and comments on this subject).

on one or two specific proposed amendments to the rule. The majority of these written comments generally opposed the proposed amendments to Rule 26(b)(1) or Rule 26.

Many of the comments in opposition to the proposed changes to Rule 26(b)(1) (or just to Rule 26) stated their opposition very generally. They argued that changing the definition of the scope of discovery is ill advised because the standards are decades old, and well-understood by litigants and courts.<sup>25</sup> But the concerns raised by many of the comments that generally opposed the proposed amendments, discussed *supra* II., were also raised in opposition to the proposed amendments to Rule 26(b)(1). A number of comments that generally opposed the amendments to Rule 26(b)(1) argued that there is no empirical basis for the amendments, and that the proposed rule is likely to create a number of problems for more ordinary cases while failing to address the problem of discovery costs in complex, high-stakes litigation where there is contentious adversary conduct.<sup>26</sup> Some also echoed the assertion that broad discovery and civil litigation have benefits that are ignored by the arguments in favor of the proposed amendments.<sup>27</sup> Numerous comments provided examples of cases where information learned under the current definition of the scope of discovery led not only to the resolution of the claims, but also changed industry standards, benefiting many more people.<sup>28</sup>

**A. Adding Proportionality to the Scope of Discovery by Transposing Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis**

Under current Rule 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” The scope of discovery and the number of discovery requests permitted are subject to limitation by the court under current Rule 26(b)(2).

A proposed amendment to Rule 26(b)(1) incorporates and rearranges the text of current Rule 26(b)(2)(C)(iii) into the definition of what information is discoverable. The published proposal would thus redefine the scope of discovery to extend to

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<sup>25</sup> *E.g.*, Comment of Bruce B. Elfvin, Elfvin & Besser, USC-RULES-CV-2013-0002-0020 (Feb. 13, 2013), at 2; Comment of Shehnaz M. Bhujwala, Khorrani LLP, USC-RULES-CV-2013-0002-0051 (Feb. 22, 2013), at 2.

<sup>26</sup> *E.g.*, Comment of Henry Kelston, Milberg LLP, USC-RULES-CV-2013-0002-1708 (Feb. 16, 2014), at 2-3; Coons, cmt. 0392.

<sup>27</sup> *E.g.*, Comment of Michael Hugo, AAJ Section on Toxic, Environmental, and Pharmaceutical Torts, USC-RULES-CV-2013-0002-2178 (Feb. 18, 2014); Testimony of Larry E. Coben, Attorneys Information Exchange Group (“AIEG”), January Hearing, at 169-77; Comment of William Rossbach, Rossbach Hart PC, USC-RULES-CV-2013-0002-2216 (Feb. 18, 2014).

<sup>28</sup> *E.g.*, Testimony of Patrick M. Regan, Regan Zambri Long & Bertram, November Hearing, at 278-87; Rossbach, cmt. 2216; AAJ Section on Toxic, Environmental, and Pharmaceutical Torts, cmt. 2178; AIEG, January Hearing, at 171-77; Ollanick, cmt. 1164.

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>29</sup>

The Committee Note states that this amendment “limit[s] the scope of discovery,” and “must be observed by the parties without court order.”<sup>30</sup>

The Advisory Committee has called this particular amendment one of the two “most important” proposals “to promote responsible use of discovery proportional to the needs of the case.”<sup>31</sup> While the Advisory Committee notes that this so-called “proportionality” limitation on discovery is already a part of the rule, it states that “it cannot be said to have realized the hopes of its authors,” indicating that the problem is not with the text of Rule 26(b)(2)(C)(iii), but with its implementation—“it is not invoked often enough to dampen excessive discovery demands.”<sup>32</sup> The Advisory Committee cites to surveys that “indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior. The number of these cases and the burdens they impose present serious problems. These problems have not yet been solved.”<sup>33</sup>

**This proposed amendment generated more than one thousand separate written comments, and was specifically addressed by more than sixty of the witnesses who testified at the public hearings on the proposed amendments, generating more testimony than any other single proposal.**

### **1. The Opposition to the Proposal**

**More than two-thirds of the written comments on this specific proposal opposed it. More than half of the witnesses who testified on this specific proposal also opposed it.**

**A large number of the comments opposing the proposal came from attorneys and organizations of attorneys who represent plaintiffs in civil litigation, including a large number of legal aid organizations, civil rights organizations, consumer rights organizations, employment rights groups, environmental justice organizations, the U.S. Commodity Futures Trading Commission, as well as attorneys who represent individuals and small businesses in wide variety of civil litigation against larger entities like corporations and governments. A majority of the**

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<sup>29</sup> Proposed Amendments, at 289.

<sup>30</sup> *Id.* at 296.

<sup>31</sup> *Id.* at 264.

<sup>32</sup> *Id.* at 265.

<sup>33</sup> *Id.*

uncategorized comments specifically opposed this proposal. A number of attorneys who represent clients as both plaintiffs and defendants also opposed the proposal,<sup>34</sup> as did a couple of defense attorneys.<sup>35</sup>

These opponents were joined in their opposition by the majority of federal judges<sup>36</sup> and academics<sup>37</sup> who commented on this proposal. Among them, former members of and former

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<sup>34</sup> Comment of Darpana Sheth, Institute for Justice, USC-RULES-CV-2013-0002-2092 (Feb. 18, 2014); Comment of Jonathan Scruggs, Alliance Defending Freedom, USC-RULES-CV-2013-0002-0323 (Nov. 4, 2013); Comment of Bryan Wood, Law Office of J. Bryan Wood, USC-RULES-CV-2013-0002-2112 (Feb. 18, 2014); Comment of Edward Allred, USC-RULES-CV-2013-0002-1456 (Feb. 14, 2014); Comment of John Burke, Thomas Braum Bernard Burke, USC-RULES-CV-2013-0002-1408 (Feb. 14, 2014); Comment of Elise E. Singer, Fine Kaplan & Black, USC-RULES-CV-2013-0002-0135 (May 21, 2013); Comment of Robert B. Fitzpatrick, Robert B. Fitzpatrick PLLC, USC-RULES-CV-2013-0002-0252 (Feb. 28, 2013); Comment of Dan Modarski, USC-RULES-CV-2013-0002-0585 (Feb. 4, 2014); Comment of Lon McClintock, McClintock Law Office PC, USC-RULES-CV-2013-0002-0631 (Feb. 6, 2014); Comment of Jon M. Steele, Runft & Steele Law Offices PLLC, USC-RULES-CV-2013-0002-1140 (Feb. 13, 2014); Comment of Brian Wojtalewicz, USC-RULES-CV-2013-0002-1155 (Feb. 13, 2014); Comment of John Pucheu, Pucheu & Robinson LLP, USC-RULES-CV-2013-0002-1778 (Feb. 17, 2014); Comment of Carlo Sabatini, Sabatini Law Firm LLC, USC-RULES-CV-2013-0002-2032 (Feb. 18, 2014); Comment of Novlette R. Kidd, Fagenson & Puglisi, USC-RULES-CV-2013-0002-2220 (Feb. 18, 2014).

<sup>35</sup> Comment of Thomas M. O'Rourke, Cozen O'Connor, USC-RULES-CV-2013-0002-0461 (Jan. 28, 2014) (enclosing Thomas G. Wilkinson, Jr. & Thomas M. O'Rourke, *Narrowing the Scope of Federal Discovery: The Proposed Amendments to the Federal Rules of Civil Procedure*, Pennsylvania Bar Ass'n Federal Practice Committee (Nov. 2013), arguing that adding proportionality to the scope of discovery may generate inequitable results, unpredictable and wide-ranging interpretations and encourage early and expensive motion practice over the basic parameters of discovery. The authors suggest that the other proposed changes to Rule 26(b)(1) limiting the scope of discovery may encourage litigants to invoke Rule 26(b)(2)(C)(iii) more often).

<sup>36</sup> Comment of Judge Shira A. Scheindlin, U.S. District Court, Southern District of New York, USC-RULES-CV-2013-0002-0398 (Jan. 12, 2014); Comment of Judge Jay C. Zainey, U.S. District Court, Eastern District of Louisiana, USC-RULES-CV-2013-0002-0657 (Feb. 7, 2014); Comment of Judge Michael Simon, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-1703 (Feb. 16, 2014); Comment of Magistrate Judge Dennis Hubel, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-1572 (Feb. 14, 2014); Comment of Judge J. Leon Holmes, U.S. District Court, Eastern District of Arkansas, USC-RULES-CV-2013-0002-0307 (Oct. 22, 2013); Comment of Judge Anna J. Brown, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-0934 filed Feb. 12, 2014); Carr, cmt. 0854. *See also* Comment of Hon. William Royal Ferguson (Ret.), Univ. of N. Texas, Dallas College of Law, USC-RULES-CV-2013-0002-1199 (Feb. 13, 2014); Comment of Hon. Nancy Gertner (Ret.), Harvard Law School, on behalf of Legal Momentum, USC-RULES-CV-2013-0002-1220 (Feb. 13, 2014).

<sup>37</sup> *See, e.g.*, Comment of Professor Arthur Miller, New York Univ. School of Law, USC-RULES-CV-2013-0002-0386 (Jan. 6, 2014); Comment of Professor Alan Morrison, George Washington Univ. Law School, USC-RULES-CV-2013-0002-0383 (Jan. 2, 2014); Comment of Professor Paul Carrington, Duke Univ. School of Law, USC-RULES-CV-2013-0002-0366 (Dec. 16, 2013); Hershkoff, cmt. 0622;

reporters for the Advisory Committee on Civil Rules specifically opposed this proposal, including Arthur Miller, the Reporter for the Advisory Committee when the concept of “proportionality” was added to Rule 26 in 1983. Several members of the United States Congress also commented on this particular proposal, and all of them opposed it.<sup>38</sup>

Those who oppose this particular proposal asserted a variety of reasons for their opposition. One of the primary reasons cited for opposing the proposal is that it is not supported by any empirical evidence.<sup>39</sup> Many who oppose this proposal cite the study by the Federal Judicial Center showing that discovery is proportional in the vast majority of cases under the current rules.<sup>40</sup> Some dispute the assertion that proportionality is not applied in most cases, asserting that it is regularly addressed by the parties at the outset of litigation,<sup>41</sup> and that legal research reveals numerous cases applying the current rule.<sup>42</sup> They argue that the reason Rule 26(b)(2)(C)(iii) is not invoked more often is because lawyers have internalized the concept of

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Comment of Professor Suja Thomas, Univ. of Illinois at Urbana-Champaign College of Law, USC-RULES-CV-2013-0002-1185 (Feb. 13, 2014); Comment of Professor Andrew Popper, American Univ. Washington College of Law, USC-RULES-CV-2013-0002-0813 (Feb. 11, 2014); Comment of Professor David Oppenheimer, Univ. of California Berkeley Law, USC-RULES-CV-2013-0002-1307 (Feb. 14, 2014); Comment of Professor Craig Futterman, Univ. of Chicago School of Law, USC-RULES-CV-2013-0002-0952 (Feb. 12, 2014); Comment of Professor Joel Hesch, Liberty Univ. School of Law, USC-RULES-CV-2013-0002-0749 (Feb. 10, 2014). *See also* Comment of Judith Resnik, et al., on behalf of 171 Law Professors, USC-RULES-CV-2013-0002-2078 (Feb. 18, 2014).

<sup>38</sup> Comment of Representative Earl Peter Blumenaur, et al., on behalf of the Oregon Congressional Delegation, USC-RULES-CV-2013-0002-0479 (Jan. 29, 2014); Comment of Representative John Conyers, Jr., et al., on behalf of 12 House Judiciary Committee members, USC-RULES-CV-2013-0002-1127 (Feb. 13, 2014); Comment of Representative Marcia Fudge, et al., on behalf of 4 members of the Congressional Black Caucus, USC-RULES-CV-2013-0002-2109 (Feb. 18, 2014); Comment of Senators Ron Wyden & Jeff Merkley, USC-RULES-CV-2013-0002-1025 (Feb. 12, 2014); Comment of Senator Charles Shumer, USC-RULES-CV-2013-0002-1376 (Feb. 14, 2014); Comment of Representative Peter Welch, USC-RULES-CV-2013-0002-0405 (Jan. 15, 2014).

<sup>39</sup> Ollanick, cmt. 1164; Miller, cmt. 0386; Hershkoff, cmt. 0622; Testimony of Professor Arthur Miller, New York Univ. School of Law, January Hearing, at 36-45; Moore, cmt. 0491; AAJ, cmt. 0372; Kelston, cmt. 1708; Testimony of Johnathan Smith, NAACP-Legal Defense and Education Fund, November Hearing, at 268-73; Comment of Margaret A. Harris, Butler & Harris, USC-RULES-CV-2013-0002-2195 (Feb. 18, 2014), at 2-3; Comment of Jon Greenbaum, Lawyers’ Committee for Civil Rights Under Law, USC-RULES-CV-2013-0002-1914 (Feb. 18, 2014), at 5-6; Comment of Barry Weprin, National Association of Shareholder and Consumer Attorneys, USC-RULES-CV-2013-0002-0417 (Jan. 17, 2014), at 4 (hereinafter “NASCAT Supp.”).

<sup>40</sup> Miller, cmt. 0386; Hershkoff, cmt. 0622; Testimony of Prof. Suja Thomas, Univ. of Illinois at Urbana-Champaign College of Law, February Hearing, at 95-104; Canty, January Hearing, at 225-32.

<sup>41</sup> Testimony of Jennie Lee Anderson, Andrus Anderson LLP, January Hearing, at 271-83; Comment of Lea Malani Bays, Robbins Geller Rudman & Dowd LLP, USC-RULES-CV-201-1614 (Feb. 14, 2014).

<sup>42</sup> *E.g.*, Moore, cmt. 0491.



proportionality in discovery,<sup>43</sup> resulting in proportional discovery in the vast majority of cases.<sup>44</sup> Several written comments and witnesses stated that they do not oppose the concept of proportionality in discovery, but they argued that there are already sufficient safeguards in the current rule that work to ensure that discovery is not disproportionate.<sup>45</sup> They express concern that the Advisory Committee is proposing to redefine the scope of discovery without a demonstrated need.<sup>46</sup> One bar association called the amendment “an excessive response to an undocumented issue.”<sup>47</sup>

Those who oppose this proposal are concerned that it makes the cost-benefit analysis of proportionality a co-equal to relevance in the scope of discovery, whereas it is now a limit on the scope of discoverable, relevant information.<sup>48</sup> They assert that it converts the scope of discovery from its longstanding single principle that embraces anything that is relevant to a claim or defense of a party (or, prior to 2000, to the subject matter) to one that effectively allows discovery of only the relevant evidence that is “proportional to the needs of the case.”<sup>49</sup> They argue that this will be interpreted to impose a more restrictive scope of discovery across the board.<sup>50</sup> They assert that while this limit currently must be observed by the parties under Rule 26(g), the rule does not currently impose on the requesting party a requirement that it first demonstrate that the discovery sought is proportional to the needs of the case before being entitled to that information.<sup>51</sup>

Additionally, although the factors proposed to be incorporated into the scope of discovery currently operate as a limitation on the scope of discoverable information, the term

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<sup>43</sup> E.g., Moore, cmt. 0491.

<sup>44</sup> Hershkoff, cmt. 0622.

<sup>45</sup> Testimony of Ralph Dewsnup, Utah Association for Justice, February Hearing, at 23-32; Testimony of J. Bernard Alexander, Alexander Krakow & Glick, February Hearing, at 272-80. *See also* Comment of Daniel Garrie, Law & Forensics LLC, USC-RULES-CV-2013-0002-0281 (Sept. 20, 2013); Hershkoff, cmt. 0622; Comment of William Fedullo, Philadelphia Bar Association, USC-RULES-CV-2013-0002-0995 (Feb. 12, 2014); Comment of Ross Pulkabrek, USC-RULES-CV-2013-0002-1527 (Feb. 14, 2014); NASCAT Supp., cmt. 0417; Comment of Steven Skalet, Mehri & Skalet PLLC, USC-RULES-CV-2013-0002-2130 (Feb. 18, 2014).

<sup>46</sup> Miller, cmt. 0386.

<sup>47</sup> Philadelphia Bar Ass’n, cmt. 0995.

<sup>48</sup> Miller, January Hearing, at 39; Comment of Salvatore Graziano, National Association of Shareholder & Consumer Attorneys, USC-RULES-CV-2013-0002-0173 (Mar. 1, 2013) (hereinafter “NASCAT”).

<sup>49</sup> Miller, cmt. 0386.

<sup>50</sup> Miller, cmt. 0386; Hershkoff, cmt. 0622.

<sup>51</sup> Burbank, cmt. 0729; Institute for Justice, cmt. 2092; AAJ, cmt. 0372.

“proportional” is not a standard in the current rule,<sup>52</sup> rather the standard is “whether the burden of the proposed discovery outweighs its likely benefit,” which the proposal turns into a *factor* in the “proportionality” test.<sup>53</sup> Under the current rule, “the needs of the case” is a separate factor to be considered by the court,<sup>54</sup> and the current rule requires a court finding that the likely benefit of discovery is outweighed by the burden of producing it.<sup>55</sup>

Professor Arthur Miller wrote and testified that the provision in the 1983 version of the rule upon which the proposed amendment is based “was designed to have limited application.”<sup>56</sup> It was not expected to raise an issue in more than a small number of cases and was intended to be “a modest exception to the basic and fundamental principle that all parties should have access to anything relevant to the ‘subject matter’ of the action.”<sup>57</sup> He further testified that the text of the rule creating limitations on the scope of discovery was based on the impressions of the Committee and undocumented assumptions about discovery practice, not empirical evidence.<sup>58</sup> He maintained that moving the text from Rule 26(b)(2)(C)(iii) into the scope of discovery in 26(b)(1) “is not merely a neutral or benign relocation.”<sup>59</sup> Other opponents of this amendment agreed that it is not a simple rearranging of the text of the current rule.<sup>60</sup>

Critics are concerned that the proposed rule permits parties to make a unilateral determination about the proportionality of discovery and refuse to provide discovery based on a boilerplate objection,<sup>61</sup> forcing the requesting party to move to compel, creating more disputes

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<sup>52</sup> Comment of Rebecca Kourlis, IAALS, USC-RULES-CV-2013-0002-0489 (Jan. 30, 2014); Philadelphia Bar Ass’n, cmt. 0995; Comment of Norman Siegel, Stueve Siegel Hanson LLP, USC-RULES-CV-2013-0002-1883 (Feb. 17, 2014).

<sup>53</sup> Institute for Justice, cmt. 2092; Zainey, cmt. 0657; Miller, cmt. 0386.

<sup>54</sup> Institute for Justice, cmt. 2092.

<sup>55</sup> E.g., AAJ, cmt. 0372; Comment of Jerome Wesevich, on behalf of Texas RioGrande Legal Aid and 14 other legal aid societies, USC-RULES-CV-2013-0002-1411 (Feb. 11, 2014), at 5 (hereinafter “Texas RioGrande Legal Aid, et al.”).

<sup>56</sup> Miller, cmt. 0386; *see also* Miller, January Hearing, at 38.

<sup>57</sup> Miller, cmt. 0386.

<sup>58</sup> Miller, January Hearing, at 38; *see also* Miller, cmt. 0386.

<sup>59</sup> Miller, cmt. 0386.

<sup>60</sup> Harris, cmt. 2195; Thornburg, cmt. 0499; Institute for Justice, cmt. 2092.

<sup>61</sup> Scheindlin, cmt. 0398; Ferguson, cmt. 1199; Institute for Justice, cmt. 2092; Comment of Michael Slack, AAJ Aviation Law Section, USC-RULES-CV-2013-0002-0266 (Aug. 30, 2013); AAJ, cmt. 0372; Comment of Professor Emeritus Louis Jacobs, Mortiz College of Law, USC-RULES-CV-2013-0002-0421 (Jan. 19, 2014); Comment of Herbert Eisenberg, National Employment Lawyers Ass’n/New York, USC-RULES-CV-2013-0002-0535 (Feb. 4, 2014); Comment of W. Bryan Smith, Tennessee Association for Justice, USC-RULES-CV-2013-0002-1123 (Feb. 13, 2014); Comment of Jocelyn Larkin, on behalf of Impact Fund and 20 other legal non-profit organizations, USC-RULES-CV-2013-0002-1413 (Feb. 14, 2014) (hereinafter “Impact Fund, et al. Supp.”); Thomas, cmt. 1185; Utah

and more motion practice that will impose greater costs on the courts and the parties before any of them have sufficient information about the facts of the case, decrease cooperation, and delay discovery and the litigation as a whole.<sup>62</sup> Some critics of the proposed amendment predict that it will turn every discovery request into a mini-trial.<sup>63</sup> They argue that these increased transaction costs alone will prevent some parties from securing discovery that is central to their claims or defenses.<sup>64</sup>

A large number of the critics of this proposed amendment highlight a potential problem created by its text. Under the current rule, the requesting party must demonstrate that the discovery is relevant to the claims or defenses, *i.e.*, that it is within the scope of discovery, and the burden of demonstrating that discovery should be limited by the court is on the party opposing discovery.<sup>65</sup> The majority of comments and testimony in opposition to the proposal express deep concern that the proposed rule, as written, will be interpreted to place the burden on the requesting party to demonstrate that the discovery requested is *both* relevant to the claims or defenses *and* proportional to the needs of the case.<sup>66</sup> These comments and witnesses argue that

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Ass'n for Justice, February Hearing, at 28; Testimony of Megan Jones, COSAL, February Hearing, at 212-21.

At least two witnesses who do work for both plaintiffs and defendants testified at the hearing in Dallas that that is precisely what they would do when defending a case. *See* Testimony of John W. Griffin, Marek Griffin & Knaupp, February Hearing, at 57-68; Testimony of Michael C. Smith, Texas Trial Lawyers Association, February Hearing, at 154-63 (hereinafter "TTLA"). *See also* Comment of Michael C. Smith, Texas Trial Lawyers Association, USC-RULES-CV-2013-0002-0639 (Feb. 6, 2014). One attorney from Colorado commented that is precisely his experience under the comparable "proportionality" rule in Colorado's Pilot Project for business cases in the Denver-metro area. *See* Pulkabrek, cmt. 1527.

<sup>62</sup> *E.g.*, Scheindlin, cmt. 0398; Wood, cmt. 2112; Jacobs, cmt. 0421; Testimony of Mark P. Chalos, Tennessee Association for Justice, February Hearing, at 104-11; TTLA, February Hearing, at 156-58; AAJ, cmt. 0372; Tennessee Ass'n for Justice, cmt. 1123; Skalet, cmt. 2130; Comment of Ariana Tadler, Milberg LLP, USC-RULES-CV-2013-0002-2173 (Feb. 18, 2014).

<sup>63</sup> *See, e.g.*, Comment of Megan Jones, COSAL, USC-RULES-CV-2013-0002-2223 (Feb. 18, 2014), at 5; Hershkoff, cmt. 0622; Comment of John H. Hickey, AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, USC-RULES-CV-2013-0002-0410 (Jan. 16, 2014); Impact Fund, et al. Supp., cmt. 1413; Comment of Beth White, West Virginia Association for Justice, USC-RULES-CV-2014-1994 (Feb. 18, 2014); Comment of J. Douglas Richards, Cohen Milstein Sellers & Toll PLLC, USC-RULES-CV-2013-0002-2142 (Feb. 18, 2014).

<sup>64</sup> *E.g.*, Burbank, cmt. 0729.

<sup>65</sup> AAJ, cmt. 0372; Zainey, cmt. 0657; NASCAT Supp., cmt. 0417.

<sup>66</sup> Scheindlin, cmt. 0398; Zainey, cmt. 0657; Gertner/Legal Momentum, cmt. 1220; Hershkoff, cmt. 0622; Institute for Justice, cmt. 2092; AAJ, cmt. 0372; Comment of Larry E. Coben, AIEG, USC-RULES-CV-2013-0002-0384 (Jan. 3, 2014); NASCAT Supp., cmt. 0417; Tennessee Ass'n for Justice, cmt. 1123; Impact Fund, et al. Supp., cmt. 1413; Bays, cmt. 1614; Comment of William Butterfield, Huasfeld LLP, USC-RULES-CV-2013-0002-2034 (Feb. 18, 2014); Tadler, cmt. 2173; Rossbach, cmt.



proving the discovery is proportional will be especially problematic in asymmetric cases, where most of the relevant information about the facts of case and the “proportionality” factors is in the hands of the party opposing discovery.<sup>67</sup> Several of these comments and witnesses argued that adding “proportionality” to the scope of discovery will undermine substantive federal laws that depend on “private attorneys general” for enforcement.<sup>68</sup> They argue that it will be virtually impossible to prove that the discovery sought is proportional without the discovery.<sup>69</sup>

A large number of the comments opposing this proposal express concern about the “proportionality” test itself, and the lack of guidance about how it is to be applied.<sup>70</sup> These comments argued that the test and its factors are vague,<sup>71</sup> nebulous,<sup>72</sup> abstract<sup>73</sup> and subjective,<sup>74</sup> and that they are weighted to favor large corporate entities and high-wage earners.<sup>75</sup> They argue that the “proportionality” test is incapable of principled application,<sup>76</sup> and they will lead to

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2216. *See also* Miller, cmt. 0386 (arguing that the Committee Note makes clear that the proponent of discovery must show that it is relevant and proportional); Thornburg, cmt. 0499.

<sup>67</sup> Institute for Justice, cmt. 2092; Burbank, cmt. 0729; Ollanick, cmt. 1164; Testimony of David A. Rosen, Rose Klein & Marias LLP, February Hearing, at 262-65; Miller, cmt. 0386; AAJ, cmt. 0372; AIEG, cmt. 0384; NASCAT Supp., cmt. 0417; Tennessee Ass’n for Justice, cmt. 1123.

<sup>68</sup> *E.g.*, Comment of Wade Henderson, Leadership Conference on Civil and Human Rights, USC-RULES-CV-2013-0002-0330 (Nov. 7, 2013); Comment of Peter J. Neufeld et al., on behalf of 7 civil rights litigators, USC-RULES-CV-2013-0002-0226 (Feb. 28, 2013); Comment of Eric Cramer, COSAL, USC-RULES-CV-2013-0002-0140 (Mar. 22, 2013); Comment of Ira Rheingold, National Association of Consumer Advocates & National Consumer Law Center, USC-RULES-CV-2013-0002-1913 (Feb. 18, 2014); Comment of Joanne S. Faulkner, USC-RULES-CV-2013-0002-0357 (Dec. 10, 2013); Testimony of Susan M. Rotkis, Consumer Litigation Associates PC, February Hearing, at 296-307.

<sup>69</sup> Griffin, February Hearing, at 60-61; Ollanick, cmt. 1164; Scheindlin, cmt. 0398.

<sup>70</sup> Scheindlin, cmt. 0398; Singer, cmt. 135; Texas RioGrande Legal Aid, et al., cmt. 1411.

<sup>71</sup> Pulkabrek, cmt. 1527 (commenting based on experience under Colorado Pilot Project, which uses a “proportionality” standard for discovery); AAJ Aviation Law Section, cmt. 0266; West Virginia Ass’n for Justice, cmt. 1994.

<sup>72</sup> Comment of Thomas Sobol, et al., Hagens Berman Sobol Shapiro LLP, USC-RULES-CV-2013-0002-0205 (Mar. 1, 2013); AAJ, cmt. 0372; West Virginia Ass’n for Justice, cmt. 1994.

<sup>73</sup> Comment of Richard T. Seymour, Law Office of Richard T. Seymour PLLC, USC-RULES-CV-2013-0002-2209 (Feb. 18, 2014).

<sup>74</sup> Wood, cmt. 2112; Pulkabrek, cmt. 1527; AAJ Aviation Law Section, cmt. 0266; Butterfield, cmt. 2034.

<sup>75</sup> *See, e.g.*, Wood, cmt. 2112; Comment of Victor M. Glasberg, Victor M. Glasberg & Associates, USC-RULES-CV-2013-0002-0525 (Feb. 3, 2014); Skalet, cmt. 2130.

<sup>76</sup> *E.g.*, Holmes, cmt. 0307; West Virginia Ass’n for Justice, cmt. 1994.

unpredictable<sup>77</sup> and inconsistent<sup>78</sup> results that will be virtually unreviewable by a court of appeals.<sup>79</sup>

There was significant concern about limiting discovery in cases based on “the amount in controversy,” especially in federal question cases, where the case is in federal court because of a congressional determination that certain rights should be protected by federal law regardless of the amount in controversy.<sup>80</sup> Critics of the proposed amendment also argued that “the amount in controversy” is subjective and constantly in dispute.<sup>81</sup> Some of those who opposed this proposal argued that it is “fundamentally inconsistent with the rule of law and the principle that the courts are open to the least among us.”<sup>82</sup> They argue the “proportionality” test creates classes of litigants, based on their resources and the amount in controversy, providing less discovery to (and thus less protection of the rights of) those with fewer resources and low or no monetary damages.<sup>83</sup> Even though the proposed amendment includes consideration of the importance of the issues at stake in the action, there is concern that this factor is subjective<sup>84</sup> and will invite a merits determination before any discovery is had,<sup>85</sup> and will be inconsistently applied.<sup>86</sup>

There was also concern that consideration of “the parties’ resources” will insulate wrongdoers who lose money or go bankrupt because of their misdeeds,<sup>87</sup> and does not clearly define “resources.”<sup>88</sup> There was concern that “the importance of the discovery in resolving the

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<sup>77</sup> Miller, cmt. 0386; Philadelphia Bar, cmt. 0995; Wood, cmt. 2112.

<sup>78</sup> AAJ Aviation Law Section, cmt. 0266; AIEG, cmt. 0384; Texas RioGrande Legal Aid, et al., cmt. 1411.

<sup>79</sup> Seymour, cmt. 2209.

<sup>80</sup> AAJ, cmt. 0372; AIEG, cmt. 0384; Texas RioGrande Legal Aid, et al., cmt. 1411; Lawyers’ Committee for Civil Rights Under Law, cmt. 1914; Skalet, cmt. 2130; Seymour, cmt. 2209.

<sup>81</sup> Scheindlin, cmt. 0398; AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, cmt. 2173; Tennessee Ass’n for Justice, cmt. 1123.

<sup>82</sup> Fitzpatrick, cmt. 0252.

<sup>83</sup> NASCAT, cmt. 0173; AIEG, cmt. 0384; Jacobs, cmt. 0421; Glasberg, cmt. 0525; Comment of Steve Garner, Strong Garner Bauer PC, USC-RULES-CV-2013-0002-0916 (Feb. 12, 2014); Lawyers’ Committee for Civil Rights Under Law, cmt. 1914; Seymour, cmt. 2209.

<sup>84</sup> Wood, cmt. 2112; AAJ, cmt. 0372; AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, cmt. 2173; Comment of Joseph Garrison, Garrison Levin-Epstein Richardson Fitzgerald & Pirrotti, USC-RULES-CV-2013-0002-1147 (Feb. 14, 2014); Impact Fund, et al. Supp., cmt. 1413; West Virginia Ass’n for Justice, cmt. 1994; Skalet, cmt. 2130.

<sup>85</sup> Impact Fund, et al. Supp., cmt. 1413; Richards, cmt. 2142.

<sup>86</sup> *E.g.*, Skalet, cmt. 2130, at 3.

<sup>87</sup> Garner, cmt. 0916; Comment of Jonathan Marcus, U.S. Commodity Futures Trading Commission (“CFTC”), USC-RULES-CV-2013-0002-1366 (Feb. 14, 2014).

<sup>88</sup> Garner, cmt. 0916; West Virginia Ass’n for Justice, cmt. 1994.

issue” is not sufficiently clear about what “issue” the discovery must be important to,<sup>89</sup> and is a factor that is particularly hard to know or demonstrate before seeing the discovery.<sup>90</sup> Finally, many commenters argued that the question of “whether the burden or expense of discovery outweighs its likely benefit,” which is the current standard under Rule 26(b)(2)(C)(iii), will also be difficult to know or show early in the litigation, before discovery occurs.<sup>91</sup> This factor was criticized as giving protection to large entities who create a lot of information that is relevant to the claims against them,<sup>92</sup> and protecting litigants who maintain archives of ESI in outdated formats that make search and collection expensive.<sup>93</sup>

## **2. Support for the Proposal**

Less than one-third of the written comments that specifically addressed this proposal supported it. Approximately 30 witnesses testified in favor of this specific proposal.

The comments and testimony in support of the proposal came in large part from corporations, their legal counsel, and the organizations that represent their interests.<sup>94</sup> They were joined by other attorneys who frequently represent governments, their agencies and agents as defendants in civil litigation,<sup>95</sup> as well as a minority of judges and academics, and a minority of the uncategorized comments. Some bar groups and some individual members of bar groups also supported the proposal. While the U.S. Equal Employment Opportunity Commission (ordinarily a plaintiff in federal civil litigation) and the NYS Bar Association Section expressed support for proportionality, they both expressed reservations about it and their support for the proposal was tentative and cautious.<sup>96</sup>

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<sup>89</sup> Morrison, cmt. 0383.

<sup>90</sup> AAJ, cmt. 0372; West Virginia Ass’n for Justice, cmt. 1994; Skalet, cmt. 2130.

<sup>91</sup> AAJ, cmt. 0372.

<sup>92</sup> Garner, cmt. 0916.

<sup>93</sup> AAJ, cmt. 0372; Law & Forensics LLC, cmt. 0281; *See also* Bays, cmt. 1614.

<sup>94</sup> *See* Testimony of Michael J. Harrington, Eli Lilly & Co., February Hearing, at 125 (“[T]he proposed rules enjoy overwhelming and widespread support in the corporate community and by general counsels.”).

<sup>95</sup> Comment of Stuart Delery, U.S. Department of Justice, Civil Division (“DOJ”), USC-RULES-CV-2013-0002-0459 (Jan. 28, 2014); Comment of Noah G. Purcell, Washington State Attorney General’s Office, USC-RULES-CV-2013-0002-0677 (Feb. 10, 2014); Testimony of Tom Horne, Attorney General of Arizona, January Hearing, at 232-35; Comments Lawrence Kahn, on behalf of the City of New York Law Department, City of Chicago, City of Houston, and the International Municipal Lawyers Ass’n, USC-RULES-CV-2013-0002-1554 (Feb. 14, 2014) (hereinafter “New York Law Department et al.”).

<sup>96</sup> Testimony of P. David Lopez, U.S. Equal Employment Opportunity Commission, January Hearing, at 68-78; Testimony of Michael C. Rakower, New York State Bar Association Commercial and Federal Litigation Section, November Hearing, at 287-92; Comment of Gregory K. Arenson, New York

Those who expressed support for the amendment did so because they believe the scope of discovery under the current rule is “overly broad”<sup>97</sup> and “anything goes,”<sup>98</sup> and is “a fundamental cause of the high costs and burdens of modern discovery”<sup>99</sup> Their concerns were primarily with the costs of preserving electronically stored information (“ESI”), but also with the costs of collecting, reviewing, and producing ESI.<sup>100</sup> Many of the comments in support of this proposal made general assertions that the costs of discovery drive parties to settle claims regardless of their merit<sup>101</sup> and is used as a tactic to harass and extort.<sup>102</sup> Many of them relied heavily on a

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State Bar Association Commercial and Federal Litigation Section (“NYS Bar Section”), USC-RULES-CV-2013-0002-0303 (Oct. 25, 2013).

<sup>97</sup> Comment of Cory Andrews, Washington Legal Foundation, USC-RULES-CV-2013-0002-0285 (Oct. 7, 2013); Comment of Edward Miller, Boehringer Ingelheim, USC-RULES-CV-2013-0002-0399 (Jan. 13, 2014); Comment of Vickie Turner, Wilson Turner Kosmo LLP, USC-RULES-CV-2013-0002-0450 (Jan. 24, 2014).

<sup>98</sup> Comment of John Beisner, Skadden Arps Slate Meagher & Flom LLP, USC-RULES-CV-2013-0002-0382 (Jan. 2, 2014), Comment of U.S. Chamber Institute for Legal Reform (“ILR”), USC-RULES-CV-2013-0002-0328 (Nov. 7, 2013).

<sup>99</sup> E. Miller, cmt. 0399; Comment of Alex Dahl, Lawyers for Civil Justice (“LCJ”), USC-RULES-CV-2013-0002-0267 (Aug. 30, 2013); Comment of J. Mitchell Smith, International Association of Defense Counsel (“IADC”), USC-RULES-CV-2013-0002-0390 (Jan. 7, 2014).

<sup>100</sup> Comment of David Howard, Microsoft Corp., USC-RULES-CV-2013-0002-1222 (Feb. 14, 2014); Comment of Eric Hemmendinger, Shawe Rosenthal LLP, USC-RULES-CV-2013-0002-0351 (Dec. 4, 2013); Comment of Malini Morrthy, Pfizer Inc., USC-RULES-CV-2013-0002-0327 (Nov. 7, 2013); NYS Bar Section, cmt. 0303; Comment of Nina Gussack, Pepper Hamilton LLP, USC-RULES-CV-2013-0002-0388 (Jan. 6, 2014); IAALS & ACTL, cmt. 0473; Washington State Attorney General’s Office, cmt. 0677; Comment of Mark S. Stewart, Ballard Spahr LLP, USC-RULES-CV-2013-0002-0412 (Jan. 16, 2014); Comment of Donald Bunnin, Allergan Inc. USC-RULES-CV-2013-0002-0436 (Jan. 22, 2014); LCJ Supp., cmt. 0540 (summarizing testimony and comments on this subject); Comment of Michael Klein, Altria & Philip Morris USA, USC-RULES-CV-2013-0002-0684 (Feb. 7, 2014); Comment of John A. Barbour, Buchanan Ingersoll & Rooney P.C., USC-RULES-CV-2013-0002-1070 (Feb. 13, 2014); Merck & Co., cmt. 1073; Comment of Dante Stella, Dykema Gossett PLLC, USC-RULES-CV-2013-0002-1585 (Feb. 14, 2014); Comment of Michael Lackey, Mayer Brown LLP, USC-RULES-CV-2013-0002-2182 (Feb. 18, 2014); ILR, cmt. 0328; Comment of Corey Goldsand, Cardinal Health Inc. USC-RULES-CV-2013-0002-1410 (Feb. 14, 2014); Comment of John R. Kouris, Defense Research Institute (“DRI”), USC-RULES-CV-2013-0002-0404 (Jan. 15, 2014); New York Law Department, et al., cmt. 1554; Eli Lilly & Co., February Hearing, at 122-24; Testimony of Thomas Kelly, Pfizer Inc., February Hearing, at 164-72; Testimony of David Werner, Shell Oil Co., February Hearing, at 185-93.

<sup>101</sup> Comment of Ralph Spooner, USC-RULES-CV-2013-0002-0423 (Jan. 20, 214); Comment of Kaspar Stoffelmayr, Bayer Corp., USC-RULES-CV-2013-0002-0309 (Oct. 25, 2013); Comment of Joseph Goldstein, USC-RULES-CV-2013-0002-0478 (Jan. 29, 2014); Comment of Bradford Berenson, General Electric Co., USC-RULES-CV-2013-0002-0599 (Feb. 5, 2014); Testimony of Dan Troy, GlaxoSmithKline, November Hearing, at 123-35; Testimony of Jack B. McCowan, Jr., Gordon & Rees LLP, November Hearing, at 6-14; Testimony of John C.S. Pierce, Butler Pappas Weihmuller Katz Craig, November Hearing, at 22-26; Testimony of David R. Cohen, Reed Smith LLP, November Hearing, at 32-

report on litigation costs of Fortune 200 companies.<sup>103</sup> Some of them relied on Nicholas M Pace and Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (RAND 2012),<sup>104</sup> which was based on information provided by eight very large companies. Many companies provided internal company information about the amount of ESI they preserve and how much they spend on preservation, as well as collection, review, and production of ESI.<sup>105</sup> This internal company data, however, was limited, in that the examples generally did not provide information about the stakes involved in the litigation that the companies were party to, whether the information preserved would have been preserved for another purpose or for the companies' own claims or defenses, or whether information learned in discovery led to settlement of valid claims, saving the companies trial costs.

Those who support this proposed amendment believe that this particular change in the scope of discovery has the potential to reduce the amount of discovery and the burden on parties responding to discovery requests,<sup>106</sup> by cabining purportedly "excessive discovery" and indirectly reducing the burden of "over-preservation."<sup>107</sup> They contend that the provisions currently in Rule 26(b)(2)(C) have failed to achieve their purpose and are commonly ignored by

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42; DRI, cmt. 0404; Comment of David R. Cohen, Reed Smith LLP, USC-RULES-CV-2013-0002-2174 (Feb. 18, 2014); Testimony of Bradford Berenson, General Electric Co., February Hearing, at 112-20.

<sup>102</sup> Comment of JoAnne Deaton, Rhodes Hieronymus PLLC, USC-RULES-CV-2013-0002-0460 (Jan. 28, 2014); Hemmendinger, cmt. 0351; Florida Justice Reform Institute, cmt. 0634; GlaxoSmithKline, November Hearing, at 133.

<sup>103</sup> LCJ, *Litigation Cost Surveys for Major Companies* (2010) (cited by Merck & Co., cmt. 1073; Comment of Richard T. Fulton, Alston & Bird LLP, USC-RULES-CV-2013-0002-1145 (Feb. 14 2014); Comment of Steven Weinstein, Farmers Inc., USC-RULES-CV-2013-0002-1259 (Feb. 14, 2014); Comment of Edward Collins, Allstate Insurance Co., USC-RULES-CV-2013-0002-1446 (Feb. 14, 2014); Cohen, cmt. 2174; Comment of Michael Drew, Jones Walker LLP, USC-RULES-CV-2013-0002-1903 (Feb. 18, 2014); Comment of Michael M. Walker, Avnet Inc., USC-RULES-CV-2013-0002-2259 (Feb. 21, 2014)).

<sup>104</sup> Comment of Evan Stolove, Fannie Mae, USC-RULES-CV-2013-0002-1360 (Feb. 14, 2014); Drew, cmt. 1903.

<sup>105</sup> Altria, cmt. 0684; Comment of Pamela Davis, Google Inc., USC-RULES-CV-2013-0002-0922 (Feb. 12, 2014); Microsoft Corp., cmt. 1222; Comment of Joseph Braunreuther, Johnson & Johnson, USC-RULES-CV-2013-0002-1474 (Feb. 14, 2014); Comment of Debra K. Broussard, Anadarko Petroleum Co., USC-RULES-CV-2013-0002-2240 (Feb. 19, 2014); Comment of Dan Troy, GlaxoSmithKline, USC-RULES-CV-2013-0002-2128 (Feb. 18, 2014); LCJ Supp., cmt. 0540; Comment of Thomas Kelly, Pfizer Inc., USC-RULES-CV-2013-0002-1491 (Feb. 14, 2014); Comment of Peter Oesterling, Nationwide Mutual Insurance Co., USC-RULES-CV-2013-0002-1457 (Feb. 14, 2014); Cardinal Health, cmt. 1410; Testimony of Timothy A. Pratt, on behalf of Federation of Defense and Corporate Counsel, January Hearing, at 26-36; Testimony of Steven J. Twist, Services Group of America, January Hearing, at 243-50.

<sup>106</sup> Pfizer, cmt. 0327.

<sup>107</sup> Comment of Kenneth Withers, Steering Committee of Working Group 1 of The Sedona Conference ("Sedona WG1"), USC-RULES-CV-2013-0002-0346 (Nov. 25, 2014); Altria, cmt. 0684.



the parties and by judges.<sup>108</sup> Several of the comments in support of this proposed amendment believe that it, and potentially other proposed amendments, will rectify an “imbalance” of the “asymmetrical costs and burdens” of discovery,<sup>109</sup> especially in cases where access to relevant information is asymmetrical, and thus the burden of producing discovery is asymmetrical.<sup>110</sup>

Some of those who support the proposal assert that it simply rearranges the text to make proportionality more prominent and will just force the parties and the courts to discuss and consider proportionality at the outset of discovery, while developing discovery tailored to the needs of each case.<sup>111</sup> Some comments support the rule because it puts the proportionality analysis in the hands of the parties, “ensuring the producing party has the ability to resist ‘fishing expeditions.’”<sup>112</sup> Some supporters, including the association of Federal Magistrate Judges who will frequently be called upon to rule on proportionality, expressly advocate or believe that the rule should be interpreted to place the burden of showing that the discovery sought is proportional on the requesting party.<sup>113</sup> Others argue that the proposed amendment will not change the rule or its application either in substance or in practice,<sup>114</sup> but some argue that even if it did, putting the burden on the requesting party is justified by the costs and burdens of electronic discovery.<sup>115</sup> At least some who support the proposal think that incorporating the

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<sup>108</sup> ILR, cmt. 0328; Bayer, cmt. 0309; Washington Legal Foundation, cmt. 0285; Testimony of Jonathan M. Redgrave, Redgrave LLP, November Hearing, at 70-83; LCJ, cmt. 0267; Comment of David Kessler, Fulbright & Jaworski LLP, USC-RULES-CV-2013-0002-0407 (Jan. 15, 2014); Testimony of Donald J. Lough, Ford Motor Co., February Hearing, at 248-54.

<sup>109</sup> Comment of Mark Behrens, Shook Hardy & Bacon LLP, USC-RULES-CV-2013-0002-0314 (Oct. 29, 2013); Comment of Robert DeBerardine, Sanofi, USC-RULES-CV-2013-0002-0681 (Feb. 10, 2014); Comment of David Royster, Zimmer, Inc., USC-RULES-CV-2013-0002-1324 (Feb. 14, 2014); Allstate Insurance Co., cmt. 1446.

<sup>110</sup> Cohen, cmt. 2174; Gussack, cmt. 0388; Testimony of Kaspar J. Stoffelmayr, Bayer Corp., January Hearing, at 88-96; Microsoft Corp., cmt. 1222; Stella, cmt. 1585; Testimony of Paul Weiner, Littler Mendleson PC, January Hearing, at 177-86.

<sup>111</sup> Testimony of Marc E. Williams, Lawyers for Civil Justice, November Hearing, at 245; Kessler, cmt. 0407; Testimony of J. Michael Weston, Defense Research Institute (“DRI”), February Hearing, at 89-93; DOJ, cmt. 0459.

<sup>112</sup> Merck & Co., cmt. 1073.

<sup>113</sup> *E.g.*, Comment of Federal Magistrate Judges Association, USC-RULES-CV-2013-0002-0615 (Feb. 7, 2014); Comment of Philip J. Favro, USC-RULES-CV-2013-0002-0298 (Oct. 25, 2013); Fannie Mae, cmt. 1360.

<sup>114</sup> Testimony of Alexander R. Dahl, Lawyers for Civil Justice, November Hearing, at 191-98; Testimony of John Beisner, Skadden Arps, January Hearing, at 61-67; Pfizer, February Hearing, at 167-68; Ford Motor Co., February Hearing, at 252.

<sup>115</sup> *E.g.*, Comment of Rex Darrell Berry, Berry & Block LLP, USC-RULES-CV-2013-0002-0669 (Feb. 7, 2014); Comment of David T. Bellaire, Financial Services Institute, USC-RULES-CV-2013-0002-1101 (Feb. 13, 2014); Comment of Steven V. Gold, Manufacturers Alliance for Productivity and Innovation, USC-RULES-CV-2013-0002-1487 (Feb. 18, 2014).

“proportionality” factors from Rule 26(b)(2)(C)(iii) into the scope is likely to increase the frequency of objections to discovery based on lack of proportionality and increase satellite litigation regarding application of the proportionality requirement,<sup>116</sup> while others doubt this result.<sup>117</sup> Several comments and witnesses argue that the opposition to this proposal are the best evidence of the need for it.<sup>118</sup>

### **3. Bar Associations Exemplify the Lack of Consensus on “Proportionality”**

Very few cross-sectional bar associations commented on the proposed rule amendments at all, and even fewer commented on this specific proposal. Only about 15 cross-sectional bar associations submitted comments, and a little more than half of them supported this particular proposal.<sup>119</sup> Four bar associations or sections thereof opposed this proposal,<sup>120</sup> and others offered no comments on it.<sup>121</sup> Several of these organizations that expressed support as a group also noted that a minority of their members opposed the proposal or included the dissenting views of some

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<sup>116</sup> Comment of Magistrate Judge Craig B. Shaffer, U.S. District Court, District of Colorado, USC-RULES-CV-2013-0002-0289 (Oct. 15, 2013), at 189-97; NYS Bar Section, cmt. 0303; New York State Bar Ass’n Commercial and Federal Litigation Section, November Hearing, at 287-92; Ford Motor Co., February Hearing, at 253; Merck & Co., cmt. 1073.

<sup>117</sup> *E.g.*, Testimony of John H. Martin, Thompson & Knight LLP, February Hearing, at 175; Cohen, cmt. 2174.

<sup>118</sup> Testimony of Gilbert S. Keteltas, Baker Hostetler, February Hearing, at 254-55; LCJ Supp., cmt. 0540.

<sup>119</sup> Comment of Peter J. Mancuso, Nassau County Bar Association, USC-RULES-CV-2013-0002-0487 (Jan. 31, 2014); NYS Bar Section, cmt. 0303; IAALS & ACTL, cmt. 0473; Federal Courts Committee of the NYCLA, USC-RULES-CV-2013-0002-2072 (Feb. 18, 2014); Comment of Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, USC-RULES-CV-2013-0002-0355 (Dec. 7, 2013); Comment of Association of the Bar of the City of New York, USC-RULES-CV-2013-0002-1054 (Feb. 12, 2014); Comment of Pennsylvania Bar Association, USC-RULES-CV-2013-0002-0350 (Dec. 3, 2013); Comment of State Bar of Michigan Committee on United States Courts, USC-RULES-CV-2013-0002-1290 (Feb. 14, 2014).

<sup>120</sup> Litigation Section, Los Angeles County Bar Association, USC-RULES-CV-2013-0002-0475 (Jan. 29, 2014); Los Angeles County Bar Association Antitrust & Unfair Business Practices Section, USC-RULES-CV-2013-0002-0462 (Jan. 28, 2014); Philadelphia Bar, cmt. 0995; Comment of Tennessee Bar Association, USC-RULES-CV-2013-0002-2015 (Feb. 18, 2014).

<sup>121</sup> Comment of State Bar of California Committee on Federal Courts, USC-RULES-CV-2013-0002-1552 (Feb. 14, 2014); Comment of Federal Bar Council, USC-RULES-CV-2013-0002-2241 (Feb. 19, 2014); Comment of Federal Litigation Section of the Federal Bar Association, USC-RULES-CV-2013-0002-1109 (Feb. 13, 2014).

of their members,<sup>122</sup> and a couple of them proposed comments to add to the Committee Note to address the concerns of their members.<sup>123</sup>

Neither the American Bar Association nor its sections endorsed or opposed this (or any) specific proposal.<sup>124</sup> While certain “individual members of the Leadership of the ABA Section of Litigation” filed comments and sent a representative to testify in support of this specific proposal, only one signatory on each of their two written comments regularly represents individual plaintiffs in civil litigation. As a longstanding member of the ABA Section of Litigation noted in his comments, neither the ABA nor the Section of Litigation supports or opposes the proposed amendment.<sup>125</sup> He wrote, “The lack of consensus on these divisive proposals speaks louder than the comments submitted by [the individual members of the Leadership of ABA Section of Litigation].”<sup>126</sup>

Other cross-sectional bar groups and their members also submitted conflicting comments. While the Institute for the Advancement of the American Legal System (“IAALS”) as an entity submitted comments in favor of this proposal,<sup>127</sup> when IAALS reported on a forum that it held on the proposed amendments, the cross-sectional group that attended could not reach a consensus in support of this proposed amendment.<sup>128</sup> While the Steering Committee of Working Group 1 of The Sedona Conference submitted comments in support of this proposal,<sup>129</sup> both the current chair of that working group and the chair emeritus of that group testified that the group itself could not reach consensus,<sup>130</sup> and that the Steering Committee itself could not really reach consensus.<sup>131</sup>

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<sup>122</sup> See Federal Courts Committee of the NYCLA, cmt. 2072; NYS Bar Section, cmt. 0303; Ass’n of the Bar of the City of New York, cmt. 1054.

<sup>123</sup> Pennsylvania Bar Ass’n, cmt. 0350; Ass’n of the Bar of the City of New York, cmt. 1054.

<sup>124</sup> Comment of Todd A. Smith, Powers Rogers & Smith PC, USC-RULES-CV-2013-0002-2214 (Feb. 18, 2014); Comment of William R. Bay, on behalf of 32 members of the leadership of the ABA Section of Litigation, USC-RULES-CV-2013-0002-0141 (Mar. 13, 2013); Comment of Don Bivens, on behalf of 23 members of the leadership of the ABA Section of Litigation, USC-RULES-CV-2013-0002-0673 (Feb. 10, 2014); see also Comment of Michael Reed, on behalf of 5 members of the ABA Standing Committee on Federal Judicial Improvements, USC-RULES-CV-2013-0002-0409 (Jan. 16, 2014).

<sup>125</sup> Smith, cmt. 2214.

<sup>126</sup> Smith, cmt. 2214, at 2

<sup>127</sup> IAALS & ACTL, cmt. 0473.

<sup>128</sup> IAALS, cmt. 0489.

<sup>129</sup> Sedona WG1, cmt. 0346.

<sup>130</sup> Testimony of Ariana Tadler, Milberg LLP, February Hearing, at 331-32; See also Sedona WG1, cmt. 0346, at 2; Testimony of Conor Crowley, Sedona Conference Working Group on Electronic Document Retention and Production, February Hearing, at 281.

<sup>131</sup> Tadler, February Hearing, at 332.



Notably, two members of that very steering committee filed comments opposing this specific proposal.<sup>132</sup>

#### **4. Proposed Alternatives**

A number of the opponents to this proposal have proposed alternatives to incorporating “proportionality” into the definition of the scope of discovery. Professor Arthur Miller and the Center for Constitutional Litigation, P.C., suggested that explicit consideration of proportionality of discovery be incorporated into Rule 16 for the parties and the courts to address at the scheduling conference.<sup>133</sup> Others suggested that the “proportionality” factors could be incorporated into the items for discussion at the Rule 26(f) conference.<sup>134</sup> Several comments and witnesses argued that the Committee should await the results of several pilot projects throughout the country aimed at reducing litigation costs before recommending a major rule change of this sort.<sup>135</sup>

#### **5. Proposed Amendments**

Several written comments and witnesses suggested additional amendments if the Advisory Committee recommends that “proportionality” be incorporated into the definition of the scope of discovery. For instance, Professor Suja Thomas suggested an amendment to Rule 37(a)(1) to state that the party opposing production bears the burden of showing that the discovery should not be produced.<sup>136</sup> The Center for Constitutional Litigation, P.C., and the Institute for Justice suggested that the rule incorporate language similar to that contained in Rule 26(b)(2)(B) to explicitly put the burden of showing why the discovery sought is not proportional to the needs of the case.<sup>137</sup> These comments and testimony urge explicit rule text regarding burden on proportionality because Supreme Court precedent suggests that the Committee Notes do not carry much, if any, weight.<sup>138</sup> Other comments also requested that language be added to the text of the rule to clarify who has the burden of showing that discovery is proportional/disproportionate,<sup>139</sup> and some urged that language clarifying that the propounding

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<sup>132</sup> Butterfield, cmt. 2034; Tadler, cmt. 2173.

<sup>133</sup> Comment of Andre M. Mura, Center for Constitutional Litigation PC (“CCL”), USC-RULES-CV-2013-0002-1535 (Feb. 14, 2014); Miller, cmt. 0386.

<sup>134</sup> Hershkoff, cmt. 0622.

<sup>135</sup> *E.g.*, Lawyers’ Committee for Civil Rights Under Law, cmt. 1914; Garrison, cmt. 1147; Sellers, November Hearing, at 308.

<sup>136</sup> Thomas, cmt. 1185.

<sup>137</sup> CCL, cmt. 1535; Institute for Justice, cmt. 2092.

<sup>138</sup> Thomas, cmt. 1185; CCL, cmt. 1535.

<sup>139</sup> Zainey, cmt. 0657; Scheindlin, cmt. 0398; Thornburg, cmt. 0499; Testimony of Lea Malani Bays, Robbins Geller Rudman & Dowd LLP, January Hearing, at 283-96; Anderson, January Hearing, at 280-81.

party does not shoulder the burden to demonstrate proportionality should at least be included in the Committee Note.<sup>140</sup>

A couple of comments suggested that the proposed rule be revised to eliminate the words “proportional to,” and substitute the words “consistent with” the needs of the case.<sup>141</sup> Several comments suggested moving “the amount in controversy” lower on the list of factors to be considered or deleting it altogether.<sup>142</sup> Others suggested the rule be modified to account for potential windfalls to businesses and entities who maintain archives of ESI in outdated formats, saying that they should not be protected from costs of discovery of their own making.<sup>143</sup>

Even those who support the proposal have advocated various changes to the text of the published proposal. At least one comment suggested that the rule include language that clearly allows judges to order additional discovery or restrict discovery as a case progresses.<sup>144</sup> A few supporters advocated eliminating “the parties’ resources” from the factors to be considered.<sup>145</sup> At least one witness suggested eliminating “the amount in controversy” or not listing it as the first factor to be considered.<sup>146</sup>

The Department of Justice, Civil Division, recommended the addition of text to the Committee Note clarifying that the placement of the “proportionality” text in Rule 26(b)(1) does not modify the scope of permissible discovery.<sup>147</sup> Critics of the proposed amendment requested a similar amendment.<sup>148</sup> DOJ also proposed the addition of language to the Committee Note saying that in applying the “proportionality” factors, the parties and the court will continue to recognize that review of factors such as the amount in controversy and the parties’ resources must be balanced against other factors, including the importance of the issues, which takes into account considerations of the public interest and, in appropriate cases, the impact of discovery on the public fisc.<sup>149</sup> The New York State Bar Association Commercial and Federal Litigation Section

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<sup>140</sup> Butterfield, cmt. 2034; Jacobs, cmt. 0421, at 3-4.

<sup>141</sup> *E.g.*, IAALS, cmt. 0489.

<sup>142</sup> *E.g.*, IAALS, cmt. 0489; Testimony of Joseph D. Garrison, National Employment Lawyers Association, January Hearing, at 21-22.

<sup>143</sup> Law & Forensics LLC, cmt. 0281. *See also* Bays, cmt. 1614.

<sup>144</sup> Comment of Mark Harrington, Guidance Software, USC-RULES-CV-2013-0002-1519 (Feb. 14, 2014), at 2.

<sup>145</sup> Keteltas, February Hearing, at 258-59; Comment of Edward Rippey, Covington & Burling LLP, USC-RULES-CV-2013-0002-1157 (Feb. 13, 2014), at 2.

<sup>146</sup> Testimony of Maja Eaton, February Hearing, at 36.

<sup>147</sup> DOJ, cmt. 0459.

<sup>148</sup> *E.g.*, Comment of Matthew Lango, National Employment Lawyers Association of Illinois, USC-RULES-CV-2013-0002-0635 (Feb. 6, 2014), at 11; Comment of Rebecca Cappy, National Employment Lawyers Association, USC-RULES-CV-2013-0002- 0304 (Mar. 1, 2013), at 11-12.

<sup>149</sup> DOJ, cmt. 0459.

also suggested that the Committee Note be amended to clarify that existing case law interpreting and applying Rule 26(b)(2)(C)(iii) would apply to the “proportional” language proposed to be added to Rule 26(b)(1).<sup>150</sup>

The Association of the Bar of the City of New York suggests numerous revisions to the Committee Note to address the concerns of its members who oppose the proposal, including: that the Committee Note make explicit that the addition of “proportionality” to the scope of discovery is not intended to alter or address existing law on the question of which party should bear the burden on any issue that may arise in a discovery dispute; adding language to the Committee Note to make explicit that the purpose of adding “proportionality” to the scope is not to tilt the playing field in favor of or against any set of parties, and to make the point that, properly applied, proportionality may protect large corporations as well as individuals from disproportionate discovery burdens; adding language to the Committee Note stating that adding “proportionality” to the scope is not intended to effectuate an across-the-board reduction in the scope of discovery, and in many cases will have no impact at all; reemphasizing in the Note that “proportionality” involves the consideration of many factors, and not simply the amount in controversy; and clarifying that a determination based on proportionality at the outset of litigation is subject to reconsideration later in the litigation.<sup>151</sup>

Professor Morrison argued that “proportionality,” if it is to be incorporated into 26(b)(1), should exist in its own sentence, after the sentence defining the scope of discovery as information “relevant to a claim or defense of any party.” The new sentence “should be directed to judges passing on an objection that a discovery request is unduly burdensome.”<sup>152</sup> It should list the factors to be considered and it should be clear that the burden of showing that a request is disproportionately burdensome should be on the objecting party. Professor Morrison also suggests that the factors be further clarified, as they appear to be duplicative, confusing and unclear.<sup>153</sup>

A significant number of those who wrote or testified in support of the proposal argued that the rule should be even narrower, limiting the scope of discovery to relevant *and material* information.<sup>154</sup>

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<sup>150</sup> NYS Bar Section, cmt. 0303, at 26.

<sup>151</sup> Ass’n of the Bar of the City of New York, cmt. 1054.

<sup>152</sup> Morrison, cmt. 0383

<sup>153</sup> *Id.*

<sup>154</sup> *E.g.*, LCJ, cmt. 0267; IADC, cmt. 0390; Stewart, cmt. 0412; Altria, cmt. 0684; Fulton, cmt. 1145; Covington & Burling LLP, cmt. 1157; Comment of Michael Harrington, Eli Lilly & Co., USC-RULES-CV-2013-0002-1264 (Feb. 14, 2014); Comment of Timothy Pratt, Boston Scientific Corp., USC-RULES-CV-2013-0002-1389 (Feb. 14, 2014).

## **B. Eliminating discovery relevant to the “subject matter”**

In 2000, the definition of the scope of discovery was limited from nonprivileged matter that is relevant to “the subject matter” of the action to only that nonprivileged matter relevant to “any party’s claim or defense.” However, “the subject matter” of the action defined the scope of discovery for 62 years, and the revised rule allowed courts to order discovery of any matter relevant to the subject matter involved in the action “[f]or good cause.”

A proposed amendment to Rule 26(b)(1) removes “the subject matter involved in the action” from the scope of discovery. The Advisory Committee states, “Discovery should be limited to the parties’ claims or defenses,” and the Committee Note to the rule states “Proportional discovery relevant to any party’s claim or defense suffices.”<sup>155</sup> The Advisory Committee Report and the Committee Note suggest that if any of that discovery supports new claims or defenses, amendment of the pleadings may be allowed.

This specific proposal elicited far fewer comments than the proposal to add “proportionality” to the scope of discovery. Approximately 10% of the written comments addressed this specific proposal. Approximately ten witnesses addressed this specific proposal in their testimony. Of the comments that specifically addressed this specific proposal, approximately two-thirds supported the proposal. Eight of the ten witnesses who specifically addressed this proposal expressed support.

There were a variety of reasons offered for supporting this proposed amendment. Some supporters argued that the provision allowing discovery of information relevant to the “subject matter” is rarely relied upon,<sup>156</sup> and that parties rarely, if ever, actually need discovery of such information.<sup>157</sup> They believe that if discovery focuses on the claims and defenses, the parties won’t engage in unnecessary discovery.<sup>158</sup> Although the current rule already limits discovery to the claims and defenses of the parties, those who support this proposed amendment assert that the availability of discovery of information relevant to “the subject matter” “has been a driving force behind the explosion in the scope of discovery.”<sup>159</sup> They lament the current rule that “permits discovery of any information relevant to ‘the subject matter involved in the action,’”<sup>160</sup> a standard they say is “overbroad,”<sup>161</sup> “amorphous,”<sup>162</sup> “ill-defined and troublesome,”<sup>163</sup> and “a

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<sup>155</sup> Proposed Amendments at 297.

<sup>156</sup> Ass’n of the Bar of the City of New York, cmt. 1054.

<sup>157</sup> Philadelphia Bar, cmt. 0995; *See also* Kessler, cmt. 0407.

<sup>158</sup> Philadelphia Bar, cmt. 0995; Ass’n of the Bar of the City of New York, cmt. 1054; Merck & Co., cmt. 1073.

<sup>159</sup> Merck & Co., cmt. 1073 (internal quotation and citation omitted); *See also* IADC, cmt. 0390.

<sup>160</sup> ILR, cmt. 0328.

<sup>161</sup> IADC, cmt. 0390.

<sup>162</sup> LCJ, cmt. 0267; Fulton, cmt. 1145.

source of indeterminacy.”<sup>164</sup> They support the proposal because it “provides a clearer standard of relevance,”<sup>165</sup> and would “simplify the discovery process.”<sup>166</sup> Supporters believe that this proposed amendment would reduce the amount of information subject to discovery,<sup>167</sup> and would thus reduce the costs of discovery<sup>168</sup> and reduce “over-preservation”<sup>169</sup>

Opponents of this proposal think that the Committee’s justification for the abrogation of language that has been a part of the scope of discovery for more than seventy-five years is inadequate.<sup>170</sup> As with the proposal to add “proportionality” to the definition of the scope of discovery, opponents to this proposed amendment cite the lack of any empiric justification that the proposal is needed,<sup>171</sup> or assert it will produce more good than harm.<sup>172</sup>

Several comments point out that under the current rule, parties generally don’t have to parse whether the discovery sought is relevant to the subject matter or more strictly to the claims and defenses, as there is little incentive to fight over this distinction.<sup>173</sup> They argue removing this “safety valve” will give defendants and contentious parties the incentive to press the relevance point much harder, forcing judges to decide relevance more often, often at an early stage of the litigation when relatively little is known about the basis of the claims and defenses.<sup>174</sup> They assert that this amendment will create incentives for defendants to decline to produce discovery on grounds of relevance, thereby imposing costs and delays on the plaintiffs, even if the discovery is ruled to be relevant by the court.<sup>175</sup> Opponents argue that the proposed abrogation of

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<sup>163</sup> LCJ, cmt. 0267.

<sup>164</sup> Zimmer, cmt. 1324.

<sup>165</sup> Fannie Mae, cmt. 1360.

<sup>166</sup> DOJ, cmt. 0459. DOJ explains that even though it vigorously opposed the 2000 amendment to the rule changing the scope of discovery from the “subject matter” to the claims and defenses, “the explosion of information resulting from new technology and the resulting prominence of electronic discovery” and intervening developments in civil litigation have convinced DOJ that eliminating discovery relevant to the “subject matter” is “a reasonable decision.”

<sup>167</sup> Cohen, cmt. 2174; LCJ, cmt. 0267.

<sup>168</sup> LCJ, cmt. 0267.

<sup>169</sup> Sedona WG1, cmt. 0346.

<sup>170</sup> Burbank, cmt. 0729; Miller, cmt. 0386; Scheindlin, cmt. 0398; Hershkoff, cmt. 0622.

<sup>171</sup> Miller, cmt. 0386; Advisory Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, cmt. 0355; Scheindlin, cmt. 0398; NASCAT Supp., cmt. 0417; Hershkoff, cmt. 0622.

<sup>172</sup> Hershkoff, cmt. 0622.

<sup>173</sup> NASCAT Supp., cmt. 0417; Federal Magistrate Judges Ass’n, cmt. 0615; Miller, cmt. 0386.

<sup>174</sup> Morrison, cmt. 0383; Miller, cmt. 0386; Skalet, cmt. 2130; Hershkoff, cmt. 0622; Federal Magistrate Judges Ass’n, cmt. 0615. *See also* Thornburg, cmt. 0499.

<sup>175</sup> Morrison, cmt. 0383; Miller, cmt. 0386; Hershkoff, cmt. 0622.

this language will result in fact pleading,<sup>176</sup> and will invite parties to file pleadings that go beyond the claims and defenses they are interested in pursuing.<sup>177</sup>

Opponents of this proposal also argue that it eliminates a tool necessary to address the problem of information asymmetry,<sup>178</sup> and will unreasonably preclude discovery of closely related claims where a plaintiff may not have sufficient evidence or information at the outset of the litigation to allege the alternative claim.<sup>179</sup> At least one comment argued that judges in complex matters, such as class actions, should retain the ability to permit discovery of relevant information needed to meet the standard for class certification.<sup>180</sup>

### **Suggested amendments**

The Association of the Bar of the City of New York suggested that the Committee Note make clear that amendment of the pleadings should be freely given when justice so requires, in accordance with Rule 15, when information supporting new claims and defenses has been revealed in discovery.<sup>181</sup> Professor Alan Morrison suggests that the remaining text of the rule be amended to allow for discovery that “may be” relevant to a claim or defense of any party to reduce the ability of defendants to resist discovery, increase the ability of plaintiffs to obtain reasonable discovery, and relieve district judges from having to rule on relevance of every discovery request.<sup>182</sup>

#### **C. Deleting “reasonably calculated” language**

The penultimate sentence of Rule 26(b)(1) states: “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” This text has been a part of the rule since 1946, and was recently amended in 2000 to add the first word, “relevant,” to make clear that only relevant information is discoverable. A proposed amendment to Rule 26(b)(1) deletes this sentence in its entirety, and replaces it with the following sentence: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

The Advisory Committee’s Report on the proposals says that “many cases continue to cite the ‘reasonably calculated’ language as though it defines the scope of discovery, and judges

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<sup>176</sup> Comment of Michael Leizerman, AAJ Trucking Litigation Group, USC-RULES-CV-2013-0002-1651 (Feb. 15 2014).

<sup>177</sup> NASCAT Supp., cmt. 0417.

<sup>178</sup> Hershkoff, cmt. 0622.

<sup>179</sup> *E.g.*, Seymour, cmt. 2209.

<sup>180</sup> Comment of Lyndsey Marcelino, National Center for Youth Law, USC-RULES-CV-2013-0002-0292 (Oct. 15, 2013).

<sup>181</sup> Ass’n of the Bar of the City of New York, cmt. 1054.

<sup>182</sup> Morrison, cmt. 0383.



often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.”<sup>183</sup>  
The Committee Note states that

Discovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party’s claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is “reasonably calculated” to lead to the discovery of admissible evidence.

The Advisory Committee’s proposed new language is intended to carry forward the purpose of allowing discovery of inadmissible but relevant (and now-proportional) information, but also “overcome the inertia that has thwarted this purpose.”<sup>184</sup>

More than 400 separate written comments supported or opposed this specific proposal. They were about evenly divided. About 20 witnesses addressed this specific proposal in their testimony and the majority of them supported it. As with the two amendments to Rule 26(b)(1) discussed above, there was a divide between corporations, governments, their counsel and organizations who supported the proposal, and attorneys and organizations that represent individuals and small businesses against larger entities who opposed the proposal. A number of attorneys who represent both plaintiffs and defendants opposed this proposal, as did a slight majority of the uncategorized comments. The majority of judges and academics who commented on this proposal opposed it. Very few bar associations commented on this specific proposal, and they were about evenly divided. One bar group filed comments both in support of and opposing this proposal without explaining the reasons it changed its position.<sup>185</sup>

Many of those who support the proposed deletion of the “reasonably calculated” language say that it is too broad<sup>186</sup> and blame it for the “over-discovery problem”<sup>187</sup> or an “over-preservation” problem.<sup>188</sup> They argue that the sentence is the “tail wagging the dog,” and leads to

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<sup>183</sup> Proposed Amendments at 266.

<sup>184</sup> *Id.*

<sup>185</sup> Compare Comment of Vincent Chang, Federal Courts Committee of NYCLA, USC-RULES-CV-2013-0002-0139 (Mar. 25, 2013), and Federal Courts Committee of the NYCLA, cmt. 2072.

<sup>186</sup> Testimony of Andrew B. Cooke, Flaherty Sensabaugh Bonasso PLLC, January Hearing, at 324; Comment of Robert Levy on behalf of 309 Companies, USC-RULES-CV-2013-0002-1269 (Feb. 14, 2014); Beisner, cmt. 0382.

<sup>187</sup> Ford Motor Co., February Hearing, at 250; Altria, cmt. 0684; McCowan, November Hearing, at 9-10.

<sup>188</sup> Pratt, January Hearing, at 29-30.



“fishing expeditions.”<sup>189</sup> Many of those who support this amendment simply agree with the Advisory Committee’s Report and restate it.<sup>190</sup>

Many of those who oppose this proposal understand the sentence with the “reasonably calculated” language to be the current standard for the scope of discovery.<sup>191</sup> Notably, the Department of Justice initially questioned why the Committee would propose to change this “long-standing and well-known aspect of the rule, which expresses an important principle defining the appropriate scope of discovery.”<sup>192</sup> Others who opposed this proposal also question the purpose of the deletion of this language.<sup>193</sup> As with several of the other proposed amendments, the opponents assert that there is no documented problem with the current language of the rule.<sup>194</sup> They point out that there is no empirical evidence that the language has had the effect hypothesized by the Committee.<sup>195</sup> They argue that the assertions made by the Advisory Committee and by supporters of the proposed amendment simply ignore the text of the rule which limits discovery to relevant information.<sup>196</sup>

Many of those who oppose the deletion of this language argue that deleting the sentence and replacing it with a new one upends more than sixty years of legal precedent interpreting and applying this language,<sup>197</sup> and simply invites a more restrictive definition of the scope of discovery.<sup>198</sup> They criticize the language that the Committee proposes to replace the “reasonably calculated” language with, asserting that the proposed new sentence is vague and incapable of

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<sup>189</sup> Testimony of Quentin Urquhart, International Association of Defense Counsel, January Hearing, at 137; DRI, cmt. 0404; Cohen, cmt. 2174.

<sup>190</sup> IADC, cmt. 0390; DRI, cmt. 0404; Comment of Rita Maimbourg, Tucker Ellis LLP, USC-RULES-CV-2013-0002-1117 (Feb. 13, 2014); Philadelphia Bar, cmt. 0995; Ford Motor Co., February Hearing.

<sup>191</sup> *See, e.g.*, Brown, cmt. 0934; Comment of Donald Slavik, AAJ Products Liability Section, USC-RULES-CV-2013-0002-0403 (Jan. 14, 2014); Comment of Gerald Acker, Michigan Association for Justice, USC-RULES-CV-2013-0002-0445 (Jan. 24 2014); Nomberg, cmt. 1023.

<sup>192</sup> *See* DOJ Comment of Feb. 6, 2013, attached to cmt. 0459.

<sup>193</sup> Miller, cmt. 0386; Zainey, cmt. 0657.

<sup>194</sup> Hershkoff, cmt. 0622; *See also* 171 Professors, cmt. 2078.

<sup>195</sup> Hershkoff, cmt. 0622; Scheindlin, cmt. 0398; Zainey, cmt. 0657; Comment of Patrick McArdle, Grossman Roth & Partridge, USC-RULES-CV-2013-0002-1524 (Feb. 14, 2014).

<sup>196</sup> Hershkoff, cmt. 0622; Scheindlin, cmt. 0398.

<sup>197</sup> O’Rourke, cmt. 0461; Zainey, cmt. 0657; Comment of Della Barnett, on behalf of Impact Fund and 5 other legal non-profit organizations, USC-RULES-CV-2013-0002-0244 (Feb. 28, 2013) (hereinafter “Impact Fund, et al.”); AAJ, cmt. 0372. *See also* Comment of Texas RioGrande Legal Aid, Inc., et al., cmt. 1411 (stating that more than 9,400 federal court opinions discuss the interpretation of this language).

<sup>198</sup> AAJ, cmt. 0372; AIEG, cmt. 0384.

principled application.<sup>199</sup> They assert that the proposed amendment would do nothing to assist the parties or the courts in avoiding and resolving discovery disputes,<sup>200</sup> and runs the risk of creating wasteful satellite litigation over the amendment's purpose and effect,<sup>201</sup> which would undermine the stated goal of reducing unnecessary costs and delays.<sup>202</sup>

The Equal Employment Opportunity Commission also opposes this proposed amendment because it the current text contains limiting language that does not appear in the sentence the Committee proposes to substitute for it. The proposed amendment eliminates a limitation on discovery of inadmissible information to information that could lead to admissible evidence. Without the "reasonably calculated" language, the EEOC argues, all inadmissible information would be discoverable as long as it is relevant, regardless of whether the discovery is reasonably calculated to lead to the discovery of admissible evidence.<sup>203</sup> At least one other organization echoed this concern.<sup>204</sup>

### **Suggested alternatives/amendments**

A couple of attorneys at Cozen O'Connor suggested that an alternative would be to retain the "reasonably calculated" language, but highlight the fact that all discovery sought must be relevant. Thus the rule could be amended to provide "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."<sup>205</sup> The Department of Justice has suggested that language be added to the Committee Note to clarify that the deletion is not intended to alter the definition of relevant discovery.<sup>206</sup>

#### **D. Removing language that describes types of discoverable information**

Currently, the scope of discovery specifically includes discovery of "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who may know of any discoverable matter."<sup>207</sup> A proposal deletes this language from the rule. The Advisory Committee Report states that

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<sup>199</sup> Comment of Jennifer Wagner, USC-RULES-CV-2013-0002-2039 (Feb. 18, 2014); West Virginia Ass'n for Justice, cmt. 1994.

<sup>200</sup> Impact Fund, et al., cmt. 0244.

<sup>201</sup> Hershkoff, cmt. 0622; Ollanick, cmt. 1164; Impact Fund, et al., cmt. 0244; AAJ, cmt. 0372.

<sup>202</sup> Hershkoff, cmt. 0622.

<sup>203</sup> Comment of P. David Lopez, U.S. Equal Employment Opportunity Commission, USC-RULES-CV-2013-0002-0146 (Mar. 4, 2013).

<sup>204</sup> AAJ, cmt. 0372.

<sup>205</sup> O'Rourke, cmt. 0461.

<sup>206</sup> DOJ, cmt. 0459.

<sup>207</sup> Fed. R. Civ. P. 26(b)(1).

“[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples.”<sup>208</sup> There is no mention of this proposed amendment in the Committee Note accompanying the proposed text of Rule 26(b)(1) that was published in August 2013.

In comparison with the other proposed amendments to Rule 26(b)(1), this proposal generated very little commentary. Fewer than twenty written comments addressed this specific proposal. Only a handful of comments supported the proposal. A majority of the comments on this proposal opposed it. Two witnesses at the public hearings testified about this specific proposal, and both of them opposed it.

Comments filed in support of this proposal agree with the Committee’s assessment that discovery of the information described is widely and routinely accepted in practice, and there is no need to include such details in the rule.<sup>209</sup> Other comments disagreed, saying that practitioners often do not find it manifest or obvious that a party can engage in discovery of meta-information.<sup>210</sup>

Those who oppose the proposal see no value in deleting this language,<sup>211</sup> and argue that its deletion will have unintended consequences. They are concerned that the deletion of this language will be interpreted by parties to litigation and courts as a substantive change that means this information is not discoverable under the proposed revised rule.<sup>212</sup> This concern was perhaps inadvertently supported by a couple of comments in favor of this proposal, which stated that this amendment will inhibit discovery on discovery,<sup>213</sup> and limit the burden of the producing party.<sup>214</sup> The concern expressed by opponents to the proposal was reinforced by other comments and

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<sup>208</sup> Proposed Amendments at 266.

<sup>209</sup> Ass’n of the Bar of the City of New York, cmt. 1054; Philadelphia Bar, cmt. 0995; NYS Bar Section, cmt. 0303.

<sup>210</sup> Comment of Professor Andrew Pardieck, Southern Illinois Univ. School of Law, USC-RULES-CV-2013-0002-1930 (Feb. 18, 2014); Comment of Craig Ball, USC-RULES-CV-2013-0002-1700 (Feb. 16, 2014); Comment of Michael Harris, Collins McMahon & Harris PLLC, USC-RULES-CV-2013-0002-1945 (Feb. 18, 2014). Bays, January Hearing, at 288; Testimony of William F. Hamilton, Bryan Univ. & Univ. of Florida Law School, January Hearing, at 218-24.

<sup>211</sup> Skalet, cmt. 2130; DOJ, cmt. 0459; Zainey, cmt. 0657; Comment of John Midgley, Columbia Legal Services, USC-RULES-CV-2013-0002-1594 (Feb. 14, 2014); Scheindlin, cmt. 0398.

<sup>212</sup> Bays, January Hearing, at 288; Hamilton, January Hearing, at 223-24; Kelston, cmt. 1708; Comment of Cynthia Mitchell, Merkel & Cocke PA, USC-RULES-CV-2013-0002-2212 (Feb. 18, 2013); Skalet, cmt. 2130; Comment of Vicki Slater, Council of State Trial Lawyer Presidents, USC-RULES-CV-2013-0002-1690 (Feb. 16, 2014); Scheindlin, cmt. 0398.

<sup>213</sup> Stella, cmt. 1585.

<sup>214</sup> Federal Courts Committee of the NYCLA, cmt. 2072

testimony lamenting discovery on discovery, and arguing that it shouldn't be allowed.<sup>215</sup> Several comments argued that discovery on discovery, which may not be strictly relevant to the claims and defenses in an action, is essential.<sup>216</sup> They argue it would be a mistake to delete the only language in the rule that recognizes and protects the right to explore this information.<sup>217</sup>

### **Suggested amendments**

A few of those who oppose the proposal asked that, if the amendment to the text of the rule goes forward, the Committee Note should be amended to include the explanation for its deletion from the Advisory Committee's Report.<sup>218</sup> Several comments that expressed support for the deletion of this language also suggest that the Committee Note be revised to explain that the deletion is not intended to be a substantive change, but is intended to simply remove clutter.<sup>219</sup>

### **III. Explicit Authorization of Cost Allocation in Protective Orders: Rule 26(c)(1)(B)**

Another part of the "proportionality" proposals would amend Rule 26(c)(1)(B) to add "an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery."<sup>220</sup> The Advisory Committee's Report and the Committee Note recognize that this authority is included in the current Rule 26(c), and is being exercised with increasing frequency.<sup>221</sup> The amendment of the rule is intended "to forestall the temptation some parties may feel to contest this authority."<sup>222</sup> The Report also notes that the Advisory Committee will begin to focus on proposals to change the presumption that the responding party pays the costs of responding to discovery requests, but that it will be some time before it determines whether any broader recommendations might be made.<sup>223</sup>

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<sup>215</sup> Testimony of Jeana M. Littrell, FedEx, November Hearing, at 16; Cooke, January Hearing, at 325-36; Behrens, cmt. 0314; Comment of Doug Lampe, Ford Motor Co., USC-RULES-CV-2013-0002-0343 (Nov. 22, 2013).

<sup>216</sup> Ball, cmt. 1700; Kelston, cmt. 1708; Council of State Trial Lawyer Presidents, cmt. 1690; Scheindlin, cmt. 0398.

<sup>217</sup> Ball, cmt. 1700; Pardieck, cmt. 1930.

<sup>218</sup> DOJ, cmt. 0459; Hamilton, January Hearing, at 224; Kelston, cmt. 1708.

<sup>219</sup> Bivens, et al., cmt. 0673; Ass'n of the Bar of the City of New York, cmt. 1054; NYS Bar Section, cmt. 0303.

<sup>220</sup> Proposed Amendments, at 266.

<sup>221</sup> *Id.* at 266, 298.

<sup>222</sup> *Id.* at 298.

<sup>223</sup> *Id.* at 266.

Almost 200 written comments specifically supported or opposed this proposal.<sup>224</sup> Of those comments, more than half of them opposed the proposal. Only six witnesses testified about this specific proposal, and all but one of them supported it.

As with the proposed addition of a “proportionality” requirement to the definition of the scope of discovery, the support for this proposal came largely from corporations, their legal counsel, and the organizations that represent their interests. Opposition to the proposal came largely from attorneys who represent individuals and small businesses against large entities, as well as plaintiffs’ lawyers’ associations, and uncategorized comments. Two federal judges voiced opposition to it, while the Federal Magistrate Judges Association supports it. Fewer than ten law professors commented on this specific proposal and a slight majority of them opposed it. Of the few bar associations to comment on this specific proposal, the majority of them supported it.

Some who support this amendment do so because they do not think it is a substantive change.<sup>225</sup> The Department of Justice supports the proposal. Even though it recognizes that the authority already exists, the Department asserts that “expressing the authority in the Rule will clarify any uncertainty.”<sup>226</sup> Many of those who oppose the amendment argue that it is unnecessary.<sup>227</sup> They note that this authority is well-recognized by the courts, including the U.S. Supreme Court,<sup>228</sup> and that cost-shifting for discovery of ESI is already available under Rule 26(b)(2)(B).<sup>229</sup>

Those on both sides of this debate agree on one thing: they believe that the proposed amendment would encourage judges to use the authority to allocate costs more often.<sup>230</sup> Several

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<sup>224</sup> This includes written comments that generally opposed amendments to Rule 26 without specifying which subsection(s) of Rule 26. A smaller number of comments actually discussed the proposed amendment to Rule 26(c)(2)(B) in any detail.

<sup>225</sup> Philadelphia Bar, cmt. 0995.

<sup>226</sup> DOJ, cmt. 0459.

<sup>227</sup> Comment of Larry A. Tawwater, American Association for Justice, USC-RULES-CV-2013-0002-1461 (Feb. 14, 2014) (hereinafter “AAJ Supp.”); NASCAT, cmt. 0173; Bays, cmt. 1614; Comment of Joseph Sellers, Cohen Milstein, USC-RULES-CV-2013-0002-0325 (Nov. 6, 2013); Comment of Joleen Youngers, Almanzar & Yungers PA, USC-RULES-CV-2013-0002-0154 (Mar. 1, 2013).

<sup>228</sup> AAJ Supp., cmt. 1461.

<sup>229</sup> NASCAT, cmt. 0173.

<sup>230</sup> LCJ, cmt. 0267; Behrens, cmt. 0314; New York Law Department, et al., cmt. 1554; Cardinal Health, cmt. 1410; Comment of Erin Sheehan, American Intellectual Property Law Association, USC-RULES-CV-2013-0002-1990 (Feb. 18, 2014); Comment of Daniel Pariser, et al., Arnold & Porter, USC-RULES-CV-2013-0002-1615 (Feb. 14, 2014); Bays, cmt. 1614; Sellers, cmt. 0325; Comment of Mark Morse, USC-RULES-CV-2013-0002-1432 (Feb. 14, 2014).

comments expressed the belief that cost-shifting in discovery, which is not commonplace now, could become routine under this proposed amendment.<sup>231</sup>

Corporations and their counsel and organizations believe this is a good thing because it reduces the costs and burdens of discovery on parties who possess a lot of relevant information,<sup>232</sup> particularly in cases where the access to relevant information is asymmetrical, and thus the costs of discovery are asymmetrical.<sup>233</sup> They say it will “level the playing field.”<sup>234</sup> One corporation said the proposed amendment to Rule 26(c)(1)(B) “may be the most important and have the greatest impact of all the proposed amendments to the Rules,” if it is “properly and routinely applied by courts.”<sup>235</sup> Several of those who support this proposed amendment see it as “an important first step” toward a “requester pays” system of discovery, which they strongly advocate.<sup>236</sup> Some supporters simply call this proposed amendment a “requester pays” rule.<sup>237</sup>

Those who oppose this proposal argue that it undermines the longstanding policy that the costs of production of discovery should be borne by the producing party.<sup>238</sup> They argue that its practical effect will be to invite a wave of new motion practice by parties and third-parties to re-allocate their discovery costs.<sup>239</sup> They argue that such additional motion practice, in itself, will unnecessarily delay production of discoverable information.<sup>240</sup> Some opponents argue that even before motion practice, the practical effect of the proposed amendment will be to encourage resistant responding parties to withhold discovery based on a proportionality objection under the proposed amendment to Rule 26(b)(1), and make discovery conditional on the payment of the

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<sup>231</sup> Scheindlin, cmt. 0398; NASCAT, cmt. 0173; AAJ Supp., cmt. 1461; Allergan Inc., cmt. 0436; Seymour, cmt. 2209.

<sup>232</sup> Comment of Wendy Curtis, Orrick Herrington & Sutcliffe LLP, USC-RULES-CV-2013-0002-0864 (Feb. 12, 2014); Sanofi, cmt. 0681.

<sup>233</sup> Sanofi, cmt. 0681; Behrens, cmt. 0314; LCJ, cmt. 0267; Turner, cmt. 0450.

<sup>234</sup> *E.g.*, Behrens, cmt. 0314.

<sup>235</sup> Allergan Inc., cmt. 0436.

<sup>236</sup> *See, e.g.*, LCJ, cmt. 0267, GlaxoSmithKline, cmt. 2128; Comment of Hon. Jon Kyl & Prof. E. Donald Elliott, USC-RULES-CV-2013-0002-0630 (Feb. 6, 2014); Comment of Linda Kelly, National Association of Manufacturers, USC-RULES-CV-2013-0002-1295 (Feb. 14, 2014); Comment of Michael J. Boorman, Huff Powel Bailey, USC-RULES-CV-2013-0002-2336 (Feb. 12, 2014). *See also* ILR, cmt. 0328; Comment of Melissa Kimmel, PhRMA, USC-RULES-CV-2013-0002-1213 (Feb. 13, 2015); Beisner, cmt. 0382.

<sup>237</sup> Comment of David Zeilstra, Hub Group Inc., USC-RULES-CV-2013-0002-1266 (Feb. 12, 2014); Financial Services Institute, cmt. 1101; Testimony of Jon Kyl, Covington & Burling, January Hearing, at 48.

<sup>238</sup> Thornburg, cmt. 0499.

<sup>239</sup> NASCAT, cmt. 0173; Butterfield, cmt. 2034; Seymour, cmt. 2209.

<sup>240</sup> Butterfield, cmt. 2034; Tennessee Ass’n for Justice, cmt. 1123.



costs of collecting, reviewing and producing the discovery by the requesting party.<sup>241</sup> Additionally, the opponents believe that the proposed amendment would incentivize responding parties to inflate their discovery costs in an effort to avoid producing relevant evidence.<sup>242</sup> They assert that stipulated protective orders will become a thing of the past,<sup>243</sup> and parties will not be able to get discovery unless they can pay for it.<sup>244</sup> They project that the end result will be that the courthouse doors will close to all but the wealthiest litigants.<sup>245</sup>

### **Suggested amendments**

A few who supported this proposal also suggested additional amendments to the rule. Professor Morrison suggested that the Committee clarify that expenses should not be routinely assessed, but be available only where the losing party was unreasonable in either making an objection or pursuing a request.<sup>246</sup> A section of the New York State Bar Association urged the Committee to add text to the rule or to the Committee Note saying that the proposed amendment is not intended to alter the American rule on attorneys' fees and does not authorize the court to allocate attorneys' fees in connection with the disclosure of discovery.<sup>247</sup> In commenting on this proposed amendment, both the IAALS and the ACTL asserted that "[t]he cost of preserving, collecting, and reviewing ESI should generally be borne by the producing party, consistent with the historical approach in America."<sup>248</sup>

Some of those who opposed the proposal made similar suggestions to Professor Morrison's and the NYS Bar Association section. Several comments argued that cost-shifting should only be considered in exceptional circumstances,<sup>249</sup> and that exceptions to the rule that the producing party pays for the costs of discovery should be both narrow and clearly defined.<sup>250</sup> They suggest that any rule should contain restrictions and offer guidance about when such orders are appropriate.<sup>251</sup> Several comments suggested that language should be added to the rule text or to the Committee Note saying that "expenses" do not include attorneys' fees,<sup>252</sup> and that the

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<sup>241</sup> Tennessee Ass'n for Justice, cmt. 1123; Seymour, cmt. 2209; Ollanick, cmt. 1164; Comment of Nimish Desai, USC-RULES-CV-2013-0002-1340 (Feb. 14, 2014).

<sup>242</sup> NASCAT, cmt. 0173; Sellers, cmt. 0325.

<sup>243</sup> Rossbach, cmt. 2216.

<sup>244</sup> AAJ, cmt. 0372, Scheindlin, cmt. 0398; Ollanick, cmt. 1164.

<sup>245</sup> AAJ, cmt. 0372; Seymour, cmt. 2209; Butterfield, cmt. 2034.

<sup>246</sup> Morrison, cmt. 0383.

<sup>247</sup> NYS Bar Section, cmt. 0303.

<sup>248</sup> IAALS & ACTL, cmt. 0473.

<sup>249</sup> *See, e.g.*, Bays, cmt. 1614.

<sup>250</sup> Butterfield, cmt. 2034.

<sup>251</sup> Butterfield, cmt. 2034.

<sup>252</sup> AAJ Supp., cmt. 1461.



amendment does not change the presumption that the responding party bears the costs of producing discovery.<sup>253</sup> One comment suggested the addition of language to the rule that requires the consideration of the parties' relative resources and the intent of the party seeking a protective order before the court can re-allocate discovery costs.<sup>254</sup> Some argued that if any such language is added, the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources,<sup>255</sup> or should exempt certain types of cases altogether.<sup>256</sup>

On the other end of the spectrum, some of those who support the proposed amendment advocated adding examples to the Committee Note demonstrating when judges should use the authority to allocate costs of discovery to the requester, including when the requester "second-guesses an administrative agency" by suing over the safety of a drug or chemical regulated by the federal government, or presents "implausible claims or defenses."<sup>257</sup> There were also a couple of comments that asked the Committee to add preservation to Rule 26(c).<sup>258</sup>

#### **IV. Reduced Time for Service: Rule 4(m)**

The Advisory Committee proposed to revise Rule 4(m) to shorten the time to serve the summons and complaint from 120 days to 60 days. This would, in the Committee's words, "get the action moving in half the time."<sup>259</sup> This proposal responded, according to the Committee, "to the commonly expressed view that four months to serve the summons and complaint is too long."<sup>260</sup> Anticipating that, in certain cases, four months might not be long enough, the revised Rule retained language authorizing a court to extend the time if the plaintiff shows good cause for the failure to serve within the proposed 60-day period.<sup>261</sup> Also, the last sentence of the proposed Rule 4(m) indicated that it does not apply to service in a foreign country under 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A), which governs condemnation proceedings.<sup>262</sup>

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<sup>253</sup> AAJ, cmt. 0372; AAJ Supp., cmt. 1461; Tennessee Ass'n for Justice, February Hearing, at 107.

<sup>254</sup> AAJ Supp., cmt. 1461.

<sup>255</sup> Sellers, cmt. 0325.

<sup>256</sup> Comment of Francisco Rodriguez, New Jersey Association for Justice, USC-RULES-CV-2013-0002-1520 (Feb. 14, 2014); Comment of John Relman, Relman Dane & Colfax PLLC, USC-RULES-CV-2013-0002-1547 (Feb. 14, 2014).

<sup>257</sup> Kyl & Elliott, cmt. 0630.

<sup>258</sup> See Sedona WG1, cmt. 0346; LCJ Supp., cmt. 0540; Altria, cmt. 0684.

<sup>259</sup> Proposed Amendments, at 261.

<sup>260</sup> *Id.*

<sup>261</sup> See *id.* at 282.

<sup>262</sup> *Id.*

The Committee received more than 380 comments concerning this proposal. The public response was overwhelmingly opposed to the proposal: More than 350 comments opposed shortening the existing 120-day time period; only 30 favored the proposal.

Of the comments in opposition, 240 were submitted by plaintiffs' attorneys or organizations comprised primarily of plaintiffs' attorneys. The few members of the federal bench who commented on this specific proposal also opposed it, including a sitting federal district court judge, the Federal Magistrate Judges Association and Chief U.S. Magistrate Judge for the District of Idaho on behalf of the Local Rules Advisory Committee for the District of Idaho. There were also comments from a couple of attorneys or groups who represent defendants, as well as several comments from attorneys who represent both plaintiffs and defendants, and more than 90 uncategorized comments—all opposed to the proposal. In addition, a couple of bar associations, a couple of law professors, and several members of Congress also opposed the proposal.

The commentary opposing the proposal sounded a familiar theme: that a 60-day period for service was too short for certain categories of cases. Examples given included admiralty cases;<sup>263</sup> cases alleging fraudulent activity;<sup>264</sup> trucking litigation;<sup>265</sup> cases against foreign corporate entities;<sup>266</sup> cases against individuals who are difficult to locate or who evade service,<sup>267</sup> such as in tax enforcement cases;<sup>268</sup> cases in which there are multiple defendants;<sup>269</sup> and cases involving *pro se* plaintiffs or where the Marshal's Service is directed to accomplish service for *in forma pauperis* plaintiffs.<sup>270</sup> This commentary recognized that the proposed Rule permits additional time upon a showing of good cause, but lamented the increase in motions practice that would follow from a shortened time period. This increased motions practice, the commentary noted, would impose additional costs solely on plaintiffs.<sup>271</sup>

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<sup>263</sup> *E.g.*, Comment of Charles D. Naylor, AAJ Admiralty Law Section, USC-RULES-CV-2013-0002-1210 (Feb. 14, 2014); Comment of Jonathan Gilzean, USC-RULES-CV-2013-0002-1937 (Feb. 18, 2014).

<sup>264</sup> CFTC, cmt. 1366.

<sup>265</sup> *E.g.*, AAJ Trucking Litigation Group, cmt. 1651, at 1-2; Comment of James Ludlow, USC-RULES-CV-2013-0002-1889 (Feb. 17, 2014).

<sup>266</sup> AAJ Aviation Law Section, cmt. 0266.

<sup>267</sup> CFTC, cmt. 1366; New York Law Department, et al., cmt. 1554.

<sup>268</sup> *E.g.*, DOJ, cmt. 0459, at 5-6.

<sup>269</sup> *Id.*

<sup>270</sup> *E.g.*, Federal Magistrate Judges Ass'n, cmt. 0615; Comment of Catherine Carr, Community Legal Services, Inc., of Philadelphia, USC-RULES-CV-2013-0002-1357 (Feb. 14, 2014); Comment of Jeanette Zelhof, on behalf of LEAP, USC-RULES-CV-2013-0002-1512 (Feb. 14, 2014).

<sup>271</sup> AAJ, cmt. 0372; Comment of Brian Murphy, USC-RULES-CV-2013-0002-1987 (Feb. 18, 2014).

Several of these comments, as well as comments by members of the judiciary, expressed the view that a 60-day time frame would not provide any commensurate benefit for the court or defendants,<sup>272</sup> and would not accomplish the Committee’s goal of getting the action moving in half the time.<sup>273</sup> Relatedly, many questioned the Committee’s statement that there exists a “commonly expressed view” that four months to serve the summons and complaint is too long.<sup>274</sup> For instance, one federal judge noted that this statement lacked any attribution, openly questioned whether there was any empirical support for it, and suggested that, in his view, the proposal would not move cases more quickly to trial but would increase costs.<sup>275</sup> Other commentary noted that shortening the time under Rule 4(m) would also shorten the time permitted under Rule 15(c)(1)(C) for notice of an action for purposes of relation back of an amendment adding or changing a party against whom a claim is made.<sup>276</sup>

The Department of Justice, though it recognized the Committee’s concern with the current 120-day rule, nonetheless opposed the reduction, largely for the reasons expressed above. It did, however, add an additional point: that “an unintended consequence of shortening the 120-day period will be to discourage plaintiffs from attempting to use the Rule 4(d)(1)(F) and (d)(3) provisions for waiver of service—thereby inadvertently resulting in an increase in litigation-related costs.”<sup>277</sup> This point was echoed by several other comments.<sup>278</sup>

Of the 30 comments favoring the proposal, half of them came from attorneys who represent defendants or organizations of defense counsel, while several others came from bar associations and a handful of plaintiffs’ attorneys. These comments echoed the Committee’s statement that four months to effect service is too long. According to this commentary, the reduction in time would not affect access to courts because courts could simply extend the time upon a showing of good cause.<sup>279</sup> This commentary did not identify any empirical support for the Committee’s statement that the current time period is “too long.”

While the Department of Justice recommended that the Committee not reduce the time period at all, it asked the Committee to consider, in the alternative, allowing for 90 days for

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<sup>272</sup> Zainey, cmt. 0657.

<sup>273</sup> Comment of Aleen R. Tiffany, Illinois Association of Defense Trial Counsel (“IDC”), USC-RULES-CV-2013-0002-1335 (Feb. 14, 2014).

<sup>274</sup> *E.g.*, Morrison, cmt. 0383.

<sup>275</sup> Zainey, cmt. 0657.

<sup>276</sup> Morrison, cmt. 0383.

<sup>277</sup> DOJ, cmt. 0459

<sup>278</sup> *E.g.*, Comment of Perry Weitz, Weitz & Luxenberg, USC-RULES-CV-2013-0002-0278 (Sept. 17, 2013); Comment of Trevor Rockstad, AAJ Darvon/Darvocet Litigation Group, USC-RULES-CV-2013-0002-0297 (Oct. 24, 2013); Comment of Thomas Foley, Jr., Foley Law Firm, USC-RULES-CV-2013-0002-0682 (Feb. 7, 2014).

<sup>279</sup> Federal Courts Committee of the NYCLA, cmt. 2072, at 4.

service.<sup>280</sup> The Federal Magistrate Judges Association also recommended that the time for service not be reduced to fewer than 90 days.<sup>281</sup> Some commenters argued that the Committee Note should be amended to explicitly state that extensions of time for “good cause” should be “liberally granted for the sake of better overall efficiency” and that the proposed change isn’t intended to change courts’ current discretion to grant extensions even absent good cause.<sup>282</sup>

## **V. Abrogation of Rule 84 and Most Official Forms**

The Committee published a proposal to abrogate Rule 84 and most of the Official Forms. It offered several reasons for this proposal. First, it believed the forms were hardly ever used.<sup>283</sup> Second, it thought that updating the forms would take considerable work, and that there were many alternative sources for forms, including from the Administrative Office of the U.S. Courts.<sup>284</sup> Third, it thought the forms were in tension with emerging pleading standards, as discussed in two recent Supreme Court decisions, *Twombly v. Bell Atlantic*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).<sup>285</sup> Rewriting the forms, the Committee believed, would be a “precarious undertaking,” and in any event, it thought such an undertaking might not be worthwhile if in fact few attorneys used the forms.<sup>286</sup>

Although few comments focused on this proposal, the comments filed were largely disapproving. By our count, the Committee received a total of 34 comments on the abrogation of the forms, with 26 opposed and 8 in favor. Several comments asserted that the forms still serve their original useful function<sup>287</sup> and argued that there was no benefit to discontinuing their inclusion now.<sup>288</sup> Attorneys who work with *pro se* litigants, and those litigants who are incarcerated argued that these litigants use and need the forms, and many of them do not have access to the internet to access other sources of example pleadings.<sup>289</sup> Several comments argued that forms available to litigants from alternative sources are not an adequate substitute because

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<sup>280</sup> DOJ, cmt. 0459, at 6.

<sup>281</sup> Federal Magistrate Judges Ass’n, cmt. 0615.

<sup>282</sup> *E.g.*, NYS Bar Section, cmt. 0303.

<sup>283</sup> Proposed Amendments, at 276.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 276-77.

<sup>286</sup> *Id.* at 277.

<sup>287</sup> IDC, cmt. 1335; Comment of Gwen D’Souza, Maryland Employment Lawyers Association, USC-RULES-CV-2013-0002-0660 (Feb. 7, 2014); Comment of Professor John Leubsdorf, Rutgers Law School, USC-RULES-CV-2013-0002-1219 (Feb. 13, 2014).

<sup>288</sup> IDC, cmt. 1335.

<sup>289</sup> Columbia Legal Services, cmt. 1594; Pennsylvania Institutional Law Project (1434); Comment of Arthur M. Read, Friends of Farmworkers, Inc., USC-RULES-CV-2013-0002-1560 (Feb. 14, 2014); Texas RioGrande Legal Aid, et al., cmt. 1411; Oppenheimer, cmt. 1307.

they are not necessarily legally sufficient.<sup>290</sup> Some argued that there is no pressing need to abrogate the forms now, and that the Committee should table the abrogation of Rule 84 and most of the Forms until a later date.<sup>291</sup>

Most focused on the abrogation of Form 11, which provides an authoritative example of a well-pleaded complaint under Rule 8. A handful of comments discussed Form 18 for patent litigation; at least one comment expressed the view that the existing Form 18 is problematic,<sup>292</sup> but another commentator thought any problems created by Form 18 were miniscule.<sup>293</sup> A few bar associations weighed in, with one noting its support,<sup>294</sup> and another noting that its membership was divided for and against.<sup>295</sup>

These simple totals, however, obscure the depth of opposition to the proposal, in particular from the academic community. For example, 109 legal academics joined Professor Jonathan Siegel's letter opposing the abrogation of Rule 84 and the forms.<sup>296</sup> And 171 law professors joined a letter filed by six other academics, which also opposed abrogation of Rule 84.<sup>297</sup>

These professors were highly critical of this proposal. Some professors argued that there was no empirical support for the Committee's statement that no one uses the forms.<sup>298</sup> Other professors contended that retaining official forms was worthwhile because the forms exist "to indicate to judges how simple and brief pleadings can be."<sup>299</sup> One professor indicated the forms were helpful to *pro se* litigants or novice practitioners, and that Rule 84 was among the very few rules that encouraged simplicity and brevity.<sup>300</sup> That same professor expressed the concern that,

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<sup>290</sup> E.g., Texas RioGrande Legal Aid, et al., cmt. 1411.

<sup>291</sup> Comment of Prof. A. Benjamin Spencer, Washington & Lee Univ. School of Law, USC-RULES-CV-2013-0002-0453 (Jan. 27, 2014); Comment of Elise E. Singer, Fine Kaplan & Black RPC, USC-RULES-CV-2013-0002-0648 (Feb. 7, 2014).

<sup>292</sup> E.g., Washington Legal Foundation, cmt. 0285.

<sup>293</sup> TTLA, February Hearing, at 163-64.

<sup>294</sup> NYS Bar Section, cmt. 0303.

<sup>295</sup> Philadelphia Bar, cmt. 0995.

<sup>296</sup> Comment of Prof. Jonathan Siegel, on behalf of 110 Legal Academics, USC-RULES-CV-2013-0002-0493 (Jan. 31, 2014). *See also* Thornburg, cmt. 0499; Testimony of Prof. Brooke Coleman, Seattle Univ. School of Law, January Hearing, at 115-18; Testimony of Reda, February Hearing, at 354-55.

<sup>297</sup> Hershkoff, cmt. 0622. One professor, however, agreed that the forms were outdated and had served their original purpose, but nonetheless thought they were useful reminders of how to interpret the pleading rules. Morrison, cmt. 0383.

<sup>298</sup> Hershkoff, cmt. 0622.

<sup>299</sup> Siegel, et al., cmt. 0493.

<sup>300</sup> Spencer, cmt. 0453. *See also* Columbia Legal Services, cmt. 1594.

with so many proposals open to public comment at the same time, practitioners may not have understood the implications of abrogating the forms.<sup>301</sup>

The academic community, moreover, disagreed with the Committee's suggestion that abrogating the forms was somehow the best way to reconcile the existing forms with the pleading standards discussed in *Iqbal* and *Twombly*. One concern expressed was that abandoning the forms would foreclose reform of the pleading rules themselves, or would be viewed as a "stealth-like signal" that the Committee was approving *Iqbal* and *Twombly*.<sup>302</sup> Another, related concern was that any tension between the forms and pleading standards suggested not a problem with the forms, but with the Supreme Court's understanding of pleading standards.<sup>303</sup> A final concern, raised by Professor Brooke Coleman, was that abrogation of Rule 84 and the forms violates the Rules Enabling Act of 1934. According to Professor Coleman, because the forms are inextricably linked to the Rules, they cannot be eliminated or amended without making a change to the Rules to which they correspond.<sup>304</sup>

## CONCLUSION

The proposed amendments to the Federal Rules of Civil Procedure generated more comments and more testimony than any previous set of proposed amendments, even those that were considered controversial at the time they were proposed. The commentary opposing the proposed amendments generally, and specifically opposing some of the proposed amendments that the Advisory Committee recommends be adopted, heavily outweighed the comments in support of the proposals. There was also a deep divide in the commentary, with corporations, their counsel and organizations that represent their interests, and governmental bodies largely supporting the proposed amendments, and virtually every other type of commenter, including current and former federal judges and a large number of legal academics, largely opposing the proposals. Very few cross-sectional bar associations weighed in on the proposals, and there was no consensus among the few that did.

The purpose of a notice and comment period is generally to guide policymakers on effects, data, expert opinions, and facts that may not have been considered in drafting new rules. Rules are changed only if the policymaking body concludes that its proposed solution will accomplish the goals or solve the problems identified. That task now falls to the Standing Committee and then the Judicial Conference of the United States.

\* \* \*

*For questions or comments, please contact Valerie M. Nannery, Senior Litigation Counsel, at [valerie.nannery@cclfirm.com](mailto:valerie.nannery@cclfirm.com) or 202-944-2803.*

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<sup>301</sup> *Id.*

<sup>302</sup> Miller, cmt. 0386.

<sup>303</sup> Siegel, et al., cmt. 0493.

<sup>304</sup> Coleman, January Hearing, at 118-24.





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**Congress of the United States**  
**Washington, DC 20515**

January 28, 2014

Advisory Committee on Civil Rules  
Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, DC 20544

Dear Members of the Advisory Committee:

We write to express concern over proposed changes to the Federal Rules of Civil Procedure.

Access to the courts is critical to the fairness and integrity of our judicial system. It helps ensure that meritorious lawsuits are heard and injured parties can receive justice. The discovery process is especially critical to plaintiffs in civil rights cases. They often do not possess the information they need to fully substantiate their claims without a thorough discovery process.

Although some of the proposed changes will improve the discovery process for the parties and the court such as allowing service of discovery requests prior to the Rule 26(f) conference, requiring an informal conference with the court before discovery motions are filed, and reducing the time between service of the Complaint and the Rule 16 conference, the majority of the proposed changes would actually increase costs, create inefficiencies, impose delay, and ultimately impede access to justice.

The proposed changes to the Federal Rules of Civil Procedure cannot be considered in a vacuum. The Supreme Court, in *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*<sup>2</sup>, recently imposed significant procedural hurdles for civil litigants by forcing them to present detailed facts during the pleading stage rather than acquiring them through pretrial discovery. With its decision in *Wal-Mart Stores, Inc. v. Dukes*<sup>3</sup>, the Court raised the standard for establishing class certification. **When litigants actually survive the hurdles created by these decisions, their ability to obtain necessary discovery should not be stymied by overly restrictive rules that will keep justice out of reach.**

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<sup>1</sup> 550 U.S. 554 (2007).

<sup>2</sup> 556 U.S. 662 (2009).

<sup>3</sup> 131 S. Ct. 2541 (2011).

### Proposed Proportionality Standard in Rule 26(b)

Of greatest concern is the proposed change to Rule 26(b)(1), described by distinguished Law Professor Arthur Miller as a “threat to the jugular of the discovery regime as we have known it.”<sup>4</sup> Current Rule 26(b)(1) provides that “parties may obtain discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or defense (emphasis added).”<sup>5</sup> The proposed change would alter the scope of discovery from a relevancy standard to a proportionality standard, meaning that when responding to a discovery request, a litigant could consider the amount in controversy, the importance of the issues, the parties’ resources, the importance of the discovery in resolving the issue, and, most importantly, whether the burden or expense of the proposed discovery outweighs its likely benefit.

Through an assessment of “proportionality,” defendants would be able to avoid producing relevant information that plaintiffs need to develop their case, especially in cases where the costs of discovery are expensive relative to the amount of damages or requested relief. Civil rights litigants will be the ones most hampered by these changes, as they already bear the burden of proving their claims in the face of 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. As a result, plaintiffs would be less able to get the information needed to meet the burden of proof. “Proportionality” assessments would result in a massive increase in aggressive collateral discovery motions to the court, taxing judicial resources, and saving neither time nor expense.

Further, the proposed rule on “proportionality” would shift the burden of production to plaintiffs. Instead of objecting to requests as “burdensome” which the defendant must show to avoid production, defendant corporations will object that a request is “disproportionate,” leaving plaintiff to show that it is not, this in spite of the truth that defendants control the greatest part of the information related to the proportionality inquiry, and, to the subject of the case itself.

### Proposed Presumptive Limits of Depositions and Interrogatories

We are also concerned about proposed changes to Rules 30, 31, 33, and 36 that would lower the presumptive limits of depositions and interrogatories. Plaintiffs often rely on these discovery tools to get the information they need to meet their burden of proof. With fewer tools on hand, they will have to waste limited judicial resources asking for additional ones. A plaintiff in an employment discrimination, product liability or a 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. Rather than simply conducting those depositions, the plaintiff would have to request

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<sup>4</sup> Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?” Hearing before the Subcomm. on Bankr. and the Courts of the S. Comm. On the Judiciary, 113th Cong. 6 (2013).

<sup>5</sup> FED. R. CIV. P. 26(b)(1).



additional depositions. This would not serve the Judicial Conference's goals of increased efficiency and decreased cost.

### Proposed Limit on Time for Service

Under the proposed Rule 4 change, the time limit in which a party to a lawsuit must give notice of legal action to another party would be reduced from 120 days to 60 days. Although the Advisory Committee's goal of increasing efficiency is laudable, this change would make the process less efficient because parties would often have to seek time extensions from the court. 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. The current 120 day time period usually allows enough time for service so that plaintiffs do not have to use judicial resources to argue for an extension of time.

Each of the proposed changes discussed above, instead of leveling the playing field, tip the already precarious balance far towards the side of the corporate defendant, increasing the cost and difficulty of getting to the relevant and necessary information to prosecute civil cases.

We respectfully request that the Judicial Conference reexamine these proposed changes to the Federal Rules of Civil Procedure to ensure the fairness and integrity of the American judicial system.

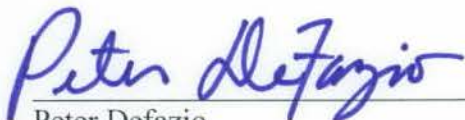
Sincerely,



Earl Blumenauer  
Member of Congress



Suzanne Bonamici  
Member of Congress



Peter Defazio  
Member of Congress



Kurt Schrader  
Member of Congress

# The Sedona Conference Commentary on Proportionality in Electronic Discovery

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THE SEDONA  
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COMMENTARY ON  
PROPORTIONALITY IN  
ELECTRONIC DISCOVERY

*A Project of The Sedona Conference®  
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Document Retention & Production (WG1)*

JANUARY 2013 VERSION



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# THE SEDONA CONFERENCE® COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY

A PROJECT OF THE SEDONA CONFERENCE® WORKING GROUP ON ELECTRONIC  
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## Preface

Welcome to another major publication in The Sedona Conference® Working Group Series (WGS<sup>SM</sup>). This is the “post-public comment” version of *The Sedona Conference® Commentary on Proportionality in Electronic Discovery*, a project of our Working Group on Electronic Document Retention & Production (WG1). The public comment version of this Commentary was first published in October 2010 and gained immediate recognition for providing a practical analytical framework to assist lawyers, judges, and parties realize the goals of Rule 1 of the federal and most state Rules of Civil Procedure – achieving the “just, speedy, and inexpensive determination of every action.”

As a testament to its value and timeliness, the public comment version of this Commentary has been cited in eight federal court decisions (including one Federal Circuit Court of Appeals decision), 15 law review articles, seven legal treatises, and at least 166 legal blogs or websites. While all the citations have been favorable, they have also included some constructive critique and useful suggestions for revision. In addition, since the Commentary was first published, the concept of “proportionality” has explicitly been included in several local rules and court pilot projects, and has found its way into the federal rulemaking process through proposed revisions to Federal Rules of Civil Procedure 26 and 37, currently before the Civil Rules Advisory Committee and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

This “post-public comment” version incorporates many of the suggestions and updates received by the original drafting team, which drew on the collective expertise of a diverse group of lawyers and representatives of firms providing consulting and legal services to both requesting and responding parties in civil litigation. And in addition to the comment by the courts and in the legal press, the Commentary was the subject of dialogue at four meetings of WG1, and numerous WG1 members contributed individual comments and edits. On behalf of The Sedona Conference®, I want to thank the editorial team and all the WG1 members whose dialogue and comments contributed to this Commentary. We hope our efforts will assist lawyers, judges, and others involved in the legal system work with the concept of proportionality in discovery.

We hesitate to call this a “final” version, as the ongoing dialogue on proportionality and its practical application to civil litigation will doubtless continue. If you wish to submit any further comments, please visit our website at <https://thesedonaconference.org> and join the online discussion forums, or email us at [info@sedonaconference.org](mailto:info@sedonaconference.org).

*Kenneth J. Withers*  
Director of Judicial Education  
The Sedona Conference®  
January 2013

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## *The Sedona Conference® Principles of Proportionality*

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1. The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

## Introduction

This Commentary discusses the origins of the doctrine of proportionality, provides examples of its application, and proposes principles to guide courts, attorneys, and parties. The principles do not merely recite existing rules and case law but rather provide a framework for applying the doctrine of proportionality to all aspects of electronic discovery. Although the Commentary cites primarily federal case law and rules, the principles apply equally to electronic discovery in state courts.

In 1938, the Federal Rules of Civil Procedure (“Federal Rules”) were adopted, providing for “the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1 (1938). Over the years, the Federal Rules have witnessed various technological revolutions, such as the “modern miracle of photographic reproduction,”<sup>1</sup> which one court noted “lessen[s] what might otherwise be burdensome transportation of records and documents.”<sup>2</sup>

Since their enactment in 1938, the Federal Rules have been amended several times to keep pace with the changing demands of courts and parties. In 1983, Rule 26(b)(1) was amended to grant courts the authority to limit excessive discovery. The Advisory Committee noted that the amendments were intended 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.”<sup>3</sup> This addition was important because “[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems.”<sup>4</sup> As explained by the Advisory Committee, the amendments address the problem of disproportionate discovery (without expressly mentioning “proportionality”). The Committee sets out the general proportionality test: determining whether “the burden or expense of the proposed discovery outweighs its likely benefits” and lists a number of factors bearing on proportionality. These include the nature and complexity of the lawsuit, the importance of the issues at stake, the parties’ resources, the significance of the substantive issues, and public policy concerns.<sup>5</sup>

The Federal Rules were amended again in 1993 when a new paragraph was added, Rule 26(b)(2). This Rule adds further judicial flexibility to address the tremendous increase in the amount of potentially discoverable information caused by the “information explosion of recent decades” and the corresponding increase in discovery costs.<sup>6</sup> The Advisory Committee Notes explain that “[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery. ...”<sup>7</sup>

In the late 1990s, the Committee acknowledged that amended Rule 26(b)(2) was having little effect. It suspected that the location of the proportionality provision, buried among other discovery provisions, hindered its effectiveness. It responded by amending Rule 26(b)(1) in 2000 to include the proportionality provision in the same subdivision that contains the general discovery duty. “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) [proportionality factors] to control excessive discovery.”

<sup>1</sup> *Herbst v. Able*, 278 F. Supp. 664, 667 (S.D.N.Y. 1967).

<sup>2</sup> *Goldberg v. Taylor Wine Co.*, No. 77-1548, 1978 U.S. Dist. LEXIS 19891, at \*14 (E.D.N.Y. Jan. 27, 1978).

<sup>3</sup> See Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(b).

<sup>4</sup> See Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26.

<sup>5</sup> See Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(b).

<sup>6</sup> See Advisory Committee Notes to 1993 Amendments to FED. R. CIV. P. 26(b).

<sup>7</sup> *Id.*

In 2006, Rule 26(b)(2) was amended to limit the discovery of electronically stored information (“ESI”) deemed not reasonably accessible because of the costs and burdens of retrieving it. The Advisory Committee Notes to this amendment state that the costs and burdens of retrieving information that is not reasonably accessible can properly be considered as part of the proportionality analysis, and that discovery of such information may be limited or the costs of such discovery shifted from the responding to the requesting party.<sup>8</sup>

Notwithstanding the foregoing amendments, courts have not always insisted on proportionality when it was warranted.<sup>9</sup> And, even when courts have applied proportionality concepts, they have not always described them as such.<sup>10</sup> In the electronic era, it has become increasingly important for courts and parties to apply the proportionality doctrine to manage the large volume of ESI and associated expenses now typical in litigation. The discussion below addresses the key issues both parties and courts confront when they conduct a proportionality analysis pursuant to Rule 26(b)(2)(C). A list of recommended principles follows the general discussion.

### The Availability of the Information from Other Sources

Rule 26(b)(2)(C)(i) directs courts to impose limitations where “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” FED. R. CIV. P. 26(b)(2)(c)(i). Where relevant information is available from multiple sources, this rule allows courts to limit discovery to the least expensive source.<sup>11</sup>

### Waiver and Undue Delay

Rule 26(b)(2)(C)(ii) also directs courts to limit discovery where “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action.” FED. R. CIV. P.

<sup>8</sup> See Committee Notes to 2006 Amendments to FED. R. CIV. P. 26(b)(2).

<sup>9</sup> See Committee Notes to 2000 Amendments to FED. R. CIV. P. 26(b)(1) (“The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.”); CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice & Procedure* § 2008.1, at 121 (2d ed. 1994) (describing the “paucity of reported cases” applying the proportionality rule and concluding “that no radical shift has occurred”).

<sup>10</sup> See, e.g., *Waldron v. Cities Serv. Co.*, 361 F.2d 671, 673 (2d Cir. 1966), *aff’d*, 391 U.S. 253 (1968) (“The plaintiff . . . may not seek indefinitely . . . to use the [discovery] process to find evidence in support of a mere ‘hunch’ or ‘suspicion’ of a cause of action.”); *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 925 (5th Cir. 1964) (“Full and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered.”); *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971) (“A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense.”); *Wely v. Clute*, 1 F.R.D. 446 (W.D.N.Y. 1940) (finding a second deposition of a plaintiff unnecessary given the availability of other discovery).

<sup>11</sup> For example, in *Young v. Pleasant Valley School District*, the court rejected the plaintiffs’ request for production of emails located on back-up tapes, citing Rule 26(b)(2)(C)(i), and noting that “[t]he burden and expense of rebuilding the district’s email system in order to provide the discovery requested by the plaintiffs, along with the additional and less expensive means available for plaintiffs to get this material[,] makes the plaintiffs’ discovery request impractical.” *Young v. Pleasant Valley Sch. Dist.*, No. 07-854, 2008 WL 2857912, at \*3 (M.D. Pa. July 21, 2008).

26(b)(2)(C)(ii). Pursuant to this provision, both discovery requests and objections to discovery must be reasonably prompt, or they may be deemed waived.<sup>12</sup>

### Burden Versus Benefit

In assessing whether to limit discovery, courts consider whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C)(iii). When they analyze these factors, courts weigh the burdens of discovery against the potential benefit of the information to be produced in light of the specific circumstances of the case. For example, a court may order a party to engage in a burdensome and costly production if the information sought is extremely pertinent to the case and is unavailable elsewhere. But what if the cost of producing the information exceeds the total value of the case? Or what if expensive production is warranted based solely on the value of the case, but the producing party lacks the resources to pay for the production? Or what if the amount in controversy is low, but the case raises important societal issues? These are the kinds of questions a court and parties may consider when they decide whether to limit discovery.<sup>13</sup>

Although Rule 26(b)(2)(C)(iii) discusses a number of monetary considerations, courts considering a limitation on discovery may likewise take nonmonetary factors into account, such as the societal benefit of resolving the case on its merits or the nonmonetary burden on the producing party. Fed. R. Civ. P. 26(b)(2)(C)(iii) expressly provides that “the importance of the issues at stake in the action” is one of the proportionality factors. The “metrics” set forth in Rule 26(b)(2)(C)(iii) provide courts

<sup>12</sup> *Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 426 (D.N.J. 2009) (“One may reasonably expect that if document production is proceeding on a rolling basis where the temporal gap in production is almost half a year apart, a receiving party will have reviewed the first production for adequacy and compliance issues for a reason as obvious as to ensure that the next production of documents will be in conformity with the first production or need to be altered. It was incumbent on Edgewood to review the adequacy of the first production so as to preserve any objections. The Court is not dictating a rigid formulation as to when a party must object to a document production. Reasonableness is the touchstone principle, as it is with most discovery obligations. The simple holding here is that it was unreasonable to wait eight months after which production was virtually complete.”)

<sup>13</sup> See, e.g., *Young v. Pleasant Valley Sch. Dist.*, 2008 WL 2857912, at \*2; see also *Spieker v. Quest Cherokee, LLC*, No. 07-1225, 2008 WL 4758604, at \*3 (D. Kan. Oct. 30, 2008) (assessing a request to limit discovery in a class action, rejecting “defendant’s argument that the ‘amount in controversy’ is limited to the named plaintiffs’ claims” and stating that “defendant’s simplistic formula for comparing the named plaintiffs’ claims with the cost of production is rejected”); *Southern Capitol Enters., Inc. v. Conseco Servs., L.L.C.*, No. 04-705, 2008 WL 4724427, at \*2 (M.D. La. Oct. 24, 2008) (“Perfection in document production is not required. . . . In these circumstances Rule 26(b)(2)(C)(iii) comes into play. At this point in the litigation, the likely benefit that could be obtained from [further discovery] is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data.”); *Metavante Corp. v. Emigrant Sav. Bank*, No. 05-1221, 2008 WL 4722336, at \*4 (E.D. Wis. Oct. 24, 2008) (“In viewing the totality of the circumstances, including the amount in controversy in this case, the parties’ resources, and the issues at stake, the court concludes that the burden [of production] does not outweigh the value of the material sought.”); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (“I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each.”); *Cenveo Corp. v. Slater*, No. 06-2632, 2007 WL 442387, at \*2 (E.D. Pa. Jan. 31, 2007) (“The dispute before the Court requires a weighing of defendants’ burden in producing the information sought against plaintiff’s interest in access to that information. Because of the close relationship between plaintiff’s claims and defendants’ computer equipment, the Court will allow plaintiff to select an expert to oversee the imaging of all of defendants’ computer equipment.”).



with significant flexibility and discretion to assess the circumstances of the case and to make sure the scope and duration of discovery are reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources.

Most courts that have addressed proportionality focus on Rules 26(b) and (c). However, Rule 26(g) also requires that the parties propounding or responding to discovery requests conduct their own proportionality analysis. Described by one court as “[o]ne of the most important, but apparently least understood or followed, of the discovery rules,”<sup>14</sup> Rule 26(g)(1) provides that

[e]very discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name. . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: . . . with respect to a discovery request, response, or objection, 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 action.

FED. R. CIV. P. 26(g)(1). The Advisory Committee announced that this rule is intended to impose “an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.”<sup>15</sup> To that end, the rule “provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”<sup>16</sup> Indeed, the Advisory Committee noted that “the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.”<sup>17</sup>

In sum, courts applying the doctrine of proportionality may consider a variety of factors, including the benefit of the proposed discovery (including nonmonetary benefits), the burden or expense of the proposed discovery, the availability of the information from other sources, and undue delay on the part of the party seeking or resisting discovery.

We recognize that some parties may inappropriately raise proportionality arguments, either as a sword to increase the burden on the producing party<sup>18</sup> or as a shield to avoid legitimate discovery obligations.<sup>19</sup> Courts must be wary of such abuses. In any event, the burden or expense of discovery is simply one factor in a proportionality analysis and may not be dispositive or even determinative in specific cases.

<sup>14</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008).

<sup>15</sup> Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(g).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, No. 07-1068, 2009 WL 1649592 (E.D. Wis. June 10, 2009). In this matter involving the terms of a distribution agreement, the plaintiff moved to compel a native production of five DVDs containing the defendant's emails and other ESI for a five-year period. The court denied the motion, holding that “[Defendant] has no obligation to turn over to an opposing party in a lawsuit non-discoverable and privileged information. . . . The mere possibility of locating some needle in the haystack of ESI . . . does not warrant the expense [defendant] would incur in reviewing it.” *Id.* at \*4.

<sup>19</sup> See *Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga. 2009). The court noted that “rather than seeking a protective order [the defendants] determined themselves that it would be overly burdensome” to produce the discovery in the court-ordered format. *Id.* at 693. The court sanctioned the defendants under Rules 26 and 37, for their failure to follow discovery orders, their lack of diligence in discovery, and “making blatant misrepresentations about the value of email discovery in this case in an effort to influence the court's ruling.” *Id.* at 692.



# The Sedona Conference® Principles of Proportionality

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## **Principle 1: The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.**

The Federal Rules do not apply until litigation has commenced. However, courts can invoke their inherent authority to sanction parties for pre-litigation preservation failures. The proportionality principles set forth in the Federal Rules, while not directly applicable, may guide those considering their pre-litigation preservation obligations.<sup>20</sup>

Thus, a party, for whom an obligation to preserve potentially relevant information has arisen, should weigh the burdens and costs of preservation against the potential value and uniqueness of such information before deciding on the appropriate scope and manner of any preservation.<sup>21</sup>

Courts conducting a *post hoc* analysis of a party's pre-litigation preservation decisions should evaluate those decisions in light of both the proportionality factors set forth in Rule 26(b)(2)(C) and the preserving party's good faith and reasonableness. The analysis will, in turn, depend on the knowledge available when the information was, or could have been, preserved.<sup>22</sup> Although there is no case law applying the proportionality factors set forth in the Federal Rules in the pre-litigation context, parties who demonstrate that they acted thoughtfully, reasonably, and in good faith in preserving, or attempting to preserve, information prior to litigation should generally be entitled to a presumption of adequate preservation. However, parties must be prepared to make this

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<sup>20</sup> See, e.g., The Sedona Conference®, *The Sedona Principles* (2d ed. 2007), Principle 5 (“The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.”); The Sedona Conference®, *The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible* 14 (July 2008) (“If the burdens and costs of preservation are disproportionate to the potential value of the source of data at issue, it is reasonable to decline to preserve the source.”); The Sedona Conference®, *The Sedona Conference® Commentary on Inactive Information Sources* 11 (July 2009) (“A reasonableness/proportionality analysis should be conducted to determine whether it would be reasonable under the circumstances to take steps to preserve a specific inactive information store . . .”); see also The Hon. Paul W. Grimm, et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008) (urging for “the application, by analogy, of Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e) to the pre-litigation duty to preserve”).

<sup>21</sup> The determination of whether a preservation obligation has arisen is addressed in *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process* (2007). This Commentary also addresses the appropriate scope and manner of preservation after the determination has been made that a preservation obligation exists.

<sup>22</sup> *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards.”)

demonstration and cannot rely on a “pure heart, empty head.” Courts should not allow hindsight bias to color their analysis of a party’s deliberate, reasonable, and good faith preservation efforts.<sup>23</sup>

**Principle 2: Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.**

Rule 26(b)(2)(C)(i) provides that courts must limit discovery when the requested material can be obtained from sources that are “more convenient, less burdensome, or less expensive.” FED. R. CIV. P. 26(b)(2)(C)(i). In other words, if relevant information is available from multiple sources, a court can limit discovery to the least burdensome source, and thus control litigation costs and promote efficiency in accordance with Rule 1. *See* FED. R. CIV. P. 1. Likewise, this provision enables courts to protect parties from abusive discovery requests. Although any one source is unlikely to meet all three criteria by being the most convenient, least burdensome, and least expensive; parties should carefully weigh each of these factors when determining which source is optimal.

For example, a court may consider limiting discovery of backup tapes that are not reasonably accessible<sup>24</sup> if the relevant information stored on the tapes can be obtained from other, more accessible, sources, such as hard-copy records, testimony, or nonparty discovery. If, for example, the producing party can easily produce hard copies of its requested emails, that party probably should not incur the costs of restoring backup tapes containing the same emails.<sup>25</sup>

In determining whether to limit purportedly burdensome or expensive discovery pursuant to Rule 26(b)(2)(C)(i), a court should consider the specific situation of the parties, taking into account the various sources in which the requested information can be found, the burden and expense of production from those sources, and whether limiting discovery to less burdensome or expensive sources will reduce the utility of the information sought. For example, the producing party may find that large numbers of emails may be more accessible and more easily produced as hard copies; but, because they will not be in electronic form, the requesting party will have to incur the costs of scanning and loading them onto a search platform or conducting a costly manual search. In this situation, it may be appropriate for a court, when it considers a request to limit production, to consider the totality of litigation costs and who should bear certain of those costs.

In the early stages of litigation, the parties and the court may be unable to assess whether limiting discovery is appropriate. The parties, for example, may not yet be fully aware of all of the viable claims and defenses or the factual or legal issues, which will ultimately be critical in the litigation. Similarly, if a requesting party seeks production of ESI archived several years earlier, the responding

<sup>23</sup> *Cf. Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 226 (E.D. Pa. 2008) (“[H]indsight . . . should not carry much weight, if any, because no matter what methods an attorney employed, an after-the-fact critique can always conclude that a better job could have been done.”)

<sup>24</sup> Rule 26(b)(2)(B) provides that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.” FED. R. CIV. P. 26(b)(2)(B).

<sup>25</sup> *Cf. U.S. v. O’Keefe*, 537 F.Supp.2d 14, 21 (D.D.C. Feb. 18, 2008).

party may not have a full understanding of the content of the ESI or its potential value to the litigation.<sup>26</sup>

Under these circumstances, the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further discovery that is more burdensome and expensive is, nevertheless, warranted. In addition, given that the vast majority of cases settle, phasing discovery may allow the parties to develop a factual record sufficient for settlement negotiations without incurring the costs of more burdensome discovery that may only be necessary if the case goes to trial.

Parties who wish to conduct phased discovery must communicate with one another about the issues relevant to the litigation and the repositories – both accessible and inaccessible – that may contain relevant information. Moreover, the parties must cooperate with one another to prepare and propose to the court a phased discovery plan.<sup>27</sup>

### **Principle 3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.**

Although the Federal Rules do not set forth specific deadlines by which parties must propound or otherwise sequence discovery, courts will often set discovery deadlines in accordance with their own scheduling orders or local rules. Courts may also sequence fact and expert discovery, set specific dates for completion of document production, or limit the time period in which parties can raise discovery disputes. From a proportionality perspective, propounding discovery requests at the early stages of the litigation allows parties sufficient time to explore compliance with the discovery requests and bring any disputes before the court for resolution. Accordingly, parties should raise any discovery disputes as soon as is reasonably possible but only after engaging in good faith attempts to resolve the dispute without the court's involvement.

If a dispute cannot be resolved, it should be raised with the court promptly. In determining whether the requested relief is appropriate, the court may consider the time at which the issue arose and whether the moving party could have raised the issue earlier. The resolution of such disputes can be fact-intensive, requiring the court to assess whether the producing party complied with its discovery obligations, the degree of culpability involved, and the prejudice to the requesting party.

Traditionally, parties must bear their own costs when they respond to discovery requests, including the costs of production. In assessing whether a particular discovery request or requirement is unduly burdensome or expensive, a court should consider the extent to which the claimed burden and expense grow out of the responding party's own action or inaction. In practice, this principle typically focuses on actions taken, or not taken, by the responding party with regard to the duties to

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<sup>26</sup> See Committee Notes to 2006 Amendments to Rule 26(b)(2) (noting that, “because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation,” it may be appropriate for the parties to engage in “focused discovery . . . to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.”)

<sup>27</sup> These issues may be considered at the Rule 26(f) conference, at which the parties must “discuss any issues about preserving discoverable information; and develop a proposed discovery plan.” FED. R. CIV. P. 26(f)(2).

preserve, search, and produce relevant information.<sup>28</sup> But, it can also occasionally arise when a requesting party delays filing a motion to compel production of ESI or production of ESI in a particular format.

A failure to preserve relevant information in an accessible format at the outset of litigation should be weighed against any party seeking to avoid the resultant burden of restoring the information. The Advisory Committee noted that an “appropriate consideration” in assessing burden and expense in the context of claims that information is not reasonably accessible is “the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources.”<sup>29</sup>

This proportionality principle also applies when a party fails to engage in early, meaningful discussions designed to develop a discovery plan and avoid potential disputes. Application of the principle in this context is appropriate because a party can be sanctioned for failing “to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).”<sup>30</sup> A party’s failure to engage in an early and meaningful meet-and-confer may shape a subsequent proportionality analysis when, for example, a party refuses to consult with an opponent about a keyword search protocol and a second search with better keywords proves necessary or when a duplicative production of material becomes necessary after ESI is produced in a form that is not reasonably usable.

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<sup>28</sup> *Quinby v. WestLB AG*, 245 F.R.D. 94, 104-05 (S.D.N.Y. 2006) (“[I]f a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data. This would permit parties to maintain data in whatever format they choose, but discourage them from converting evidence to inaccessible formats because the party responsible for the conversion will bear the cost of restoring the data. Furthermore, it would prevent parties from taking unfair advantage of a self-inflicted burden by shifting part of the costs of undoing the burden to an adversary. If, on the other hand, it is not reasonably foreseeable that the particular evidence in issue will have to be produced, the responding party who converts the evidence into an inaccessible format after the duty to preserve evidence arose may still seek to shift the costs associated with restoring and searching for relevant evidence.”)

<sup>29</sup> Committee Notes to 2006 Amendments to Rule 26(b)(2).

<sup>30</sup> FED. R. CIV. P. 37(f).



**Principle 4: Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.**

Rule 26(b)(2)(C)(iii) provides that in considering whether to limit potentially burdensome or expensive discovery, courts should consider “the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C)(iii). In other words, the court may limit discovery if the information sought, while relevant, is not sufficiently important to warrant the burden and expense of its production.<sup>31</sup> This issue often arises when discovery requests seek information that is duplicative, cumulative, or not reasonably accessible.<sup>32</sup> See FED. R. CIV. P. 26(b)(2)(B) (incorporating factors set forth in Federal Rule 26(b)(2)(C)).

When asked to limit discovery on the basis of burden or expense, courts should consider the likely benefits of the information sought to resolving factual issues in dispute. Discovery must be limited if the burden or expense of producing the requested information is disproportionate to its likely benefits, considering the discovery’s importance to the litigation. Performing this kind of assessment can be particularly challenging since it may be impossible to evaluate the requested information until it is actually produced.<sup>33</sup>

In some cases, it may be clear that the information requested is important or perhaps even outcome-determinative.<sup>34</sup> In other cases, courts can order sampling of the requested information, consider extrinsic evidence, or both, to determine whether the requested information is sufficiently important to warrant potentially burdensome or expensive discovery.<sup>35</sup>

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<sup>31</sup> An alternative to limiting burdensome or expensive discovery is to shift its cost to the requesting party. See FED. R. CIV. P. 26(c); see also *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (“[T]here is no justification for a blanket order precluding discovery of the defendants’ e-mails on the ground that such discovery is unlikely to provide relevant information... The more difficult issue is the extent to which each party should pay the costs of production.”); *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (“The converse solution is to make the party seeking the restoration of the backup tapes pay for them, so that the requesting party literally gets what it pays for.”)

<sup>32</sup> Courts may also employ sampling for the purpose of evaluating a request to shift costs. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“Requiring the responding party to restore and produce responsive documents from a small sample of backup tapes will inform the cost-shifting analysis.”)

<sup>33</sup> See Committee Notes to 2006 Amendments to Rule 26(b)(2) (“The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation.”); see also *Peskoff v. Faber*, 244 F.R.D. 54, 59 (D.D.C. 2007) (“Application of this factor can be challenging because the importance of the results of the forensic examination can only be assessed after it is done.”)

<sup>34</sup> See *Covad Communs. Co. v. Revonet, Inc.*, 258 F.R.D. 5, 13 (D.D.C. 2009) (permitting discovery that “should establish once and for all” a key issue in the case).

<sup>35</sup> See Committee Notes to 2006 Amendments to Rule 26(b)(2) (“[T]he parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.”)

In *Kipperman v. Onex Corporation*, the court required the defendants to produce two “sample” backup tapes so the court could compare the volume and importance of the information located on the tapes with the costs of their restoration and production.<sup>36</sup> After reviewing the results of the sample, the court determined that the information contained on the backup tapes was sufficiently important to warrant further discovery: “I don’t ... declare these to be smoking guns but they certainly are hot and they certainly do smell like they have been discharged lately.”<sup>37</sup>

In addition to sampling, courts generally consider extrinsic information submitted by the parties to determine whether requested discovery is sufficiently important to warrant potentially burdensome or expensive discovery. Such evidence may include the parties’ opinions regarding the likely importance of the requested information,<sup>38</sup> whether the requested information was created by “key players,”<sup>39</sup> whether prior discovery permits an inference that the requested information is likely to be important,<sup>40</sup> whether the creation of the information requested was contemporaneous with key facts in the case,<sup>41</sup> and whether the information requested is unique.<sup>42</sup> Any attempt to evaluate the importance of requested information will be fact-specific and thus will vary from case to case.

The party opposing discovery, of course, may put forth evidence that the burden or expense of producing the requested information outweighs its potential importance.

### **Principle 5: Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.**

The Federal Rules recognize that proportionality encompasses nonmonetary considerations. Rule 26(g)(1)(B)(iii) requires that an attorney (or *pro se* party) who promulgates discovery must consider “the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.” Rule 26(b)(2)(C)(iii) similarly requires that a court consider “the importance of the issues at stake in the action” when it considers whether to limit discovery. FED. R. CIV. P. 26(b)(2)(C)(iii).

The Committee Notes to Section 26(b)(2)(C)(iii) state:

The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially

<sup>36</sup> *Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga. 2009).

<sup>37</sup> *Id.* at 691 (“The court believes that some of the most interesting evidence in this matter has come from e-mail production.”)

<sup>38</sup> *Id.* at 689 (“Defendants argued that ... the value of the information on the tapes was dubious at best.”)

<sup>39</sup> *Zubulake*, 217 F.R.D. at 317 (“[E]mail constituted a substantial means of communication among UBS employees.”)

<sup>40</sup> *Peskoff*, 244 F.R.D. at 60 (“[I]t can be said that the information that has been produced thus far in this case permits the court to infer the possible existence of additional similar information that warrants further judicial action.”); *Ameriwood Indus., Inc. v. Liberman*, No. 06-524, 2006 WL 3825291, at \*3 (E.D. Mo. Dec. 27, 2006) (“In light of the Samsung email, the Court finds that other deleted or active versions of emails may yet exist on defendants’ computers.”)

<sup>41</sup> *Ameriwood Indus., Inc.*, 2006 WL 3825291, at \*5 (“In the instant action, defendants are alleged to have used the computers, which are the subject of the discovery request, to secrete and distribute plaintiff’s confidential information.”)

<sup>42</sup> See FED. R. CIV. P. 26(b)(2)(C)(i) (providing that courts must limit discovery that is “unreasonably cumulative or duplicative”).

weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.<sup>43</sup>

What role should nonmonetary factors such as “the importance of the issues at stake” play in a proportionality analysis? In civil actions that are essentially private disputes (such as most breach of contract or traditional tort actions), nonmonetary factors are usually irrelevant. However, in civil actions deriving from constitutional or statutorily created rights (such as those brought under 42 U.S.C. § 1983 or Title VII), nonmonetary factors may favor broader discovery. Any proportionality analysis should consider the nature of the right at issue and any other relevant public interest or public policy considerations, and whether, under the particular circumstances of the case, discovery should be restricted.

For example, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, an action for injunctive relief under the Americans with Disabilities Act, the court denied the defendant’s request to limit discovery of backup tapes because of “the importance of the issue at stake and the parties’ resources.”<sup>44</sup> Other courts have considered nonmonetary issues such as “the strong public policy in favor of disclosure of relevant materials,”<sup>45</sup> and even the health concerns and family obligations of the producing party.<sup>46</sup>

### **Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis.**

It is well documented that the volume of ESI is exploding in every corner of the digital world, increasing the volume of potentially discoverable information. Where appropriate, the application of technology to quickly isolate essential information serves the goal of proportionality by creating efficiencies and cost savings. Parties should meet and confer regarding technological approaches to preservation, selection, review, and disclosure that reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens.

<sup>43</sup> See Committee Notes to 1983 Amendments to Rule 26(b).

<sup>44</sup> *Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 148 (D.D.C. 2007). The court noted that: “Plaintiffs are physically challenged citizens of this community who need the access to public transportation that WMATA is supposed to provide. That persons who suffer from physical disabilities have equal transportation resources to work and to enjoy their lives with their fellow citizens is a crucial concern of this community. Plaintiffs have no substantial financial resources of which I am aware and the law firm representing them is proceeding pro bono. . . . I will therefore order the search of the backup tapes Plaintiffs seek.” *Id.* at 148.

<sup>45</sup> *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002).

<sup>46</sup> *Hunter v. Ohio Indem. Co.*, No. 06-3524, 2007 WL 2769805, at \*1 (N.D. Cal. Sept. 21, 2007) (“[T]he burden of a deposition on Ms. Jansen, who has virtually no knowledge of any [relevant] issues . . . and is caring for a spouse with a life-threatening illness, would be inhumane as well as unproductive.”)



Parties or their counsel should have a general understanding of the technology available to reduce the cost and burden of electronic discovery in accordance with the proportionality doctrine.<sup>47</sup> These tools and techniques change rapidly, and keeping abreast of changes can present a challenge. Counsel should remain current in the advancements or engage experts as needed to ensure they take advantage of best practices. The Sedona Conference® has published a number of commentaries recently that discuss the application of technology to contain costs and reduce expense and burden.<sup>48</sup>

When they consider arguments related to cost and burden, courts may ask the parties to provide detailed information about the retrieval of electronic information, the use of review tools, and key word searches.<sup>49</sup> Parties familiar with the available technological tools and their costs will have an edge in asserting, or responding to, arguments concerning cost and burden.

Parties and law firms involved in a significant amount of electronic discovery may choose one or more standard tools that meet their overall needs. The fact that a standard tool is not the ideal fit for a particular case should not be held against the firm or the party unless the tool is conspicuously inadequate, as might happen where the volume of information is unusually high. Parties and law firms may have to consider other tools for cases that exceed the capacity of their standard tool or tools.

While technology may create efficiencies and cost savings, it is not a panacea and there may be circumstances when the costs of technological tools outweigh the benefits of their use.

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<sup>47</sup> Principle 11 of The Sedona Principles notes that parties may use technological tools for preservation and production: "A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information." The Sedona Conference®, *The Sedona Principles* (2d ed. 2007), Principle 11.

<sup>48</sup> See The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (May 2009); The Sedona Conference®, *The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* (Aug. 2008); The Sedona Conference®, *The Sedona Conference® Best Practices Commentary on Search & Retrieval Methods* (Aug. 2007) and others available on the Publications page at <http://www.thosedonaconference.org>. In addition, the ongoing TREC Legal Track has yielded insights into best practices. See Douglas W. Oard, Jason R. Baron, and David D. Lewis, *Some Lessons Learned To Date from the TREC Legal Track (2006-2009)*, Feb. 24, 2010, <http://trec-legal.umiacs.umd.edu/LessonsLearned.pdf>.

<sup>49</sup> *Apsley v. Boeing Co.*, No. 05-1368, 2007 WL 163201, at \*4 (D. Kan. Jan. 18, 2007) (scheduling a hearing to consider arguments related to the burden of producing emails, including technological issues).

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THE LAW  
FORWARD  
IN A  
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The Sedona Conference® Working Group Series<sup>SM</sup> (WGS<sup>SM</sup>) represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today.

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The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—The Sedona Principles; Best Practices Recommendations and Principles Addressing Electronic Document Production (March 2003 version)—was immediate and substantial. The Principles was cited in the Judicial Conference of the United States Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the “public comment” draft, and was cited in a seminal e-discovery decision of the Federal District Court in New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer’s *Digital Discovery and E-Evidence*, “The Principles ... influence is already becoming evident.”

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We currently have active Working Groups in the areas of 1) electronic document retention and production; 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) Markman hearings and claim construction; (6) international e-information disclosure and management issues; (7) e-discovery in Canadian civil litigation; (8) mass torts and punitive damages; and (9) patent damages and remedies. See the “Working Group Series<sup>SM</sup>” area of our website at [www.thesedonaconference.org](http://www.thesedonaconference.org) for further details on our Working Group Series<sup>SM</sup> and the Membership Program.

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# The Sedona Conference Cooperation Proclamation: Resources for the Judiciary

(Updated December 2014)

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# THE SEDONA CONFERENCE COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY

December 2014

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*Dialogue Designed to Move the Law  
Forward in a Reasoned and Just Way*



# **The Sedona Conference Cooperation Proclamation: Resources for the Judiciary**

December 2014

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## PREFACE

This December 2014 edition of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* (“*Resources*”) continues a collaborative effort of The Sedona Conference. Drafts of what became the public comment version of the *Resources*, which was published in 2011, were presented at meetings of Working Group 1 and at programs sponsored by a variety of courts and judicial education organizations, including the Federal Judicial Center. After publication of the first official edition in 2011, an updated edition was published in 2012.

The *Resources* are intended to aid State and federal judges in the management of electronically stored information (“ESI”) in civil actions for which the judges are responsible. “Responsibility” is an elastic term. A judge may have overall case management responsibility over a single action. Alternatively, a judge may be assigned to manage one or more phases or events of the action. (Moreover, a judge may assign a special master to oversee phases or events, and these *Resources* can assist the special master in undertaking her duties).

Whatever the judge’s role, the *Resources* offer a framework for the management of ESI. This December 2014 edition expands that framework and again focuses on the “stages of litigation from the judge’s perspective,” starting with the preservation of ESI through the initial case management order (whatever that may be called in a specific jurisdiction), the resolution of discovery disputes, trial, and post-trial awards of costs.

To assist judges, these *Resources*:

- Articulate a clear judicial philosophy of case management and of resolution of discovery disputes;
- Identify the stages of civil litigation when judicial management is most appropriate or desirable;
- Recognize that not all civil actions are equal in the resources of the parties or the actual amount in issue and encourage proportionality;
- Identify the issues that a judge is likely to face at each stage of litigation;
- Suggest strategies for case management or dispute resolution that encourage the parties, when possible, to reach a cooperative resolution at each stage;
- Recommend further readings on the issues presented at each stage.

The *Resources* are an evolving endeavor. Case law and other sources of information have been updated. Articles that have not been peer-reviewed, but which are noteworthy in the opinion of the Senior Editors, have been included in a new “Addendum.” Perhaps most importantly from a judicial perspective, this December 2014 edition also includes a new, separate section on judicial ethics in the context of ESI and presents timely matters for



judges to consider. The Senior Editors trust that this new section will be the beginning of what will be a continuing—and evolving—dialogue on judicial ethics in the “Age of the Internet.”

The *Resources* are not intended to be authoritative. Rather, the *Resources* identify issues that federal and State judges may confront in the management of civil actions that involve ESI and suggest strategies that judges might employ. The *Resources* also provide, in some instances, sample forms or orders that illustrate approaches taken by individual judges in specific actions. In addition, the *Resources* include non-exhaustive references to written materials that judges may wish to consult. With the exception of publications of The Sedona Conference, no forms or other materials cited are endorsed by The Sedona Conference, the Senior Editors, or anyone else who contributed to the *Resources*. Judges are reminded that civil actions call for individualized assessment of facts and law as well as independent resolution of issues.

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## I. INTRODUCTION

The *Resources* recognize that there are different models for the appropriate role of judges in civil litigation. The primary models may be characterized as “active case management” and “discovery management.” The first is intended to be proactive and the latter reactive. The *Resources* are intended to assist judges who follow either.

There are “structural” reasons why a judge might follow one model and not the other. For example, in federal courts, civil actions are usually assigned to judges on an individual basis, that is, a particular civil action is assigned to one judge from commencement to conclusion. Known as “individualized case management” (“ICM”), this fosters active case management in the federal courts and in those state courts (or units thereof, such as dedicated business courts) that have adopted ICM.

On the other hand, many state courts, for reasons of volume and history, do not use ICM. Instead, from the commencement to conclusion of an action, different judges may preside over select events (such as an initial conference, discovery dispute or motion, etc.). This model makes active case management difficult or impossible to implement.

In addition to these structural factors, there may also be a judicial philosophy that drives the adoption of a particular model by an individual judge. This philosophical question arises from consideration of whether discovery (on which the *Resources* focus) is “party-driven” as opposed to “judge-driven.” There are judges who, for example, deem it appropriate to bring parties in on a regular basis to work out discovery procedures and address anticipated discovery problems. There are other judges who believe that, given the nature of civil litigation in our common law tradition, parties should drive discovery and the pace of a particular action. These judges only deal with problems after they have been brought to their attention by the parties. Large caseloads may also necessitate this model of discovery management.

These *Resources* recommend active case management by judges. They stress cooperation and transparency in the search for, and collection of, ESI. However, as noted in 9.2.2 below, parties (and many judges) seldom share or negotiate search and collection methodologies, nor are they required to under any state or federal rule of civil procedure. Rather, when a party receives a request for production, the party and its attorney must comply with that request in a reasonable manner and the attorney must certify that any response is made in good faith and consistent with Federal Rule of Civil Procedure 26(g)(1).<sup>1</sup> Discovery as practiced in the United States creates the potential for protracted disputes and the imposition of substantial burdens on the resources of the courts and parties. The discovery of electronic information, such as email, the content of social media, or information from databases (“eDiscovery”), has multiplied those potential burdens. With the goals of Rule 1

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<sup>1</sup> For the sake of brevity, the Federal Rules of Civil Procedure will not be shortened to the commonly used abbreviations “Fed. R. Civ. P.” or “FRCP” when referenced in the body of the text of the *Resources for the Judiciary*. However, they may occasionally be referred to simply “the Rules” in a broad or general context. Further, when individual rules are referenced, they will simply be referred to by their numerical indicator preceded by the word “Rule”.

of the Federal Rules of Civil Procedure in mind, which is to secure the just, speedy and inexpensive resolution of civil litigation, the *Resources* urge the adoption of the active case management model whenever possible. Active case management can prevent disputes and minimize burdens. For a discussion of the need for active case management in civil litigation, see *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187 (Colo. 2013) and Steven G. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).

By urging the active case management model, the *Resources* do not mean to imply that judges should be routinely making discovery decisions for the parties. Discovery is designed to be, and remains, party-driven. Active case management provides a strong framework in which the parties should develop and execute their own cooperative discovery plans. Parties are provided a clear set of expectations designed to move the evidence-gathering phase of the litigation forward in a speedy and inexpensive way, without the cost, delay, and gamesmanship associated with unmanaged discovery. The dual role of the judge under active case management is: first, to facilitate the cooperative formulation and execution of the discovery plan, and, second, to intervene if the parties fail to reach agreement or a dispute arises. The recommendations and sample orders collected here have been selected and reviewed with the goal of encouraging the parties to cooperate in the conduct of discovery to the greatest extent possible, rather than imposing judicially-dictated solutions.

These *Resources* recognize, however, that being a “discovery manager,” as opposed to an “active case manager,” may be the only workable model for a number of judges who can only intervene after a discovery dispute has arisen. The *Resources* provide practical assistance to all judges.

## II. REVIEW OF EXISTING LITERATURE ON eDISCOVERY FOR JUDGES

1. The *Resources* assume that the judicial reader is familiar with eDiscovery in general—including the differences between eDiscovery and paper discovery; the problems of volume, complexity, and cost; and the recurring issues of preservation, accessibility, form of production, and waiver of privilege or work product protection.

2. For judges who are unfamiliar with eDiscovery, or who wish to become reacquainted with it, several publications provide an overview that is unbiased, peer-reviewed, practical, and well-suited for judicial readers. Any judge who is currently presiding over, or who anticipates, litigation involving eDiscovery is encouraged to be familiar with the following resources, each of which was the product of collaborative study and consensus:

2.1. The Sedona Conference Glossary provides a “tool to assist in the understanding and discussion of electronic discovery and electronic information management issues.”<sup>2</sup>

2.2. THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Redgrave et al. eds., 2d ed. 2007), <https://thesedonaconference.org/download-pub/81>.

2.2.1. *The Sedona Principles* is the culmination of a process by which judges, practitioners, and academics considered eDiscovery as it has developed since the publication of the First Edition in 2004 and the 2006 amendments to the Federal Rules of Civil Procedure. Considered to be an authoritative text on eDiscovery, *The Sedona Principles* provide a lens through which eDiscovery can be managed.

2.3. The Federal Rules of Civil Procedure, and in particular, the Advisory Committee’s Notes accompanying the 2006 amendments. *See*, Federal Rules of Civil Procedure Advisory Committee’s notes (as amended April 12, 2006, effective December 1, 2006).<sup>3</sup>

2.3.1. Effective December 1, 2006, the Rules were amended to make explicit that electronically stored information (“ESI”) was discoverable and to establish a framework for judges, attorneys, and parties to address and engage in eDiscovery.

2.3.2. The *Resources* do not urge the adoption of the Federal Rules of Civil Procedure in any state. However, the *Resources* do suggest that the

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<sup>2</sup> THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (Sherry Harris et al eds., 4th ed. 2014), <https://thesedonaconference.org/download-pub/3689>.

<sup>3</sup> There are proposals to amend the Federal Rules of Civil Procedure to address, among other things, proportionality and sanctions. Any amendments would not become effective to, at the earliest, December 1, 2015.

Rules provide both the outline of a judicial management philosophy and practical suggestions for state judges as they deal with eDiscovery. Indeed, the Federal Rules of Civil Procedure has been favorably cited by state courts.<sup>4</sup>

- 2.4. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT JUDGES, (6th ed. 2013), [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/\\$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf).
  - 2.4.1 This comprehensive reference manual for district judges in civil and criminal proceedings includes, among other things, a newly drafted-Section 6.01 on civil case management, which emphasizes the role of the judge as an active case manager and addresses eDiscovery, including guidance for cooperation among the parties and dispute resolution.
- 2.5. BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, FED. JUDICIAL CTR., MANAGING DISCOVERY OF ELECTRONICALLY STORED INFORMATION 2d ed. 2012), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d\\_eb.pdf/\\$file/eldscpkt2d\\_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf).
  - 2.5.1. This is a short, concise introduction to the Federal Rules of Civil Procedure and to the issues that judges may encounter as they deal with eDiscovery. It is published by the Federal Judicial Center, an arm of the United States courts, which provides education materials and programs to federal judges and court staff.
- 2.6. Conference of Chief Justices GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION, (2006), *available at* [http://www.flcourts.org/gen\\_public/cmplx\\_lit/bin/reference/E-discovery%20and%20E-records/e-discovery/CS\\_EIDiscCCJGuidelines.pdf](http://www.flcourts.org/gen_public/cmplx_lit/bin/reference/E-discovery%20and%20E-records/e-discovery/CS_EIDiscCCJGuidelines.pdf).
  - 2.6.1. The Guidelines, which predate the 2006 amendments to the Federal Rules of Civil Procedure represent a set of best practices recommended by the Conference of Chief Justices that may be available to state judges as they confront eDiscovery in their court. The Guidelines have particular applicability to judges in state courts that have no rules that specifically address eDiscovery.
- 2.7. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, THE UNIFORM RULES RELATING TO DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007), *available at*

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<sup>4</sup> See, e.g., *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009).



[http://www.uniformlaws.org/shared/docs/discovery%20of%20electronically%20stored%20information/urrdoesi\\_final\\_07.pdf](http://www.uniformlaws.org/shared/docs/discovery%20of%20electronically%20stored%20information/urrdoesi_final_07.pdf).

2.7.1. The *Uniform Rules*, promulgated in final form by the National Conference of Commissioners for Uniform State Laws after the 2006 amendments to the Federal Rules of Civil Procedure, essentially mirror the amendments. Although the *Uniform Rules* have not been adopted by any state, they are the product of extensive deliberation and public comment. Like the Federal Rules of Civil Procedure, the *Uniform Rules* embody a philosophy of judicial management and provide a number of practical suggestions for avoiding and resolving eDiscovery disputes.

2.8. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION (2012), available at [http://iaals.du.edu/images/wygwam/documents/publications/Navigating\\_eDiscovery\\_2nd\\_Edition.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Navigating_eDiscovery_2nd_Edition.pdf).

2.8.1. This document organizes various concepts, vocabulary and “well-known case law” for the benefit of state court judges.

### 3. Local rules and pilot projects

3.1. Since the 2006 amendments to the Federal Rules of Civil Procedure became effective, there has been a veritable explosion of discovery rules among the states. Some of these were first adopted in decisions of state supreme courts (i.e., Texas). Other states adopted the 2006 amendments in part or in whole (i.e., Florida), and other states, began experiments intended to combine various rule changes with efficiency and cost-savings. At the same time, federal courts of appeals and district courts began to develop local rules or procedures to expand upon the 2006 amendments and foster the goals of Rule 1. What follows are examples of federal and state rules and orders, sometimes experimental, intended to increase efficiencies, control costs, and further cooperation between parties.

3.2. Seventh Circuit Electronic Discovery Pilot Program, *Statement of Purpose and Preparation of Principles*, available at <http://www.discoverypilot.com> (last visited Jan. 20, 2014).

3.2.1. The Pilot Program is based on a set of Principles developed by a broad-based committee of the Chicago-area federal bar in 2009 and adopted by standing order by many of the trial judges in the Seventh Circuit of the United States Courts. The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery.



The Pilot Program plans to periodically study the effectiveness of the Principles and issue reports.

- 3.2.2. The Seventh Circuit Electronic Discovery Pilot Program has issued its "Interim Report on Phase Three May 2012 – May 2013." Among other things, this Interim Report includes in an Appendix a "Model Discovery Plan" and a "Model Case Management Order No. 2."<sup>5</sup>
- 3.3. [Model] Order Regarding E-Discovery in Patent Cases, E.D. Tex. Civ. R., App. P available at <http://www.txed.uscourts.gov/page1.shtml?location=rules:local> (last visited Dec. 30, 2013).3.3.1. This Model Order was developed to "to be a helpful starting point for [United States] district courts to use in requiring the responsible, targeted use of eDiscovery in patent cases." Among other things, the Model Order places presumptive limits on "the number of custodians and search terms for all email production requests.' Given the unique nature of patent infringement litigation, however, judges should exercise care in attempting to export the Model Order to other types of civil litigation."
- 3.4. *In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, 1:11-mc-00388-LAP (S.D.N.Y. Nov. 1, 2011) (Oct. 2011) (Exhibit B: Joint Electronic Discovery Submission No. and standing order designating the case for inclusion in the Project), available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf) (last visited Jan. 21, 2014).
- 3.4.1. This Pilot Project was developed by the Judicial Improvements Committee of the Southern District of New York. Effective November 1, 2011, the Pilot Project focuses on complex civil actions, incorporates procedures intended to "improve the quality of judicial case management," and will be effective for an eighteen-month trial period.
- 3.5. *Default Standard For Discovery, Including Discovery of Electronically Stored Information ("ESI"), United States District Court for the District of Delaware,,* (Dec. 8, 2011).available at <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf> (last visited Jan. 21, 2014).
- 3.5.1. This Default Standard encourages parties in civil actions to reach agreement on various topics, including proportionality, preservation, and privilege, and sets forth "parameters and/or timing of

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<sup>5</sup> Seventh Circuit Electronic Discovery Pilot Program, *Interim Report on Phase Three* (May 2012-May 2013), available at [http://www.discoverypilot.com/sites/default/files/phase\\_three\\_interim\\_report.pdf](http://www.discoverypilot.com/sites/default/files/phase_three_interim_report.pdf).

discovery ... until further order ... or the parties reach agreement." *Id.* at 1.a.

- 3.6. *Guidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas, available at <http://www.ksd.uscourts.gov/guidelines-for-esi/> (last visited Jan. 21, 2014).*
  - 3.6.1. These Guidelines are intended to "facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention."
- 3.7. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland, available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (last visited Jan. 06, 2014).*
  - 3.7.1. This Suggested Protocol has not been adopted by the court. Instead, it "is a working model" intended to assist counsel in dealing with ESI in civil actions. The Suggested Protocol is "intended to provide the parties with a comprehensive framework to address and resolve a wide range of ESI issues, [but] it is not intended to be an inflexible checklist." *Id.* at 2.
- 3.8. [Model] Order Regarding ESI Discovery, Ala. Civ. App., 10th Jud. Dist. (Jefferson County) [included in program materials, *see* <https://thesedonaconference.org/node/5645>].
  - 3.8.1. This is a form of order developed by Judge Robert S. Vance, Jr. that requires parties, after a status conference, to "undertake a 'Meet & Confer' process, with the goal of promptly assessing what ESI needs and challenges will be" in a particular civil case. *Id.* at 1. Among other things, the order directs counsel to confer with their clients on certain matters prior to the "Meet & Confer." 3.9. [Directive 11-02,] *Adopting Pilot Rules for Certain District Court Civil Cases*, Sup. Ct. of Colo., Office of the Chief Justice (amended June 2013), *available at* [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/CJD%2011-02amended%206-26-13.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf).
- 3.9. [Order] Adopting Pilot Rules for Certain District Court Civil Cases, Sup. Ct. of Colo., Office of the Chief Justice.
  - 3.9.1. This project, known by the acronym, 'CAPP,' was developed by a 'balanced committee' consisting of, among others, the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the Legal System. Adopted by the Colorado Supreme Court as a two-year experiment, the Project became effective

January 1, 2012. CAPP is in effect in certain Colorado judicial districts and is "intended to study whether adopting certain rules regarding the control of the discovery process reduces the expense of civil litigation in certain business actions. ... "

- 3.10. A Report to the Chief Judge and Chief Administrative Judge, *Electronic Discovery in the New York State Courts* (N.Y. State Unified Ct. Sys. Feb. 2010), available at <http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf>.

3.10.1. This report was commissioned by the Chief Judge and Chief Administrative Judge of the New York State courts. It is based on an extensive review of the literature addressing eDiscovery and interviews with judges, law clerks, and practicing attorneys. It identifies a set of specific "action items" to improve the management of eDiscovery.

4. In addition to these general works, there are articles and publications that address particular issues in discovery, such as preservation, attorney-client privilege, work product protection, evidential foundations, and discovery from non-parties. Representative articles and publications are cited throughout the following Chapters and in the Addendum.

### III. GENERAL RECOMMENDATIONS FOR JUDGES

1. A review of the sources cited above reveals a common thread: The key to reducing the cost and delay associated with eDiscovery is judicial attention to discovery issues starting early in, and continuing throughout, any given stage of an action. The expenditure of a small measure of judicial resources at the beginning of litigation to set the tone and direction for discovery—and the judge’s availability to the parties at each stage of discovery—will most likely save the expenditure of significantly more judicial resources later.
2. The *Resources* make the following recommendations:
  - 2.1. Judges should adopt a *hands-on* approach to case management early in each action.
  - 2.2. Judges should establish deadlines and keep parties to those deadlines (or make reasonable adjustments) with periodic status reports or conferences.
  - 2.3. Judges should demand attorney competence.
  - 2.4. Judges should encourage the parties to meet before discovery commences to develop a realistic discovery plan.
  - 2.5. Judges should encourage proportionality in preservation demands and expectations and in discovery requests and responses.
  - 2.6. Judges should exercise their discretion to limit or condition disproportionate discovery and shift disproportionate costs.
  - 2.7. If necessary, judges should exercise their authority to issue sanctions under the relevant statutes, rules, or the exercise of inherent authority on parties and/or counsel who create unnecessary costs or delay, or who otherwise frustrate the goals of discovery by “gaming the system.”
3. These broad recommendations should not be interpreted to mean that judges should issue blanket orders that dictate the scope of discovery, the nature of the parties’ discovery requests or responses, the form or forms of production, or any other details of the conduct of discovery. Our civil litigation system does not contemplate that a judge conducts discovery, and eDiscovery in particular is fraught with highly technical and case-specific issues that are better left to the parties to resolve. Moreover, the recommendations transcend the specific rules of civil procedure that may be in effect in any particular jurisdiction. The recommendations can be applied equally to federal or state litigation, and in every court or action in which discovery is allowed, from family court to complex commercial court.

4. The recommendations are made with the understanding that there may be circumstances that require a judge to bring pressure to bear on the parties and attorneys, who, left to their own devices, may increase burdens and cost of litigation.

5. The above recommendation, that “judges should demand attorney competence,” requires some extended discussion. Attorneys, for the most part, are generalists. Some focus on particular areas of the law. However, whatever area they may practice in, attorneys, as a general proposition, are not *expert* in the technologies that can be encountered in eDiscovery. For example, not every attorney should be expected to develop mechanisms for, and conduct, automated searches.

What attorneys should be expected to be is competent within the meaning of the Model Rules of Professional Conduct and/or its federal and state equivalents. For example, and at a minimum, an attorney should understand how to reasonably ensure client confidences when using email. Moreover, an attorney should understand when she needs the assistance of an eDiscovery consultant. These are simply not matters of ethics: Attorney *incompetence* in eDiscovery can lead to the waste of court and party resources and unnecessarily increase the costs and time of civil litigation.

6. In addition to the recommendations set forth above, judges may consider whether the appointment of a special master under Rule 53 or its state equivalent would be appropriate to address ESI-related issues in specific civil actions when the expense of a special master is justified. Plainly, the appointment of a special master should be a rare event. However, given the volume of ESI that might be in issue, a special master might assist a court in, for example, undertaking the in camera review of ESI alleged to be confidential because of, among other things, attorney-client privilege and/or work product protection.

As an alternative to the appointment of a special master, judges may consider, if authorized by rule or order, a *mediator* who might be appointed to assist the parties to resolve their discovery disputes.

7. The above recommendations apply to *all* civil actions, but with the understanding that—especially when Recommendation 7 is taken into consideration—“large” or complex civil actions might become a focus of case management. *It is, however, essential to recognize that eDiscovery also occurs in “small” civil actions, or, in other words, the vast majority of litigation in our civil litigation system.* Judges should take care to utilize all the tools available to them to limit eDiscovery costs such that those costs are not disproportionate to the amount in controversy in any particular “small” action.

8. The next section of the *Resources*, “The Stages of Litigation from a Judge’s Perspective,” briefly analyses each juncture in discovery at which judicial action is necessary and desirable, presents the issues the judge is likely to confront, suggests possible strategies for encouraging cooperative solutions to those issues, presents forms, stipulations, and orders that have been used to resolve the issues, and recommends further reading for those who wish to learn more about those particular issues.

9. The next section of the *Resources* also includes sample orders, representative decisions, and further readings published by The Sedona Conference. Moreover, as noted above, the separate Addendum to the *Resources* identifies various lawyer-authored articles.

10. What follows immediately below are *some* general references to materials that may inform the reader on the “General Recommendations for Judges”:

- 10.1. *See*, The Sedona Principles, *Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production supra* Part II.2.2.
- 10.2. The Sedona Conference *Commentary on Ethics and Metadata* focuses on the ethical considerations of the inclusion and review of metadata in the non-discovery and discovery contexts.<sup>6</sup>
- 10.3. *In re Taylor*, 655 F.3d 274, 288 (3d Cir. 2011) (“We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer.”).
- 10.4. Ronald J. Hedges, *THE FLOW OF LITIGATION* (2009) [included in program materials, *see* <https://thesedonaconference.org/node/5645>].
  - 10.4.1. This one-page chart is intended to assist judges in visualizing the stages of a federal civil action, from pre-litigation issuance of a litigation hold through pleadings, discovery, motions and trial. It suggests opportunities for judges to, among other things, schedule meaningful status conferences, and stage motion-and-discovery practice to create opportunities for early case resolution.
- 10.5. *W. Holding Co. v. Chartis Ins. Co.*, No. 11-2271(GAG/BJM), 2013 WL 1352562 (D.P.R. Apr. 3, 2013) (Memorandum Opinion attaching “Order Governing Discovery of Electronically Stored Information from FDIC-R”).
- 10.6. Special Master’s Order No. 1, *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC, 2012 WL 2060876 (D. Hawai’i June 18, 2012).
- 10.7. Preliminary Order Appointing Special Master, *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai’i Apr. 9, 2012).
- 10.8. *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai’i Apr. 9, 2012) (order setting forth scope of special master’s duties).

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<sup>6</sup> The Sedona Conference *Commentary on Ethics and Metadata*, 14 SEDONA CONF. J. 169 (Fall 2013) available at <https://thesedonaconference.org/download-pub/3111>.

- 10.9. *Cannata v. Wyndham*, 2:10-CV-00068-PMP, 2012 WL 528224 (D. Nev. Feb. 17, 2012) (order discussing, among other things, the appointment of a special master).
- 10.10. *Short Trial Rules in the United States District Court for the District of Nevada*, (2013), available at <http://www.nvd.uscourts.gov/Files/USDC%20Short%20Trial%20Rules.pdf>.
- 10.10.1. These Rules are intended to expedite civil trials through procedures designed to impose restrictions on discovery.
- 10.11. *In re DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187 (Col. 2013).
- 10.12. *In re: Amendments to the Florida Rules of Civil Procedure – Electronic Discovery*, No. SC11-1542 (Fla. December 5, 2012).



#### IV. THE STAGES OF LITIGATION FROM A JUDGE'S PERSPECTIVE

##### 1. Preservation

- 1.1. Preservation of relevant ESI is the key to eDiscovery. Absent preservation, meaningful discovery cannot be conducted. Indeed, absent preservation, a judge will soon be faced with the task of determining whether to impose spoliation sanctions and what those sanctions should be. Nevertheless, preservation decisions are usually made before the parties see a judge for the first time and, for that matter, before litigation commences. Preservation decisions also implicate questions of attorney-client privilege and work product protection. Thus, judges should be prepared to address preservation issues as early as possible in the action, and may be called upon to address these issues later as well.
- 1.2. Issues presented
  - 1.2.1. First, at least some significant preservation decisions are made before litigation commences. Generally speaking, the duty to preserve arises when the likelihood of litigation is known or reasonably foreseeable. Presumably, a putative plaintiff must begin to preserve before the filing of a complaint. Similarly, a defendant may be aware that it will be involved in litigation before service of process. If so, the defendant must preserve at the earlier date. The *trigger* for the existence of a duty to preserve is fact-sensitive and often in dispute. It should be noted that preservation for the purposes of litigation may conflict with information management policies, which, among other things, call for the routine and automatic deletion of data.
  - 1.2.2. Second, there is no realistic mechanism available for judicial determination of the existence or scope of a duty to preserve before litigation commences. There may be significant costs involved in preservation, especially if a party, in the absence of any judicial direction, believes it must *over preserve* discoverable information. This may lead to disputes between parties that will require judicial resolution as soon as possible.
  - 1.2.3. Third, the decision to preserve and the scope of preservation are questions that attorneys should advise their clients about. That advice, as well as the communication of that duty (to, for example, employees and independent contractors), is presumably subject to attorney-client privilege and work product protection. Disputes pertaining to the nature of communications involving privilege—and the scope of any privilege or work product—frequently arise.

- 1.3. Suggested judicial management strategies
  - 1.3.1. Ensure that the parties discuss preservation at the initial conference between the parties required by Rule 26(f).
  - 1.3.2. Direct the parties to present any disputes about preservation to the court as soon as possible so that the judge can issue appropriate orders regarding what should or should not be preserved in the earliest stage of litigation.
- 1.4. Sample orders
  - 1.4.1. *Prelim. Conf. Stipulation and Order (Form N.Y. Sup. Ct., Cnty. of Nassau, Com. Div. (Feb. 1, 2009)* [included in program materials, see <https://thesedonaconference.org/node/5645>].
  - 1.4.2. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2012 (E.D. La. Aug. 10, 2010).
  - 1.4.3. Order for Preservation of Documents and Tangible Things, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d 1145 (C.D. Cal. December 20, 2010).
  - 1.4.4. Two agreed orders in: *John B. v. Emkes*, 852 F.Supp.2d 944 (M.D. Tenn, 2012). (on migration of email); and *John B. v. Emkes*, 852 F.Supp.2d 944 (M.D. Tenn, 2012) (on the protocol for migration of email).
- 1.5. Representative decisions
  - 1.5.1. *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336 (Fed. Cir. 2011) *cert. denied*, 132 S. Ct. 1540, 182 L. Ed. 2d 162 (U.S. 2012).
  - 1.5.2. *Cf. In re John W. Danforth Grp.*, No.13-MC-33S, 2013 WL 3324017 (W.D.N.Y. December 1, 2013) (denying Rule 27(a) prefiling petition to preserve ESI).
  - 1.5.3. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011), *on remand*, 917 F.Supp.2d 300 (D. Del. 2013).
  - 1.5.4. *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010).
  - 1.5.5. *Pippins v. KPMG LLP*, 279 F.R.D. 245 (S.D.N.Y. 2012).
  - 1.5.6. *Simms v. Deggeller Attractions, Inc.*, Nos. 7:12-cv-00038, 7:12-cv-00039, 7:12-cv-00161, 2013 WL 49756 (W.D. Va. Jan. 2, 2013).

- 1.5.7. *Cf. State of Texas v. City of Frisco*, No. 4:07cv383, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008) (dismissing Declaratory Judgment action addressed to scope of preservation).
- 1.5.8. *United States ex. Rel. Baker v. Community Health Systems, Inc.*, No. 05-279 WJ/ACT, 2012 WL 5387069 (D.N.M. Oct. 3, 2012).
- 1.5.9. *Goldmark v. Mellina*, Docket No. L-2053-08, 2012 WL 2200921 (N.J. App. Div. June 18, 2012) (*per curiam*).

1.6. Further reading

- 1.6.1. The Sedona Conference *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010), available at <https://thesedonaconference.org/download-pub/470>.

## 2. Parties' early case assessment

- 2.1. Early case assessment ideally takes place *prior* to joinder of issue. That assessment is a process by which a party undertakes an internal cost-benefit analysis to determine whether to settle or litigate. This process is nothing new. What is new, however, is the need to take into account the preservation, collection, review, and production of ESI in making that assessment.
- 2.2. Early case assessment, although included here as a *marker* in the litigation process, is not a stage of litigation from a judge's perspective, but can lead to a better-informed and more effective Rule 26(f) conference and initial case management order under Rule 16(c)(2).
- 2.3. Because early case assessment does not involve the judge, there are no "issues presented," "suggested judicial management strategies," "sample orders," or "further reading" presented here.
- 2.4. The results of an early case assessment in a particular action are likely to be protected from discovery by attorney-client privilege or work product protection. Nevertheless, undertaking the cost-benefit analysis necessary for any assessment is an important step from a party's prospective and the knowledge that one was performed by a party may inform the judge of the likelihood of early settlement.

### 3. Initial scheduling order

- 3.1. An “initial scheduling order” is issued under the authority of Rule 16(a) or its state equivalents. The initial order directs attorneys and *pro se* litigants to appear before a judge to establish, among other things, “early and continuing control so the case will not be protracted because of lack of management.” Rule 16(a)(2). This initial order is an opportunity for the judge to communicate the court’s expectation that attorneys and parties will meaningfully prepare for the Rule 26(f) meet-and-confer and the first Rule 16(b) conference. It may serve to remind parties or counsel that sanctions may be imposed under Rule 16(f)(1)(B) if they are “substantially unprepared to participate.” The initial order is also an opportunity for the judge to communicate the court’s expectation of how the parties should strive to cooperate in discovery.
- 3.2. Issues presented
  - 3.2.1. One of the major problems that judges face is the preparation (or lack thereof) of parties for the first conference with the judge. Rule 26(f) describes when parties should have their first meeting. It also describes the required topics for parties to discuss at that meeting (the “meet-and-confer”) and how the results of that meeting should be presented to the judge. In federal courts, local rules may supplement the list of factors to be discussed under Rule 26(f).
  - 3.2.2. A number of states have adopted statutes, rules, or orders that function in much the same way as Rule 26(f). In states courts where there is no equivalent to Rule 26(f), it might be useful for the judge presiding over a particular action to direct the parties to meet before the initial conference, discuss eDiscovery issues, and report to the court. This would, at the least, compel the parties to consider the issues suggested by Rule 26(f) and local rules and enable the parties to avoid conducting eDiscovery in a vacuum.
- 3.3. Suggested judicial management strategies
  - 3.3.1. Require the parties to meet-and-confer on eDiscovery and any other topics enumerated in Rule 26(f) and local rules before the initial case management conference.
  - 3.3.2. Direct each party to assess the scope of preservation of ESI, documents and tangible things, and the adequacy of its preservation efforts.
  - 3.3.3. Direct the parties to discuss the scope of preservation.

- 3.3.4. Encourage the parties to engage in early case assessment for the purpose of focusing them on the projected cost and duration of litigation and the prospect of settlement as opposed to litigation.
  - 3.3.5. Suggest that each party identify a person or persons particularly knowledgeable about the party's electronic information systems and who is prepared to assist counsel in the Rule 26(f) meet-and-confer and later in the litigation.
  - 3.3.6. Encourage the parties to consider any issues of privilege, the inadvertent disclosure of privileged information, and the form and timing of privilege logs. Refer the parties to Federal Rule of Evidence 502 (discussed in Section IV.11.2.), as they may not be familiar with it.
  - 3.3.7. Direct the parties to report on any agreements reached at the meet-and-confer as well as any *disagreements*.
- 3.4. Sample orders
- 3.4.1. *Standing Order Governing Discovery of Electronically Stored Information Individual Commercial Calendar "W" Courtroom 207, In the Circuit Court of Cook County, Illinois, County Department, Law Division* (effective Jan. 1, 2012), available at <http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standi ng%20Orders/Tailor%20SO%20Governing%20Discovery%20of%20 Electronically%20Stored%20Inform.pdf>.
  - 3.4.2. Admin. Order of the Chief Admin. Judge of the Cts., amending Sec. 202.12(c) of the Unif. Civ. R. for the Sup. and Cnty. Ct., N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c).
  - 3.4.3. Joint Submission Regarding E-Discovery, *Cannata v. Wyndham Worldwide Corporation*, 2:10-CV-00068-PMP, 2012 WL 528224 (D. Nev. Mar. 17, 2012), (unfiled).
  - 3.4.4. *See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles, supra* Part II.3.2.
    - 3.4.4.1. The Pilot Program is based on a set of Principles developed by a broad-based committee of the Chicago-area federal bar in 2009 and adopted by standing order by many of the trial judges in the Seventh Circuit of the United States Courts. The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery. The Pilot Program plans to periodically study the effectiveness of the Principles and issue reports.

3.5. Representative decisions

3.5.1. *DeGeer v. Gillis*, No. 09 C 6974, 2010 WL 3732132 (N.D. Ill. Sept. 17, 2010), *motion granted in part and denied in part*; *DeGeer v. Gillis*, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

3.5.2. *Littlefield v. Dealer Warranty Services, LLC*, No. 4:09 CV 1000 DDN, 2010 WL 3905226 (E.D. Mo. Sept. 27, 2010).

3.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).



#### 4. The “meet-and-confer” to formulate a discovery plan

- 4.1.1. The initial meet-and-confer contemplated by Rule 26(f) is central to the management of eDiscovery (indeed, all discovery). If done correctly, this meet-and-confer will enable the parties to establish, on a cooperative basis, how the action will proceed and will also reduce the cost of eDiscovery and any delay associated with the resolution of discovery disputes. Rule 26(f) also requires the parties to report their agreements—and disagreements—in a discovery plan submitted to the court. The discovery plan should guide the issuance of the initial case management order.
- 4.1.2. Judicial management of the meet-and-confer itself should be minimal once the court establishes the expectations and the agenda. The meet-and-confer is *party*—not *judge*—driven. Indeed, the judge need not even be aware that a meet-and-confer took place until a discovery plan is submitted.
- 4.2. Issues presented
- 4.2.1. Did the meet-and-confer take place?
- 4.2.2. If, in fact, there was a meet-and-confer, did a *meaningful* one take place?
- 4.2.3. Did the parties explore all topics set forth in Rule 26(f) and applicable local rules?
- 4.2.4. Was a comprehensive discovery plan submitted?
- 4.3. Suggested judicial management strategies
- 4.3.1. Develop, with the concurrence of colleagues, a form of discovery plan that supplements and expands on Form 52 of the Federal Rules of Civil Procedure and incorporates any additional topics identified in local rules.
- 4.3.2. Advise the parties that the court will be available by email, telephone, or letter should disputes arise in the meet-and-confer process to resolve disputes.
- 4.3.3. Suggest that involvement of knowledgeable party representatives or experts in a meet-and-confer may be beneficial in addressing ESI-related topics, with appropriate stipulations regarding any statements made by them.
- 4.3.4. Advise that, at least in complex actions with likely discovery issues or large volumes of ESI, the meet-and-confer may be a continuing process requiring multiple meetings. This may require that

appropriate time be afforded to the parties before a discovery plan is submitted, a case management conference conducted, or an initial case management order entered.

#### 4.4. Sample orders

4.4.1. Rule 26(f) Stipulation and Order Regarding Discovery Protocols, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL Docket No. 1869, No. 1:07-mc-00489-PLF-JMF, 2009 WL 3443563 (D.D.C. Oct. 23, 2009).

4.4.2. Amended Stipulation Regarding Preservation, Review and Production of Certain Electronically Stored Information and Privileged Materials, *United States v. Louisiana Generating, LLC*, 938 F.Supp.2d 615, (M.D. La. Mar. 5, 2010).

4.4.3. Joint Initial Report (Revised) *United States v. Apple, Inc.*, Civil Action Nos. 1:12-cv-2826-DLC and 11-md-02293 (S.D.N.Y. December 6, 2012). *available at* <http://www.justice.gov/atr/cases/f285000/285031.pdf>.

4.4.4. *See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles, supra* Part II.3.2.

4.4.4.1. The Pilot Program is based on a set of Principles developed by a broad-based committee of the Chicago-area federal bar in 2009 and adopted by standing order by many of the trial judges in the Seventh Circuit of the United States Courts. The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery. The Pilot Program plans to periodically study the effectiveness of the Principles and issue reports.

4.4.5. *See Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, supra* Part II.3.4.

4.4.6. *See Joint Submission Regarding E-Discovery, Cannata v. Wyndham Worldwide Corporation, supra* at Part IV.3.2.

4.4.6.1. This joint submission was prepared and submitted to a special master; it was intended to provide the special master with a comprehensive guide to the parties, the claims, and the status of discovery.

4.4.7. *See Order Regarding ESI Discovery supra* Part II.3.8.

4.4.7.1. This is a form of order developed by Judge Robert S. Vance, Jr. It requires parties, after a status conference, to “undertake a ‘Meet &

Confer' process, with the goal of promptly assessing what ESI needs and challenges will be" in a particular civil case. Among other things, the order directs counsel to confer with their clients on certain matters prior to the meet-and-confer.

4.4.8. [MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES  
Federal Circuit Chief Judge Randall Rader.

4.4.9. Discovery Order, In the United States District Court for the District of Maryland, Honorable Paul W. Grimm, (D. Md. April 9, 2013), available at [http://iaals.du.edu/images/wygwam/documents/publications/Grimm\\_Discovery\\_Order.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf).

4.5. Representative decisions

4.5.1. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, Civil Action No. 01-cv-01644-REB-CBS, 2010 WL 502721 (D. Colo. Feb. 8, 2010).

4.5.2. *In re Facebook PPC Adver. Litig.*, No. C09-03043 JF (HRL), 2011 WL 1324516 (N.D. Cal. Apr. 6, 2011).

4.5.3. *Easley v. Lennar Corp.*, No. 2:11-CV-00357-ECR-CWH, 2012 WL 2244206 (D. Nev. June 15, 2012).

4.5.4. *Apple Inc. v. Samsung Elec. Co Ltd.*, No. 12-CV-0630-LHK (PSG), 2013 WL 1942163 (N.D. Ca. May 9, 2013).

4.5.5. *Zepeda v. PayPal, Inc.*, No. 4:10-cv-02500-SBA, 2013 WL 2051641 (N.D. Cal. May 14, 2013).

4.6. Further reading

4.6.1. THE SEDONA CONFERENCE: JUMPSTART OUTLINE, QUESTIONS TO ASK YOUR CLIENT & YOUR ADVERSARY TO PREPARE FOR PRESERVATION RULE 26 OBLIGATIONS, COURT CONFERENCES, & REQUESTS FOR PRODUCTION (Mar. 2011), <https://thesedonaconference.org/download-pub/427>.

4.6.2. *See Default Standard For Discovery, Including Discovery of Electronically Stored Information ("ESI")*, supra Part II.3.5.

4.6.3. *Guidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas*, Guideline 4 available at <http://www.ksd.uscourts.gov/guidelines-for-esi/> (last visited Jan. 21, 2014).

4.6.4. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland*, Conference of Parties and Report, available at

<http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (last visited Jan. 06, 2014).

- 4.6.5. United States District Court for the District of New Jersey Local Civil Rule 26.1 (d) (“Discovery of Digital Information Including Computer-Based Information”), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi36.pdf/\\$file/ElecDi36.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi36.pdf/$file/ElecDi36.pdf) (last visited Jan. 20, 2014).
- 4.6.6. The Joint Electronic Technology Working Group, Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (Feb. 2012) *available at* <http://mow.fd.org/final-esi-protocol.pdf>. Although this document is directed to criminal e-discovery, it includes a useful “ESI Discovery Production Checklist.”
- 4.6.7. *See Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, supra* Part II.3.4 Exhibit A: Initial Pretrial Conference Checklist.

## 5. Initial case management order

- 5.1. Rule 16(b)(1) authorizes federal judges to issue case management orders, including an *initial* case management order, after the parties have engaged in the meet-and-confer process and submitted a discovery plan. State judges, of course, are not bound by the Federal Rules of Civil Procedure. Nevertheless, the topics that Rule 16(c)(2) contemplate a federal judge address in an initial case management order suggest a useful framework for state judges to look to as they meet with parties for the first time.
- 5.2. Issues presented
  - 5.2.1. How should a judge react when parties have not conferred before their first meeting with the judge, either in violation of Rule 26(f), a state equivalent, or a direction to do so? Should sanctions be imposed? Should the judge send them to a jury or court conference room and tell the parties to come back in an hour or so with at least a rudimentary discovery plan?
  - 5.2.2. Assuming that the parties have reached one or more agreements, should the judge execute an initial case management order that embodies those agreements *verbatim* or should the judge, while giving due deference to what the parties agreed to, exercise discretion to fashion an order that meets the needs of the calendar?
  - 5.2.3. How should the judge schedule subsequent conferences? Should the judge set a firm date for the next conference? Should the judge, assuming that discovery is sequenced, schedule conferences after particular discovery is expected to conclude?
- 5.3. Suggested judicial management strategies
  - 5.3.1. Incorporate, as appropriate, party agreements in the initial case management order.
  - 5.3.2. Resolve any disagreements as soon as practicable, perhaps at the initial case management conference itself.
  - 5.3.3. Schedule a further conference or conferences as needed in the initial case management order.
  - 5.3.4. Suggest that, rather than directed interrogatories or Rule 30(b)(6) depositions, the parties informally exchange information about their respective electronic information systems.

5.4. Sample orders

5.4.1. *Preliminary Conference Stipulation and Order (Form), New York Supreme Court, County of Nassau, Commercial Division* (Feb. 1, 2009), available at <https://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf>.

5.5. Representative decisions

5.5.1. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

5.6. Further reading

5.6.1. Barbara J. Rothstein, Ronald J. Hedges, & Elizabeth C. Wiggins, *supra* II.2.5 at 4-5.

5.6.2. William W Schwarzer, Alan Hirsch, Fed. Judicial Ctr., *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES*, 4-7 (2d ed. 2006).

## 6. Defining the scope of eDiscovery

- 6.1. All discovery in the federal courts is governed by Rule 26(b)(1), which provides that parties can seek discovery of non-privileged information *relevant* to any party's claim or defense and, *for good cause shown*, "information relevant to the subject matter involved in the action." The scope of discovery may be different in state rules. However, the scope of eDiscovery is essentially the same as that of discovery generally.
- 6.2. Issues presented
- 6.2.1. Requests for discovery of ESI often lack relation to the issues in the action. For example, parties may seek "all email" or "all databases" from an opposing party. In the first instance, the scope of eDiscovery should be defined by the parties with reference to claims and defenses set forth in the pleadings. However, the parties may request, and the court may consider, broader *subject matter* discovery for good cause. Since one or both parties may desire broader discovery, or may be unsure as to what the appropriate scope of discovery should be, the court should require that the parties negotiate the scope of discovery and attempt to reach agreement at the outset. The scope may later be modified by agreement or by court order; but it should not be undefined or allowed to drift.
- 6.2.2. Of particular concern for judges is the *rise* of social media, both in terms of simple volume, near-universality of access and use, and potential as a source of discoverable information. Discovery of social media can be extensive and can implicate privacy interests of parties and nonparties who participate in social media sites that include discoverable ESI. If agreement cannot be reached, there is no consensus as to how social media discovery should be conducted. For example, must access to a party's "private" social media be conditioned on a showing of relevance based on the party's public postings? Should an attorney be directed to search his client's postings to determine what is relevant? Should a judge conduct an *in camera* review? Should a special master?
- 6.2.3. The discovery of social media should be governed by the same principles that govern discovery of other electronically stored information. For example, must access to a party's *private* social media be conditioned on a showing of relevance based on the party's public postings? Should an attorney be directed to search his client's postings to determine what is relevant? Should a judge conduct an *in camera* review? Should a special master?



- 6.2.4. Discovery of particular social media sites, or of particular applications supported by those sites, may be subject to, and limited by the Stored Communications Act, 18 U.S.C.A. § 2701 et. seq.
  - 6.2.5. There may be instances where a party in a civil action seeks to engage in so-called *transnational discovery*, that is, discovery of ESI that is located in another country and subject to the possession, custody, or control of an adversary party. In that circumstance, production (defined very broadly) of ESI may be subject to a personal privacy and/or commercial *blocking* statute of the *host* country. Production of such ESI in violation of such a statute may expose the party to civil and/or criminal sanctions.
- 6.3. Suggested judicial management strategies
- 6.3.1. Require that the discovery plan address the scope of eDiscovery and describe any disputes as to scope.
  - 6.3.2. Require the party seeking discovery into matters beyond the claims and defenses of the parties to explain why the proposed broader discovery is relevant and necessary.
  - 6.3.3. Require parties seeking broader discovery to demonstrate that the proposed discovery is proportionate to the matter, with reference to Rule 26(b)(2)(C).
  - 6.3.4. Resolve any disputes as to scope in the initial case management order.
  - 6.3.5. Require the parties, at least in the first instance, to focus any requests for discovery of social media to relevant and necessary ESI.
    - 6.3.5.1. Focus discovery of social media to reduce volume and address legitimate privacy interests of parties and nonparties.
  - 6.3.6. Require the parties to consider privacy interests of parties and nonparties and, if appropriate, consider issuance of a Rule 26(c) protective order limiting access to the ESI.
  - 6.3.7. When transnational discovery is in dispute, require the parties to address any foreign law governing the production of *protected* ESI and consider, as an alternate to ordering production, ordering the requesting party to proceed by letters rogatory.
  - 6.3.8. Consider *sequencing* or *phasing* eDiscovery, focusing on discovery of ESI directly related to claims and defenses in the pleadings in the first instance to expedite the discovery process and deferring rulings on broader eDiscovery requests until the first phase is completed.

#### 6.4. Sample orders

- 6.4.1. Special Master's Order No. 1, *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai'i June 18, 2012).
- 6.4.2. *Preliminary Conference Stipulation and Order (Form)*, New York Supreme Court, County of Nassau, Commercial Division (Feb. 1, 2009).
- 6.4.3. THE SEDONA CONFERENCE, INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE, & DATA PROTECTION. BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION, (Amor Esteban et al. eds., European Union Edition; Public Comment Version; 2011) *available at* <https://thesedonaconference.org/download-pub/495>.
- 6.4.3. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.221, Case-Management Plan (2004).

#### 6.5. Representative decisions

- 6.5.1. *Fawcett v. Altieri*, 38 Misc.3d 1022 ((N.Y. Sup. Ct. Jan. 3, 2013) (social media).
- 6.5.2. *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566 (C.D. Ca. Sept. 7, 2012) (social media).
- 6.5.3. *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. December 23, 2010) (transnational discovery).
- 6.5.4. *Higgins v. Koch Dvlpt. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278 (S.D. Ind. December 5, 2013) (social media discovery).
- 6.5.5. *NOLA Spice Designs, LLC v. Haydel Enterprises, Inc.*, No. 12-2515, 2013 WL 3366278 (E.D. La. Aug. 2, 2013) (broad forensic examination inconsistent with Rule 34(a)(1)(A)).
- 6.5.6. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010) (Stored Communications Act).
- 6.5.7. *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (social media discovery).
- 6.5.8. *Genger v. TR Investors, LLC*, 26 A.3d 180 (Del. 2011).

#### 6.6. Further reading

- 6.6.1. Kristen L. Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119 (2011).

- 6.6.2. Steven S. Gensler, *Special Rules for Discovery of Social Media?* 65 ARK. L. REV. 7 (2012).
- 6.6.3. *The Sedona Conference Primer on Social Media*, 14 SEDONA CONF. J. 191 (Fall 2013), available at <https://thesedonaconference.org/download-pub/1751>.
- 6.6.4. Decision Tree for Discovery of Social Media [included in program materials, see <https://thesedonaconference.org/node/5645>].

## 7. Proportionality

- 7.1.1. Discovery can be expensive. Indeed, some argue that discovery costs and burdens, particularly those related to discovery of ESI, are so expensive that they prevent parties from fully and fairly litigating their claims and defenses in federal or state court.
- 7.1.2. How can proportionality be realized? First, attorneys have a duty to engage in proportionate discovery in both their requests and responses, a duty recognized in Rule 26(g)(1)(B)(iii). Second, judges must be prepared to use proportionality as a tool to limit the potential costs and burdens of discovery, and to require parties to respond to reasonable discovery requests rather than raise *blanket* objections.
- 7.1.3. Rule 26(b)(1) makes clear that *all* discovery is subject to proportionality. Rule 26(b)(2)(C), known as the “Proportionality Rule,” embodies a cost-benefit analysis that a judge must perform in permitting parties to engage in what might be costly and time-consuming eDiscovery. Although states may or may not have adopted similar rules, state judges often engage in proportionality analyses—however these may be expressed—in ruling on discovery requests. Although judges might prefer that the parties engage in a proportionality analysis, the exercise of proportionality by federal and state judges is perhaps the strongest tool available to manage discovery.
- 7.1.4. Proportionality is more than just a simple cost-benefit analysis. For example, Rule 26(b)(2)(C)(iii) speaks of “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake ... and the importance of the discovery in resolving the issues.”
- 7.2. Issues presented
- 7.2.1. Requesting parties request “*any and all*” information related to the broad subject matter of the dispute, without tying their requests to specific factual issues related to the claims or defenses.
- 7.2.2. Requesting parties request information from sources that are not reasonably accessible to the responding parties, based on the cost and burden involved.
- 7.2.3. Responding parties oppose discovery on the basis of *burden* or *over breadth* without specifically identifying the costs involved in responding.

### 7.3. Suggested judicial management strategies

- 7.3.1. Direct the parties to discuss in the meet-and-confer, and include in the discovery plan, estimates of the cost of responding to particular requests for discovery of ESI in comparison with the reasonable ranges of outcomes of the action.
- 7.3.2. Require attorneys to develop discovery budgets with the approval of their clients.
- 7.3.3. Issue scheduling orders with the assistance of counsel (and, as appropriate, the parties) that allow only discovery proportionate to the reasonable range of outcomes.
- 7.3.4. Limit eDiscovery in the first instance to ESI that can be produced by least expensive means and is most likely to produce relevant information.
- 7.3.5. Use all the judicial management strategies described above to determine whether and when further discovery should be allowed.
- 7.3.6. Appoint third parties, such as neutral experts or special masters to assist the court, *if necessary given the nature of a particular action or as agreed by the parties*, to monitor discovery and ensure that proportionate discovery is conducted.

### 7.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

### 7.5. Representative decisions

- 7.5.1. *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT, 2013 WL 3770837 (N.D. Ga. December 19, 2013).
- 7.5.2. *Chevron Corp. v. Donziger*, No. 11 Civ. 0691(LAK), 2013 WL 1087236 (S.D.N.Y. Mar. 15, 2013).
- 7.5.3. *McNulty v. Reddy Ice Holdings, Inc.*, 271 F.R.D. 569 (E.D. Mich. 2011).
- 7.5.4. *U.S. ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235 (D.D.C. Jan. 24, 2011).
- 7.5.5. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

7.6. Further reading

7.6.1. G.S. Freeman, P.S. Grewal, R.J. Hedges & C.B. Shaffer, *Active Management of ESI in 'Small' Civil Actions*, *FED. BAR ASSN* (Nov. 25, 2013) available at <http://www.fedbar.org/Image-Library/Chapters/Hawaii-Chapter/ACTIVE-MANAGEMENT-OF-ESI-IN-SMALL-CIVIL-ACTIONS.aspx>.

7.6.2. The Sedona Conference Working Group on Electronic Document Retention & Production (WG1), *The Sedona Conference Commentary on Proportionality*, 14 *SEDONA CONF. J.* 155 (Fall 2013) available at <https://thesedonaconference.org/download-pub/1778>.

## 8. Identification of “not reasonably accessible” sources of ESI

- 8.1.1. Rule 26(b)(2)(B) provides that a party need not produce ESI from sources that the party identifies as being not reasonably accessible because of undue burden or cost. If a requesting party persists in requesting ESI from those sources, the judge must determine whether the sources are, in fact, not reasonably accessible. If *good cause* exists for the production of ESI from those sources, the judge may order the ESI to be produced under the limitations of the Proportionality Rule (Rule 26(b)(2)(C)), and may also impose other conditions, including cost-sharing or cost-shifting.
- 8.1.2. *Production* of ESI from sources that are not reasonably accessible is, however, distinct from *preservation* of that ESI. Identification of a source of ESI as being not reasonably accessible does not relieve the party of the obligation to preserve evidence, absent agreement of the parties.
- 8.2. Issues presented
- 8.2.1. First, how should the *source* be identified or described? The Committee Note to Rule 26(f) suggests that parties discuss whether ESI is reasonably accessible. This discussion should be in sufficient detail so that the requesting party can make an informed determination whether to seek production from any source not being searched.
- 8.2.2. Second, is the source of the requested ESI not reasonably accessible *in fact*? The burden is on the party asserting that designation. Discovery may be needed to enable a party to contest an adversary’s assertion that the source is not reasonably accessible. Discovery may include sampling of ESI from the source, depositions of witnesses knowledgeable about the responding party’s information systems, or allowing some form of inspection of the source.
- 8.2.3. Third, if the responding party shows that the source is not reasonably accessible, but the requesting party presses its request for production, the court must determine whether *good cause* exists for the production. The Committee Note to Rule 26(b)(2)(B) suggests that a court may consider a number of factors in determining whether good cause exists. One factor may be whether the source was rendered not reasonably accessible by the action or inaction of the responding party. Note, however, as does the Committee, that, as technology advances, what is and is not considered *reasonably accessible* will change.
- 8.2.4. Finally, Rule 26 (b)(2)(B) directs the judge to consider the proportionality limitations of Rule 26(b)(2)(C) and allows the judge to place conditions on any discovery.



### 8.3. Suggested judicial management strategies

- 8.3.1. Require the parties, at the Rule 26(f) meet-and-confer or its state equivalent, to identify sources of ESI that a party deems not reasonably accessible and address any dispute arising from that identification.
- 8.3.2. Direct the parties to include in their discovery plan any agreement—or disagreement—pertaining to discovery from not reasonably accessible sources.
- ~~8.3.3. Direct the party who asserts that requested ESI is on a not reasonably accessible source to identify any accessible sources in which the ESI can be found.~~
- 8.3.4. Limit discovery, at least in the first instance, to ESI from accessible sources and defer any consideration of discovery from not reasonably accessible sources, until after an assessment of further need can be made.
- 8.3.5. Allow the parties to engage in *focused* and *limited* discovery to test whether, in fact, ESI is on a not reasonably accessible source.
- 8.3.6. Direct the requesting party to narrow its requests to minimize, or at least reduce, any undue burden or cost.
- 8.3.7. Require the parties to present expert testimony, if necessary, on whether the source of the requested ESI is not reasonably accessible.
- 8.3.8. Appoint third parties such as neutral experts or special masters, if necessary, to assist the court in determining whether a source is not reasonably accessible.

### 8.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

### 8.5. Representative decisions

- 8.5.1. *Annex Books, Inc. v. City of Indianapolis*, No. 1:03-cv-918-SEB-TAB, 2012 WL 892170 (S.D. Ind. Mar. 14, 2012).
- 8.5.2. *General Electric Co. v. Wilkins*, No. 1:10-cv-00674 LJO JLT, 2012 WL 570048 (E.D. Ca. Feb. 1, 2012).
- 8.5.3. *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 (2011).

8.6. Further reading

- 8.6.1. The Sedona Conference *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281 (Aug. 2008) available at <https://thesedonaconference.org/download-pub/66>.
- 8.6.2. Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH J.L. & TECH. 7 available at <http://law.richmond.edu/jolt/v14i3/article7.pdf>.

## 9. Search and collection methodologies

- 9.1. One goal of judicial case management should be to encourage parties to agree on a search and collection methodology *before* discovery begins. This should reduce cost and delay and conserve judicial resources. Defining such a methodology in terms of date ranges, data sources, file type, and likely custodians enables parties to conduct eDiscovery in an efficient and cost-effective way. While traditional methods of identification and collection (interviews with custodians, manual searches through files, etc.) have their place, tremendous cost-savings can be realized if parties agree to use automated search and collection technologies, particularly with larger collections. The more transparency and cooperation between the parties in the application of these technologies, the less the likelihood that parties will dispute the results.
- 9.2. Issues presented
- 9.2.1. Parties are not accustomed to sharing, let alone negotiating, the methodology they intend to use for search and collection of ESI. This resistance is compounded by concern that selection criteria may reveal the mental processes of counsel and be work product.
- 9.2.2. Parties *requesting* ESI are often unaware of the search and collection methodologies that might be available to the *responding* party. For example, the requesting party is unlikely to know how the responding party has organized its ESI or what search criteria could yield the most relevant and useful information.
- 9.2.3. Parties may not be familiar with advanced technological tools to reduce the cost of manual search and collection procedures. These technologies are intended to limit the need for manual review of large volumes of ESI for relevance and privilege. Properly used, these technologies hold the promise of substantially decreasing the cost and delay normally associated with document review. However, the existing case law on automated review is sparse and, in the final analysis, merely finds that a particular technology is *reasonable*. Few courts have reviewed the *results* of an automated search and found that those results were reasonable. Moreover, there is no accepted definition of *reasonableness* of automated search.
- 9.2.4. Automated search raises another unanswered question: Should the technology be measured under a *Daubert*<sup>7</sup> analysis—or its state equivalent—or should a more lenient *reasonableness* be the measure?

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<sup>7</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

- 9.2.5. Finally, parties may fear that a court will reject a specific technological tool or method as being *unreasonable*, resulting in the need to repeat a search or production, the loss of privilege or work product protection, or a sanction. This fear may be alleviated or eliminated if the parties reach agreement on a tool or method and present that agreement to a court as a stipulation binding the parties, but absent such agreement, the party proposing to use a specific method may seek prior judicial approval.
- 9.3. Suggested judicial management strategies
- 9.3.1. Direct the parties to collaborate on a sample search of ESI to determine the most effective search methodology to apply to a larger collection.
- 9.3.2. Direct the parties to attempt to reach agreement on the use of automated search technologies, and advise the parties that insistence on the use of costly and time-consuming manual procedures will be viewed with skepticism.
- 9.3.3. Direct the parties to agree on a reasonable set of *keywords*, if key word searching is an appropriate methodology. Avoid having the court be forced to select key words for the parties; as the court is not in a position to determine whether any given set of key words will be effective in retrieving relevant information and filtering out irrelevant information.
- 9.3.4. Consider staging searches, focusing on those data sources most likely to yield relevant information. *Staging* here means staging by data source rather than issue, as is often employed in complex litigation.
- 9.3.5. Suggest that the parties engage (or order the appointment of) a neutral to assist them in developing a search methodology, come to agreement on a methodology, or resolve any dispute with regard to the application of a methodology.
- 9.4. Sample orders
- 9.4.1. Case Management Order: Protocol Relating to the Production of Electronically Stored Information ("ESI"), *In re Actos (Pioglitazone) Products Liab. Litig.*, MDL No. 6:11-md-2299, 2012 WL 7861249 (W.D. La. December 30, 2012) (describing stipulated search methodology proof of concept).
- 9.4.2. Order Governing Discovery of Electronically Stored Information from FDIC-R, *W. Holding Co. v Chartis Ins. Co. of P.R.*, 2013 WL 1352562

(Apr. 3, 2013) (establishing a default protocol for obtaining ESI from a government entity/party).

9.4.3. Order RE: EEOC's Motion for Resolution of Discovery Dispute, *EEOC v. Original Honeybaked Ham Co.*, Civil Action No. 11-cv-02560-MSK-MEH, 2013 WL 753480 (D. Colo. Feb 27, 2013) (approving search terms in employment discrimination action).

9.4.4. *Fosamax/Alendronate Sodium Drug Cases*, Case No. JCCP 4664 (Ca. Super. Ct. Apr. 18, 2013 (minute order declining to require producing party to use predictive coding).

## 9.5. Representative decisions

9.5.1. *S2 Automation, LLC v. Micron Tech., Inc.*, No. 11-0884, 2012 WL 3656454 (D.N.M. Aug. 9, 2012) (requiring disclosure of a party's search methodology through application of 26(g)(1)).

9.5.2. *Software Rights Archive, LLC v. Facebook, Inc.*, Case No. C:12-03970 RMW, 2013 WL 4396719 (N.D. Cal. Aug. 13, 2013) (addressing ambiguities in a party's request for discovery of source code).

9.5.3. *Gordon v. Kaleida Health*, No. 1:08-cv-00378, 2013 WL 6018912 (W.D.N.Y. May 21, 2013) (addressing whether producing party must meet-and-confer with regard to an ESI protocol and use of predictive coding).

9.5.4. *EORHB, Inc. v. HOA Holdings, C.A. No. 7409-VCL, LLC*, 2013 WL 1960621 (Del. Ch. Ct. May 6, 2013) (unpublished opinion withdrawing *sua sponte* bench order for parties to show cause why they should not be using advanced technological search tools).

9.5.5. *Chura v. Delmar Gardens of Lenexa, Inc.*, Civil Action No. 11-2090-CM-DJW, 2012 WL 940270 (D. Kan. Mar. 20, 2012).

9.5.6. *Da Silva Moore v. Publicis Groupe SA*, 287 F.R.D. 182 (S.D.N.Y. 2012), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. 2012).

9.5.7. *DCG Sys., Inc. v. Checkpoint Technologies, LLC*, No. C-11-03792 PSG, 2011 WL 5244356 (N.D. Cal. Nov. 2, 2011).

9.5.8. *In re Nat'l Ass'n of Music Merchants, Musical Instruments & Equip. Antitrust Litig.*, MDL No. 2121, 2011 WL 6372826 (S.D. Cal. Dec. 19, 2011) (describing what may be the inaccuracies of search terms).

## 9.6. Further reading

- 9.6.1. The Sedona Conference *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery* (Dec. 2013), <https://thesedonaconference.org/download-pub/3669>.
- 9.6.2. Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 SEDONA CONF. J. 229 (2010).
- 9.6.3. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH J.L. & TECH. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf>.
- 9.6.4. Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technologically-Assisted Review*, 7 Fed. Cts. L. Rev. (1) (2013) available at <http://www.fclr.org/fclr/articles/html/2010/grossman.pdf>.
- 9.6.5. Maura R. Grossman, et al., *Overview of the TREC 2011 Legal Track*, NIST SPECIAL PUB. 500-295: THE TWENTIETH TEXT RETRIEVAL CONFERENCE PROCEEDINGS (TREC 2011), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.21904.12.pdf>.
- 9.6.6. Briefs from Virginia court in *Global Aerospace Inc., et al. v. Landow Aviation*:
- 9.6.6.1. Memorandum in Support of Motion for Protective Order Approving the Use of Predictive Coding, *Global Aerospace Inc., et al. v. Landow Aviation*, No. CL 61040, 2012 WL 1419842 (Va. Cir. Apr. 9, 2012).
- 9.6.6.2. Opposition of Plaintiffs to Landow Defendants' Motion for Protective Order Regarding Electronic Documents and "Predictive Coding," *Global Aerospace Inc., et al. v. Landow Aviation* No. CL 61040, 2012, WL 1419848 (Va. Cir. Apr. 16, 2012).
- 9.6.6.3. Order Approving the Use of Predictive Coding for Discovery, *Global Aerospace Inc., et al. v. Landow*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Apr. 23, 2012).
- 9.6.6.4. See The Sedona Conference *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, *supra* Part IV.9.6.1.

9.7. A “coda” on the use of advanced technologies to search large volumes of ESI

- 9.7.1. This short essay, unique to the format of these *Resources*, is intended to raise questions with regard to the use of “computer-assisted review” or “technology-assisted review” or “predictive coding” in civil litigation. The essay supplements the “Issues presented” and “Suggested judicial management strategies” set forth above.

The first question that a judge should ask when presented with a proposal to use advanced technology (whatever it may be called) to collect, search, and produce ESI is whether the parties agree to use it. ~~If so—and absent some countervailing case management concern~~ such as delay—there would not appear to be any reason for the judge to discourage or disallow the use of advanced technology. Of course, as will be explained below, the “results” of that use may be of great concern to the judge should a dispute arise.

Related to the first question is whether (as noted above in Issue presented 9.2.1) the judge should—or even has the authority to—compel a *responding* party to meet-and-confer with the *requesting* party about *how* the responding party should respond to a request for production of discoverable and nonprivileged ESI. No rule requires this. However, there is at least one decision in which the presiding judge required a producing party to disclose search terms and custodians to “aid \*\*\* [the requesting party] in uncovering the sufficiency of \*\*\* [the producing party’s] production and serves greater purposes of transparency in discovery.” *Apple Inc. v. Samsung Elec. Co.*, 2013 WL 1942163 (N.D. Ca. May 9, 2013). See *S2 Automation LLC v. Micron Tech., Inc.*, No. 11-0884, 2012 WL 3656454 (D.N.M. Aug. 9, 2012), where the court, relying on Rule 26(g)(1), required a producing party to disclose its search methodology. This tension between allowing a party to simply respond to a request to produce and conferring with the requesting party as to how it will do so is reflected in *Gordon v. Kaleida Health*, cited above in 9.5.2.

- 9.7.2. Second, assuming that a judge is inclined to order the use of some type of advanced technology, the Representative Decisions cited above reflect some “lessons” that might be drawn. These are:

9.7.2.1. The judge only approved the “threshold” use of an automated technology. The “results” of any such use might be subject to challenge that would require evidentiary hearings, expert testimony, and rulings.

9.7.2.2. As another threshold matter, there was a recognized superiority of advanced technology over manual review or a



“simpler” technology, such as the use of search terms, etc., used in the decisions cited in 9.4 above, given the volume of ESI in issue and attorney review costs.

9.7.2.3. The party seeking to use advanced technology should offer some degree of “transparency” of process, although there is no consensus as to whether that transparency should extend to the disclosure of information that might be subject to work product protection, such as the selection of the initial “seed set” of ESI submitted to “train” an advanced technology.

9.7.2.4. “Reasonableness” of the advanced technology selected appears to be central to judicial acceptance of the use of that technology.

9.7.2.5. Speculation by the producing party is insufficient to defeat threshold judicial approval.

9.7.3. Third, there have been few *contested* challenges to either *process* or *results* that any court has been required to rule on. However, in the event that there is such a challenge, here are some issues for the judge to consider:

9.7.3.1. Who will bear the burden of proof? Should it be the party that used (or imposed) the advanced technology or the opposing party?

9.7.3.2. What proofs should the court expect or require? Are representations by attorneys sufficient? What might the consequences of misrepresentations be? See *S2 Automation LLC v. Micron Tech., Inc.* above. Will lay testimony by attorneys or consultants be required? If expert testimony is required (and presumably it would be to at least some degree), do Federal Rule of Evidence 702 and *Daubert* or their state equivalents apply?

9.7.3.3. If the appropriate standard is “reasonableness, what is a sufficient degree of “reasonableness”? For example, if a particular set of ESI to be searched consists of 1,000,000 pages, and the advanced technology subject to judicial approval is predicted to identify 80% of the responsive ESI, is 80% “good enough”? Should 90% be deemed to be reasonable? If it will cost significantly more to capture 95% of the responsive ESI, is the additional cost “reasonable?”

9.7.3.3.1. We do have one example of what might be deemed a “reasonable” approach to the use of advanced

technologies: In *Dornoch Holdings Internat'l, LLC v. Conagra Foods Lamb Weston, Inc.*<sup>8</sup>, a special master used search terms to develop a privilege log of over 40,000 documents out of a set of 1.3 million. In response to the defendants' objections to the log, the special master conducted an *in camera* review of a "statistically significant number" of randomly selected documents on the log and, among other things, recommended that, "the selection of a 59%, or greater correlation of search term precision [be deemed sufficient] for a document to remain withheld as privileged." The special master noted that the selection of that percentage, "will result in a known release of some privileged documents," but that a clawback agreement and Federal Rule of Evidence 502(b)(3) would protect against waiver. The presiding district judge adopted the recommendations, but dismissed the action because of misrepresentations made by the plaintiffs.

9.7.3.3.2. Leaving aside other recommendations made by the special master, which would have allowed the defendants to challenge any document "above" the 59% threshold or would have allowed the defendants to argue that a document "below" the threshold was in fact privileged, is a 59% figure a reasonable one?

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<sup>8</sup> No. 1:10-CV-00135-TJH, 2013 WL 2384103 (D. Idaho May 24, 2013).

## 10. Form or forms of production

10.1. ESI exists, and can be produced, in various forms. Form of production can be a particularly contentious issue in eDiscovery. Parties can dispute whether ESI should be produced in, for example, paper, PDF, TIFF, or native form.<sup>9</sup> This section addresses form of production and why a particular form or forms may be appropriate for the needs of a particular action.

### 10.2. Issues presented

10.2.1. The first issue arises when parties request production of ESI in a particular form or forms. Rule 34(b) describes the means by which parties deal with form of production in the federal courts. Many states have adopted identical or similar rules.

10.2.2. Under Rule 34, the requesting party may designate the form or forms in which it wants ESI produced. The designation is intended to “facilitate the orderly, efficient, and cost-effective discovery of electronically stored information.” Committee Note to the 2006 amendments, Federal Rule of Civil Procedure 34(b). “If a request does not specify a form, ... the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.” Federal Rule of Civil Procedure 34(b)(2)(E). If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must confer under Rule 37(a)(2)(B) in an effort to resolve the dispute. If a court is forced to resolve the dispute, “the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in [the] rule. ...” Committee Note, 2006 Amendment, Federal Rule of Civil Procedure 34(b).

10.2.3. Rule 34(b)(2)(E)(i) directs that a “party must produce documents as they are kept in the *usual course of business* or must organize and label them to correspond with the categories in the request ...” (emphasis added). However, Rule 34(a)(1)(A) also permits the discovery of “any documents or electronically stored information ... after translation by the responding party into a *reasonably usable form* ...” (emphasis added). Thus, the default form of production should be the form in which the ESI is kept in the “usual course of business” or, alternatively, in a “reasonably usable form.”

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<sup>9</sup> The Sedona Conference Glossary: *E-Discovery & Digital Information Management*, *supra* note 2.

10.2.4. A second and more contentious issue arises from requests that seek a form that incorporates "metadata." Metadata refers to ESI that is not apparent from the face of a given electronic "document" and may disclose, for example:

- date of creation, edits, comments
- file size and location
- deletion dates and times
- access and distribution
- authorship or the username associated with those tasks<sup>10</sup>

10.2.5. Metadata also provides a means by which a party can conduct a meaningful and relatively inexpensive search of an adversary's ESI. While the metadata itself may not be relevant to any claim or defense in a particular action, some types of metadata serve a useful purpose in helping the parties access and review relevant ESI.

10.2.6. Metadata may show the history of a backdated document or a party's improper attempts to delete relevant ESI. Thus, there are circumstances under which metadata may be highly relevant.

10.2.7. A responding party may produce ESI in a form that is not in a "reasonably useable form" as required by the rule. This may be because the ESI has been produced in an unusual or proprietary format requiring specialized software to be searched or read, or in a jumbled and disorganized fashion, or in such large volume as to frustrate any effective review. This may be the result of the parties failing to meet-and-confer on the appropriate format prior to production, a failure of the requesting party to understand the consequences of its request, or an intentional effort by the responding party to hide the ball.

### 10.3. Suggested judicial management strategies

10.3.1. Direct the parties to describe the manner in which they maintain ESI so that the parties can discuss the appropriate form or forms of production. Emphasize to the parties that an informal discussion may minimize or eliminate cost and undue delay.

10.3.2. In an action pending in state court that does not have an equivalent to Rule 34(b), direct the parties to follow the procedure set forth in that rule.

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<sup>10</sup> The Sedona Conference Glossary: *E-Discovery & Digital Information Management*, *supra* note 2.

10.3.3. Apply Sedona Principle 12, which provides that, in the absence of agreement or an order, production should be made in either the form or forms in which the information is ordinarily maintained or in a reasonably usable form, “taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.”

10.3.4. Require the requesting party to demonstrate why production of ESI should be in a particular form or forms and require a producing party to demonstrate why production of ESI in a particular form or forms does not unreasonably diminish its usability.

#### 10.4. Sample orders

10.4.1. *National Day Laborer Org. Network v. US ICE*, No. 10 Civ. 3488(SAS), 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (identifying sources and meta fields for future production of ESI), *opinion and order withdrawn*, June 17, 2011.

10.4.2. Order Governing Discovery of Electronically Stored Information from FDIC-R, *W. Holding Co. v. Chartis Ins. Co.*, No. 11-2271(GAG/BJM), 2013 WL 1352562 (D.P.R. Apr. 3, 2013).

10.4.3. Stipulation and Order Regarding the production of Documents and Electronically Stored Information, *In re Urethane Antitrust Litig.*, 251 F.R.D. 629 (D. Kan. Nov. 25, 2008).

#### 10.5. Representative decisions

10.5.1. *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008).

10.5.2. *Jannx Med. Sys., Inc. v. Methodist Hosps., Inc.*, 2:08-CV-286-PRC, 2010 WL 4789275 (N.D. Ind. Nov. 17, 2010).

#### 10.6. Further reading

10.6.1. See *The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production*, *supra* Part II.2.2.

10.6.2. *Guidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas*, Guideline 4 available at <http://www.ksd.uscourts.gov/guidelines-for-esi/> (last visited Jan. 21, 2014).

10.6.3. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland, Conference of Parties and Report, available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (last visited Jan. 06, 2014).*

## 11. Confidentiality and public access

11.1. This is a topic that may be raised in any civil action, state or federal. Rule 26(c)(1) (and its state analogs) allows a party to “move for a protective order in the court where the action is pending.” The court may, for good cause, issue an order “to protect a party from annoyance, embarrassment, oppression, or undue burden or expense” for a number of reasons, including the confidential nature of a document. Rule 26(c)(1)(A-H).

### 11.2. Issues presented

11.2.1. First, a judge should be skeptical about a party’s request for a confidentiality order that governs ESI. For example, has the ESI been *published* on the Internet or another medium?

11.2.2. Second, there is a fundamental distinction between the burden imposed on a party to secure a confidentiality order and the burden imposed on a party to secure a *filing* under seal. The latter implicates First Amendment and common law based rights of access. This fundamental distinction requires a judge to: (a) appreciate the distinction and (b) apply a much more stringent test when *filing under seal* is sought.

11.2.3. Beyond protecting privilege and work product, parties often seek to protect information that might, for example, constitute a trade secret or reveal highly personal matters. If exchanged without some type of restriction of use or dissemination, that information may become known to the public at large. Protective orders issued pursuant to Rule 26(c) or its state equivalents must be looked to for protection here.

### 11.3. Suggested judicial management strategies

### 11.4. Sample orders

11.4.1. Discovery Order, In the United States District Court for the District of Maryland, Honorable Paul W. Grimm, (D. Md. April 9, 2013), *available at* [http://iaals.du.edu/images/wygwam/documents/http://iaals.du.edu/images/wygwam/documents/publications/Grimm\\_Discovery\\_Order.pdf](http://iaals.du.edu/images/wygwam/documents/http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf).

11.4.2. The Sedona Conference *International Principles on Discovery, Disclosure & Data Protection*, App. B: Model Protected Data Protective Order, <https://thesedonaconference.org/download-pub/495>.



11.5. Representative decisions

11.5.1. *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012).

11.5.2. *Rocky Mt. Bank v. Google, Inc.*, 428 Fed. Appx. 690 (9th Cir. 2011).

11.6. Further reading

11.6.1. *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases, Mar. 2007 Post-Public Comment Version*, 8 SEDONA CONF. J. 141 (Fall 2007).

## 12. Protection of attorney-client privilege and work product

12.1. Protection of attorney-client privilege and confidentiality goes to the heart of the adversary system. Production of ESI, which can often be voluminous and contain non-apparent information, leads to the risk that information subject to privilege or work product protection, or information that is confidential in nature, is inadvertently produced or is produced without adequate protection.

### 12.2. Issues presented

12.2.1. Responding parties that withhold relevant documents on privilege or work product grounds are almost universally required to provide a privilege log identifying the withheld documents and stating why the documents were withheld. *See, e.g.*, Rule 26(b)(5)(A).

12.2.2. Rule 26(b)(5)(B) establishes a default procedure for asserting claims of privilege after production of information in discovery. If privilege or work product is asserted over produced information, the producing party must timely notify the receiving party, who is obligated to “promptly return, sequester, or destroy the specified information and any copies it has. ...” The information should then be identified on a privilege log, subject to judicial resolution if challenged. “The producing party must preserve the information until the claim is resolved.”

12.2.3. Rule FED. R. CIV. P. 26 (b)(5)(B) is a procedural rule and does not afford any substantive protection for attorney-client communications or work product material produced during discovery. While the *procedure* is designed to reduce cost and delay associated with disputes over inadvertently produced privileged documents and ESI during discovery, production itself may give raise to a waiver in many state courts. Until recently, this was also true in many federal courts, and the scope of waiver may have extended to all information regarding the same subject matter as the inadvertently-produced information.

12.2.4. Therefore, the risks associated with inadvertent production of privileged information have been very high; consequently, the cost of privilege review is often cited as a *major* component of the overall cost of litigation.

12.2.5. Rule 502 of the Federal Rules of Evidence was enacted in the fall of 2008 to address these concerns. Several states have adopted equivalents of FED. R. EVID. 502.

12.2.6. Federal Rule of Evidence 502(a) limits the risk of subject matter waiver to instances in which the waiver was intentional. Federal Rule of Evidence 502(b) establishes *somewhat* uniform standards throughout the federal courts to resolve claims of waiver by inadvertent production, adopting a three-part test to determine if an inadvertent production constitutes a waiver. Federal Rule of Evidence 502(e) allows parties to enter into nonwaiver agreements which are binding only as to those parties. Federal Rule of Evidence 502(d) has the greatest potential for cost-savings and efficiencies. It provides for *nonwaiver* confidentiality orders under which parties can disclose ESI and other information in discovery without waiving attorney-client privilege or work product protection. Such an order is binding in any other federal and state proceeding. Federal Rule of Evidence 502 was intended to reduce the cost and risks associated with the production of large-scale collections of information, particularly ESI.

12.3. Suggested judicial management strategies

12.3.1. Ensure that the parties meet-and-confer on privilege and confidentiality issues before discovery begins and before presenting any disputes to the court.

12.3.2. Direct the parties to attempt to agree on issues of waiver and protection of confidential information, and that any resulting agreements be presented to the court at the initial case management conference and incorporated in the court's Rule 16 scheduling order.

12.3.3. Consider entering a nonwaiver confidentiality order with or without the parties' agreement under Federal Rule of Evidence 502(d), after providing the parties with an opportunity to express any concerns about such an order.

12.3.4. Establish a procedure by which challenges to privilege or confidentiality assertions can be addressed in the most timely and efficient manner, ideally before disputed documents appear in depositions or as attachments to motions.

12.3.5. In the event that the privilege or confidentiality designations of a large volume of documents are challenged, direct the parties to attempt agreement on *categorizing* disputed information so that a ruling on samples will apply to each category.

12.3.6. Suggest that the parties engage (or order the appointment of) a neutral to rule on challenges to privilege or confidentiality designations.

## 12.4. Sample orders

12.4.1. Stipulation and Order Under Federal Rule of Evidence 502(d), *Franco v. Connecticut Gen. Life Ins. Co.*, 818 F. Supp. 2d 792 (D.N.J. Oct. 28, 2011).

12.4.2. Protective Order Containing Clawback Provisions, *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL2949582 (D. Kan. December 22, 2010) (discussing whether to issue an order entering a clawback provision to govern the inadvertent disclosure of “privileged or otherwise protected” documents and information under Federal Rule of Evidence 502(d)).

## 12.5. Representative decisions

12.5.1. *Brookfield Asset Mgmt. v. AIG Fin. Prod. Corp.*, No. 09 Civ. 8285(PGG)(FM), 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013).

12.5.2. *Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993 (N.D. Cal. Mar. 11, 2011).

12.5.3. *Jeanes-Kemp, LLC v. Johnson Controls, Inc.*, No. C-09-05535 EDL, 2010 WL 3522028 (S.D. Miss. Sept. 1, 2010).

12.5.4. *Thorncreek Apartments III, LLC v. Vill. of Park Forest*, Nos. 08 C 1225, 08-C-0869 and 08-C-4303, 2011 WL 3489828 (N.D. Ill. Aug. 9, 2011).

12.5.5. *Stengart v. Loving Care Agency*, 990 A. 2d 650 (N.J. 2010).

12.5.6. *Woodard v. Victory Records, Inc.*, No. 11 CV 7594, 2013 WL 4501455 (N.D. Ill. Aug. 22, 2013).

12.5.7. *Surfcast, Inc. v. Microsoft Corp.*, No. 2:12-cv-333-JAW, 2013 WL 4039413 (D. Me. Aug. 7, 2013).

12.5.8. *Lund v. Myers*, 232 Ariz. 309, 305 P.3d 374 (2013).

## 12.6. Further reading

12.6.1. Martin R. Lueck, Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 SEDONA CONF. J. 229 (2009).

12.6.2. Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 (2009).

12.6.3. Maura R. Grossman and Ronald J. Hedges, *Do the FRCPs Provide for ‘Clawless’ Clawbacks?* 9 DIGITAL DISCOVERY & E-EVIDENCE (BNA) 285 (Sept. 1, 2009).

12.6.4. Paul W. Grimm, Lisa Yurwit Bergstrom, Matthew P. Krauter,  
*Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*  
17 RICH. J.L. & TECH. 8 (2011) available at  
<http://jolt.richmond.edu/v17i3/article8.pdf>.

12.6.5. See *The Sedona Principles: Second Edition Best Practices  
Recommendations & Principles for Addressing Electronic Document  
Production, supra* Part II. 2.2.

### 13. The privilege log

13.1.1. As noted in Section IV.11.2., Rule 26 (b)(5)(A) prescribes the preparation of a timely privilege log and, in general, describes its contents. The form or content of privilege logs may also be supplemented by local rules.

13.1.2. Privilege logs are essential to judicial resolution of disputes between parties about withheld information. Nevertheless, especially with ESI, privilege logs can be voluminous, a major source of satellite litigation, and a substantial drain on judicial resources.

#### 13.2. Issues presented

13.2.1. The parties must be clear on the level of detail a privilege log must contain. Rule 26(b)(5)(A)(2) requires that a party “describe the nature of the documents ... and do so in a manner that ... will enable other parties to assess the claim.” This does not offer concrete guidance about what form the log should take. Absent party agreement, the court must prescribe the form. For example, should logged email include such metadata fields as “to,” “from,” “cc,” “bcc” or the like? Should other metadata fields be included? Judges should be wary of automatically-generated privilege “logs” based on arbitrary criteria, for example, the simple phrase “attorney-client privilege” or the name of an attorney appearing in a document.

13.2.2. Second, how specific should the claim of privilege be stated? Is it sufficient to describe the document as “giving legal advice?” Should the description read, “giving legal advice on issue x?”

13.2.3. Third, what can the judge or the parties do to reduce the volume of a potentially voluminous log? Would it be acceptable to fully describe exemplars of documents in each of several categories?

13.2.4. Fourth, what about message strings? Message strings (or “threads”) consist of related email communications over time, initiated by a “parent” message. The parent message may be an attorney-client communication or work product, the status of which may not be obvious later in the string. How should strings be described on a log? Should only privileged messages on a string be logged? Is it sufficient to log only the “latest” message? Should non-privileged communications within the string be logged?

#### 13.3. Suggested judicial management strategies

13.3.1. Encourage the parties, at the initial meet-and-confer, to agree on the definition of privileged communications and work product as a precursor to any discussion of privilege logs.

- 13.3.2. Require the parties to address the form and content of privilege logs at the initial meet-and-confer.
- 13.3.3. Require the parties to attempt to agree at the initial meet-and-confer on a reasonable time to produce a privilege log, which may be more than the time otherwise allowed by local rule or practice if voluminous ESI must be logged.
- 13.3.4. Address the form and date of production of the log at the initial case management conference or as soon thereafter as practicable.
- 13.3.5. Encourage the parties to identify presumptively-privileged documents that may be segregated and excluded from production based on some agreed methodology, for example, communications with outside counsel after the filing of a complaint or answer.
- 13.3.6. Encourage the parties to agree that otherwise voluminous logs be prepared more economically, for example, by category of items rather than individual listing of each document.
- 13.3.7. Encourage the parties to agree on how message strings should be logged.
- 13.3.8. Require the “designating” party to submit an affidavit or affidavits that, for example, identify all persons named on a log and describe in greater detail why a particular document or documents are privileged.
- 13.3.9. If necessary, conduct an *in camera* review or refer disputes about logs to a special master.

#### 13.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

#### 13.5. Representative Decisions

- 13.5.1. *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007) (document retention notice).
- 13.5.2. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238 (E.D. Pa. 2008).
- 13.5.3. *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) *aff'd*, 580 F.3d 485 (7th Cir. 2009) (“strings”).



13.5.4. *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95 (D.D.C. 2012).

13.6. Further reading

13.6.1. Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV.. 19 (2010) available at <http://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf>.

13.6.2. Jeane A. Thomas, David D. Cross, and Courtney Ingraffia Barton, *Reducing the Costs of Privilege Reviews and Logs*, NAT'L L. J. (Mar. 23, 2009) available at <http://www.crowell.com/documents/Reducing-the-costs-of-privilege-reviews-and-logs.pdf>.

## 14. Allocation of costs during litigation

14.1.1. Cost-shifting came to eDiscovery with the iconic *Zubulake*<sup>11</sup> decisions in the context of production of ESI from “inaccessible” sources. Cost-shifting and cost-sharing are implicit in Rule 26(b)(2)(B), under which “[t]he court may specify conditions for the discovery” of ESI from not reasonably accessible sources. Many judges have relied on the Proportionality Rule to require cost-shifting or cost-sharing in lieu of “limit[ing] the frequency or extent” of discovery. Rule 26(b)(2)(C). Other judges have limited cost-shifting or cost-sharing to production of ESI from not reasonably accessible sources.

14.1.2. Cost-shifting or cost-sharing in discovery is inconsistent with the presumption, stated by the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), that each party bears its own litigation costs. The party seeking cost-shifting or cost-sharing bears the burden of overcoming that presumption.

### 14.2. Issues presented

14.2.1. Cost-shifting or cost-sharing questions may not be limited to the production of ESI. Preservation of ESI may entail significant costs, and parties may seek to have these costs shifted or shared. This should be discussed at the initial Rule 26(f) meet-and-confer, if not sooner. There is an absence of authority or precedent for courts to follow in addressing this issue. However, Sedona Proportionality Principle 1 suggests that the “burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.”

14.2.2. There may be actions in which crucial ESI is known to be available only from sources that are not reasonably accessible, for instance, email that no longer exists on accessible systems, or word-processing documents from retired applications. In such actions, cost-shifting or cost-sharing questions are likely to arise during the initial Rule 26(f) meet-and-confer.

14.2.3. The Federal Rules of Civil Procedure do not set forth factors for a cost-shifting or cost-sharing analysis. What factors might be used? Factors suggested in the Committee Note to the 2006 amendments to Rule 26(b)(2)(B), concerning “good cause” for production of ESI from not reasonably accessible sources may be informative. *Zubulake* set forth a related, but slightly different, set of factors specifically for cost-

<sup>11</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y.) and 220 F.R.D. 422 (S.D.N.Y.) and 216 F.R.D. 280 (S.D.N.Y.) and 217 F.R.D. 309 (S.D.N.Y.).

shifting. Likewise, there is no uniformity among the state courts that have addressed this issue in the ESI context.

#### 14.3. Suggested judicial management strategies

14.3.1. Limit production of ESI to reasonably accessible information, the costs of which are presumably borne by the producing party.

14.3.2. Address cost-shifting or cost-sharing only after all relevant reasonably accessible information has been produced and reviewed by the requesting party.

14.3.3. Require the party seeking to shift costs to describe, in a detailed affidavit, the cost and burden it expects to incur in producing ESI from sources it deems *not reasonably accessible*.

14.3.4. Require sampling of ESI that a party has been requested to produce from sources it deems *not reasonably accessible*, thus enabling the judge to ascertain the extent to which relevant information resides within the ESI and the cost of retrieval of the entire data set.

#### 14.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

#### 14.5. Representative decisions

14.5.1. *Boeynaems v. LA Fitness Internat'l*, 285 F.R.D. 331 (E.D. Pa. 2012).

14.5.2. *Fleischer v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405(CM)(JCF), 2012 WL 6732905 (S.D.N.Y. Dec. 27, 2012).

14.5.3. *Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. 2007).

14.5.4. Mia Mazza, Emmalena K. Quesada, Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH J.L. & TECH. 11 (2007) available at <http://jolt.richmond.edu/v13i3/article11.pdf>.

14.5.5. *Couch v. Wan*, No. 1:08cv1621 LJO DLB, 2011 WL 2551546 (E.D. Cal. June 24, 2011) *recons. denied*, No. CV F 08-1621 LJO DLB, 2011 WL 2971118 (E.D. Cal. December 20, 2011).

14.5.6. *SPM Resorts, Inc. v. Diamond Resorts Mgmt., Inc.*, 65 So. 3d 146 (Fla. Dist. Ct. App. 2011) (*per curiam*).

14.5.7. *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*,  
94 A.D.3d 58, 939 N.Y.S.2d 395 (2012).

14.6. Further reading

14.6.1. See *The Sedona Conference Commentary on Proportionality*, (Jan. 2013), *supra* Part IV.7.6.1.

14.6.2. See *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, *supra* Part IV.8.6.1.

## 15. Discovery from non-parties

15.1. Discovery of ESI can be particularly troubling when nonparties are involved. Plainly, Rule 45 and its state equivalents allow such discovery. However, the ESI sought may be voluminous and expensive for a nonparty to produce.

### 15.2. Issues presented

15.2.1. Promoting cooperation with respect to nonparty subpoena practice can be both simpler and more difficult than elsewhere in eDiscovery. On the one hand, Rule 45 specifically provides that requesting parties and attorneys “must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” That rule also requires the court to protect nonparties from undue burden and expense, which may include an award of attorney’s fees, on parties or attorneys who fail to make reasonable efforts to avoid undue burden and expense. Rule 45(c)(1).

15.2.2. On the other hand, nonparty involvement in discovery may complicate case management for a judge. For instance, Rule 45 has no meet-and-confer requirement, so there is no formal mechanism for parties to work together to reduce costs and burdens. Moreover, subpoenaed nonparties may be outside the jurisdiction of the case-management judge. This may lead to more complication, as a court in another jurisdiction may be responsible for ruling on any dispute about scope of a subpoena.

### 15.3. Suggested judicial management strategies

15.3.1. Encourage the parties in their initial Rule 26 meet-and-confer to address any intent to secure information from nonparties and to include such intent in their discovery plan.

15.3.2. Direct the parties to present any dispute *between themselves* as to nonparty discovery to the court at the initial scheduling conference or as soon thereafter as possible.

15.3.3. Once a subpoena is served, request the issuing party and the subpoenaed nonparty to meet-and-confer in an attempt to resolve any of the latter’s objections to the subpoena without formal motion practice.

15.3.4. Encourage the parties and the subpoenaed nonparty to stipulate to an extension of time for the latter to object to the subpoena. The limited time period for objection under Rule 45(c)(2)(B) may frustrate any effort to resolve disputes amicably and without judicial involvement.

15.3.5. In the event that another judge has jurisdiction over the subpoena, *with the knowledge of the parties*, coordinate with that judge as to who will be responsible for ruling on any dispute.

15.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

15.5. Representative decisions

15.5.1. *Auto Club Family Ins. v. Ahner*, Civil Action No. 05-5723, 2007 WL 2480322 (E.D. La. Aug. 29, 2007).

15.5.2. *Ervine v. S.B., R.Z.W., and E.A.B.*, No. 11 C 1187, 2011 WL 867336 (N.D. Ill. Mar. 10, 2011).

15.5.3. *Mick Haig Productions, e.K. v. Does*, Civil Action No. 3:10-CV-1900-N, 2011 WL 5104095 (N.D. Tex. Sept. 9, 2011) *aff'd sub nom. Mick Haig Productions e.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012).

15.5.4. *Mount Hope Church v. Bash Back!*, 705 F.3d 418 (9th Cir. 2012).

15.5.5. *Legal Voice v. Storman's Inc.*, 738 F.3d 1178 (9th Cir. 2013).

15.5.6. *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 (2011).

15.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

## 16. Discovery motion practice

16.1.1. Discovery motions can be the bane of a judge's involvement with ESI. Discovery motions can disrupt the timing of discovery and grow into satellite litigation when the merits of an action are pushed aside. Active judicial management of motion practice is essential and may eliminate or minimize motions.

16.1.2. Rule 26(c)(1) and Rule 37(a)(1) require a moving party to certify that it has, in "good faith," conferred or attempted to confer with the other affected parties in an attempt to resolve the dispute. The United States District Court for the District of New Jersey requires parties to bring any discovery dispute before a magistrate judge by conference call or letter prior to filing any formal motion. District of New Jersey, Local Civil Rule 37.1(a)(1). Going one step further, the United States District Court for the Eastern District of Texas maintains a *Discovery Hotline* so that parties can "get a hearing on the record and ruling on the discovery ..." by a judge on discovery disputes. Eastern District of Texas, Local Rule CV 26(e). These rules demonstrate an attempt to reduce formal motion practice in the federal courts and many state courts have followed suit.

### 16.2. Issues presented

16.2.1. First, is the motion timely? Has the moving party exhausted reasonable alternatives to a formal motion? Has the responding party made, or offered to make, discovery that might obviate the need for a motion?

16.2.2. Second, has the moving party made a sufficient showing to allow the motion to be decided? What proofs should the moving party make?

16.2.3. Third, judges should be aware that expert reports submitted in support of, or in opposition to, discovery motions *may* be required to comply with Federal Rule of Evidence 702 and *Daubert* or their state counterparts. Such compliance may multiply the costs to the parties and the complexity of discovery motion practice. This question might also arise in motions related to Technology Assisted Review. See *generally* Section 9.

### 16.3. Suggested judicial management strategies

16.3.1. Consider holding regular discovery conferences in complex civil actions to provide informal guidance to parties on emerging discovery disputes so as to avoid motion practice.



- 16.3.2. Advise the parties, at the initial case management conference, that formal motion practice on discovery disputes is disfavored; and that the court expects parties to make good faith efforts to resolve disputes on their own.
- 16.3.3. Be available to resolve disputes informally and promptly should disputes arise or make arrangements for a colleague to be available in a particular instance.
- 16.3.4. Require the parties to submit their dispute as a joint letter to the court requesting resolution.
- 16.3.5. Meet with the parties on an informal basis to attempt to resolve the dispute prior to the filing of any motion.
- 16.3.6. Ensure that the parties confer pursuant to Rule 26(c)(1) or Rule 37(a)(1) or their state equivalents in an attempt to resolve any dispute.
- 16.3.7. Insist that any formal motion include sufficient detail, including affidavits from competent persons if needed, which describe the nature of the dispute and the reason for the relief sought as well as, if appropriate, a detailed description of costs.
- 16.3.8. Similarly, insist that the responding party describe why the discovery sought cannot or should not be allowed and, if appropriate, a detailed description of costs.
- 16.3.9. Consistent with Issue Presented 15.2.3 above, address compliance with *Daubert* and Federal Rule of Evidence 702 or the equivalent state counterpart with the parties, if warranted.

16.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

16.5. Representative decisions

- 16.5.1. *Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc.*, No. 12 Civ. 1579(HB)(JOF), 2012 WL 5927379 (S.D.N.Y. Nov. 21, 2012).

## 16.6. Further reading

- 16.6.1. D.J. Waxse, *Experts on Computer-Assisted Review: Why Federal Rule of Evidence 702 Should Apply to Their Use*, 52 WASHBURN L.J. 207 (2013).

## 17. Evidential foundations

- 17.1. All civil actions proceed as if they will be disposed of by dispositive motion or trial. Discovery itself is intended to obtain information that will be admitted into evidence. These considerations may become lost on attorneys, parties, and judges.

### 17.2. Issues presented

17.2.1. In planning and executing discovery, the parties may lose sight of the ultimate goal of obtaining admissible evidence. ESI presents unique evidential issues, because electronic files are derived from complex information systems and the files can often be complex themselves. Making a sufficient demonstration for admissibility of ESI from information systems may be difficult if the offering party has not kept sight of all the elements needed to establish foundation, relevance, and authenticity. This requires attention to detail at every stage of litigation, from preservation through collection, review, and production. The parties may need to retain experts in information systems to assist with eDiscovery, and these or other experts may be called upon to testify or submit affidavits if admissibility questions arise.

17.2.2. Preliminary admissibility questions are determined by the court under FED. R. EVID. 104(a) and its state equivalents. The court is not bound by rules of evidence in making these determinations, and may be assisted by proffers from the offering party or its expert that are not measured under *Daubert* or *Frye* standards. However, final admissibility questions may require expert opinion admitted subject to rules of evidence.

### 17.3. Suggested judicial management strategies

17.3.1. Parties may preserve and collect ESI before a civil action has commenced or service of process effected. At this pre-litigation stage, the Federal Rules of Civil Procedure do not provide guidance that might assist the parties or the court in making decisions about methods of preservation and collection of ESI which will have a direct bearing on admissibility later. Perhaps the best that can be done by judges is to educate the bench and bar on these questions.

17.3.2. Remind the parties at the initial case management conference that, as the parties collect, produce, and review ESI, admissibility should be taken into account. This is especially important when ESI is produced by a nonparty in response to a subpoena.

17.3.3. Direct the parties, before any dispositive motion or final pretrial conference, to stipulate to the admissibility of relevant ESI or to identify, by specific exhibit, what objections to admissibility are expected to be raised.

#### 17.4. Sample orders

Pretrial Order No. 22 Relating to the United States' Preservation of Documents and Electronically Stored Information, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La. Jan. 4, 2011).

#### 17.5. Representative decisions

17.5.1. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

17.5.2. *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012).

17.5.3. *Rodriguez v. State*, 273 P.3d 845 (Nev. Sup. Ct. 2012).

17.5.4. *Gulley v. State*, ---S.W.3d---, 2012 Ark. 368 (Ark. 2012).

17.5.5. *Swanson v. Davis*, 69 A.3d 372 (Del. 2013) (unpublished table decision).

17.5.6. *Parker v. State*, No. 38, 2013, 2014 WL 621289 (Del. Sup. Ct. Feb. 5, 2014) (post on defendant's social media page sufficiently authenticated through circumstantial evidence and victim testimony).

#### 17.6. Further reading

17.6.1. The Sedona Conference *Commentary on ESI Evidence & Admissibility*, 9 SEDONA CONF. J. 217 (Fall 2008), <https://thesedonaconference.org/download-pub/70>.

17.6.2. GEORGE L. PAUL, FOUNDATIONS OF DIGITAL EVIDENCE (ABA Publ'g 2008).

17.6.3. Paul W. Grimm, L. Y. Bergstrom, and MM. O'Toole-Loureiro, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013).

## 18. Electronic trials

18.1. ESI is commonly admitted into evidence at trial. Doing so, however, may present technical as well as scheduling problems for the parties and the trial judge. As with evidential issues, the parties should plan and execute their eDiscovery with the use of ESI at trial in mind.

### 18.2. Issues presented

18.2.1. First, opposing counsel in a civil action may have different preferences as to the type of electronic evidence presentation system they want to use. Counsel should agree on the system that will be used; and most importantly, that system must be compatible with the court's resources.

18.2.2. Second, opposing counsel may have different levels of skill in the preparation of electronic presentations or in the use of electronic evidence presentation systems. Counsel must have adequate technical support. The court must be on guard against the possibility that a jury will be confused or unduly influenced by the quality of the presentation and lose focus on the evidence being presented.

### 18.3. Suggested judicial management strategies

18.3.1. Require the parties to exchange information, not later than the final pretrial conference, about what evidence they intend to introduce in electronic form.

18.3.2. Urge the parties to use a common evidence presentation system.

18.3.3. Require the parties to perform *dry runs* of their electronic evidence to avoid any technical problems.

18.3.4. Require the parties to have knowledgeable operators of the evidence presentation system or systems present at trial.

18.3.5. Charge the jury to be attentive to, but not mesmerized by, electronic evidence.

### 18.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

18.5. Representative decisions

If you would like to contribute a representative decision that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

18.6. Further reading

18.6.1. DEANNE C. SIEMER ET AL., EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE'S GUIDE TO PRETRIAL AND TRIAL (Fed. Jud. Ctr. & Nat'l Inst. for Trial Advoc. 2001), available at <https://public.resource.org/scribd/8763731.pdf>.

## 19. Jury issues

19.1. We live in the *Age of the Internet*. Electronic information is available at our fingertips, as is the opportunity to share our opinions and thoughts among *friends*. At the same time, our legal system recognizes that, although a declining percentage of civil actions are resolved on the merits at trial, the jury is a fundamental part of that resolution. Attorneys and parties have always attempted to learn about members of a jury venire, perhaps to select sympathetic or, at least, unbiased jurors. How do those attempts by attorneys and parties fare on the Internet? To address this question, Chapter 19 focuses on two distinct aspects of the jury system:

(a) Investigation of the members of a jury venire before the selection of jurors; and

(b) Possible influences on the jury after it has been selected and before verdict

### 19.2. Issues presented

19.2.1. It is not uncommon, especially when there are high *stakes* in a particular civil action, for an attorney or his agents to learn more about a venireperson than the minimum information that may be gleaned for a court's list. What ethical restraints exist—or should exist—on the ability of attorneys or parties to learn about the lifestyle or opinions of a member of a jury venire?

19.2.2. One of the basic principles of our civil justice system is that the finder of fact (here, a jury) should resolve disputed issues of fact *only* on the basis of competent evidence admitted during trial. To vindicate that principle, judges have, among other things, instructed jurors not to deliberate until all the evidence has been admitted and the jury has been charged and not to conduct independent research into the facts. On the other hand, opportunities to exchange views with fellow jurors, friends, and others have increased exponentially with the advent of the Internet. What might a judge say to the members of a jury to impress on them the need to *not* conduct independent investigations into the facts? What remedies are available when that instruction is ignored?

### 19.3. Suggested judicial management strategies

19.3.1. At the beginning of the petit jury selection process, when the entire venire is selected and seated together, include in any discussion of jury service the admonition that, if selected as a petit juror, the juror must refrain from any discussion of the trial for which the juror is

selected to serve and must obey the instructions of the presiding judge.

19.3.2. Encourage the members of a petit jury not to bring cell phones or any other electronic communications device into the jury room.

19.3.3. Admonish the members of a petit jury on repeated occasions during their service not to discuss any aspect of the trial with anyone, including their fellow jurors, except when directed to do so by the presiding judge.

19.3.4. Give to the members of a petit jury, at the commencement of the trial and after the close of evidence, the Proposed Model Jury Instructions prepared by the Judicial Conference Committee on Court Administration and Case Management (June 2012).

19.3.5. Should credible allegations of juror misconduct be made, conduct a prompt and thorough investigation.

19.4. Sample orders

19.4.1. *Proposed Model Jury Instructions, The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, Jud. Conf. Comm. on Court Administration and Case Mgmt. (CACM) (June 2012) available at [www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf](http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf).

19.4.2. *Amendments to the Florida Rules of Judicial Administration – Rule 2.451 (“Use of Electronic Devices”)*, No. SC12-764 (Fl. Sup. Ct. December 3, 2013) available at <http://www.floridasupremecourt.org/decisions/2013/sc13-1915.pdf>.

19.5. Representative decisions

19.5.1. *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), as amended (Sept. 15, 2011).

19.5.2. *Juror No. One v. Supreme Court*, 142 Cal. Rptr.3d 151 (Cal. Ct. App. 2012).

19.5.3. *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. Ct. App. 2012).

19.5.4. *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (2011).



19.6. Further reading

19.6.1. MEGHAN DUNN, FED. JUDICIAL CTR., JURORS' USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS, A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (FJC Nov. 22, 2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf).

19.6.2. Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621 (2011).

19.6.3 National Center for State Courts, *Social Media and the Courts State Links*, <http://www.ncsc.org/topics/media/social-media-and-the-courts/state-links.aspx?cat=judicial%20ethics%20advisory%20opinions%20on%20social%20media> (last visited Jan. 22, 2014).

## 20. Sanctions

20.1.1. The risk of sanctions is a serious concern in eDiscovery. Imposition of sanctions is one of the most unpleasant tasks a judge might be required to undertake. Moreover, as with discovery disputes generally, motions for sanctions run the risk of extended—and expensive—satellite proceedings.

20.1.2. Parties may view any adverse discovery decision by a judge to be a *sanction*, no matter how routine or minor. A sanction, however, is a “penalty or coercive measure that results from failure to comply with a law, rule, or order ... [e.g.] a sanction for discovery abuse.”<sup>12</sup> A true sanction should be distinguished from a case management order that may result from actions or failures in discovery, such as an order to limit or compel discovery, to extend the discovery period, or require a witness to be re-deposed with the shifting of costs. True sanctions must be based on findings by the court; for example, that a party or counsel engaged in culpable conduct, without substantial justification, that led to a violation of a court order, prejudice to the opposing party, or interference with the administration of justice. The power to sanction may be based on statute, rule, or the inherent authority of the court.

### 20.2. Issues presented

20.2.1. When a party formally complains of another party’s conduct in eDiscovery and seeks “sanctions,” what is the nature of the conduct being complained of and what is the relief sought? Is the requested sanction really addressed to a case management issue, for example, a need for additional time to conduct or complete discovery? Can such a dispute be resolved without a formal motion or by a simple extension of court-ordered deadlines?

20.2.2. What proofs should a moving party present? What opportunities should be given the responding party to present any defenses? What should the record consist of? Given the varying standards for the imposition of sanctions, a judge who considers sanctions must carefully document the findings of fact and legal conclusions of law.

20.2.3. The timing of a sanctions motion can be troublesome for a judge. *When* should such a motion be made, assuming that a judge has discretion to permit filing at a specific time? Should the judge require that other discovery (or perhaps *all* discovery) be completed before any motion is made?

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<sup>12</sup> *Black’s Law Dictionary* (9th Edition, 2004), p. 1368.

20.2.4. "Piecemeal" motion practice can lead to excessive cost to the parties, delay in resolution of an action, and stress on already-strained court resources.

20.3. Suggested judicial management strategies

20.3.1. Inquire, whenever the word "sanction" arises, about the nature of the dispute. Ascertain *exactly* what relief is sought and why.

20.3.2. Conduct an informal proceeding in the first instance. Determine whether a party is using the word "sanction" to request an extension of some deadline.

20.3.3. In lieu of allowing a formal motion, consider whether other discovery may be conducted that could eliminate, or at least reduce, the need for the motion.

20.3.4. Consider whether to postpone any ruling on the imposition of sanctions or the amount of sanctions pending a resolution of the action on its merits.

20.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

20.5. Representative Decisions

20.5.1. *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).

20.5.2. *Coquina Investments v. Rothstein*, No. 10-60786-Civ., 2012 WL 3202273 (S.D. Fl. Aug. 3, 2012).

20.5.3. *Ellis v. Toshiba America Info. Sys.*, 160 Cal.Rptr.3d 557, 2 (Ca. Ct. App. Aug. 7, 2013)(as modified Aug. 14, 2013).

20.5.4. *Flagg v. City of Detroit*, 715 F.3d 257 (6th Cir. 2013).

20.5.5. *Gatto v. United Air Lines*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

20.5.6. *Green v. Blitz U.S.A., Inc.*, Civil Action No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).

20.5.7. *Omogbehin v. Cino*, 485 Fed.Appx. 606 (3d Cir. 2012).

20.5.8. *Qualcomm Inc. v. Broadcom Corp.*, 05CV1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010).

20.5.9. *United Cent. Bank v. Kanan Fashions, Inc.*, No. 10 CV 331, 2011 WL 4396912 (N.D. Ill. Mar. 31, 2011) *report accepted in part, rejected in part*, No. 10 C 331, 2011 WL 4396856 (N.D. Ill. Sept. 21, 2011).

20.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

## 21. Post-judgment costs

21.1.1. A word to the reader: This stage of litigation looks to the award of costs after a party secures a final judgment in its favor. It does not address cost-sharing or -shifting during discovery. (That is addressed in Section IV.13).

21.1.2. Under the Federal Rules of Civil Procedure a prevailing party “should be allowed” its costs. In the first instance, costs are taxed by the Clerk of the District Court in which a judgment is entered. Rule 54(d)(1). Awardable costs are defined in 28 U.S.C. Sec. 1920, and include costs associated with, “[f]ees for ... electronically reported transcripts necessarily obtained for use in the case,” 28 U.S.C. Sec. 1920(2), and “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case. ...” 28 U.S.C. Sec. 1920(4). Applications have been made and, in some instances granted, for awards based on expenses incurred in, for example, creating litigation databases, although “[t]axing litigation databases is a new area of law where courts have diverged in their approaches.” *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608 (E.D. Pa. 2011). Applications for ESI-related costs are rare but, when allowed, may impose significant costs on the losing parties. Judges should be aware of the varying approaches to the award of such costs. *We are unaware of any state decisions that have addressed post-judgment awards of ESI-related costs.*

### 21.2. Issues presented

21.2.1. First, how should a statute or rule that allows an award of costs be interpreted? Such statutes and rules often appear to be based on the common law. Taking *exemplification* and *copies* and construing these to include, for example, making available TIFF images with load files may be problematic.

21.2.2. Second, assuming that ESI-related costs *may* be taxed under a statute or rule, what challenges can be raised to the application by a losing party? The necessity and reasonableness of, for example, the cost of creation of a database is not simply arithmetic and may require expert opinion. How does that *fit* into an award of costs by a clerk?

21.2.3. Third, look at, for example, Rule 68(a). This addresses offers of judgment, which include “costs then accrued.” As a matter of policy, should judges encourage offers which include ESI-related costs? Is the offeror not being given an unfair advantage?

21.2.4. Note that a circuit split exists.

21.3. Suggested judicial management strategies

If you would like to contribute any judicial management strategies that illustrate post-judgment costs, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com)

21.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

21.5. Representative decisions

21.5.1. *In re Ricoh Co., Ltd. Patent Litig.*, 661 F.3d 1361 (Fed. Cir. 2011). (determining that making ESI available through a database constituted “electronic production”).

21.5.2. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012)(allowing taxation of costs for scanning, conversion of native files to TIFF images, and transferring VHS recordings to DVD format, but denying taxation of costs for data collection, preservation, and culling).

21.5.3. *Country Vintner v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013) (adopting *Race-Tires’* narrow interpretation of Sec. 1920).

21.5.4. *Cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012) (holding that the cost of document translation is not taxable).

21.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at [kjw@sedonaconference.org](mailto:kjw@sedonaconference.org) or Ronald J. Hedges at [r\\_hedges@live.com](mailto:r_hedges@live.com).

**V. ESI-Related Ethics for Judges**

1. This chapter is not intended to offer strategies for judges when they use the Internet. Rather, the Chapter *is* intended to highlight questions that judges might wish to consider when they do so.
2. Here are some basic questions:
  - 2.1. Should a judge participate in a social networking site such as Facebook?
  - 2.2. Should a judge “friend” attorneys or parties or allow himself to be “friended?”
  - 2.3. Should an attorney or a party appear before a judge who is a “friend” or should the judge recuse himself?
  - 2.4. Should a judge engage in Internet-based factual or legal research related to an action before him?
  - 2.5. To what extent should a judge engage on research of contested facts on the Internet?
3. There are a number of judicial ethics opinions that address at least some of the questions above. The ethics opinions are:
  - 3.1. ABA Comm. on Ethics & Prof’ Responsibility, Formal Op. 462 (2013) (“Judge’s Use of Electronic Social Networking Media”), <http://www.americanbar.org/content/dam/aba/publications/YourABA/462.authcheckdam.pdf>.
  - 3.2. California Judges Ass’n, Judicial Ethics Comm. Op. 66 (2010), <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>, (“Online Social Networking”).
  - 3.3. Judicial Ethics Advisory Committee Opinion Number: 2009-20 (Fl. Sup. Ct, 2008), Florida Supreme Court, Judicial Ethics Advisory Committee Opinion Number: 2009-20 (Nov. 17, 2008) (“Whether a judge may post comments and other material on the judge’s page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.”).
  - 3.4. Administrative Office of the Courts, Ethics Comm. of the Kentucky Judiciary, Formal Ethics Op. JE-119 (Jan. 20, 2010) (“Judges’ Membership on Internet-Based Social Networking Sites”).
  - 3.5. Maryland Jud. Ethics Comm., Opinion Request No.: 2012-07 (June 12, 2012), <http://www.courts.state.md.us/ethics/pdfs/2012-07.pdf> (“Judge Must Consider Limitations on Use of Social Networking Sites”).



- 3.6. Massachusetts Supreme Judicial Court, CJE Opinion No. 2011-6 (Dec. 28, 2011) (“Facebook: using social networking web site”).
  - 3.7. New York Advisory Committee on Judicial Ethics, Advisory Opinion 08-176 (Jan. 29, 2009) (“Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. \*\*\*.”).
  - 3.8. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (Dec. 3, 2010) (“A judge may be a ‘friend’ on a social networking site with a lawyer who appears as counsel in a case before the judge. \*\*\*.”).
  - 3.9. State of Oklahoma, Judicial Ethics Opinion 2011-3, 2011 OK JUD ETH 3 (December 6, 2011) (“May a judge who hold an internet social account, such as Facebook, Twitter, or LinkedIn without violating the Code of Judicial Conduct?” and “May a Judge who owns an internet based social media account add court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as ‘friends’ on the account?”)
  - 3.10. South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion No. 17-2009 (Oct. 2009) (“Propriety of a magistrate judge being a member of a social networking site such as Facebook.”).
  - 3.11. Tennessee Administrative Office of the Courts, Judicial Ethics Comm. Adv. Op. No. 12-01 (Oct. 23, 2012).
4. There is one disciplinary opinion of which we are aware that addressed a judge “friending” an attorney who appeared before him and conducting Internet-based fact research during a civil proceeding: *Public Reprimand B. Carlton Terry, Jr., District Court Judge, Judicial District 22*<sup>13</sup>. For a disciplinary opinion tangentially related to the subject of this Chapter inasmuch as it involved a judge’s use of unauthorized technology (video recording and live broadcasting) of a civil proceeding, see *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (Judicial Council of the Seventh Circuit Sept. 28, 2009).
  5. There are a handful of reported decisions that addresses judicial participation on the Internet. Absent definitive guidance from the highest court of a judge’s jurisdiction, it would appear prudent to give serious consider to participating in social media and, if so, to what extent.

<sup>13</sup> State of North Carolina Judicial Standards Commission, Inquiry No. 08-234 (2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

- 5.1. *Domville v. State*, 103 So.3d 184 (Fla. 4<sup>th</sup> Dist. Ct. App. 2012) (*per curiam*) (granting a criminal defendant's motion to dismiss because the judge was Facebook friends with the prosecutor).
  - 5.2. *Chace v. Loisel*, Case No. 5D13-4449, 014 WL 258620 (Fla. 5th DCA 2014) (questioning *Domville* and holding that, to warrant recusal, party must allege facts sufficient to "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial").
  - 5.3. *Youkers v. State*, 400 S.W.3d 200 (Tex. App. May 15, 2013) (declining to find bias where the trial judge was a "friend" of the victim's father on a social networking site).
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# **The Sedona Conference Cooperation Proclamation: Resources for the Judiciary**

## **ADDENDUM Including Supplemental Materials**

## PREFACE

This Addendum is a stand-alone document that includes various articles authored by attorneys. Unlike scholarly articles referenced in the *Resources*, the articles here have not been peer reviewed and may reflect partisan views.

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**DEPARTMENT OF JUSTICE**  
**INTEROFFICE MEMO**

DATE: May 30, 2016

TO: Oregon Council on Court Procedure

FROM: Ken Crowley  
Attorney in Charge, Civil Litigation Section,  
Trial Division, Oregon Dept. of Justice

SUBJECT: **Support for Rule Changes to Address E-Discovery, including  
“Proportionality” Language**

When I joined the Council on Court Procedure last summer, I did so with a purpose. The Council’s role as steward of the Oregon Rules of Civil Procedure is meaningful to the work of my colleagues and I at DOJ Trial Division. The twenty-four lawyers in my section work every day within the framework of these rules. I joined the Council’s E-Discovery sub-committee because no greater challenge faces us today in civil litigation than that created by E-Discovery.

This memo discusses (1) the significant impact that E-Discovery is having on civil litigation across the country and in Oregon, (2) the rule changes adopted within the Federal Rules of Civil Procedure to address the impact from E-Discovery, including the new “Proportionality” standard, and how those rule changes are intended to balance the playing field, and (3) the E-Discovery sub-committee’s ongoing considerations, including rule changes to adopt a conferral process and incorporate a “Proportionality” standard into the Oregon rules.

I urge the Council to support these changes and move the proposed language forward for public comment.

I. CIVIL LITIGATION IN THE AGE OF E-DISCOVERY

*(1) E-Discovery is having Significant Impact on Civil Litigation Across the Country and in Oregon.*

At the Attorney General’s Public Law Conference last fall, I led a panel discussion presented jointly by Civil Litigation Section, DAS Risk Management, and Dept. of Human Services, entitled “Government Litigation in the Age of E-Discovery.” That presentation was well received, and, since then, I have participated in two more similar presentations to leaders within State government, one to State Risk Managers, and another to State Procurement Specialists. The general thrust of these presentations has been that civil litigation has entered a new age, in which the landscape is significantly different than it was a decade ago. That difference is due to the shift from paper to Electronically Stored Information (ESI) in all facets of our lives, including work.

How does the rise of ESI impact civil litigation? The quantity of available information related to any given matter, which is the subject of litigation, tends to be exponentially greater than it was a decade ago. For example, a routine employment case that might have involved a bankers box of documents a decade ago, now involves 30,000+ digital files.

Today, people convey information in all sorts of different ways, including voice messages, texts, snap chat, tweets, emails, calendaring, word documents, PDFs, spread sheets, power points, photos, and much more. Likewise, the ESI created by those communications can be found in a variety of locations, cell phones, tablets, laptops, PCs, external hard drives, thumb drives, zip drives, DVDs, CDs, local networks, share drives, network servers, and the cloud.

Paper files are now just a small portion of the mountain of data we generate on any given issue. This illustrates the challenge currently faced all across the country by the legal profession, and in particular by those who practice civil litigation, where broad discovery is the rule. In many respects, the legal community is struggling to catch up with the rest of the world. But, there is no denying that the shift to digital communications is ongoing. Lawyers have little choice, but to embrace the change, learn to adapt, and develop new ways to deal with E-Discovery.

*(2) The impact of E-Discovery on Lawyers and their Clients.*

There is no doubt that E-Discovery has impacted how DOJ Trial Division must approach civil litigation. Likewise, our clients also must adapt.

To succeed in litigation, it is critical from the outset to identify, locate, and preserve relevant information. As soon as there is a reasonable expectation of litigation this process begins. Clear communication with our clients is required. Custodians of relevant records must be identified and receive litigation hold notices.

Civil litigation paralegals have always had a role in the discovery process, but now their responsibilities are becoming even greater. Within DOJ Trial Division, paralegals are becoming our IT experts, often coordinating with client IT departments to learn about each the client's unique way of managing and storing ESI. Because the quantity of information in each case is so great, outside vendors often must be relied upon to assist with the gathering, managing, storing, searching, and organizing of ESI. Again, our paralegals coordinate with the outside vendors to accomplish these tasks. Needless to say, the time and expense associated with these efforts is substantially greater than it was a decade ago, when we were dealing with mostly paper files. If lawyers and law firms in the private bar are not seeing these kinds of challenges with E-Discovery yet, they are coming.

Moreover, the adjustment to this new reality of E-Discovery hasn't been without its frustrations. Clients have not always understood their heightened duty to provide full

disclosure, and what that means in terms of ESI. For example, we've seen cases where we did not get complete initial disclosures from our client and as a result the federal court expressed the intent to award sanctions. Our response has been to work with our clients to overhaul their internal litigation support practices to better deal with E-Discovery.

Furthermore, because E-Discovery is such a new and comprehensive change in civil litigation, it can be difficult for courts to understand the scope of the challenge. For example, we've had cases where we've gone to great lengths to fully respond to broad E-Discovery requests, and our time and expenses were very high, more than \$25,000. Yet, when we objected to further disclosures as unduly burdensome and beyond the scope, the court not only disagreed, it ordered that we retain a forensic expert at additional expense, and awarded partial sanctions. Judges who have been on the bench for a while, and do not have prior experience as lawyers dealing with E-Discovery, simply don't recognize that E-Discovery is far different from the paper discovery that they experienced when they were practicing lawyers.

E-Discovery has created circumstances that have tipped the balance of litigation. At DOJ Trail Division, our efforts to adapt are ongoing. We are developing practices and procedures to deal more proactively with E-Discovery. For example, we have already instituted a new practice in every case involve E-Discovery of scheduling a conferral conference with the opposing party early in the litigation. The purpose of the conference is to review/narrow the scope of E-Discovery, discuss challenges to gather ESI, propose cost sharing options, etc. In addition, we are hiring new personnel who will focus exclusively on E-Discovery solutions.

But, despite these efforts, the cost and complexity of civil litigation is on the rise. The major reason for that is E-Discovery. It is the single biggest challenge in civil litigation today – for the Department of Justice, our clients, as well as the rest of the civil bar, in Oregon and throughout the country.

#### I. NEW FEDERAL DISCOVERY RULES INCLUDING PROPORTIONALITY

As of the first of year, the Federal Rules of Civil Procedure now have new rules intended to address the challenges created by E-Discovery.

FRCP 26(b)(1) describes the scope of discovery as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any parties claim or defense ***and proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed



discovery outweighs its likely benefit. Information with this scope of discovery need not be admissible in evidence to be discoverable.

FRCP 26(b)(2)(B) applies the new standard to E-Discovery:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 36 B. The court may specify conditions for the discovery.

Finally, FRCP 26(d)(1) and 26(f)(1) – (3) impose a duty to confer before parties engage in any discovery.

Together, these rules provide a framework for a new approach to E-Discovery. Obviously, a great deal of work went into the creation of these rules before they were adopted by the United States Supreme Court. But, interestingly, it is my understanding that the driving force behind the rule changes came from judges, themselves, who were facing E-Discovery issues more and more often. They recognized the need for change, and the “Proportionality” language in particular was viewed as the mechanism to accomplish that change. The intent is for the parties to be able to apply “Proportionality” as the standard during their initial conferral process, and set meaningful limits on discovery obligations from the outset, so that the court will not have to be drawn in, and have to sort out these difficult and sometime technical discovery issues as often.

Although this new framework for E-Discovery has only been in place for a short time, there are already obvious signs that it is providing relief. One of those signs is that parties are removing more cases to federal court, when they have the opportunity, to take advantage of the more reasonable discovery rules. If the Council on Court Procedure is able to take meaningful steps that may not be necessary in Oregon.

## II. CURRENT CONSIDERATIONS FOR ADDRESSING E-DISCOVERY IN OREGON INCLUDING PROPORTIONALITY

### *(1) The Council on Court Procedure’s considerations of E-Discovery.*

The Council is a very deliberative body. The process for studying, proposing, and making rule changes takes time. The complete process begins in the fall and takes a year or more. Any proposed rule change starts out with consideration and debate at the subcommittee

level. Generally, when a consensus of a subcommittee is in agreement, it makes a recommendation to the full Council. If the full Council has questions, it may send the matter back to the subcommittee for further work, and then reconsider the matter at a subsequent full Council meeting. After a vote of approval by the full Council, a proposed rule change then goes out for a period of public comment, usually over the summer months. Then in early fall, the Council reconvenes, considers the public comments, decides whether to make any adjustments, table the matter, or whether to go forward with adoption of the rule change, and submission to the legislature.

The Council has had a standing subcommittee on E-Discovery going back several years. So far, it has studied issues arising related to E-Discovery, but put forth very little in terms of substantive change to address the current significant issues.

Caution is good. But, after a decade of watching the rest of the world shift from paper to digital, the legal profession needs to start catching up. The new Federal Rules of Civil Procedure relating to “Proportionality” have begun to address the issues in Federal practice. Oregon state court practice should not be left behind. Oregon should address the issues raised by E-Discovery progressively rather than waiting on the sidelines while others work to solve the problems. The Council on Court Procedure is an ideal place for this to happen in Oregon.

*(2) The Work of the E-Discovery Subcommittee.*

One thing I’ve come to appreciate is that addressing issues of E-Discovery at the subcommittee level is not easy because there are currently clear partisan divides on the issues.

The plaintiffs’ bar knows it has an advantage under the current rules, and therefore argues that the current rules are adequate. Their position is that, if a discovery request is burdensome, the other side can take it up with the court, and the court can decide. They argue there’s no prohibition against courts considering proportionality under the current rules, but to include that terminology would give it undue weight, over other considerations. The defense bar, on the other hand, is generally the side that bears all the weight from the shifted burdens of E-Discovery. The defense bar is the side that must bear the added time, expense, complexities, develop new practices, acquire new skills, associated with responding to new E-Discovery. And, when that burden becomes so great that it is overwhelming, the defense bar has the burden of convincing the court.

When our state courts have been faced with these issues, at best, the results have been mixed. The tendency has often been to try to find middle ground, or worse, to rely on the general concept that civil discovery is broad and therefore the motion for protective order is denied. In general, our state courts have not recognized that civil litigation has drastically changed because of E-Discovery.

Some in the plaintiffs bar argue that not all cases have a heavy E-Discovery burden. That's true; the world we operate in has not gone completely paperless. But, one thing is certain, there is no going back. In the decade that I have worked within DOJ Trial Division, I have seen the cost, size, and complexity of litigation rise dramatically because of E-Discovery. When I first came to Trial Division we dealt mainly with paper files. Now, everything we do is done electronically. It's really quite amazing how computers and the digital age have changed the way we all do business. A completely paperless future may not be that far away. In my view, changing the ORCPs is a natural response to what we see going on around us everyday.

We can and should move forward and deal with this issue in a fair way, to both plaintiffs and defendants. It will likely be a learning process. But, up to this point, besides the new changes to the Federal Rules, little has been done to help the legal profession in Oregon adopt to the challenges created by ESI.

*(3) Measures under Consideration, including Incorporation of a "Proportionality" Standard into the Oregon Rules.*

When the opportunity to serve on the Council on Court Procedure arose, I believed it would be a chance to work on these issues. I knew the Federal Rules had just adopted changes for the very purpose of addressing the burdens of E-Discovery. Therefore, I thought the timing might be right for Oregon to pursue similar measures.

From the first E-Discovery subcommittee meeting I supported change. My efforts were focused primarily on two areas, early case conferral, and incorporation of the federal "proportionality" standard. The early case confer proposal has gotten support from the plaintiffs side as well as the defense side of the subcommittee. We have moved that proposal forward for a vote from full Council. And, although the rule was sent back to subcommittee for minor changes, we do not expect the proposal to be controversial when it is brought forward at the June meeting.

However, the idea of incorporating "Proportionality" into the state rules has met with more resistance. Although other members of the defense bar serving on the subcommittee strongly support the proposal, the plaintiffs' bar has raised various objections over the course of the last several months.

We began with a discussion about aligning the State rules with the new Federal Rules as much as possible. In that vain, it was suggested that "Proportionality" language be placed at the beginning of Rule 36 to more clearly describe the standard for discovery. That was viewed as too extreme, but the plaintiff lawyers on the committee seemed willing to compromise. At that point, as a compromise, it was suggested that the language instead be inserted as part of the first paragraph in 36C:

In deciding what constitutes an undue burden, the court shall consider, amongst other things, the proportionality of the request for production to

the needs of the case including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.

There appeared to be a consensus with this language at our March subcommittee meeting, but when it was brought forward to the full Council, one of the plaintiff members of the subcommittee expressed reservations. So, the full Council directed that the subcommittee continue working on it. After having done so, it now appears that the plaintiff lawyers on the subcommittee are becoming more and more entrenched with the idea that Oregon should not have any mention of "Proportionality" in its rules at all.

At the last E-Discovery subcommittee meeting, the debate was polite, but no consensus was reached. However, because of the importance of the issues, we agreed to present both perspectives for full Council review at our June meeting, with the hope of having a vote about whether to approve. Of course, even if the Council approves, that doesn't mean that the "Proportionality" language will be adopted. It will then be put out for public comment.

## I. CONCLUSION

I urge the Council to vote to adopt these proposed rule changes, so that we can hear public comment, and continue our efforts on this important issue.

E-Discovery is the most significant issue we face in civil litigation today. It is causing havoc in Oregon and elsewhere. The E-Discovery sub-committee has done good work to reach compromise, but at this point, the topic needs to be moved forward. The Council on Court Procedure is the appropriate body to take leadership and address this issue in Oregon.

Thank you all for your consideration on this matter.



1 remainder. An answering party may not give lack of information or knowledge as a reason for  
2 failure to admit or deny unless the answering party states that reasonable inquiry has been  
3 made and that the information known or readily obtainable by the answering party is  
4 insufficient to enable the answering party to admit or deny. A party who considers that a  
5 matter of which an admission has been requested presents a genuine issue for trial may not, on  
6 that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C,  
7 deny the matter or set forth reasons why the party cannot admit or deny it.

8 **C Motion to determine sufficiency.** The party who has requested the admissions may  
9 move to determine the sufficiency of the answers or objections. Unless the court determines  
10 that an objection is justified, it shall order that an answer be served. If the court determines  
11 that an answer does not comply with the requirements of this rule, it may order either that the  
12 matter is admitted or that an amended answer be served. The court may, in lieu of these  
13 orders, determine that final disposition of the request be made at a designated time prior to  
14 trial. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the  
15 motion.

16 **D Effect of admission.** Any matter admitted pursuant to this rule is conclusively  
17 established unless the court on motion permits withdrawal or amendment of the admission.  
18 The court may permit withdrawal or amendment when the presentation of the merits of the  
19 case will be subserved thereby and the party who obtained the admission fails to satisfy the  
20 court that withdrawal or amendment will prejudice such party in maintaining such party's case  
21 or such party's defense on the merits. Any admission made by a party pursuant to this rule is  
22 for the purpose of the pending action only, and neither constitutes an admission by such party  
23 for any other purpose nor may be used against such party in any other action.

24 **E Form of response.** The request for admissions shall be so arranged that a blank space  
25 shall be provided after each separately numbered request. The space shall be reasonably  
26 calculated to enable the answering party to insert the admissions, denials, or objections within

1 the space. If sufficient space is not provided, the answering party may attach additional papers  
2 with the admissions, denials, or objections and refer to them in the space provided in the  
3 request.

4 **F Number.**

5 **F(1) Generally. Excluding requests relating solely to business records in subsection F(2)**  
6 **of this rule, a [A] party may serve more than one set of requested admissions upon an adverse**  
7 **party, but the total number of requests shall not exceed 30, unless the court otherwise orders**  
8 **for good cause shown after the proposed additional requests have been filed. In determining**  
9 **what constitutes a request for admission for the purpose of applying this limitation in number,**  
10 **it is intended that each request be counted separately, whether or not it is subsidiary or**  
11 **incidental to or dependent upon or included in another request, and however the requests may**  
12 **be grouped, combined, or arranged.**

13 **F(2) Requests related to admissibility of business records. Notwithstanding subsection**  
14 **F(1) of this rule, and in addition to any requests made under that subsection, a party may**  
15 **serve a reasonable number of additional requests for admission to establish the authenticity**  
16 **and admissibility of specified business records under Rule 803(6) of the Oregon Evidence**  
17 **Code relating to the business records exception to hearsay.**







1 liability alone although there is a genuine issue as to the amount of damages.

2           **D Form of affidavits and declarations; defense required.** Except as provided by section  
3 E of this rule, supporting and opposing affidavits and declarations [*shall*] **must** be made on  
4 personal knowledge, [*shall*] **must** set forth such facts as would be admissible in evidence, and  
5 [*shall*] **must** show affirmatively that the affiant or declarant is competent to testify to the  
6 matters stated therein. Sworn or certified copies of all [*papers*] **documents** or parts thereof  
7 referred to in an affidavit or a declaration [*shall*] **must** be attached thereto or served therewith.  
8 The court may permit affidavits or declarations to be supplemented or opposed by depositions  
9 or further affidavits or declarations. When a motion for summary judgment is made and  
10 supported as provided in this rule, an adverse party may not rest upon the mere allegations or  
11 denials of that party's pleading[, *but*]; **rather**, the adverse party's response, by affidavits,  
12 declarations, or as otherwise provided in this section, must set forth specific facts showing that  
13 there is a genuine issue as to any material fact for trial. If the adverse party does not so  
14 respond, the court shall grant the motion, if appropriate.

15           **E Affidavit or declaration of attorney when expert opinion required.** Motions under  
16 this rule are not designed to be used as discovery devices to obtain the names of potential  
17 expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for  
18 summary judgment, is required to provide the opinion of an expert to establish a genuine issue  
19 of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed,  
20 qualified expert has been retained who is available and willing to testify to admissible facts or  
21 opinions creating a question of fact[,] will be deemed sufficient to controvert the allegations of  
22 the moving party and an adequate basis for the court to deny the motion. The affidavit or  
23 declaration [*shall*] **must** be made in good faith based on admissible facts or opinions obtained  
24 from a qualified expert who has actually been retained by the attorney, who is available and  
25 willing to testify, and who has actually rendered an opinion or provided facts [*which*] **that**, if  
26 revealed by affidavit or declaration, would be a sufficient basis for denying the motion for

1 summary judgment.

2 **F When affidavits or declarations are unavailable.** Should it appear from the affidavits  
3 or declarations of a party opposing the motion that [such] **the** party cannot, for reasons stated,  
4 present by affidavit or declaration facts essential to justify the opposition of that party, the  
5 court may deny the motion or may order a continuance to permit affidavits or declarations to  
6 be obtained or depositions to be taken or discovery to be had, or may make [such] **any** other  
7 order as is just.

8 **G Affidavits or declarations made in bad faith.** Should it appear to the satisfaction of  
9 the court at any time that any of the affidavits or declarations presented pursuant to this rule  
10 are presented in bad faith or solely for the purpose of delay, the court shall [forthwith]  
11 **promptly** order the party [employing them] **filing such an affidavit or declaration** to pay to the  
12 other party the amount of the reasonable expenses [which] **that** the filing of the [affidavits or  
13 declarations] **affidavit or declaration** caused the other party to incur, including reasonable  
14 attorney fees, and any offending party or attorney may be subject to sanctions for contempt.

15 **H Multiple parties or claims; limited judgment.** If the court grants summary judgment  
16 for [less] **fewer** than all parties [and] **or fewer than all** claims **or defenses** in an action, a limited  
17 judgment may be entered if the court makes the determination required by Rule 67 B.

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