Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

December 19, 2013

Submitted electronically via Regulations.gov

Dear Members of the Committee on Rules of Practice and Procedure:

I offer these comments on behalf of the American Association of Justice ("AAJ"), formerly the Association of Trial Lawyers of America ("ATLA"), on the proposed changes to the Federal Rules of Civil Procedure. AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard consumers' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety.

I appreciated the opportunity to make oral remarks at your November hearing and understand that you have received comments from many AAJ members relating their experiences in the courts and their thoughts regarding particular details in the proposals. Our members practice in a variety of areas, including but not limited to admiralty, aviation, railroad, civil rights, employment rights, products liability, pharmaceutical litigation, medical negligence, class actions, and other complex litigation matters on the plaintiff's side. Many of our members represent a single plaintiff at a time, litigating against some of the most powerful and well-financed corporate defendants. The experiences of our members make our organization well positioned to consider the direct effect these proposed changes will have on parties' ability to uphold their rights under the law. AAJ members have firsthand experiences with the kinds of discovery manipulations and obstructive tactics undertaken by defendants, who frequently have substantially greater resources than the plaintiffs AAJ members represent. A difference in resources can tip litigation in a manner that subtly favors the party with more resources. These proposed changes to the Federal Rules of Civil Procedure will further unbalance the scales of justice in favor of the party with greater resources.

These comments address some of the questions raised during the November hearing and supplement the comments I made then as well as those of Mary Alice McLarty, Immediate Past President of AAJ, which were submitted to this Committee in March 2013.

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I. The Federal Rules Are Intended to Allow All Americans a Forum to Enforce Their Rights Under the Law.

The Federal Rules of Civil Procedure were drafted to assure citizens access to the courts, a fundamental right under our Constitution.[1] The drafters of the Rules embodied that belief in Rule 1, which, as the Committee well knows, is intended to "secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendments seek more speed and less expense, but will accomplish neither, and will instead unintentionally hamper the quest for justice. No matter how modest members of the committee might believe the proposed changes are, any change takes on a life of its own that is not necessarily the one projected by its drafters. Recent U.S. Supreme Court reinterpretations of procedural and evidentiary rules, such as those governing pleading, summary judgment and expert evidence, provide only the most obvious examples of movement in directions not anticipated by the Rules' drafters. This trend, rather than ensuring access to justice through the courts and a strong civil justice system, has slowly stripped away Americans' ability to enforce their rights through legal processes. Plaintiffs today have an uphill battle when they seek access to the courts and, in particular, their Seventh Amendment right to a jury trial. The continuing diminution of the jury trial, so important to our history and conception of justice, ought to impel us to find ways to support that institution, rather than hasten its demise. Many of the Rules changes proposed by the Committee in this package comprise another step in the wrong direction.

[1] *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); *Chambers v. Baltimore and Ohio R.R.*, 207 U.S. 142, 148 (1907).

II. Proposed Changes to Rule 34(b)(2)(B) and Rule 34(b)(2)(C) Will Benefit the Administration of Justice.

While opposed to a number of the proposals, AAJ is pleased to support the Committee's proposed changes to Rule 34 Requests for Production Objections and Responses. We appreciate that the Committee dropped the proposed limitation on Rule 34(a) Requests for Production from the Rules package and strongly believe that calls to reinstate the proposal are ill-advised. The remaining proposed changes to Rule 34 will affect both parties equally, are fair, and will allow for good case management.

The new requirement in Rule 34(b)(2)(B) that the grounds for objecting be stated with specificity and the new requirement in Rule 34(b)(2)(C) that an objection "state whether any responsive materials are being withheld on the basis of that objection" are positive steps toward preventing parties from evading discovery requests. As the Committee acknowledges, Rule 34 responses frequently contain a list of objections, then produce materials, and then conclude that the production is made subject to the earlier objections.[2] This makes it difficult for the requesting party to assess what has or has not been produced and on what grounds the party is objecting to which request. These Rule changes will discourage parties from evading discovery on procedural grounds, and allow parties who need discovery in the control of the other party to assess when further discovery would produce evidence to support their claims.

AAJ also supports the proposed change to Rule 34(b)(2)(B) that would codify the general practice of producing copies of documents or electronically stored information ("ESI") rather than simply permitting inspection and require the parties to disclose when production will occur. This change will streamline the production of documents in discovery and allow parties to anticipate when documents will be produced for inspection, particularly when the production takes place in stages.

III. The Proposed Changes to Rule 26(b) Will Fundamentally Tilt the Scales of Justice in Favor of Well-Resourced Defendants.

The proposed changes to Rule 26(b) are the most problematic of the proposals. The purpose of discovery is to allow each side to obtain relevant information that they would not otherwise have access to "so that the litigation playing field would be level, settlements would be informed, and meaningful trials would be possible."[3] The fundamental problem with the proposed changes to Rule 26(b) is that they shift the discovery process from one that is intended to give injured parties access to justice to one that will (intended or not) give defendants step-by-step instructions on how to avoid producing relevant information that plaintiffs need to prove their cases. Discovery is the key that opens the door to the information that is necessary to

[2] Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (hereinafter "Proposed Rules") at 269.

[3] 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, 341 (2013).

remediate violations of important constitutional, statutory and common law protections.[4] Plaintiffs know that they were hurt; often only defendants have the information about how plaintiffs were hurt. Even though we believe that the Advisory Committee merely seeks to recognize and highlight current practice under the Rules regarding proportionality, and that the revisions ought not change current practices, the placement of the concept as a part of the scope of discovery could be viewed as changing proportionality from a practical consideration to one that renders critical information off-limits merely because it may be expensive to retrieve. Such an interpretation of its new placement would fundamentally alter the scope of discovery in a way that will only benefit defendants seeking to evade accountability for wrongdoing.

AAJ fundamentally disagrees with the Committee's claim that "excessive discovery occurs in a worrisome number of cases" and that it creates "serious problems."[5] Despite being asked to do so, the Committee never defines "a worrisome number" of cases, nor does it describe the "serious problems" that disproportional discovery creates. As discussed further below, there is no unbiased empirical evidence supporting claims of excessive discovery in any substantial number of cases, and this Committee has received reliable information from the Federal Judicial Center demonstrating that there is no pervasive problem with discovery.[6] Further, the Committee's claim that excessive discovery occurs in cases that are "complex, involve high stakes, and generate contentious adversary behavior"[7] suggests that the Committee's proposed changes to the scope of discovery will not address any such problem, to the extent it even exists in those limited circumstances.

The Committee's proposed changes to other discovery rules reference the new limitation on the scope of discovery as set out in Rule 26(b)(1). Yet, the very Rules that would reference Rule 26(b)(1), such as Rules 30, 31, 33 and 36, all allow the court to grant leave to exceed the restrictions. When the case is large and complex and involves high stakes, the parties will agree to extend discovery beyond the narrow restrictions set out in the new Rules because both parties need the information in the custody of the other side. The proposed changes to the scope of discovery will *only* impact cases involving smaller plaintiffs against large defendants. These smaller plaintiffs will be most in need of discovery because the defendants will have all the information, as in civil rights, employment, and discrimination cases.[8] The plaintiffs most

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[4] *Id*. at 356. *See also Hickman v. Taylor,* 329 U.S. 495, 501 (1947) (recognizing that the rules "invest the deposition-discovery process with a vital role in the preparation for trial.").

[5] Proposed Rules, *supra* note 2, at 265.

[6] Emery G. Lee III, Federal Judicial Center Research Division, Report to the Standing Committee, slides 2-3, (Jan. 2013) ("Discovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases.").

[7] Proposed Rules, *supra* note 2, at 265.

[8] *See, e.g.*, Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buff. L. Rev. 485, 498 (1989) (civil rights plaintiffs "rarely will possess or be able to obtain information pertinent to their cases .... available only during discovery"); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 Lewis & Clark L. Rev. 65, 132-40 (2010); *See generally* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2010).

affected will also be plaintiffs like small businesses and whistleblowers who face off against large corporate defendants, the chief beneficiaries of this new, narrowed scope of discovery that will enable them to hide critical information.[9]

a. Changing the very definition of discoverable information will limit access to the information necessary to meet the burden of proof at trial.

The first inherently problematic change to Rule 26(b)(1) is the removal of the long-standing and well-understood phrase "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." As the Committee notes in its Proposed Rules, this provision traces back to the 1940s[10] and was added less than a decade after the Federal Rules of Civil Procedure were first promulgated. There are, accordingly, more than 60 years of judicial interpretation of this phrase, and it is understood by both the Judiciary and litigants.[11] The Committee's proposed phrase "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable" in no way conveys the same definition of what is discoverable as "reasonably calculated to lead to the discovery of admissible evidence."

Despite its claim to the contrary, the Committee is therefore not preserving the limits defining the scope of discovery with this proposed language. Removing the well-understood phrase defining the scope of discovery for more than 60 years simply invites a new interpretation of the new, different scope of discovery. If it appears to the Committee that the "reasonably calculated" language overrides other limits on the scope of discovery, the new, plainly broader language, containing no limits, certainly will have the same effect. If "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable," it apparently no longer must be limited to that which is "reasonably calculated" to lead to discoverable evidence. While proportionality, discussed below, provides an additional governing principle, it does not provide any guidance on what is information is relevant. Thus, rather than provide a limiting principle in the new language, the drafters have broadened the scope of discovery, while inviting significant additional motion practice by the litigants, demanding even more judicial resources, to resolve the proper interpretation of the new language.

By removing the traditional definition of the scope of discoverable relevant information, the five-factor proportionality test will become the primary focus when determining whether the information sought is discoverable. This change in emphasis prioritizes the limitations on

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[9] Under the existing Rule, cases are legion where defendants have attempted to avoid discovery by asserting production is too burdensome even when the defendant purposely organized its filing or computer system to hide information. *See, e.g., Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) (stating that a party "may not excuse itself from compliance with Rule 34 ... by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition."); *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001) (collecting cases).

[10] Proposed Rules, *supra* note 2, at 266.

[11] The sentence was amended in 2000 to include the word "relevant" but the core phrase has remained intact.

discovery rather than the need for discovery. This will fundamentally change the standard for discovery, creating a new, extremely narrow, scope of discovery that will only benefit those who would hide relevant information from the party that needs it and bears the burden of proof, usually the plaintiff. Instead of a narrowly tailored solution aimed at fixing perceived problems in large high-stakes cases, the Committee has crafted a new standard that will unduly burden the most vulnerable plaintiffs while working to protect those who wish to avoid all accountability for wrongdoing.

b. Adding "proportionality" to the scope of discovery will benefit defendants at the expense of those harmed by them.

The second inherently problematic change to Rule 26(b) is the addition of five "proportionality" factors to the scope of discovery. Each factor will benefit defendants at the expense of plaintiffs who need the information, raising more questions than they will answer, creating collateral litigation in each and every case, and drastically increasing the workload of the federal judiciary.

While it may seem reasonable on the surface to consider the amount in controversy in determining whether discovery is appropriate in a given case, including this factor in the "proportionality" analysis, indeed as the *first* factor to be considered, disregards the fact that many civil cases are in federal court *not* based on the amount in controvery, but because Congress has determined that the rights at stake are so important that they should be the subject of federal law regardless of the amount in controvery. The factor makes the amount in controversy relevant even in non-diversity cases, and even in cases where the plaintiffs seek declaratory or injunctive relief, not monetary damages. In all of these cases, defendants will fight discovery, and potentially avoid liability, simply by arguing that the amount in controversy is not high enough to warrant the discovery needed to prove the claim. There is no indication of the extent to which any particular court will rely on this factor, so claims that such a problem will be resolved by consideration of the importance of the issues at stake in the action is speculative at best, as the very same defendants will also argue that the issues are not important enough to justify the discovery.

Determination of "the importance of the issues at stake in the action" is an extremely subjective standard, subject to the same criticisms the plausibility standard under *Iqbal*[12] has received.[13] Who determines how important an issue is? For the plaintiff who alleges that she has been discriminated against in terms of wage equality, as in the Lilly Ledbetter case, the issue is of the utmost importance.[14] To the company trying to hide evidence of said wage discrimination, the issue is not important at all, perhaps even deemed "frivolous." At the outset of the case, the court will likely not have enough information to determine whether the issues are

[12] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[13] *See, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. Rev. 1710 (2013) (surveying extant literature).

[14] *See generally Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

"important" enough to justify discovery under the new proportionality standard. The importance of the issues at stake in the case becomes clearer after the parties are able to take discovery.

Evaluation of the parties' resources is yet another nebulous standard that raises only new issues to be resolved in every case. When a small plaintiff sues a large corporate defendant or employer, whose resources are the determining factor? Will the larger party be able to argue that discovery should be restricted because of the other party's resources? How is the requesting party supposed to demonstrate the resources of the party resisting discovery? Like many of the "proportionality" factors, this consideration will not affect discovery in the high-stakes cases between large corporations, which will be exempt from this consideration as they will both have extensive resources available.

Consideration of "the importance of the discovery in resolving the issue" gives defendants hiding critical information another excuse to avoid producing relevant discovery that the other side needs to prove their case. While a smaller plaintiff may argue that certain records are necessary for them to prove their case, a defendant will argue every time that the discovery sought is simply unimportant. As with the other factors, what should be considered "important" in resolving an issue is a subjective judgment and will need to be determined by the court on a case-by-case basis because plaintiffs and defendants will rarely agree on the importance of the discovery. Without discovery, there will be virtually no information upon which the court can determine whether this factor favors the requesting or responding party.

Finally, the specific consideration of "whether the burden or expense of the proposed discovery outweighs its likely benefit" has the most drastic implications for the fair administration of justice. Defendants already argue in almost every case that discovery is simply too burdensome and expensive to produce. Including this factor in the "proportionality" test for the scope of discovery will only give the argument validity even when there is no basis for it. Worse, this factor upends the incentives for defendants to preserve documents in an easily accessible format and encourages them to ensure that discovery will be too expensive or difficult to retrieve. The resultant burden on plaintiffs would go beyond arguing that the discovery sought is critical to meet their burden of proof, but also that defendants are deliberately and unecessarily making discovery more difficult. Plaintiffs will rarely have enough information to prove planned burdensomeness by defendants without even more discovery.[15]

The proportionality test gives defendants a step-by-step formula to argue that critical relevant information should not be produced. The new standard will ensure that every reasonable defense lawyer will argue that each discovery request is too burdensome, too expensive, not important enough, and so forth in *every case*. It creates a world where plaintiffs will have to prove proportionality within the framework of loaded factors; ironically, the new Rules will also limit the ability of plaintiffs to develop the proof of proportionality.

[15]The Federal Rules governing sanctions for parties for this kind of behavior are also being relaxed in this Rules package, which will only perpetuate the practice. *See* the discussion of the proposed changes to Rule 37(e) below for a further analysis of this issue.

At the public hearing on November 7th, several members of the Committee suggested that the revisions to Rule 26(b) do not actually change the substance of the Rule or the burdens on the parties. But that simply begs the question: If proposed Rule 26(b) is *not* intended to change the Rule, then *why change the text of the Rule*? If it is not the intent of the Committee to substantively change the scope of discovery and the burdens on the parties from the current Rule, then amending the Rule is not only unnecessary, it is unwise, as it will surely lead to protracted satellite litigation by the parties and varied interpretations by the courts of what the Committee meant when it changed the text of the Rule. This will undermine the Committee's laudable goals of reducing the burdens and costs of litigation, and moving cases to trial on the merits.

By contrast, the Notes following the proposed Rules suggest a substantial change is intended. The Note to the proposed change in Rule 26(b)(1), for example, specifically states that "[t]he scope of discovery . . . is revised to *limit the scope of discovery*."[16] The Center for Judicial Studies at Duke University School of Law, which sponsored and hosted the Duke Conference from which the proposed Rules package came, states very clearly that "[t]he proposed amendments *will have a profound impact on the scope of discovery*."[17] The Committee need only look at comments and testimony from those who praised this proposed change to understand that it is being and will be interpreted as a significant change to the current Rule, far more substantial than the Committee apparently contemplates.

The proposed change in the text of Rule 26(b) likely will be interpreted as a substantive change, and not merely a reorganization of the text. Under the current Rule 26(b)(2)(C), a court must, on motion or on its own, limit the extent of discovery *otherwise allowed by the Rules if* it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the 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.

Thus, discovery is not only limited by a six-factor proportionality test by subsection (iii), it is also limited by other factors that are equally important, including whether the requesting party has any other more convenient, less burdensome or less expensive way to obtain the discovery. These additional factors in Rule 26(b)(2)(C) are somehow deemed not equal nor as important as proportionality by the Committee. The current rule also requires the court to make a determination that discovery should be limited. The proposed amendment, on the other hand,

[16] Proposed Rules, *supra* note 2 at 296 (emphasis added).

[17] *See* http://law.duke.edu/judicialstudies/conferences/advisorycouncil/ (last visited November 11, 2013) (emphasis added).

puts this determination into the hands of the parties in the first instance and makes it a part of the scope of discoverable information.

By adding "proportionality" to the *scope* of discovery, the proposed Rule limits the very definition of "discovery . . . allowed by the Rules." It thus permits a party at the front end to simply refuse reasonable discovery requests because they are purportedly "disproportional," even if the discovery requested is relevant. Rather than leaving the determination of "proportionality" to the court on motion of a party or on its own, when and if such a dispute ever arises, proposed Rule 26(b)(1) will force courts to spend time and scarce judicial resources determining the limits of proportionality in each case before the court or the parties know very much about exactly what is at stake in the case. By putting this proportionality assessment into the hands of the parties in the first instance, proposed Rule 26(b)(1) limits the kind and amount of discovery that plaintiffs will be able to get from unwilling and uncooperative defendants. Plaintiffs will be forced to spend time and money, as well as use up judicial resources, to demonstrate that they are entitled to basic discovery that is allowed under the current Rules, and has been allowed since 1946.

This puts a heavy burden on the party requesting discovery, and will particularly harm plaintiffs in cases where there is an asymmetry in access to relevant information necessary to meet the burden of proof. The usual practice under current Rule 26(b)(2) puts the initial burden of showing that the discovery is relevant, *i.e.*, within the scope of discovery, under current Rule 26(b)(1) on the party requesting discovery. Then, the burden shifts to the party opposing discovery to show that the discovery is improper under Rule 26(b)(2)(C).[18] Under Rule 26(b)(2)(B), the burden is expressly placed on the party resisting discovery of ESI to demonstrate that it is not reasonably accessible because of undue burden or cost. Under proposed Rule 26(b)(1), though, *the very definition of what is discoverable changes*, and the courts interpreting this change in scope will put the burden on the requesting party to demonstrate that the discovery requested is within that new scope of discovery—that it is *both* relevant *and* proportional—in order to demonstrate that he or she is entitled to discovery in the first place. It also inverts the court's analysis from whether discovery should be *limited* to whether discovery should be *permitted*.

Thus, the proposed Rule does not address allegedly "disproportionate" discovery, but rather narrows the scope of discovery to such an extent that plaintiffs will not be able to get the critical information they need to support their burdens of proof. By changing and limiting the scope of discovery without expressly putting the burden on the party resisting discovery, the proposed Rule puts the burden on the requesting party to demonstrate that her discovery requests are "proportional," even if she has little to no information about the opposing party's resources, the importance of the particular discovery in resolving the issues in the case, or whether the burden or expense of discovery will outweigh its likely benefit. [19] The result will be to put an

[18] *See, e.g., DL v. District of Columbia*, 251 F.R.D. 38, 43 (D.D.C. 2008); *Sadofsky v. Fiesta Prods.*, LLC, 252 F.R.D. 143, 151 (E.D.N.Y. 2008).

[19] That is an inversion of how burdens of proof usually are allocated. *See, e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626 (1993). ("It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a

insurmountable burden on the party with fewer resources and less access to relevant information in the case.

While Rule 26(g) already requires parties to certify that their discovery requests are, *inter alia*, "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," they must so certify "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry." Under the current Rule, parties requesting discovery do not have to *prove* that the requests are not unduly burdensome or expensive. It is likely that the proposed change to Rule 26(b)(1) will impose that very burden on them.

IV. The Proposed Presumptive Limits on Discovery Requests and Depositions Will Have a Disproportionately Negative Impact on Plaintiffs.

a. Proposed limitations on the number of interrogatories and requests for admission will make litigation more burdensome.

The Committee's proposal to amend Rule 33 to limit the number of interrogatories from 25 to 15 is problematic. Interrogatories are a useful, inexpensive and unobtrusive way to obtain basic background information, which can be of great use later in a case. By cutting the number of interrogatories allowed by almost half and including all discrete subparts, the Committee is merely delaying a resolution of simple issues in the case and creating more work for the courts in resolving these disputes.

The Committee's proposal to amend Rule 36 to impose a limit of 25 requests for admission where no limit currently exists is equally problematic. Like interrogatories, requests for admission are cheap but essential discovery tools. The ability to request that the defendant admit basic facts is vital to smaller plaintiffs who must establish certain critical information and is virtually cost-free, which can save both parties significant litigation costs. Imposing a narrow limit of 25 requests for admission will only encourage parties to make requests broader to get needed information from a mere 25 requests. It will also lead to unintended collateral fights over what counts towards the new numerical limits. As the Committee knows, the most common response to a plaintiff's requests for admission are for the defendants to simply deny the request. When plaintiffs are forced to make their requests for admission broader, defendants will have more reason to deny the requests because they will simply not be narrow enough to be completely correct. This procedural minuet will force plaintiffs to spend time, their own resources, and the court's resources establishing information that could currently be easily resolved by several, narrow requests for admission, leaving the parties to use more expensive and instrusive means of discovery in place of requests for admission.

Even the exception to proposed Rule 36 favors defendants and large corporate interests over the interests of smaller plaintiffs. The Committee's new limit expressly exempts requests to

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withdrawal did not occur as alleged. Such was the rule at common law. 'In every case the onus probandi lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.'" (citing W. Bailey, Onus Probandi 1 (1886); Powell on Evidence 167–171)).

admit the genuineness of documents so as to avoid the impact of this new restriction on "document-heavy" litigation. While cases involving small plaintiffs against large defendants rely on documents, the bulk of "document-heavy" litigation involves cases where large corporations face off against other large corporations.[20] Thus, large defendants in high-stakes litigation do not have the same limits on requests for admission as plaintiffs with smaller cases do, and plaintiffs will have a harder time getting the discovery necessary to meet their burdens of proof.

In the final proposed Rules, the Committee notes that the proposal to reduce the presumptive number of interrogatories and to limit the number of requests for admission for the first time have not attracted much concern or criticism.[21] At the same time, the Committee recognizes that there is some concern that 15 interrogatories will not be enough for even some relatively small-stakes cases. The Committee cites no evidence supporting these proposals, or any purported need for limiting these efficient forms of discovery.

While perhaps not commonly seen as important to a plaintiff's discovery efforts, interrogatories and requests for admission are, in fact, critical information-gathering tools. There is no doubt that the proposed changes will unduly burden plaintiffs in cases where the access to information by the parties is asymmetrical. Changes to the number of interrogatories and requests for admission will limit important discovery tools that are used to resolve simple issues of fact and narrow issues for trial. With these new restrictions, parties will no longer be able to resolve these issues quickly, or inexpensively, and the courts will be burdened with the minutia of discovery disputes, drawing out the cases, leading to aggressive motion practice regardless of the size of the dispute, and ultimately resulting in delayed resolutions and increased costs for

[20] Of the top 100 verdicts as reported by the *National Law Journal*, seven out of top ten are business v. business cases. *See Top 100 Verdicts of 2006*, National Law Journal (Feb. 26, 2007).

[21] Proposed Rules, *supra* note 2, at 268, 269. It is not clear what level of commentary the Committee would determine to be indicative of concern. Many of the comments submitted to the Advisory Committee in March 2013 indicated concern over both provisions. It seems of particular note that objections to these proposal were not limited to individual members of the plaintiffs' bar, but also included a number of organizations speaking on behalf of many members whose access to critical discovery will be harmed by these proposed limitations. *See, e.g.*, Comment from Mary Alice McLarty on Behalf of the American Association for Justice (Mar. 4, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0152; Comment from Rebecca Hamburg Cappy on Behalf of the National Employment Lawyers Association (Mar. 1, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0304. Government agencies, including the U.S. Department of Justice and the U.S. Equal Opportunity Employment Commission, also objected to the proposed limits. *See* Comment from Stuart F. Delery on Behalf of the United States Department of Justice, Civil Division (Feb. 6, 2013), **(**objecting to the proposed limits on the grounds that it would impair discovery in some of its litigation) (on file with American Association for Justice); *See* Comment from P. David Lopez on Behalf of the United States Equal Opportunity Employment Commission (Mar. 4, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0146 (objecting on the grounds the limitations would impose on the Agency's law enforcement efforts as well as on the grounds that such limits have little, if any, relevance to achieving proportionality in discovery). Objections to this provision were also made by several nonprofit membership organizations devoted to the public interest. *See, e.g.*, Comment from Salvatore Graziano on Behalf of the National Association of Shareholder and Consumer Attorneys (Mar. 1, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0173; Comment from F. Paul Bland, Jr. on Behalf of Public Justice P.C. and The Public Justice Foundation (Mar. 1, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0164.

parties and the courts in resolving these issues. They will be a blow to all plaintiffs who need information from the defendants to meet their burdens of proof.

b. New limits on depositions will deny plaintiffs access to justice.

i. The new limits will have a disproportionately negative impact on plaintiffs.

AAJ is concerned that the Committee has overlooked the core concerns of the plaintiffs' bar when it comes to the proposed new limits on Rule 30 and Rule 31 depositions. The Committee's proposal to reduce the number of written and oral depositions from ten to five and reduce the hours for those depositions from seven to six will severely impair plaintiffs' ability to get necessary information from defendants. Most troublesome is the stated goal that "the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery."[22] That expectation for the appropriate amount of discovery differs depending on whether a party is the plaintiff or the defendant, but the expectation for all is that the administration of justice is fair and evenhanded and allows parties the opportunity to obtain basic information to determine whether they can meet their burden of proof.

The limitation on the number of depositions will have a disproportionately negative impact on plaintiffs who have the burden of proof. This negative impact will be particularly bad in civil rights, employment discrimination, qui tam, and intellectual property cases, where access to relevant information is asymmetric. In cases where the plaintiff needs information from the defendant to prove his case, the defendant will have no incentive to cooperate with discovery beyond what is mandated by the Federal Rules. Further, that defendant will do everything in its power to ensure that plaintiffs get as little information as possible throughout the process, but particularly in depositions where plaintiffs have the opportunity to directly question those who have the information necessary to support their case.[23] By cutting in half the number of opportunities for the plaintiff to get that information from a reluctant defendant, the Committee is virtually ensuring that a clever, evasive defendant will not be held accountable for its wrongdoing because it will be difficult for plaintiffs to prove that the defendants deliberately stymied their ability to get critical information. Further, it frequently is not until later depositions that the plaintiff even has enough information to know who the critical deponents should be. It should therefore come as no surprise that the defense bar wholeheartedly embraces these proposed changes.

The Committee states that "the parties can be expected to agree and should manage to agree in most [cases that deserve more than 5 depositions]."[24] This may be true when the parties

[22] Proposed Rules, *supra* note 2, at 268.

[23] This kind of manipulation can take many forms, but one form is for defendants to select corporate representatives who know nothing about the company's involvement in the issue. Under the proposed Rules, any defendant will be able to waste one of the five depositions available with an unknowledgeable witness. The difference is that it will be far more difficult for plaintiff to add additional depositions to compensate for the one who did not have any knowledge relevant to the case.

[24] Proposed Rules, *supra* note 2, at 268.

are both large corporations who equally need a greater number of depositions. However, the defendant will never agree to any additional discovery in cases where everything the plaintiffs need to meet their burdens of proof is in the hands of the defendants. The burden will then fall on the plaintiffs to prove that more discovery is warranted and on the court to manage the dispute over depositions in almost every case involving a non-corporate plaintiff.

The Committee has also inadvertently provided the excuse that additional depositions are too burdensome and costly in its proposed Rules package. The Committee notes that "each additional deposition increases the cost of an action by 5%."[25] Any defendant wishing to deny additional depositions in order to hide information and avoid accountability need only rely on that statement to support its claim. This statement by the Committee permanently tilts the scales of justice in favor of defendants. There is no question that depositions carry costs, but our judicial system has long determined that the cost of additional depositions is well worth the potential benefit to the parties and in the interests of a fair judicial system. The proposed Rule turns that determination on its head and gives the party holding all the cards the means to resist any attempts to get them to disclose the information.

ii. The proposed limits on depositions are not supported by empirical evidence.

While the Committee has asserted that limits on depositions have been studied by the Federal Judicial Center ("FJC"), the FJC data did not support the specific limitations proposed and did not specifically identify depositions as a problem in discovery. In asking the FJC to further examine its data, the Committee essentially requested that the FJC find the data to support the conclusion the Committee wanted to reach. Yet, even the FJC's second look at its research does not support any need for changing the presumptive limitations on depositions. When the study's author returned to the data, he found that between 14% and 23% of cases required more than five depositions and that 78% or 79% of these cases had ten or fewer depositions.[26] It is likely the very cases that exceeded ten depositions were those where additional depositions were necessary. The Committee itself notes that "parties do not wantonly take more than 5 depositions simply because the presumptive limit is 10."[27] Further, without a breakdown of which of those cases were between small plaintiffs and large defendants and which involved corporation against corporation, the numbers are relatively useless.

The numbers do not change the fact that large corporations will agree to more than five or ten depositions when their opponent is another large corporation because both sides need the information from the depositions. It is where the access to information is asymmetric that plaintiffs will be harmed because only one side will want to take more than the number of depositions prescribed in the Federal Rules. The statistics also say nothing about the fact that plaintiffs who need additional depositions will have a much greater burden to get to the current

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[25] Proposed Rules, *supra* note 2, at 267.

[26] *Id*.

[27] Proposed Rules, *supra* note 2, at 267.

limit of ten depositions, but also to get beyond that number when necessary. It is easier to argue that a party should be entitled to 12 depositions when the baseline is ten than when the baseline is five, and it may very well be those final two depositions that allow a party to meet its burden of proof.[28]

In addition, the Committee recognizes that no causal relationship can be established between costs and number of depositions, even if 43% of plaintiffs' lawyers and 45% of defendants' lawyers report they consider the discovery costs to be too high relative to their client's stake in the litigation when there are more than five depositions.[29] Those numbers say nothing for the majority, 57% and 55%, respectively, who disagree with that conclusion and actually suggest that the majority of litigants do not find their discovery costs too high relative to their client's stake in the litigation.[30]

iii. Depositions serve many purposes beyond preparing for cross-examination or impeachment at trial.

As grounds for the claim that it is reasonable to reduce the presumptive number of depositions from ten to five, the Committee claims that every witness who testifies at trial does not have to be deposed first. The Duke Conference judges may have noted that they regularly see lawyers effectively cross-examine witnesses in *criminal* trials without the benefits of depositions and that they rarely see trial witnesses effectively impeached with deposition testimony.[31] This rationale conflates criminal and civil trials, which are different and are governed by their own separate procedural rules.[32] The rationale for reducing the presumptive limit on the number of depositions also disregards the essential purpose of a deposition as a fact gathering mission, to help the parties prepare for trial, or avoid it based on the information that is revealed.[33] The deposing party is searching for information that can be used to help its case and

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[28] The Committee's observation, "It is easier to manage up than to manage down," is not a neutral statement with regard to availability of discovery. It presumes that any case with more than 5 depositions needs to be actively managed. It also fails to recognize that setting presumptive defaults lower will reduce the availability of discovery. See section IV.d., *infra*, for a discussion of the impact of anchoring on the availability of discovery under the Proposed Rules.

[29] Proposed Rules, *supra* note 2, at 267.

[30] The concept that "discovery costs [are] too high relative to their client's stake in the litigation" is a completely subjective judgment, and there is no evidence that the costs are actually too high in any of the cases, or that the other side would agree with the assertion, particularly when that side needs the depositions to obtain information only in the custody of the defendant.

[31] Proposed Rules, *supra* note 2, at 267.

[32] For example, under Rule 16 of the Federal Rules of Criminal Procedure, the government must disclose, *inter alia*, all material evidence to the defense. Civil defendants are not required to make such disclosures except in response to requests for discovery.

[33] The Committee notes that many parties are "opting" to use arbitration or mediation that is "less expensive than civil litigation because they do not involve depositions." This is a loaded comment that ignores the many other reasons disputes are arbitrated instead of tried. Many consumers, patients, clients, job applicants and employees are forced to arbitrate their claims, and therefore arbitrations may not be considered "sufficient to reach resolution of

may allow it to confirm facts, find other witnesses or evidence, or assess the benefits of settlement.

AAJ appreciates the Committee's responsiveness in determining that four hours for a deposition is insufficient. While the reduction from seven to six hours for a deposition is not as dramatic, the combination of that change with the reduction in the number of depositions from ten to five means that parties will have less than half the current time for depositions.

c. The "proportionality" standard in the proposed scope of discovery exacerbates the problems with the proposed presumptive limits.

The proposed reductions in the presumptive limits on interrogatories, requests for admission and depositions are made significantly worse by the proposed change to the scope of discovery in Rule 26(b)(1), which is incorporated in the proposed amendments to Rules 30, 31, 33 and 36. The Committee provides an exception to each of the new presumptive limits that allows a court to grant leave to take more discovery only "to the extent consistent with Rule 26(b)(1) and (2)." By incorporating the new scope of discovery, which includes direct consideration of whether the burden or expense of the proposed discovery outweighs its likely benefits, the Committee has virtually guaranteed that it will be extremely difficult for a party to argue successfully that additional depositions are necessary in any case where the other side objects. This is simply because the other party will always argue that it is too burdensome or expensive to provide more discovery. Thus, contrary to the Committee's assertion, it will be *much* harder to prove that the deposing party is entitled to more depositions even in cases that warrant a greater number, and it will be much harder for the requesting party to demonstrate that it is entitled to propound more interrogatories and requests for admission.

d. Presumptive changes to the Rules will become standard.

The claim, espoused by the defense bar and many advocates of these proposed changes that these changes are not a drastic departure from the current procedural framework because they are "presumptive" and therefore will be relaxed when good cause dictates, is a fallacy. This argument disregards the uneven playing field in certain kinds of litigation and our already overburdened court system.

To best understand the myriad ways that these presumptions will eventually become standards, one need only turn to the behavioral scientists who study the theory of "anchoring." Anchoring means that people tend to frame their understandings based on numbers, judgments, or assessments to which they have been exposed and use these frameworks as a starting point for future judgments.[34] The theory of anchoring applies to the courtroom, and judges are no less immune to anchoring than others. One researcher noted:

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important disagreements." Indeed, in the aftermath of *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), mandatory arbitration agreements can prohibit class action arbitrations, render individual arbitration too expensive to maintain, and effectively exculpate defendants for actionable misconduct. *See also American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) (arbitration requirement effectively insulated defendant from potential antitrust liability).

[34] Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128 (2012) (citing Jon D. Hanson &

> [T]he best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom . . . There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice."[35]

Empirical evidence firmly supports this application of anchoring to the judiciary.[36]

Even beyond anchoring, it is reasonable to conclude that the federal courts are likely to consider the presumptive limits as the outside limits of discovery as the new, lower presumptive limits are applied more often. In essence, what may have been intended to be presumptive limits will become mandatory caps on discovery. It is significantly easier for a party to argue that less discovery is appropriate under the current Rules than it will be for a party to argue that more discovery is appropriate under the proposed changes to the Rules. There is no doubt that these presumptive limits will effectively reduce the amount of relevant discovery. The defense bar supports these changes for this very reason. If the presumptive changes to Rules 26, 30, 31, 33 and 36 are enacted, judges will begin to apply these new limits as the standard and it will be very difficult for plaintiffs to overcome those limits even when they are completely inadequate to get critical, relevant information.

Worse still, these presumptive limits will largely harm plaintiffs with asymmetric access to information who need discovery from defendants to meet their burdens of proof. When large corporations face off against each other, they will not be subject to these limitations since both sides will agree to more than the presumptive limits because both sides will need the discovery. These presumptions, as they become standard, will incentivize defendants to hide information, frustrating the Committee's admirable goal of encouraging cooperation between the parties. They will also drive up the costs for smaller plaintiffs by forcing them to go to court to get the critical information to which they are currently entitled.

V. The Committee Should Make Its Proposed Changes to Rule 26(c)(1)(B) Clearer to Prevent it From Becoming a Model for Cost Shifting in Discovery.

AAJ does not object to the Committee's proposed change to Rule 26(c)(1)(B) *per se*. However, AAJ recommends that a comment be added to the Rule's note indicating that the

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Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 667 (1999) (describing anchoring)).

[35] *Id*. at 1186.

[36] *See generally* Chris Guthrie, Jeffrey Rachlinski, Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 20-21 (2007) ("We have found that anchors trigger judicial decision making (*citation omitted*) . . . Both anchoring studies suggest that the anchors had a powerful influence on judgment. This was true both when the anchor bore essentially no relation to the magnitude of the claim and when the judges knew full well that they were supposed to ignore the anchor. In both cases, the anchor triggered intuitive, automatic processing that the judges were unable to override.").

addition of the words "or the allocation of expenses" not be given any undue weight, and noting that the addition of this language does not change the presumption that the responding party should bear the costs of producing discovery. Any change to this presumption would work against the interests of justice in the same manner as many of the proposed Rules being considered in this Rules package. It would only harm the ability of injured parties, who almost always have fewer resources than the wrongdoers, while benefiting those who committed the wrong. The loudest voices behind complaints about the cost of discovery requests are large defendants who already deliberately bury critical information in discovery.[37] The law should continue to presume that each party is entitled to explore the full memory of the other.

The combination of the proposed changes being considered in this Rules package and allowing the wrongdoer to impose the cost of providing critical information would do more than tilt the scale of justice; it would slam the courthouse doors shut to every litigant without deep pockets. To the extent the Committee considers such a Rule change in the future, it should be limited to lawsuits where large corporations sue other large corporations. Any other iteration would do a disservice to every American who currently has or may ever have a claim against a deep-pocketed entity.

VI. The Proposed Change to Rule 4 Allows an Insufficient Time Period for Service.

The Committee proposes to change Rule 4 to cut the time limit for service in half from 120 days to 60 days as part of its "case management proposals." This Rule change is entirely unnecessary and, like many of the other proposed changes, only works against plaintiffs by incentivizing defendants to avoid accountability. Adequate time for service is a critical component of ensuring access to the courthouse. Far from delaying a case unnecessarily, allowing reasonable and realistic time for service is an important stepping-stone for the start of a case. The current time frame of 120 days is a reasonable time period for service of process on a reluctant defendant. In specific kinds of cases, such as admiralty cases where plaintiffs must reach a ship to effectuate service, 60 days will almost always be inadequate.

While the proposed Rule does allow the court to extend the time for service if the plaintiff shows good cause, in reality, the Rule change will reward defendants for ducking service until they can run out the clock. Plaintiffs, who already have the burden of proof, would then have to meet yet another burden by going to court to show that there was good cause for failure to serve within the newly restricted time frame. This increases the cost to the plaintiff while rewarding the defendant for evading service. In the worst-case scenario, where the plaintiff cannot meet the burden because the defendant left limited evidence of evading service, the action will simply be dismissed and the plaintiff will be in the position of having to start her

[37] There is nothing hyperbolic about this statement. As just one example of this common practice, in *Lawson v. Honeywell* the plaintiff was injured when her seatbelt malfunctioned during a car accident. Each defendant claimed that it was too burdensome and too expensive to produce discovery, yet they were still required to produce the discovery because of the current Rules, upon which the rules of civil procedure in Mississippi were modeled, *see, e.g.*, *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So.2d 427, 432 (Miss. 2007). Plaintiff found the critical document showing evidence of wrongdoing buried in a CD containing over 1600 documents from one defendant alone. The buried document was relied on in the plaintiff's brief before the Mississippi Supreme Court, which reversed the trial Court's summary dismissal. *Lawson v. Honeywell Int'l, Inc.*, 75 So.3d 1024 (Miss. 2011).

case again, if the statute of limitations has not already expired. The current 120-day time period for service allows enough time for service such that plaintiffs do not usually have to go into court and request an extension of time. Although plaintiffs currently have this "good cause" burden of proof, under current Rule 4(m), they exercise it infrequently. This proposed change will mean that the burden on plaintiffs will be much greater because they will have to frequently prove "good cause" under the meaning of Rule 4(m).

Further, rather than easing the case-management burden on courts, this proposed change would increase the burden on courts because courts will now have to regularly address collateral motions to show good cause for failure to service within a 60-day window and the court's case management responsibilities as a whole will certainly increase. Certain kinds of cases will almost always require court intervention for failure to serve within the narrow time frame of two months.

The proposed change to Rule 4(m) is a solution in search of a problem. Plaintiffs should be entitled to an adequate time for service, and this proposed Rule change should be rejected in the interest of justice.[38]

VII. Proposed Changes to Rule 37(e) Would Disincentivize Defendants from Appropriately Preserving Critical Discovery and Reward Them for Spoliation.

AAJ appreciates the careful look the Committee is taking at the proposed changes to Rule 37(e). However, AAJ respectfully submits that the Committee is asking the wrong questions and that the questions posed in the August 15, 2013 Request for Comments on Proposed Rules and Form Amendments will invite defendants to steer the Committee towards a standard that will exempt them from having to preserve critical discovery and allow them to escape accountability when they have improperly destroyed such discovery.

a. The Committee should not expand Rule 37(e) beyond electronically stored information.

AAJ strongly believes that the Committee should not expand Rule 37(e) to all discoverable information. The Committee has recognized in the past that the source of the concerns about sanctions under Rule 37(e) is the preservation of ESI[39] and that there is a clear distinction to be made between ESI and other discoverable information.[40] In its March 2012 briefing book, the Committee stated, "[w]e already have one Rule (37(e)) prompted by the distinctive features of electronically stored information. Focusing on that information now would be consistent with that first step in recognizing that electronically stored information

[38] The proposed change to 16(b)(2) does not suffer from the same problem because it equally affects both parties and therefore the burden is not unfairly on one party over the other.

[39] Agenda Book of the Advisory Committee on Civil Rules, Ann Arbor, MI, at 253 (Mar. 22-23, 2012) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.

[40] *Id*. at 254. The March 2012 briefing book also considers the merits of other arguments, but it is clear that the Committee recognizes that there is a distinction to be made in this regard.

presents distinctive preservation challenges."[41] As the Committee recognized when it created Rule 37(e), ESI is a special category of discovery and one that is increasingly a large percentage of the discoverable information in a given case. AAJ does not dispute that corporations are required to store a vast amount of data in order to be responsive to discovery requests, but ESI is easy to maintain, easily searchable by the holding party for information that is responsive to a discovery request, and easily destroyed through bad faith and negligence.

The Committee's concern that there may be future difficulties in drawing a meaningful dividing line between ESI and other discovery has not thus far been true. Rule 37(e) was added a mere seven years ago. If the Committee later finds that there is a problem drawing such a line, it can certainly address it at that time, but the Committee should not preemptively address a problem that does not currently exist.

b. Proposed 37(e)(1) inappropriately preempts state common law in diversity cases.

The Committee's proposed language blurs the distinction between sanctions and curative measures and, in doing so, inadvertently preempts state common law in diversity cases. The current language of Rule 37(e) makes clear that a court may not impose sanctions under these rules for failing to maintain ESI lost as part of routine, goodfaith operations. The phrase "under these rules" is clear; it excludes duties under state law and appropriately places the breach of the duty to preserve as a breach of duty to the court, which is within the authority of the power granted to the Judicial Conference under the Rules Enabling Act.[42] The Committee now proposes to expand the breach of duty to the court to include a breach of duty to the litigant, an authority that is usually a matter of state common law. Many states have found that the failure to appropriately preserve discovery is a violation of the duty owed to the litigant and that a *curative* measure is an adverse-inference jury instruction, which is given to remedy the breach of entitlement.[43] However, the proposed language in Rule 37(e)(1)(B) would actually prevent adverse-inference jury instructions from being used as a curative measure by cabining the adverse-inference jury instruction under the auspices of the standards required to impose a sanction. It is no longer a curative measure because it cannot be given unless the party also meets the standard for sanctions. Though the Committee has stated that it does not intend to affect any state tort remedy for spoliation, a conflict appears to occur through this expansion.

The use of adverse-inference jury instructions as a curative measure is distinct from sanctions and requires no additional standards that must be met for the adverse-inference jury instruction to be given. Rule 37(e)(1)(B) also requires that the sanction or adverse-inference jury instruction only be given if the court finds that the party's actions (1) caused substantial prejudice in the litigation and were willful or in bad faith; or (2) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. In creating

[41] *Id*. at 254.

[42] 28 U.S.C. §§ 2071-2077.

[43] *See, e.g., Miller v. Lankow*, 801 N.W.2d 120, 128 (Minn. 2011); *Cost v. State*, 417 Md. 360, 370-71 (2010); *Kirkland v. New York City Housing Authority*, 666 N.Y.S.2d 609, 611 (App. Div. 1997).

this standard, the Committee has turned its role on its head. The Judicial Conference should not be in the business of protecting large corporations from having to preserve discovery,[44] particularly when the impact could be to preempt state law. The only appropriate role with regard to preservation is to address any breaches of duty to the court, a function that is already addressed in the current language of Rule 37(e).

The Committee need look no further than a recent decision by Judge Shira Scheindlin in the Southern District of New York to find a salient critique of the proposed changes to Rule 37(e) and the unintended impact these changes would have on the ability of a party to avoid any consequences for destroying critical discovery. In *Sekisui America Corp. v. Hart*, issued on the same day the Rules Committee released the proposed changes to the Rules, Judge Scheindlin considered the question of whether, in deciding to impose an adverse-inference jury instruction, prejudice to the innocent party may be presumed when evidence is destroyed, either intentionally or through gross negligence.[45] Judge Scheindlin specifically noted the proposed changes to Rule 37(e) and said that the burden of proving prejudice from discovery lost as a result of willful or intentional misconduct should not fall on the innocent party. She also noted that imposing sanctions only where evidence is destroyed willfully or in bad faith creates "perverse incentives" and encourages "sloppy behavior."[46]

c. The proposed factors in assessing a party's conduct will allow a spoliator to avoid accountability and puts an undue burden on the innocent party.

The current standard is not only limited in scope in that it only applies to ESI, but also has been interpreted as a broad safe harbor that discourages parties from failing to preserve ESI and allows a court discretion to appropriately penalize a party when they fail to do so. The proposed language promulgated by the Committee will only reward a party who fails to properly preserve discovery, particularly in cases where access to information is asymmetrical and only the defendant has the evidence showing how the plaintiff was harmed. As noted above, defendants already make every effort to obfuscate critical documents that they are required to provide during discovery; the proposed changes to Rule 37(e) will encourage them to destroy

[44] It should also be noted that, despite complaints by large corporations, the fact that they are required to retain data does not automatically mean they are subject to an undue burden. LCJ argues in its recent submission to this Committee that "most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue." LCJ Public Comment at 3. As evidence, LCJ repeats a claim by Microsoft that they preserve 787.5 GB of data for every 2.3 MB of data that are actually used in litigation (citing to a Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (Aug. 31, 2011)). That number indicates absolutely nothing about the data that Microsoft is preserving. For example, that data might include cases that Microsoft files against a competitor, or data relating to an anticipated liability for which no claim is made. Further, there is no indication by the amount of data to suggest that Microsoft actually produces all the information requested. While all that data may be relevant to the case, Microsoft may choose to respond to discovery by only releasing certain responsive information while arguing against having to produce more. It is possible to continue to speculate as to why the ratios are extreme, but the fact is that the ratios themselves indicate nothing about whether the duty to preserve data is too high in and of itself.

[45] 2013 WL 4116322 at *4, n.51 (S.D.N.Y. Aug. 15, 2013).

[46] *Id.*

these documents and hide behind the claim that the destruction does not meet the "willful or in bad faith" standard prescribed in Rule 37(e)(2) merely because they do not meet all of the factors set out in assessing a party's conduct.[47] The "[f]actors to be considered in assessing a party's conduct" as laid out in proposed Rule 37(e)(2)(A-E) could be interpreted by a court to require the party failing to preserve discoverable information to meet every factor listed,[48] including the reasonable consideration that the party be on notice that the litigation was likely and that the information would be discoverable, but also the far more nebulous considerations of the "reasonableness" of the parties efforts to preserve the information and the "proportionality" of the preservation efforts.

For example, as the amount of ESI increases, companies are increasingly reliant on the "cloud" to store their data. This puts the data outside of their immediate control, which can serve as yet another excuse for their failure to preserve discovery. All a defendant would have to argue is that they made "reasonable" and "proportional" efforts to preserve discovery, but that somehow, someone forgot to pay a bill for the preservation and all the ESI was destroyed.[49] It would be virtually impossible for a defendant to meet the undefined standards in proposed Rule 37(e) under those circumstances, and they would get yet another get-out-of-jail free card for failing to meet their discovery obligations. Rules should be crafted to discourage parties from destroying discovery, not give them cover when they do so.

Worse still, the proposed language puts the full burden on the non-destroying party (almost always the plaintiff, particularly in asymmetric cases) to prove that defendants did not "reasonably" maintain the discovery sought and that their efforts to preserve the information were not "proportional." This begs the question of what is reasonable and proportional; a consideration that will vary from case to case and will require judicial resources to resolve, but will almost always give the benefit of the doubt to the defendant who destroyed the information in the first place. How can a plaintiff prove that a defendant's failure to preserve discoverable information was not "proportional," particularly without significant discovery of the defendant's preservation policies and processes? This new standard will only encourage the escalation of collateral litigation – and additional discovery – to determine whether the failure to preserve documents meets these new factors.[50]

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[47] "Willful" and "bad faith" will require the court to apply a much higher threshold to the destruction of discovery than the current "good faith" standard currently used in Rule 37(e).

[48] As written, this proposed Rule lists five factors to be considered in assessing a party's conduct, joined by an "and" which suggests that courts may read the new Rule as requiring that the destroying party meet all these factors.

[49] The Rules Committee has considered the issue of ESI stored in the cloud. The June 2013 briefing books contains draft minutes from the Civil Rules Advisory Committee which states, "[a]s information storage moves in the cloud, there will be increasing risks that information will be lost without fault." Agenda Book of the Committee on Rules of Practice and Procedure, Washington DC, at 165 (June 3-4, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-06.pdf. AAJ is concerned that information stored in the cloud will be deliberately "lost" and defendants will have cover to claim that they were without fault.

[50] Even though the Committee concluded that defining "willful" or "bad faith" would not be useful, and seems likely to produce more problems than help, *see* Proposed Rules, *supra* note 2, at 273, it has invited comment on whether these terms should be defined, and what such definitions should be. The proposals made by large corporations and

d. The Committee should not make any changes to existing Rule 37(e).

The Committee has made clear that the proposed amendment to Rule 37(e) is designed to "provide more protection against sanctions than current Rule 37(e)."[51] AAJ believes that sanctions are entirely appropriate where a party has failed to preserve discovery that should have been produced to the opposing party, regardless of whether the failure was willful or in bad faith.

In laying out the proposed new standard, the Rules Committee has inadvertently given defendants holding critical information of their wrongdoing the license to destroy discovery and then hide behind the new standard to avoid accountability for having done so. Spoliation generally arises as an issue for plaintiffs when a defendant destroys physical evidence in products liability cases, but if this Rule goes into effect, it will impact every case.[52] Further, the current language ensures maximum judicial flexibility to determine the appropriate consequence for spoliation.

The proposed language also imposes a significant new burden on the plaintiff to prove that the defendants did not engage in "reasonable" and "proportional" preservation efforts. This requires the innocent party to prove prejudice and shifts the costs to the injured party who must then meet the burden of proof. The Committee should retain the current language in Rule 37(e), which is limited to ESI, contains a "safe harbor" provision for the preservation of ESI, and appropriately balances the responsibility for preserving discoverable information on the custodial party.

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their defenders can only benefit the party destroying the discovery. By narrowing the definitions of the terms "willful" and "bad faith," or worse, requiring that the destruction be "willful *and* in bad faith," as many defense-side commenters and witnesses have suggested, defendants will be able to destroy critical discovery at will and hide behind the excuse that they do not specifically meet the factors laid out in Rule 37(e)(2)(A-E) and are therefore not culpable.

[51] Proposed Rules, *supra* note 2, at 274.

[52] Consider the defendant's misconduct in *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 2994 (2008). While no evidence was destroyed in that case, the defendant, as documented by the Eleventh Circuit, engaged in a strategy of denial, deception, and subterfuge, repeatedly withholding evidence of their wrongdoing and resulted in sanctions imposed at the appellate level. The existence of the evidence became known only because of a whistleblower. When further incriminating evidence became available, the District Court again sanctioned defendants, post-appeal for their contemptuous abuse of discovery and found that their bad faith "prejudiced [plaintiffs] in their presentation of evidence to the jury *and on appeal*." *Action Marine, Inc. v. Continental Carbon, Inc.*, 243 F.R.D. 670, 671 (M.D. Ala. 2007). The defendant then had the temerity in a petition for certiorari in the U.S. Supreme Court to argue that the sanctions lodged against them for their repeated discovery abuse should render the punitive damages awarded against them for their underlying misconduct superfluous. While this is an extreme example of a defendant hiding the ball, the type of behavior it exemplifies is far too common and underlying litigation calculation too frequently made to be ignored. The rules of civil procedure should not facilitate similar manipulative misbehavior.

VIII. Most of the Proposed Changes Will Benefit Only Wrongdoers, Unduly Burden Plaintiffs and Increase the Burdens on Our Courts by Creating Collateral Litigation.

All of the proposed changes to the Federal Rules discussed in Sections III-VII will hinder the ability of injured parties to hold wrongdoers accountable while greatly benefiting the party who committed the wrong. Under each and every one of these proposed Rule changes, the burden will increase for plaintiffs. AAJ submits that if the Committee chooses to address complaints about discovery expense by defendants, it should only do so at the same time as it addresses complaints we believe even more valid about defendants hiding discoverable materials. To address one without the other creates an enormous imbalance. In addition, our already overburdened court system will be further slowed by collateral litigation over the new scope of discovery and every other proposed change because injured plaintiffs will always need more information to meet their burdens of proof at trial than defendants will be willing to provide.

a. The proposed changes will increase the burden and cost for plaintiffs.

Our judicial system gives plaintiffs the burden of proof in civil cases, which gives defendants every incentive to "hide the ball" by fighting discovery at every turn and attempting to limit the amount of information they produce. This tactic can take many forms including, but not limited to, deliberately burying critical documents that prove wrongdoing in huge discovery productions of irrelevant information, making discovery more physically difficult to obtain by taking steps such as leaving relevant information in a warehouse, and using procedural tactics to avoid having to produce the critical documents in the first place. The proposed Rules will only encourage these practices because defendants will use the five prongs of the new Rule 26(b) proportionality test to further frustrate discovery, and, in doing so, will prevent harmed individuals from holding wrongdoers accountable because plaintiffs will have an even more difficult time getting the necessary information to support their cases.

The Committee is using changes in Rules to address what it has called a problem of management. Yet, most of the proposed Rules would do nothing to address general concerns about how judges currently manage cases. Instead, most of the proposed amendments would essentially let judges off the hook for having to actively manage cases; when faced with such a marked increase in discovery disputes, judges who do not now manage will simply use the shorthand of the new Rules to limit discovery in most cases to the new limits.

The proposed changes also fundamentally shift the burdens and costs of litigation. Instead of defendants having to prove that discovery should be limited, plaintiffs must prove that discovery is necessary beyond the presumptive limits. This will prevent plaintiffs in certain cases from getting access to the information that they are currently entitled to and that they need to meet their burden of proof. These proposed Rule changes will shift the costs to the plaintiff, who is least able to bear it. The costs to plaintiffs will be both indeterminate, discouraging an untold number of meritorious cases from being pursued,[53] and concrete. Under these proposed

[53] In a 2009 study, discussed further in section V below, the American Bar Association found that 82% of respondents reported that their firms turn away cases when it is not cost effective to handle them. *A.B.A. Section of*

Rules, plaintiffs will have to engage in increased motion practice at every step of discovery just to get basic discovery. The new Rules give defendants new excuses to avoid being held accountable while restricting the amount of information that plaintiffs are automatically entitled to. They will also drive up costs for plaintiffs as they engage in repeated mini-trials to resolve each and every discovery dispute. Plaintiffs will be in a catch 22; they will have to engage in these mini-trials to prove unknown facts in order to even discover the facts. Finally, limited opportunity for discovery will mean that parties will need to rely more on experts during trial to prove their case because they will not have as much access to discovery. This is a cost that large defendants can easily cover, but smaller plaintiffs may be unable to afford.

It is worth noting that this Committee and even the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach.

b. The proposed Rules would increase the costs and burdens for the courts.

The proposed Rules also will impose a significant cost on our courts, which can ill-afford them at this time of sequestration and budget cuts. As civil dockets in many district courts have been more crowded and court resources have become scarcer, many judges have less time to closely manage civil dockets and have postponed hearing those cases. However, the proposed Rules will only increase the number of collateral arguments, which will increase the burden on the courts to adjudicate every little discovery dispute. Under the proposed changes to the discovery Rules, motions will be filed to fight discovery at every turn creating collateral litigation on every single discovery issue and requiring more hearings before the overburdened courts. The number of discovery issues that will now be litigated in every case is astounding. Parties will have to engage in collateral litigation over the number of oral and written depositions, the amount of time for depositions, the number and content of interrogatories, the number and content of requests for admission, and every proportionality facet of Rule 26(b) including the resources of the parties, the burden or expense of the proposed discovery, and whether the issue at stake or the discovery sought is important.

These costs and burdens will impact the courts at a systematic level. The impact will be immediate. Cases will be delayed because of the new inability of parties to obtain factual information and identities of key players without having to go through motions practice and court hearings before being able to find out information they can currently obtain through normal discovery. Designated corporate representatives all too often turn out to have no knowledge of the facts at issue or even who has custody of pertinent records. The proposed Rules will encourage the use of this tactic.

Litigation Member Survey on Civil Practice: Full Report, at 2 (Dec. 11, 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf (hereinafter "ABA Study"). Driving up the cost of litigation will mean that smaller cases will not be litigated and access to the courts will be denied.

The Committee does not have to look far to find an example of the havoc these proposed Rules will have on the court docket. As the Committee may recall, the Judicial Conference experimented with mandatory Rule 11 sanctions in 1983, only to be forced to repeal them a mere 10 years later.[54] For the 10 years that mandatory sanctions were in effect, litigation surrounding Rule 11 significantly increased. Motions and cross-motions for Rule 11 sanctions, which were more often employed for tactical reasons in meritorious cases than for Rule 11's intended purpose, expended judicial resources and sidetracked the courts from addressing the merits of the cases before them. Worse still, mandatory Rule 11 sanctions had a greater impact on plaintiffs, particularly those plaintiffs who needed discovery only in the custody of the defendants. During the decade that mandatory Rule 11 sanctions were in effect, sanctions were more often imposed against plaintiffs than defendants and more often imposed against plaintiffs in certain kinds of cases, primarily in civil rights and certain kinds of discrimination cases. A leading study on this issue showed that although civil rights cases made up 11.4% of federal cases filed, 22.7% of the cases in which sanctions had been imposed were civil rights cases.[55] The Committee now proposes to make every step of discovery subject to the same collateral litigation that mandatory Rule 11 sanctions created.

The members of this Committee are well aware of the dire financial straits of the federal judiciary. The federal judiciary was subject to flat funding even before sequestration cut hundreds of millions of dollars from the federal courts. In a recent letter to Vice President Biden, 87 Chief Judges noted their "grave concern" over federal court funding.[56] The letter stated, "[r]eductions in court budgets reduce the overall volume of work that the Judiciary is able to perform and communicate timely to the public in a variety of ways, again undermining out core constitutional responsibilities." The Judicial Conference itself then authored a letter to the Obama Administration echoing the Chief Judges' concerns and adding that "[staffing] losses are resulting in the slower processing of civil and bankruptcy cases, which impacts individuals and businesses seeking to resolve disputes in federal courts."[57] Creating new discovery rules that will only exacerbate the current burden on and cost to the courts does not make any sense, especially at this time of fiscal crisis.

[54] The several year timeline required under the Rules Enabling Act suggests that problems with mandatory Rule 11 sanctions were known within a very short time, yet courts were tied up with the related collateral litigation for several additional years as the Rule change made its way through the Judicial Conference.

[55] Prepared Testimony of Professor Theodore Eisenberg, Cornell University, submitted in House Committee on the Judiciary Oversight Hearing (citing Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943 (1992)).

[56] Letter from Hon. Loretta A. Preska, Chief Judge of the S.D.N.Y., to Vice President Joseph R. Biden, Jr. (Aug. 13, 2013).

[57] Letter from John D. Bates, Secretary for the Judicial Conference of the United States, to President Barack Obama (Sept. 2013).

IX. There Is No Legitimate Empirical Evidence to Support the Proposed Rules.

As harmful as these changes will be to the ability of injured parties to recover from those who wronged them, the reality is that there is no unbiased empirical evidence to support these proposals. The empirical studies done by most groups, including the FJC, continue to demonstrate no support for these changes.[58] In fact, the only purported foundation for these changes are biased studies of a few, select pro-defendant groups who start with the conclusion that the discovery rules are "too burdensome," and then work backwards to create a study that will support those conclusions.

The core studies relied on by the defense bar in supporting the proposed changes to the Rules that will only harm, and in reality, only impact, smaller plaintiffs are two studies by Lawyers for Civil Justice ("LCJ") and the American College of Trial Lawyers/the Institute for the Advancement of the American Legal System ("ACTL/IAALS").[59] The first study by ACTL/IAALS in 2009 surveyed the Fellows of the ACTL, a group dominated by those representing defendants in civil litigation, and, unsurprisingly, came to the conclusion that the civil justice system takes too long and costs too much.[60] The second study (hereinafter "LCJ Study") was authored by LCJ, Civil Justice Reform Group ("CJRG"), and the U.S. Chamber Institute for Legal Reform ("ILR"), all defense bar groups, and relied on a study conducted by the Searle Center, another organization that represents only defense bar interests.[61] The Searle

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[58] For example, the FJC study found that the empirical evidence for out of control discovery costs is limited. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 770 (2010). Reported expenditures for discovery amounted to a median of 1.6% of the reported stakes for plaintiffs and 3.3% of the reported stakes for defendants. 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*, at page 2 (Oct. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/FJC%20National%20Case-Based%20Civil%20Rules%20Survey.pdf. Other academic research has pointed out that the FJC's findings are consistent with decades of other empirical research. *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 Or. L. Rev. 1085, 1116 (2012) ("the cost narrative is out of touch with empirical data").

[59] It should be noted that all these organizations claim to be unbiased, but a cursory review of their members and positions makes it abundantly clear that they only represent large corporate business interests and the defense bar.

[60] Paul C. Saunders et al., Inst. for the Advancement of the Am. Legal System, *Final Report of the Joint Project of the American College of Trial Lawyers Taskforce on Discovery and the Institute for the Advancement of the American Legal System*, (Mar. 11, 2009; Rev. Apr. 15, 2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf. For a detailed critique of the IAALS study, *see* Center for Constitutional Litigation, *Nineteenth Century Rules for the Twenty-First Century Courts: An Analysis and Critique of 21st Century Civil Justice System: A Roadmap for Reform Pilot Project Rules* (Mar. 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/CCL,%2019th%20Century%20Rules%20for%2021st%20Century%20Courts.pdf.

[61] Lawyers for Civil Justice et. al., *Litigation Cost Survey of Major Companies, For Presentation to Committee on Rules of Practice and Procedure, Judicial Conference of the United States, 2010 Conference on Civil Litigation, Duke Law School* (May 10-11, 2010), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx. LCJ has two membership levels of corporate/defense organizations and law firms but the corporations and defense organizations are the only members who have voting rights in LCJ.

study looked only at the interests of large companies in the Fortune 200 and even recognized that the study only allows for an understanding of the complaints about discovery by large corporations. The study concluded that proportionality must be emphasized in discovery, which will "strike at the heart of current practices which fuel runaway discovery costs."[62] Yet, this study has been extrapolated by defense organizations as relevant to all civil litigation.[63]

LCJ's study is so problematic that even the non-partisan FJC questioned its legitimacy. A 2010 Duke Law Journal Article by the authors of the FJC empirical study stated, "given its relatively small sample size of two hundred companies, its response rate of 10 percent, its short nine-year timeframe, and its lack of adjustment for inflation, the value of the study's findings is limited."[64] Many examples of the inherent problems with the LCJ Study can be found, but one example serves to illustrate the ways in which the LCJ's conclusions cannot be applied outside the context of cases where large corporations face off against other large corporations. The LCJ Study found that the ratio of number of pages of documents produced to average number of exhibit pages was 1044 to 1, a mere .10% of the pages produced.[65] While this number is startling on its face, and regardless of whether it is accurate, such complaints do not show that discovery is inefficient and needs to be "fixed." It only demonstrates that defendants produce a large number of documents that are not useful as exhibits.

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[62] *Id*. at 7

[63] LCJ defined a "major case" as closed cases in which outside litigation transaction costs exceeded $250,000. While that number is large, these are Fortune 200 companies who frequently use large corporate law firms with high billing rates to handle litigation. It would not take long for these companies to rack up legal bills above and beyond that threshold.

[64] Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. at 770. A commentator has described the study as "made up of unverified, self-reported, and self-interested statistics provided by a small number of very large corporations in response to a survey 'developed by organizations whose member companies are concerned about the impact of litigation costs on their ability to compete in a global economy.'" J. Douglas Richards & Michael Eisenkraft, *Pro-Business and Anti-Efficiency: How Conservative Procedural "Innovations" Have Made Litigation Slower, More Expensive, and Less Efficient*, CPI Antitrust Chron. at 6-7 (May 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291519. Outside sources would also doubt the results of LCJ's study based on neutral standards. The LCJ Study said it mailed surveys to all 200 Fortune 200 companies and got a response rate of almost 20 percent, which would mean fewer than 40 companies responded. In order to have a 95% confidence level in your results, a survey administered to 200 entities would need responses from 132. *See* What is a Good Response Rate for a Random Survey Sample, http://www.snapsurveys.com/blog/good-response-rate-random-survey-sample/ (Mar. 29, 2012). While there is not a hard line for response rates, anecdotal evidence suggests that journal editors prefer a 60 percent response rate before they will publish survey results. *See generally* Timothy Johnson and Linda Owens, Am. Ass'n for Public Opinion Research, Section on Research Methods, *Survey Response Rate Reporting in the Professional Literature* (2003), *available at* http://www.srl.uic.edu/publist/Conference/rr_reporting.pdf; *see also* Jack E. Fincham, *Response Rates and Responsiveness for Surveys, Standards, and the Journal*, 72 Am. J. Pharm Educ. 43 (Apr. 15, 2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2384218/.

[65] LCJ Study, *supra* note 56, at 16. LCJ repeats these claims in their August 30, 2013 submission to this Committee. Lawyers for Civil Justice, Public Comment to the Advisory Committee on Civil Rules (Aug. 30, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267 (Hereinafter "LCJ Public Comment").

Ironically, the LCJ Study states that "[l]arge organizations in asymmetrical litigation face disproportionately burdensome discovery costs, in particular in the case of e-discovery."[66] This statement clearly demonstrates that the defense bar is not concerned about the corporation vs. corporation cases that actually drive their discovery costs, but the significantly smaller cases where they are called upon to be held accountable for wrongdoing to smaller plaintiffs. These Fortune 200 companies are the very companies that engage in protracted litigation for their own means. Complaints about how burdensome discovery is deliberately overlook the role defendants play in creating such massive amounts of discovery. As one scholar noted, "[e]ven as to the high-cost cases, we do not know how much of the expenditure and delay in a given case are the result of tactical decisions by defense counsel- driven by economic self-interest or reflecting litigation practices of attrition and dilatoriness – rather than of hyperactivity on the part of plaintiffs."[67] For example, corporate defendants often bury the critical "smoking gun" in a huge document production, designed to expend smaller plaintiffs' resources unproductively, cause plaintiffs to miss the key document, and increase the chance that the defendant will not be held accountable for its wrongdoing.

LCJ openly admits that the FJC study surveyed a broad group of attorneys, including solo practitioners from small firms, and notes that roughly one-third of the cases were "civil rights" cases.[68] They contrast their own survey to that sample and note that they only surveyed Fortune 200 companies. Yet, they simultaneously argue that the results of their study should be applied to every case across the board, even those cases where the FJC found that a cross section of attorneys perceive the discovery processes as "reasonable, not unduly burdensome, and not likely to influence settlement."[69] So, by LCJ's own admission, a full sampling of the plaintiffs bar and defense bar by a non-partisan source found that the discovery process does not require such a dramatic overhaul of the discovery rules.

Studies like LCJ's and ACTL/IAALS's are conducted by organizations representing the defense bar and then enter into an echo chamber, which repeats the claims in an attempt to lend them some legitimacy.[70] One has to look no further than a recent Forbes article to see this echo chamber at work. On August 15, 2013, Forbes released an article informing its readers that the

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[66] *Id*. at 6.

[67] Miller, *Simplified Pleading*, 88 N.Y.U. L. Rev. at 364.

[68] LCJ Study, *supra* note 56, at 6.

[69] *Id*. (citing 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* at 2.)

[70] From public records, it appears that CJRG gave money to Searle, which conducted the survey. That study was then cited by CJRG and ILR to prove their findings in their own report. The anecdotal evidence is tainted too. As one commentator stated, "[i]f one searches pieces written by defense counsel that deal with [the topic of 'out-of-control' legal expenses], there will be very little real-world substantiation of hyperbolic claims typically made about the scope of problems with litigation costs. The degree to which defense counsel tend to dominate the narrative in legal circles with overblown rhetoric about supposedly out-of-control legal costs in all likelihood reflects the reality that defense counsel in high-stakes litigation heavily outnumber plaintiffs' counsel and they align themselves with the interests of the corporate client base . . . by propagating unsubstantiated rhetoric that might support the curtailment of access to the courts by plaintiffs in civil cases." Richards & Eisenkraft, s*upra* note 59, at 3.

comment period on the proposed Rules amendments had opened.[71] The article puts forth the defense bar's positions that discovery costs have "skyrocketed, and some litigants have used the high price of preserving, collecting, and producing electronic documents as a tactical weapon."[72] It then uses as support the following sources: the 2009 ACTL/IAALS study, an article by a corporate source also relying on the ACTL/IAALS study[73] (deceptively cited as a link representing the 2010 Duke Conference), a Bloomberg BNA article citing to LCJ's proposals for e-discovery,[74] a Washington Legal Foundation Legal Backgrounder which relies on LCJ's April 2013 submission to the Advisory Committee, and, finally, LCJ's submission to the Advisory Committee which relies on LCJ's own biased 2010 study to support the proposed changes to the Federal Rules.[75] When all these sources are closely examined, it quickly becomes evident that the entire basis for the defense bar's claims that reforms are desperately needed to address out-of-control discovery comes from the ACTL/IAALS study and the LCJ Study, both of which were conducted and evaluated by the very advocates who were determined to find evidence to support the allegation that discovery costs are out of control.[76]

Beyond the fundamental problems with the defense bar's echo chamber of biased research, other research has also failed to find empirical data to support the drastic changes to discovery proposed in this Rules package. A study by the American Bar Association ("ABA") found that 63% of respondents believe that the current Rules are conducive to meeting the goal of reaching a "just, speedy and inexpensive determination of every action."[77] Further, the same study found that about 45% of respondents think that discovery mechanisms work well, while

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[71] Glenn G. Lammi, *Comment Period For Proposed Amendments to Discovery Rules Begins Today*, Forbes (Aug. 15, 2013), *available at* http://www.forbes.com/sites/wlf/2013/08/15/comment-period-for-proposed-amendments-to-discovery-rules-begins-today/.

[72] *Id*.

[73] Daniel E. Troy and John O'Tuel, *A Toolkit for Change: How the Federal Civil Rules Advisory Committee Can Fix a Civil Justice System "In Serious Need of Repair*," 25 Washington Legal Foundation 1 (May 21, 2010), *available at* http://www.wlf.org/publishing/publication_detail.asp?id=2167.

[74] Thomas Y. Allman, *Rules Committee Adopts 'Package' of Discovery Amendments*, BNA Insight (Apr. 25, 2013), *available at* http://www.theediscoveryblog.com/wp-content/uploads/2013/06/2013RulePackageBLOOMBERGBAsPublished1.pdf.

[75] Lawyers for Civil Justice et al, Comment to the Civil Rules Advisory Committee: Supporting Publication of Proposed Rules 37(e) and the Duke Subcommittee Proposals for Public Comment: A Meaningful Step Towards Addressing Preservation, Discovery and Costs (Apr. 1, 2013) *available at* http://wlflegalpulse.files.wordpress.com/2013/08/lcj-comment-a-meaningful-step-040113.pdf.

[76] Arguments that the Searle study is somehow more empirically sound than the other studies are without basis. The Searle study is extremely biased as it only takes into account the view of corporate interests when considering the cost of litigation, which will always subjectively find the cost of litigation to be too high regardless of actual costs or trends.

[77] ABA Study, *supra* note 52, at 2. The study also found that more than 38% of respondents believe that one set of rules cannot accommodate every case. *Id*.

about 52% think that they do not.[78] The results of the ABA study varied widely and either side can find data in the study to support their position, but the fact remains that the study was far from conclusive and certainly does not, as a whole, support overhauling the entire discovery process. Another study by the National Employment Lawyers Association, an organization comprised almost entirely of plaintiff's counsel, found that most respondents believed that the discovery process is too costly, but also that discovery is abused, largely by defendants, in almost every case.[79]

Most notably, the only completely independent, nonpartisan study, which was conducted by the FJC, found that the empirical evidence does not support the theory that litigation costs are out of control, [80] found empirical support for the solutions put forth by Rule critics lacking,[81] and did not find any indication for change.[82] Specifically, the study found that empirical research has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation and recommended that "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 . . . and additional, *credible* research on the relationship between pretrial discovery and litigation costs (emphasis added)."[83]

X. Conclusion

While AAJ fully supports efforts to streamline the discovery process and make it less burdensome for all parties, the proposed changes to the Rules unduly burden only plaintiffs, who have the burden of proof, and reward defendants who deliberately engage in a range of bad behavior, including evading service, obfuscating requests for admission and interrogatories, and burying critical facts. There are less draconian ways to encourage better discovery procedures and judicial management of discovery. As Professor Miller stated, "if assumptions about litigation costs, judicial management, and abusive use of the system are driving pretrial process changes, the policymakers must strive to understand these matters fully and appraise what is real

[78] This result is particularly notable given that a greater number of defense attorneys responded to the ABA study. *Id*.

[79] Rebecca M. Hamburg & Matthew C. Koski, National Employment Lawyers Association, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009*, at 6 (Mar. 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf. One example of the way in which discovery is abused noted that defendants resists discovery and rely on plaintiffs counsel to compel them to meet their basic discovery obligations. *Id*. at 11 n. 30.

[80] Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. at 776 ("Moreover, the limited empirical evidence that exists does not support the broad statement that litigation costs, in general, are out of control").

[81] *Id*.

[82] *Id*. at 787. ("The FJC study found that discovery and overall litigation costs were largely proportionate to stakes, and that the stakes in a given case were the best predictor of overall costs.")

[83] Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. at 787 (emphasis added).

and what is illusion before the procedure is altered any further."[84] Rather than adopt a one-size-fits-all approach through the Federal Rules, the Judicial Conference could increase judicial education or create narrowly tailored new Rules that only apply to cases between large corporate parties in high-stakes litigation, as those are the cases that have exobitant discovery costs.

The Committee has made clear its intention to limit discovery by "adjust[ing] expectations concerning the appropriate amount of civil discovery."[85] AAJ understands that it is not the Committee's intention to do so in a way that harms only plaintiffs. Unfortunately, that is exactly what these proposed Rule changes will accomplish. Large corporate defendants have set up a straw man of small plaintiffs creating "disproportionate" discovery costs for defendants. However, a close analysis of the problems with discovery demonstrates that defendants deliberately drive up the costs of discovery by fighting discovery, hiding relevant documents, and coming up with excuses to avoid producing discovery that will allow the other side to meet its burden of proof. Defendants already have incentives to duck their discovery responsibilities; these proposed Rules will make it even easier for defendants to evade discovery and make it easier for them to avoid accountability.

While each change will be harmful to the ability of plaintiffs to bring a case, the cumulative effect of all these changes will be devastating. Judges already have discretion to determine on a case-by-case basis what discovery limits are necessary. Lowering those limits will only burden the court by creating an influx of new collateral litigation so plaintiffs can obtain the basic discovery to which they are currently entitled under the Rules. Ultimately only the parties who need discovery to prove their cases will be harmed. The corporate echo chamber supporting these proposed Rules makes it abundantly clear who these Rules benefit and it is certainly not everyday Americans who are injured by corporate malfeasance.

Taken as a whole, these changes to the Rules will impede access to justice and deny the just, speedy, and inexpensive determination of civil actions in our courts. These proposals are a solution to a problem that does not exist. There is no legitimate empirical data that supports such drastic changes to the Rules, and the only neutral empirical research conducted by the FJC makes clear that these proposed changes are entirely unnecessary and that the cases where discovery is extremely costly are few and far between. Smaller cases should not be limited by large discovery costs in large cases. The proposed changes would not even impact the more costly lawsuits between large corporations because those parties will both agree to extensions to the presumptive limits on discovery. Only where a plaintiff needs discovery from a larger defendant will these limitations will be implemented. Defendants in those instances have every motivation to hide the ball and use the proposed limited discovery rules to ensure that plaintiffs are not able to receive the information they need to bring and support their case.

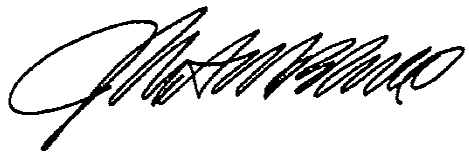
For all these reasons, while AAJ has noted proposed changes that fairly improve the rules, AAJ strongly urges you to reject the Rules as currently proposed that add proportionality

[84] Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. Rev. 1, 54 (2010).

[85] Proposed Rules, *supra* note 2, at 268.

to the scope of discovery, impose reduced presumptive limits on discovery and time of service, and make sanctions less likely in instances of spoliation.

Sincerely yours,



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