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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. David G. Campbell
Advisory Committee on Civil Rules

RE: Report of Advisory Committee on Civil Rules

DATE: May 2, 2014

Introduction

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2013.

Part IA of this Report presents for action a proposal recommending adoption of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. For the most part, these recommendations are little changed from the proposals that were published for comment last summer. The most obvious changes are encompassed by a recommendation to withdraw amendments that would tighten presumptive numerical limits on some forms of discovery. The remaining amendments form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending adoption of a revised Rule 37(e). Publication was approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to the June 2013 meeting. A substantially revised version was approved for publication at the June meeting. The invitation for comments included five specific questions on points highlighted in the Standing Committee discussion. Many concerns were raised in extensive testimony and voluminous comments that addressed these five questions and many other matters as well. The rule text has been revised extensively in response to the testimony and comments, and was further revised in light of comments on the draft that appeared in the agenda materials for the April Civil Rules Committee meeting. The core of the published rule, however, remains.

Part IC presents for action a recommendation to approve for adoption a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part ID presents for action a recommendation to approve adoption of an amendment that clarifies an ambiguity inadvertently introduced to Rule 6(d) in 2005. It may be appropriate to defer submission to the Judicial Conference pending action on other proposals to amend Rule 6(d) that have not yet been published for comment.

Part IE presents for action a recommendation to approve adoption of an amendment that clarifies a longstanding ambiguity in Rule 55(c).

Part IIA presents the recommendation to publish an amendment that deletes the provision in Rule 6(d) that allows 3 added days to respond after service by electronic means. The recommendation was approved last January. It is presented here to complete the package of parallel amendments proposed for publication by the Appellate, Bankruptcy, and Criminal Rules Committees.

Part IIB presents for action a recommendation to approve publication of an amendment of Rule 4(m) to make it clear that service on a foreign corporation outside any judicial district of the United States is exempt from Rule 4(m) time limits.

Part IIC presents for action a recommendation to approve for publication a revised rule text that seeks to better accomplish the purpose of a Rule 82 amendment that was approved for publication, subject to further consideration of the rule text, at the January, 2014 Standing Committee meeting.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. DUKE RULES PACKAGE

The Standing Committee approved the August, 2013 publication of a package of proposed amendments developed by the Duke Conference Subcommittee. Amendments were proposed for Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The proposals, along with other proposals published at the same time, were explored at three maximum-capacity hearings in November (Washington, D.C.), January (Phoenix, Arizona), and February (Dallas, Texas). They were also addressed in more than 2,000 written comments submitted to the Committee. A summary of the comments and testimony is attached.

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

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

Rule amendments were the third component of the response to the Duke Conference. There was widespread agreement that the present rule structure is basically sound, that the time has not come to consider fundamental revision of the familiar structure. But there is room to pursue careful changes that will advance the goals of cooperation, proportionality, and active judicial case

management. The proposed amendments were published as a package of integrated measures that would work toward those goals. The parts that are carried forward toward adoption remain an integrated package aimed at the same goals. The parts that are omitted were designed to contribute to these ends, but the remaining package will function well without them.

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

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

(1) Discovery Proposals

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

(a) Rule 26(b)(1): Four Elements

The Rule 26(b)(1) proposal includes four major elements. The cost-benefit factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery, identifying elements to be considered in determining whether requested discovery is proportional to the needs of the case. The examples recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated as no longer necessary. The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is also eliminated. And the provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten. Each element deserves separate consideration.

(i) Scope of Discovery: Proportionality

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

This proposed change provoked a stark division in the comments. Those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed only to favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy any uniform application among different courts. They asserted that “proportionality” will become a new automatic and blanket objection to all discovery requests, or would encourage reluctant parties to withhold relevant and responsive information by making unspoken and self-serving determinations of nonproportionality, leading to increased motion practice with attendant costs and delays. And they were particularly concerned that proportionality would routinely defeat the rather extensive discovery ordinarily needed to prove many claims that involve modest amounts of money but principles important not only to the plaintiffs but also to the public interest. These problems were particularly emphasized in noting categories of cases that typically involve “asymmetric information” — plaintiffs in many employment and civil rights actions have little relevant information, while defendants hold all the important information and reveal it only through extensive discovery. Many asserted that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Finally, some argued that the proportionality proposal is a solution in search of a problem — that discovery in civil litigation already is proportional to the needs of cases. These arguments were often coupled with the assertion that there is no empirical evidence to support concerns that disproportional discovery is sought in a worrisome number of cases.

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

1. Findings from Duke

A principal conclusion of the Duke conference was that discovery in civil litigation would

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

Some comments on the proportionality change suggest that the change is not needed — that discovery in civil litigation already is proportional to the needs of cases. Many of these comments rely on a closed-case survey prepared by the Federal Judicial Center for the Duke Conference at the Committee’s request. The Committee does not agree that the FJC survey or other surveys prepared for the conference suggest no need for change.

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the “right amount” of information, and more than half reported that the costs of discovery were the “right amount” in proportion to their client's stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients’ stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5 percent of plaintiff attorneys and 39.9 percent of defendant attorneys in cases that actually settled. On the question whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs, defendants, and both about equally, that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke conference showed even greater dissatisfaction with the costs and extent of civil discovery. In surveys of lawyers from the American College of Trial Lawyers (“ACTL”), the ABA Section of Litigation, and the National Employment Lawyers Association (“NELA”), more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. A report from the ACTL Task Force on Discovery and the Institute for the Advancement of the American Legal System (“IAALS”) reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today’s civil litigation system takes too long

and costs too much, resulting in some deserving cases not being brought and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: “Proportionality should be the most important principle applied to all discovery.”

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

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

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

The adoption of the proportionality factors in 1983 was followed by amendments in 1993 and 2000 that were designed to encourage courts to enforce them. Despite these efforts, the clear sense of the Duke conference was that a greater emphasis on proportionality is needed. The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging

parties and courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes. Four different advisory committees acting independently across many years have independently concluded that proportionality is an important dimension of discovery practice. If the expressions of concern in the testimony and comments reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.

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

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

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

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

(ii) Discovery of Discoverable Matters

Rule 26(b)(1) now illustrates discoverable matters as “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” These words do no harm; there is no indication that the absence of any reference to electronically stored information has supported untoward negative implications. But Rule 26 is more than twice as long as the next longest rules (Rules 71.1 and 45 vie for that dubious distinction), the point illustrated in this language is now widely understood by courts and attorneys, and removing excess language is a positive step. Some of the comments expressed doubt about the Committee’s assertion that discovery of these matters is so well entrenched that the language is no longer needed. They urged that the Committee Note should include this statement, so as to thwart any ill-founded attempts to draw negative inferences from the deletion. The Note has been revised to address this concern. And the Note also mentions discovery of information about a party’s information system as an example of permitted discovery that is not expressly covered by the deleted language.

(iii) Subject-Matter Discovery

Up to 2000, Rule 26(b)(1) provided for discovery of any nonprivileged matter “relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” Responding to repeated suggestions that discovery should be confined to the parties’ claims or defenses, the 2000 amendments narrowed the scope of discovery by preserving subject-matter discovery, but allowing discovery to extend beyond what was relevant to the pleaded claims or defenses only on court order for good cause. The 2000 Committee Note conceded that the dividing line that separates discovery relevant to the subject matter from discovery relevant to the pleaded claims or defenses “cannot be defined with precision.” The change was “designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.” The distinction between lawyer-managed discovery and court-managed discovery, however, has not had any noticeable effect in encouraging judges who remain reluctant to provide more active management of discovery to become more active.

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

defenses, the information can be used to support amended pleadings.

(iv) “Reasonably calculated to lead”

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

Original Rule 26 governed depositions. An amendment of Rule 26(b) adopted by the Supreme Court in 1946 that took effect in 1948 provided: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” The 1946 Committee Note explained that the purpose of the sentence was to prevent parties from refusing discovery of relevant information on admissibility grounds. In 2000, this provision was amended to limit it to “[r]elevant information.” The 2000 Committee Note expressed concern that this provision “might swallow any other limitation on the scope of discovery.” It explained that “relevant” as added to the sentence “means within the scope of discovery as defined in this subdivision [(b)(1)].” In other words, the sentence has never been intended to define the scope of discovery. It is merely a ban on admissibility-based refusals to provide relevant discovery. And yet lawyers and courts often rely on this provision as an independent definition of the scope of discovery that extends beyond information relevant to the parties’ claims or defenses, or even the subject matter of the action.

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

(b) Rule 26(b)(2)(C)(iii): Reflect (b)(1)

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

(c) Rule 26(c)(1): Allocation of Expenses

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

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

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

(d) Rule 34: Specific Objections, Production, Withholding

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

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

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

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

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

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

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

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

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

The Committee recommends that this proposal be approved for adoption.

(f) Numerical Limits: Rules 30, 31, 33, 36

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

These proposals garnered some support. They also encountered fierce resistance. The most basic ground of resistance was that the present limits in Rules 30, 31, and 33 work well. Many expressed the fear that presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims and defenses. The comments further suggested that there is no shown need or reason to change them, nor is there any experience that

would suggest that requests to admit are so frequently over-used as to require introduction of a first-time presumptive limit.

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

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

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

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

all judges to take a more active case management role.

(2) Early Case Management

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

(a) Rule 16

Four sets of changes are proposed for Rule 16.

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

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

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

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

(b) Rule 4(m): Time to Serve

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

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

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

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

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

(3) Cooperation

The published proposal amends Rule 1 to direct that the rules “be construed, ~~and~~

administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The Committee recommends approval of this proposal for adoption without change to either rule text or Committee Note.

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

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

Doubts also were expressed on more practical grounds. Many comments suggested that the proposed rule is attractive as an abstract proposition, but argued that it should be withdrawn because it will prompt the strategic use of “Rule 1 motions” for dilatory purposes.

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

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

DUKE RULES PACKAGE¹

1 **Rule 1. Scope and Purpose**

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

4 Committee Note

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

12 Gap Report

13 No changes were made in the rule text or Committee Note as published.

14 **Rule 4. Summons**

15 * * *

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

22 Committee Note

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

26 Shortening the presumptive time for service will increase the frequency of occasions to

¹ The rule texts use overlining and underlining to show changes from the present rule texts. The Committee Notes use underlining to show additions to the Notes as published.

27 extend the time for good cause. More time may be needed, for example, when a request to waive
28 service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis
29 action.

30 The final sentence is amended to make it clear that the reference to Rule 4 in
31 Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make
32 timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

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

35 Gap Report

36 The time to serve was set at 60 days in the published proposal. It has been changed to 90
37 days. Text was added to the Committee Note to address occasions to extend the time, and to call
38 attention to the relationship between Rule 4(m) and Rule 15(c)(1)(C).

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

40 **(b) Scheduling.**

41 (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district
42 judge — or a magistrate judge when authorized by local rule — must issue a
43 scheduling order:

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

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

47 (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in~~
48 ~~any event unless the judge finds good cause for delay, the judge must issue it~~ within
49 the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or
50 ~~90~~ 60 days after any defendant has appeared.

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

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

53 (iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically
54 stored information;

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

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

61 [present (v) and (vi) would be renumbered] * * *

62

Committee Note

63 The provision for consulting at a scheduling conference by “telephone, mail, or other means”
64 is deleted. A scheduling conference is more effective if the court and parties engage in direct
65 simultaneous communication. The conference may be held in person, by telephone, or by more
66 sophisticated electronic means.

67 The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after
68 any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This
69 change, together with the shortened time for making service under Rule 4(m), will reduce delay at
70 the beginning of litigation. At the same time, a new provision recognizes that the court may find
71 good cause to extend the time to issue the scheduling order. In some cases it may be that the parties
72 cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference
73 in the time allowed. Litigation involving complex issues, multiple parties, and large organizations,
74 public or private, may be more likely to need extra time to establish meaningful collaboration
75 between counsel and the people who can supply the information needed to participate in a useful
76 way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling
77 conference or order, an order extending the time for the scheduling conference will also extend the
78 time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first
79 scheduling conference in the time set by the rule.

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

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

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

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

94

Gap Report

95 No changes were made in the published rule text. Language was added to the Committee

96 Note to address examples of circumstances that may establish good cause to delay issuing the
97 scheduling order.

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

99 * * *

100 **(b) Discovery Scope and Limits.**

101 (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as
102 follows: Parties may obtain discovery regarding any nonprivileged matter that is
103 relevant to any party's claim or defense and proportional to the needs of the case,
104 considering the importance of the issues at stake in the action, the amount in
105 controversy, the parties' relative access to relevant information, the parties'
106 resources, the importance of the discovery in resolving the issues, and whether the
107 burden or expense of the proposed discovery outweighs its likely benefit.
108 Information within this scope of discovery need not be admissible in evidence to be
109 discoverable. —including the existence, description, nature, custody, condition, and
110 location of any documents or other tangible things and the identity and location of
111 persons who know of any discoverable matter. For good cause, the court may order
112 discovery of any matter relevant to the subject matter involved in the action.
113 Relevant information need not be admissible at the trial if the discovery appears
114 reasonably calculated to lead to the discovery of admissible evidence. All discovery
115 is subject to the limitations imposed by Rule 26(b)(2)(C).

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

117 * * *

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

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

126 * * *

127 **(c) Protective Orders.**

128 (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or
129 person from annoyance, embarrassment, oppression, or undue burden or expense,

130 including one or more of the following: * * *
131 (B) specifying terms, including time and place or the allocation of expenses, for the
132 disclosure or discovery; * * *

133 **(d) Timing and Sequence of Discovery.** * * *

134 (2) Early Rule 34 Requests.

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

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

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

139 (B) When Considered Served. The request is considered as to have been served at
140 the first Rule 26(f) conference.

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

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

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

145 * * *

146 **(f) Conference of the Parties; Planning for Discovery.** * * *

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

148 (C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically
149 stored information, including the form or forms in which it should be
150 produced;

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

155 Committee Note

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

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

163 Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim
164 or defense and is proportional to the needs of the case. The considerations that bear on

165 proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one
166 addition.

167 Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983
168 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1).
169 Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined
170 that “the discovery is unduly burdensome or expensive, taking into account the needs of the case,
171 the amount in controversy, limitations on the parties’ resources, and the importance of the issues at
172 stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing
173 a discovery request, response, or objection certified that the request, response, or objection was “not
174 unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already
175 had in the case, the amount in controversy, and the importance of the issues at stake in the
176 litigation.” The parties thus shared the responsibility to honor these limits on the scope of discovery.

177 The 1983 Committee Note stated that the new provisions were added “to deal with the
178 problem of over-discovery. The objective is to guard against redundant or disproportionate
179 discovery by giving the court authority to reduce the amount of discovery that may be directed to
180 matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage
181 judges to be more aggressive in identifying and discouraging discovery overuse. The grounds
182 mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in
183 issuing protective orders under Rule 26(c). * * * On the whole, however, district judges have been
184 reluctant to limit the use of the discovery devices.”

185 The clear focus of the 1983 provisions may have been softened, although inadvertently, by
186 the amendments made in 1993. The 1993 Committee Note explained: “[F]ormer paragraph (b)(1)
187 [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs
188 (3) and (4).” Subdividing the paragraphs, however, was done in a way that could be read to separate
189 the proportionality provisions as “limitations,” no longer an integral part of the (b)(1) scope
190 provisions. That appearance was immediately offset by the next statement in the Note: “Textual
191 changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of
192 discovery.”

193 The 1993 amendments added two factors to the considerations that bear on limiting
194 discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,”
195 and “the importance of the proposed discovery in resolving the issues.” Addressing these and other
196 limitations added by the 1993 discovery amendments, the Committee Note stated that “[t]he
197 revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose
198 additional restrictions on the scope and extent of discovery * * *.”

199 The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment
200 made in 2000 that added a new sentence at the end of (b)(1): “All discovery is subject to the
201 limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)].” The Committee Note

202 recognized that “[t]hese limitations apply to discovery that is otherwise within the scope of
203 subdivision (b)(1).” It explained that the Committee had been told repeatedly that courts were not
204 using these limitations as originally intended. “This otherwise redundant cross-reference has been
205 added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive
206 discovery.”

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

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

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

217 The parties may begin discovery without a full appreciation of the factors that bear on
218 proportionality. A party requesting discovery, for example, may have little information about the
219 burden or expense of responding. A party requested to provide discovery may have little
220 information about the importance of the discovery in resolving the issues as understood by the
221 requesting party. Many of these uncertainties should be addressed and reduced in the parties’ Rule
222 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties
223 continue to disagree, the discovery dispute could be brought before the court and the parties’
224 responsibilities would remain as they have been since 1983. A party claiming undue burden or
225 expense ordinarily has far better information — perhaps the only information — with respect to that
226 part of the determination. A party claiming that a request is important to resolve the issues should
227 be able to explain the ways in which the underlying information bears on the issues as that party
228 understands them. The court’s responsibility, using all the information provided by the parties, is
229 to consider these and all the other factors in reaching a case-specific determination of the appropriate
230 scope of discovery.

231 The direction to consider the parties’ relative access to relevant information adds new text
232 to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some
233 cases involve what often is called “information asymmetry.” One party — often an individual
234 plaintiff — may have very little discoverable information. The other party may have vast amounts
235 of information, including information that can be readily retrieved and information that is more
236 difficult to retrieve. In practice these circumstances often mean that the burden of responding to
237 discovery lies heavier on the party who has more information, and properly so.

238 Restoring proportionality as an express component of the scope of discovery warrants
239 repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983
240 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the
241 discovery process and thus acknowledges the reality that it cannot always operate on a self-
242 regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of
243 recent decades has greatly increased both the potential cost of wide-ranging discovery and the
244 potential for discovery to be used as an instrument for delay or oppression.” What seemed an
245 explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again
246 reflects the need for continuing and close judicial involvement in the cases that do not yield readily
247 to the ideal of effective party management. It is expected that discovery will be effectively managed
248 by the parties in many cases. But there will be important occasions for judicial management, both
249 when the parties are legitimately unable to resolve important differences and when the parties fall
250 short of effective, cooperative management on their own.

251 It also is important to repeat the caution that the monetary stakes are only one factor, to be
252 balanced against other factors. The 1983 Committee Note recognized “the significance of the
253 substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule
254 recognizes that many cases in public policy spheres, such as employment practices, free speech, and
255 other matters, may have importance far beyond the monetary amount involved.” Many other
256 substantive areas also may involve litigation that seeks relatively small amounts of money, or no
257 money at all, but that seeks to vindicate vitally important personal or public values.

258 So too, consideration of the parties’ resources does not foreclose discovery requests
259 addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy
260 party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-
261 handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce
262 a party, whether financially weak or affluent.”

263 A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing
264 discovery of any matter relevant to any party’s claim or defense, the present rule adds: “including
265 the existence, description, nature, custody, condition, and location of any documents or other
266 tangible things and the identity and location of persons who know of any discoverable matter.”
267 Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter
268 the long text of Rule 26 with these examples. The discovery identified in these examples should still
269 be permitted under the revised rule when relevant and proportional to the needs of the case. Framing
270 intelligent requests for electronically stored information, for example, may require detailed
271 information about another party’s information systems and other information resources.

272 The amendment deletes the former provision authorizing the court, for good cause, to order
273 discovery of any matter relevant to the subject matter involved in the action. The Committee has
274 been informed that this language is rarely invoked. Proportional discovery relevant to any party’s
275 claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

276 The distinction between matter relevant to a claim or defense and matter relevant to the subject
277 matter was introduced in 2000. Until then, the scope of discovery reached matter “relevant to the
278 subject matter involved in the pending action.” Rule 26(b)(1) was amended in 2000 to limit the
279 initial scope of discovery to matter “relevant to the claim or defense of any party.” Discovery could
280 extend to “any matter relevant to the subject matter involved in the action” only by court order based
281 on good cause. The Committee Note observed that the amendment was “designed to involve the
282 court more actively in regulating the breadth of sweeping or contentious discovery.” But even with
283 court supervision, discovery should be limited to matter relevant to the parties’ claims or defenses,
284 recognizing that the parties may amend their claims and defenses in the course of the litigation. The
285 uncertainty generated by the broad reference to subject matter is reflected in the 2000 Note’s later
286 recognition that “[t]he dividing line between information relevant to the claims and defenses and that
287 relevant only to the subject matter of the action cannot be defined with precision.” Because the
288 present amendment limits discovery to matter relevant to any party’s claim or defense, it is
289 important to focus more carefully on that concept. The 2000 Note offered three examples of
290 information that, suitably focused, would be relevant to the parties’ claims or defenses. The
291 examples were “other incidents of the same type, or involving the same product”; “information
292 about organizational arrangements or filing systems”; and “information that could be used to
293 impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is
294 relevant to the parties’ claims or defenses may also support amendment of the pleadings to add a
295 new claim or defense that affects the scope of discovery.

296 The former provision for discovery of relevant but inadmissible information that appears
297 “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. ~~Hearsay~~
298 ~~is a common illustration. The qualifying phrase — “if the discovery appears reasonably calculated~~
299 ~~to lead to the discovery of admissible evidence” — is omitted. Discovery of inadmissible~~
300 ~~information is limited to matter that is otherwise within the scope of discovery, namely that which~~
301 ~~is relevant to a party’s claim or defense and proportional to the needs of the case. The discovery of~~
302 ~~inadmissible evidence should not extend beyond the permissible scope of discovery simply because~~
303 ~~it is “reasonably calculated” to lead to the discovery of admissible evidence. The phrase has been~~
304 ~~used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000~~
305 ~~amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery~~
306 ~~“might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to~~
307 ~~prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear~~
308 ~~that “‘relevant’ means within the scope of discovery as defined in this subdivision * * *.” The~~
309 ~~“reasonably calculated” phrase has continued to create problems, however, and is removed by these~~
310 ~~amendments. It is replaced by the direct statement that “Information within this scope of discovery~~
311 ~~need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not~~
312 ~~admissible in evidence remains available so long as it is otherwise within the scope of discovery.~~

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

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

322 Rule 26(d)(1)(B)-(2) is added ~~is amended~~ to allow a party to deliver Rule 34 requests to
323 another party more than 21 days after that party has been served even though the parties have not
324 yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has
325 been served, and by that party to any plaintiff and any other party that has been served. Delivery
326 does not count as service; the requests are considered to be served at the first Rule 26(f) conference.
327 Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery
328 moratorium is designed to facilitate focused discussion during the Rule 26(f) conference.
329 Discussion at the conference may produce changes in the requests. The opportunity for advance
330 scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether
331 to allow additional time to respond.

332 Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-
333 specific sequences of discovery.

334 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery
335 plan — issues about preserving electronically stored information and court orders under Evidence
336 Rule 502.

337 Gap Report

338 The published text of Rule 26(b)(1) is revised to place “the importance of the issues at stake”
339 first in the list of factors to be considered in measuring proportionality, and to add a new factor, “the
340 parties’ relative access to relevant information.” The proposal to amend Rule 26(b)(2)(A) to adjust
341 for the proposal to add a presumptive numerical limit on Rule 36 requests to admit is omitted to
342 reflect withdrawal of the Rule 36 proposal. The result restores the authority to limit the number of
343 Rule 36 requests by local rule. The proposal to amend Rule 26(b)(2)(C) to adjust for elimination
344 of the local-rule authority is withdrawn to reflect restoration of that authority. Style changes were
345 made in Rule 26(d)(1), deleting the only proposed change, and in 26(d)(2). The Committee Note
346 was expanded to emphasize the importance of observing proportionality by recounting the history
347 of repeated efforts to encourage it. Other new material in the Note responds to concerns expressed
348 in testimony and comments, particularly the concern that restoring proportionality to the scope of
349 discovery might somehow change the “burdens” imposed on a party requesting discovery when
350 faced with a proportionality objection.

351 **Rule 30. Depositions by Oral Examination**

352 **(a) When a Deposition May Be Taken. * * ***

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

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

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

360 Committee Note

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

363 Gap Report

364 The proposals to reduce the presumptive number of depositions from 10 to 5, and to shorten
365 the presumptive length of an oral deposition from one day of 7 hours to one day of 6 hours, were
366 withdrawn. The Committee Note was changed accordingly.

367 **Rule 31. Depositions by Written Questions**

368 **(a) When a Deposition May Be Taken. * * ***

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

371 Committee Note

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

374 Gap Report

375 The proposal to reduce the presumptive number of depositions from 10 to 5 was withdrawn.
376 The Committee Note was changed accordingly.

377 **Rule 33. Interrogatories to Parties**

378 **(a) In General.**

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

381 Committee Note

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

384 Gap Report

385 The proposal to reduce the presumptive number of interrogatories from 25 to 15 was
386 withdrawn. The Committee Note was changed accordingly.

387 **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things,**
388 **or Entering onto Land, for Inspection and Other Purposes * * ***

389 **(b) Procedure.** * * *

390 (2) *Responses and Objections.* * * *

391 (A) *Time to Respond.* The party to whom the request is directed must respond in
392 writing within 30 days after being served or — if the request was delivered
393 under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f)
394 conference. A shorter or longer time may be stipulated to under Rule 29 or
395 be ordered by the court.

396 (B) *Responding to Each Item.* For each item or category, the response must either
397 state that inspection and related activities will be permitted as requested or
398 state with specificity the grounds for objecting to the request with specificity,
399 including the reasons. The responding party may state that it will produce
400 copies of documents or of electronically stored information instead of
401 permitting inspection. The production must then be completed no later than
402 the time for inspection stated in the request or a later another reasonable time
403 stated in the response.

404 (C) *Objections.* An objection must state whether any responsive materials are being
405 withheld on the basis of that objection. An objection to part of a request
406 must specify the part and permit inspection of the rest. * * *

407 Committee Note

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

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

413 Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with
414 specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less
415 specific objections might be suitable under Rule 34. The specificity of the objection ties to the new
416 provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive
417 materials are being withheld on the basis of that objection. An objection may state that a request
418 is overbroad, but if the objection recognizes that some part of the request is appropriate the objection
419 should state the scope that is not overbroad. Examples would be a statement that the responding
420 party will limit the search to documents or electronically stored information created within a given
421 period of time prior to the events in suit, or to specified sources. When there is such an objection,
422 the statement of what has been withheld can properly identify as matters "withheld" anything
423 beyond the scope of the search specified in the objection.

424 Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of
425 documents or electronically stored information rather than simply permitting inspection. The
426 response to the request must state that copies will be produced. The production must be completed
427 either by the time for inspection stated in the request or by a ~~later~~ another reasonable time
428 specifically identified in the response. When it is necessary to make the production in stages the
429 response should specify the beginning and end dates of the production.

430 Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state
431 whether anything is being withheld on the basis of the objection. This amendment should end the
432 confusion that frequently arises when a producing party states several objections and still produces
433 information, leaving the requesting party uncertain whether any relevant and responsive information
434 has been withheld on the basis of the objections. The producing party does not need to provide a
435 detailed description or log of all documents withheld, but does need to alert other parties to the fact
436 that documents have been withheld and thereby facilitate an informed discussion of the objection.
437 An objection that states the limits that have controlled the search for responsive and relevant
438 materials qualifies as a statement that the materials have been "withheld."

439 Gap Report

440 Style changes were made in the published text of Rule 34(b)(2)(B). The Committee Note
441 was expanded to emphasize the interplay between a specific objection that defines the scope of the
442 search made for responsive information and the requirement to state whether any responsive
443 materials are being withheld.

444 **Rule 36. Requests for Admission**

445 Gap Report

446 The published proposal to add a presumptive limit of 25 requests to admit, not counting
447 requests to admit the genuineness of described documents, was withdrawn.

448 **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

449 **(a) Motion for an Order Compelling Disclosure or Discovery. * * ***

450 (3) *Specific Motions. * * **

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

454 (iv) a party fails to produce documents or fails to respond that inspection
455 will be permitted — or fails to permit inspection — as requested
456 under Rule 34.

457 Committee Note

458 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of
459 documents or electronically stored information rather than simply permitting inspection. This change
460 brings item (iv) into line with paragraph (B), which provides a motion for an order compelling
461 “production, or inspection.”

RULES TEXT

1 **Rule 1. Scope and Purpose**

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

4 **Rule 4. Summons**

5 * * *

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

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

13 * * *

14 **(b) Scheduling.**

15 (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district
16 judge — or a magistrate judge when authorized by local rule — must issue a
17 scheduling order:

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

19 (B) after consulting with the parties' attorneys and any unrepresented parties at a
20 scheduling conference.

21 (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but
22 unless the judge finds good cause for delay, the judge must issue it within the earlier
23 of 90 days after any defendant has been served with the complaint or 60 days after
24 any defendant has appeared.

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

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

27 (iii) provide for disclosure, discovery, or preservation of electronically stored
28 information;

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

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

35 [present (v) and (vi) would be renumbered] * * *

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

37 * * *

38 **(b) Discovery Scope and Limits.**

39 (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as
40 follows: Parties may obtain discovery regarding any nonprivileged matter that is
41 relevant to any party's claim or defense and proportional to the needs of the case,
42 considering the importance of the issues at stake in the action, the amount in
43 controversy, the parties' relative access to relevant information, the parties'
44 resources, the importance of the discovery in resolving the issues, and whether the
45 burden or expense of the proposed discovery outweighs its likely benefit.
46 Information within this scope of discovery need not be admissible in evidence to be
47 discoverable.

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

49 * * *

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

53 (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

54 * * *

55 **(c) Protective Orders.**

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

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

61 **(d) Timing and Sequence of Discovery.** * * *

62 (2) *Early Rule 34 Requests.*

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

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

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

67 (B) *When Considered Served.* The request is considered to have been served at the
68 first Rule 26(f) conference.

- 69 (3) *Sequence*. Unless the parties stipulate or the court orders otherwise for the parties' and
70 witnesses' convenience and in the interests of justice:
71 (A) methods of discovery may be used in any sequence; and
72 (B) discovery by one party does not require any other party to delay its discovery.

73 * * *

74 **(f) Conference of the Parties; Planning for Discovery.** * * *

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

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

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

82 **Rule 30. Depositions by Oral Examination**

83 **(a) When a Deposition May Be Taken.** * * *

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

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

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

91 **Rule 31. Depositions by Written Questions**

92 **(a) When a Deposition May Be Taken.** * * *

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

95 **Rule 33. Interrogatories to Parties**

96 **(a) In General.**

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

99 **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or**
100 **Entering onto Land, for Inspection and Other Purposes * * ***

101 **(b) Procedure. * * ***

102 (2) *Responses and Objections. * * **

103 (A) *Time to Respond.* The party to whom the request is directed must respond in
104 writing within 30 days after being served or — if the request was delivered
105 under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f)
106 conference. A shorter or longer time may be stipulated to under Rule 29 or
107 be ordered by the court.

108 (B) *Responding to Each Item.* For each item or category, the response must either
109 state that inspection and related activities will be permitted as requested or
110 state with specificity the grounds for objecting to the request, including the
111 reasons. The responding party may state that it will produce copies of
112 documents or of electronically stored information instead of permitting
113 inspection. The production must then be completed no later than the time for
114 inspection stated in the request or another reasonable time stated in the
115 response.

116 (C) *Objections.* An objection must state whether any responsive materials are being
117 withheld on the basis of that objection. An objection to part of a request must
118 specify the part and permit inspection of the rest. . * * *

119 **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

120 **(a) Motion for an Order Compelling Disclosure or Discovery. * * ***

121 (3) *Specific Motions. * * **

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

125 (iv) a party fails to produce documents or fails to respond that inspection
126 will be permitted — or fails to permit inspection — as requested
127 under Rule 34.

SUMMARY OF TESTIMONY & COMMENTS, AUGUST 2013 PUBLICATION

Three sets of summaries capture the core of the public testimony and written comments on the package of proposals published for comment in August, 2013. One set is devoted exclusively to Rule 37(e). Two sets cover the remaining proposals. One summary, much more compact, describes the pre-publication comments. It is set out separately. The second summarizes in some detail the testimony at the three hearings and the post-publication comments through number 486. Comments after number 486 are treated differently. Some are described in some detail, whether because they provide new thoughts, or because they reflect the considered views of organizations that attempt to explore and resolve competing interests, or because they come from official sources, or because they are elegant expressions of points made in many other comments. Comments between number 487 and 600 that are not covered by more extensive notes are counted at the end as if votes on the points they address. This format was adopted to illustrate the waste that would be involved in counting every comment in this way. Comments after number 600 that add nothing of new substance to the discussion are not listed separately.

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

The comments include many suggestions for adding to the Committee Notes. Many of the suggestions are attractive. Failure to add many of them to the Notes does not reflect on their merit. It seems better to have the merits of these ideas tested in actual cases that will provide specific context and more thorough development.

— Edward H. Cooper

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GENERAL COMMENTS

[This category was added late in the venture to reflect some very brief comments in the early set, up to number 486. A few of the later comments offered general observations on the nature of the rulemaking process that merit a quick note.]

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

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

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

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

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

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

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

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

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

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

1221, Kris Aleksoy: "The seventy emails I have received from my colleagues tell me that this is the most important issue that has graced my email this year."

1379, James R. Maxeiner: Comprehensive reform is needed. "The Duke Rules Package does not go there." So for Rule 4, courts should serve complaints, and should in every case review them before making service. Proportionality in discovery should not be left to the parties; judges should control discovery, which should take place in court and require the judge to evaluate the testimony and veracity of the witnesses. Comprehensive reform would include a general loser-pays rule. Cooperation should be made mandatory — including cooperation in disclosing all the facts available to a party.

1870, David Stevens: Delayed rulings on motions to dismiss are a real problem; parties "blow through" discovery deadlines because no one wants to waste money on useless discovery until the motion to dismiss is decided.

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: Agrees that federal civil procedure should be adopted through the Enabling Act process. On December 10, 2013, the IPO adopted this resolution:

RESOLVED, IPO opposes Congress dictating the outcome of deliberations of the Judicial Conference of the United States, or bypassing the Judicial Conference and its rulemaking entirely, relative to the rules of civil procedure such as (a) the scope and sequencing of discovery in patent cases including claim construction, (b) the setting of pleading standards for patent infringement, and (c) the initial disclosure and joinder of interested parties.

Pointing to local rules in some districts for patent cases, a second resolution urges that the Judicial Conference "develop and adopt rules to address issues of case management and discovery in patent cases in a timely manner."

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

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

RULE 1

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

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

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

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

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

331, Robert DiCello: "The proposals are not likely to encourage collegiality among lawyers — something much desired and needed today." (From the context, this appears to be directed to the discovery proposals, not Rule 1.)

333, Racine Miller: Similar to 331 above.

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

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

system."

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

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

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

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

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

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

November Hearing, Paul D. Carrington: p 60, 68 The Rule 1 proposal "kind of suggests that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side." "I would certainly not want to go very far down the road of burdening plaintiffs' lawyers with duties that diminish their ability to bring their cases * * *." The plaintiff's lawyer should not be made responsible for the outcome. Rule 1 is a good rule. "[B]ut trying to impose an independent duty on the part of a lawyer representing the plaintiffs to try to save costs and prevent this from being too vigorous a dispute is I think subject to the same kind of complaint" that was made to the original 1993 version of initial disclosure, which required an attorney to identify witnesses and documents harmful to the client.

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

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

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

399, Edward Miller: "Creating a duty to cooperate is a well-intentioned idea that is sure to lead

to unintended negative consequences, including abusive motions * * *. The meaning of 'cooperation' is vague, and the tension between cooperation and a lawyer's duties to the client are (sic) already complicated."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

922, Pamela Davis for Google Inc.: Welcomes the Rule 1 proposal. But cautions "that cooperation under Rule 1 should not be read to impose discovery obligations beyond good faith and reasonable diligence on the parties." Courts should "start with the presumption that lawyers are behaving ethically in discharging their duties, as evidenced by the certification requirement of Rule 26(g)."

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

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports the proposal. This is "an enforceable mandate. The enforcement * * * will, we hope, lead to a decrease in litigation costs for all parties. We further hope that [it] will provide guidance and a basis for courts to curtail abusive litigation tactics, * * * that we see all too often used by defendants in civil actions."

1457, Peter J. Oesterling for Nationwide Mut. Ins. Co.: Supports the proposal, believing that it

will promote cooperation. "[C]ooperation is often essential in focusing preservation and discovery on the true needs of a case."

1489, Ralph Artigliere: This comment speaks from experience as a litigator, Florida trial judge, and present teacher of electronic discovery. "[C]ooperation is always party neutral." It is not enough to view it as an aspirational principle. It belongs in the rules. Cooperation benefits the client. So long as it is not in the rules, parties and lawyers who seek the cooperative path are at a disadvantage when the opponent does not reciprocate; in turn, that creates a disincentive to cooperation. As a judge, I learned that holding lawyers to a higher standard of behavior caused everyone "to up their game." Professionalism was mandatory in my courtroom. Some lawyers behave unprofessionally with their opponent, then come to court "with a different face for the judge." "Send a message to federal judges [although there are many now who care passionately] that you support their efforts toward fair, unimpeded disclosure in discovery by giving them a rule that says cooperation is a requirement."

1883, Norman E. Siegel: Favors the proposal, and suggests more precise language that puts some of the burden on counsel.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports the proposal. "[T]he intent and result of the rule change are to make explicit what is implicit, that parties must cooperate." But "in our experience Rule 1 is rarely invoked. Thus, we do not believe that the changes to Rule 1 will have a major impact on the behavior of parties and their counsel."

2173, Ariana J. Tadler: "Cooperation" should be added to the rule text, with a statement of what is expected in the Committee Note. "Cooperation, when sincerely applied, is widely acknowledged to be the best, if not the only, way to guard against excessive discovery." It is no more amorphous than "speedy," or "inexpensive," or — particularly — "just." And "just" is the ultimate and most important goal. February Hearing, Ariana Tadler: p 325 Supports, but suggests that "cooperation" be added to the rule text. Cooperation "really, really works. It's a win, win." Judges know when the parties do not cooperate, and hold them accountable.

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

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

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

RULE 4

Time to Serve

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

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

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

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

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

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

279, Kyle McNew: "A lot of cases settle in between filing and service, but 60 days just isn't enough to get a case settled." So fewer cases will settle.

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

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

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

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

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

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

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

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

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

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

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

363, Dean Fuchs, at request of NELA-Georgia Board: Reducing the time to serve will create a perverse incentive for defendants to evade service. It can be difficult to personally serve some defendants. They often utilize P.O. boxes, drop boxes, or other contrivances to obfuscate their actual addresses or whereabouts. "I am often forced to unnecessarily incur the expense of engaging private process servers, and on occasion, more expensive private investigators to stake out and surveil the defendants * * *." Problems with timely service are more likely to arise from evasive defendants than lazy plaintiffs' counsel. There is one circumstance, however, in which

plaintiff's counsel properly delays service. The 90 days available to sue after the EEOC issues a right-to-sue letter are used up in obtaining the EEOC investigative file under FOIA, and most competent attorneys will want to review the file before undertaking a case. A plaintiff may be required to file pro se while seeking representation. After investigation, prospective counsel may advise the plaintiff the case is not worth pursuing and should be voluntarily dismissed. If the case is pursued, counsel will have an opportunity to amend the complaint before it is served. In these circumstances, delay in service will promote judicial economy. The present 120-day period enhances the ability of plaintiffs with viable claims to retain counsel.

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

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

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

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

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

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

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

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

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Plaintiffs have the incentive to serve defendants as soon as possible. In multidefendant cases it is often necessary to request more than 120 days to effect service on individuals and on agent partnerships in limited liability companies that are evading service. 448, Robert D. Curran, tracks 410.

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

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

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

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

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

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

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

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Plaintiffs' attorneys at the conference thought there is little need for change; pointed to the potential impairment of requests to waive service; and feared the effects when the "parties are trying to identify the defendant and the statute of limitations is close to expiring."

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

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

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

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

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

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

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

784, Michael Millen: Plaintiffs often approach me a few days before expiration of the limitations period. When I cannot take the case I help them draft a pro per complaint. Then they look for an attorney to take over the case after filing it in pro per. And they are afraid to attempt to make service themselves while looking, lest they make a mistake. "There is a world of difference between finding an attorney in 60 days versus finding an attorney in 120 days."

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

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

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

1105, David Ginsburg: "Insurance companies will often 'alert' their insureds of pending service which encourages defendants to evade service. The carriers refuse to accept alternate service and refuse to provide current defendant addresses without court orders."

1209, Christopher Heffelfinger: Provides a nice statement on several familiar arguments that 60 days are too few, including the difficulties of locating individual defendants — "is a stakeout

necessary" to show good cause for an extension when an individual has been absent from the place for attempted service twice, three times, four times?

1210, AAJ Admiralty Section: A reminder that service — arrest — in an in rem admiralty action must be delayed until the vessel is in port.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Moderately opposes. A 60-day period will interfere with requests to waive service. In addition, "obtaining service is sometimes a challenging and time-consuming process." Setting the period at 60 days will increase motion practice.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "The very nature of finding and serving an over-the-road truck driver is problematic."

1672, Michael T. Blotevogel: Cases do not move fast enough in federal courts to benefit from shortening the time for service. But it will increase expenses.

1175, Shawn Spencer: To keep costs down and to avoid service at a person's home or office, I often try service by certified mail. If that is unsuccessful, the Postal Service will not return the complaint to me until at least 21 days have passed. A 60-day period to serve would leave little time.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Requiring that service * * * take place within 60 days in most cases makes excellent sense."

1292, George Wailes: Suggests a problem that may be unique to California. When it is not easy to find the defendant, it may be necessary to move to publish summons under Rule 4(n)(2). The rules for publication in California require a court order based on a declaration of diligence, and then provide that service is complete only 28 days after first publication. If the Rule 4(m) period is shortened to 60 days, it will be necessary to file an ex parte application to shorten the time for a motion to publish the summons.

1388, Jonathan Marcus for CFTC: "[M]any defendants named in CFTC civil actions simply do not want to be found. This is especially true for defendants engaged in Ponzi and other schemes who also may attempt to run from criminal prosecution." Shortening the time also will interfere with requests to waive service.

1414, David Abrams: Reducing it to 60 days will discourage initial resort to informal and inexpensive means that may not work. But if it is shortened, the rule should provide an automatic extension if the defendant contests service.

1555, Anthony Tarricone: Spells out the reasons why service under the Hague Convention often takes 90 days, 120 days, or more. One snag is that service must be made by the "Central Authority" in the country where service is made, according to its own rules; the plaintiff has no control over this. Matters are worse in countries that are not signatories to the Convention. And notes that foreign defendants who are provided courtesy copies of service papers through contemporary means rarely waive the formalities of Hague Convention service, or whatever other rules apply, choosing "to delay advancement of the case in court by insisting on the formalities of service * * *."

1588, Leigh Ferrin for Public Law Center: Pro se plaintiffs encounter great difficulty in figuring

out whom to serve, and how. The difficulties are greater when suing a government agency. Some are able to invoke the Marshals Service, but the marshals are overworked and frequently fail to meet even the 120-day deadline.

1932, Brian R. Wilson: The change increases the risk that games will be played with arguments of insufficiency of service. In 2007 the Ohio Supreme Court ruled that a properly raised and preserved insufficiency-of-service defense is not waived by active participation in the litigation — and affirmed dismissal for insufficient service on a motion for directed verdict made after the conclusion of the plaintiff's case in chief.

2002, Hon. Candy Wagahoff Dale for Local Rules Advisory Committee, D. Idaho: In cases where there is good cause to take more than 60 days, there will be increased motion practice. Idaho allows 180 days; even now, the 120-day period in Rule 4(m) "has caused plaintiffs to endure precarious arguments regarding statute of limitations defenses."

2014, Jennifer Verkamp: In False Claims Act cases the complaint remains under seal, unserved, until the government decides whether to intervene in the litigation. The moment when the government decides not to intervene is the first moment when the relator is informed of the results of the government investigation. These cases are often complicated, and the relator must undertake a close analysis and perhaps do further investigation or consultation with new counsel before deciding whether to proceed further. Careful deliberation will be impeded by reducing the time to serve.

2209, Richard Talbot Seymour: "Sometimes, a delay in service is occasioned by nothing more sinister than waiting for a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission, so that all claims can be made in the same case."

2334, Robert A. Hyde for City of Phoenix: Supports shortening the time to serve. The City "continues to encounter plaintiffs seeming to 'park' cases for nearly four months after filing, only then to rush to accomplish service on the 120th day (or after). The proposed amendment * * * will foster diligence at the earliest stages of a lawsuit * * *."

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

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

much time to decide motions for summary judgment.

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

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

Exclude Condemnation Notice

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

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

2072, Federal Courts Committee, New York County Lawyers' Assn.: Notes this aspect in approving the 4(m) revision.

RULE 16: TIME FOR SCHEDULING ORDER

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

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

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

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

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

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

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

conferences and manuals might help.

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

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

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

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

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

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

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

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

the proposed change.

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

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

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference, plaintiff and defense attorneys alike, "agreed that lawyers and parties are more cooperative when the judges are involved from the beginning of a case." Some thought the proposed case-management proposals should be adopted now, deferring the "proportionality" amendment of Rule 26(b)(1) to see whether more active management under present rules will do the job.

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

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

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

1119, Rebecca Love Kourlis for IAALS: The first attachment is the National Center for State Courts evaluation of the New Hampshire pilot project for Proportional Discovery/Automatic Disclosure Rules. The rules, for the first time, require fact pleading and an answer; a meeting of the parties after the answer is filed — the goal is to have the parties file a stipulation that becomes the case scheduling order, but if they fail the court holds a scheduling conference, which may be by telephone; automatic disclosure of some information; limits to 25 interrogatories and 20 hours of deposition time; and a separate meeting to discuss preservation of ESI. Contrary to expectations, the new rules did not reduce the time to disposition during the 2-year study period. The rate of filing answers went from 15% when they were not required to 56% under the regime that required them; there was a statistically significant reduction in the rate of default judgments. The rate of holding court scheduling conferences fell dramatically. "Contrary to expectations, there was not a statistically significant change in the proportion of cases in which a discovery dispute was litigated."

The second attachment is the Final Report on a survey answered by 44 attorneys (25% of the target population) who participated in the Suffolk Superior Court Business Litigation Session Pilot Project. The Project principles were to limit discovery to the magnitude of the claims actually at issue; to stage discovery; to require all parties to produce all reasonably available, nonprotected documents that may be used to support claims, counterclaims, or defenses; and requiring parties to confer early and often on discovery and make periodic reports on the conferences to the court. Participation in the pilot was voluntary; very few of those who

responded to the survey opted out. Answering 10 questions, 80% thought the pilot procedures were better or much better than regular Business Litigation Section practice; a still higher number thought the pilot procedures better or much better than regular Superior Court procedures. The materials are sparse, but it appears that enthusiasm for the pilot practices arose from more intense judicial management and from more efficient discovery.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Advancing the deadline for issuance of the initial scheduling order is also worthwhile in order to promote progress earlier in the litigation." And it is hoped that "more judges will see the wisdom in personally conducting those conferences."

1481, George Dent: Accelerating the scheduling conference puts undue pressure on the Rule 26(f) conference and initial disclosures.

1536, Lisa Tate for American Council of Life Insurers: Opposes. "It is extremely difficult, and unrealistic, for a corporate defendant to investigate, hire counsel, and formulate a litigation strategy within the first sixty-to-ninety days after being served."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports the Rule 16 proposals for early and active court involvement.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1746, David Holub: Opposes. "Impromptu conferences lead to ambushes rather than thoughtful briefing and citation to authority."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Shortening the time "does not create an undue burden on the parties, specifically defendants," and "is not extremely onerous" since additional time can be allowed.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports.

2209, Richard Talbot Seymour: The proposal does not, but should, change the current rule that measures time from the date of service on any defendant. A later-served defendant should not be burdened with the results of a conference it was unable to attend. The time should run from service on all defendants, or from "some number of defendants fewer than all." (2252, David J. Lender expresses a similar concern: the shorter time is unfair to later-served defendants, an unfairness that could be exacerbated by serving early Rule 34 requests on the first-served defendant, hoping to set the ground rules for document preservation and production before all defendants can be heard.)

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

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

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

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

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

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

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

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

RULE 16: ACTUAL CONFERENCE

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

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

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

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

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

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

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Endorses

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

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

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

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

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

2032, Carlo Sabatini: "I agree that an actual conference by direct communication with the court is valuable."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Face-to-face conferences are more conducive to resolving issues, but telephone conferences may be more efficient in some circumstances. The revision is wise.

RULE 16: PRESERVING ESI, RULE 502 AGREEMENTS

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

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

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

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

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

In Appendix C, an addition is suggested for the Committee Note that comments on providing for preservation of electronically stored information: "judicial intervention is appropriate only after the parties meet and confer in good faith about these issues." This suggestion seems tied to several other suggestions for revising Rule 16(a) and (b). Some of the suggestions are noted in "other" at the end of these summaries; others go to more general preservation and spoliation issues focused on Rule 37(e). 2260, Thomas N. Vanderford, Jr., and Meghan B. Hoffman, for Hyundai Motor America Supports the Sedona recommendation that "privacy" be added to the list of subjects to be addressed, noting a transnational dimension that is reflected in other comments as well: "Hyundai Motor Company is subject to strict privacy laws of Korea."

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

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

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

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

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

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

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes the proposal. "[T]he scheduling order is often a very premature occasion for" discussing preservation. This topic is too important to be approached hurriedly. And if it is included, the result may be to impede entry of a scheduling order.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Addressing preservation will enhance cooperation. "FRE 502 is an invaluable tool for lessening the time and expense associated with privilege reviews and waiver issues." The Committee "understand that a typical FRE 502(d) agreement would prevent the waiver of privilege and allow for the claw-back of privileged materials."

2150, Gayla Thal for Union Pacific Corp.: This is one of several comments endorsing the Sedona Conference recommendation that preservation should be added to Rule 16(a) as one of the purposes of a pretrial conference.

RULE 16: CONFERENCE BEFORE DISCOVERY MOTION

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

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

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

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

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

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

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

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

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

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

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

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

same.

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

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

854, Hon. James G. Carr: The pre-motion conference should be required. It has been required by local rule in the Northern District of Ohio since 1994, and it works. "I probably have no more than two or three formal motions to compel a year. During that time, I will have perhaps a couple dozen phone conferences following a request for assistance. Those conferences rarely last more than a half hour, are always on the record, invariably result in a prompt and binding decision, and move cases along far more quickly * * *."

864, Wendy Butler Curtis: Undertook a docket survey of eight district judges — four who require either a pre-motion conference or a short letter brief before making a discovery motion, and four who do not. The ratio of motions to cases was 5.59% for the judges who do not have such a requirement, and 1.37% for those who do. This practice should be required.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes. "In our experience, such conferences, without a written motion before the court and the parties, lend themselves to quick and less-informed decisions on matters that potentially can have a significant impact on the merits of the case and involves substantial expense."

1413, Jocelyn D. Larkin for Impact Fund and several others: Supports the proposal. "Most discovery disputes (even those in large cases) are not factually complicated and do not warrant extensive (and expensive) briefing on a 35-day motion calendar. Systemic reform cases often present threshold questions about the scope of discovery * * *. Attorneys for government agencies may have less flexibility to cooperate in discovery matters than their private counterparts, making early and active assistance from the court particularly critical."

1883, Norman E. Siegel: Several districts have this rule, including our local district, W.D.Mo. This "is the single most important mechanism to make discovery more efficient and curb discovery abuses." It will not add significant burdens on the courts.

2032, Carlo Sabatini: (1) Some judges in M.D.Pa. issue an order at the beginning of each case that implements this proposal. But "the procedure actually encourages parties to initially take unreasonable discovery positions." That is because if a motion is required, the risk of a fee sanction if an unreasonable party does not abandon unreasonable positions in the pre-motion conference of the parties leads to abandoning unreasonable positions. An informal hearing before a motion means that there is no risk — there is no provision for sanctions for taking unreasonable positions, and any position that remains to be pursued by a formal motion is substantially justified because the court did not force abandonment. (2) But if the proposal goes forward, the rule should require that the conference be on the record.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Many courts require pre-motion conferences. They often serve to resolve discovery disputes without motions.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This change appears likely to save time,

reduce costs, and generally aid in the efficient and speedy resolution of claims."

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

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

RULES 26 ET SEQ.: DISCOVERY GENERALLY

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

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

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

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

291, Fred Slough: As it is, in discrimination and consumer cases discovery limits have been closing the federal courts for the ordinary American. Plaintiffs need adequate discovery, but the limits imposed work all to the advantage of defendants who have all the information and need little from plaintiffs.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: "The uncertainty that these changes will inject into discovery will lead to mountainous collateral litigation * * *."

301, Hillary G. Rinehardt: "The proposed changes will negatively impact almost all plaintiffs, but in particular those plaintiffs involved in complex litigation where there are multiple defendants." Typically defendants control the majority of relevant information, and will have new tools to avoid providing it.

302, John K. Rinehardt: Verbatim the same as 301.

306, William C. Faber, Jr.: "The complex organizational structure of organizations demands more discovery than the changes provide." There is little help for senior citizens seriously injured by the neglect of a nursing home or a citizen wounded by international banks' financial fraud."

310, Johnathan J. Smith, for NAACP Legal Defense Fund: "[T]he proposed amendments * * * threaten to undermine the ability of civil rights plaintiffs to obtain relief through the federal courts." And the impact of limiting discovery (and limiting sanctions for failure to preserve discoverable information) should be assessed in the context of other recent developments that have made it more difficult to prevail on civil rights claims. Pleading standards have been raised. Class certification has become more difficult.

318, Brian Sanford: Further restrictions on discovery will mean that summary-judgment records are even more different from trial records. The restrictions will favor the defense and infringe on

the right to jury trial. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

322, Michelle D. Schwartz, for Alliance for Justice: Includes a long preface to more specific comments. The proposals will not only make it more difficult for plaintiffs to stand up for their rights in court. They also will make it more difficult "for the public to learn of corporate wrongdoing and threats to their health and safety." These effects must be considered in a broader context that is restricting access justice. (1) Courts are understaffed and overburdened. (2) Forced arbitration clauses divert disputes to private proceedings with no discovery and "conducted by an arbitrator of the company's choosing." (3) Access to class actions is being limited. (4) Pleading standards have been heightened. Compounding these problems by restricting discovery will make plaintiffs less willing to come forward, and will make attorneys less willing to take their cases. Private enforcement of public policy will be further limited.

324, Jonathan J. Margolis: Writes primarily for employment plaintiff litigation, but reflects on other types of cases as well. Cumulatively, the proposed changes will favor those who have more information — commonly defendants — and harm those who have less — commonly plaintiffs. Information imbalance is especially rife in civil rights litigation. "The progression that has led to the near-extinction of civil trials will only be exacerbated if less discovery is permitted * * *." The amendments, moreover, will encourage misuse of discovery by obstructionism. Efficiency will be impaired by more frequent motion practice — for example, there are few motions to take more than 10 depositions, but there will be many motions to take more than 5. There is little evidence of any need to impose these changes and costs.

325, Joseph M. Sellers: The proposed discovery changes will unsettle the law, "requiring parties more often to appeal to the courts to obtain discovery in excess of tightened presumptive limits, and providing more hooks on which to hang objections * * *." This comment includes a lengthy statement of the advantages of early, active, hands-on case management, but "agree[s] with the Committee's point that adoption of new, universal mandates regarding judicial case management is likely premature * * *." Much can be learned from pilot projects, such as the NELA protocol for employment cases and the S.D.N.Y. complex-case project. And individual judges, such as Judge Grimm, are helping to mark the way through discovery management orders.

329, Bryan Spoon: "The proposed changes benefit large corporations and add another barrier between a Plaintiff and the materials that could prove, or disprove his/her case." (It is not clear from context whether this addresses only proposed Rule 37(e), or other of the proposals more generally.)

331, Robert DiCello: (These brief comments seem to be addressed to various aspects of the discovery proposals, although only the numerical limits proposals are directly identified.) There is no problem of excessive discovery. The numerical limits are too low for many serious or complicated cases, and will disproportionately impact civil rights case. They are completely one-sided in favor of defendants, and do not do much of anything to penalize obstruction in discovery and unwarranted motion practice. They will not make litigation more accessible to everyday citizens.

332, Samuel Cohen: The proposals will not reduce costs; instead they will increase motion practice. They will disadvantage plaintiffs litigating against well-resourced defendants. The limits on depositions and document requests (?) should not be enacted.

335, Rebecca Heinegg: The proposals are one-sided. They hurt plaintiffs by limiting discovery,

"but do nothing to penalize obstruction in discovery and unwarranted motion practice."

336, William York: The proposals are one-sided. They will limit discovery, hurting plaintiffs' attorneys. They will increase contention and disagreements, leading to more contentious motion practice.

340, Joseph Treese: Seems to be aimed at the full package of proposals in suggesting careful consideration of the expanded case-management burden faced by the judiciary.

341, Karen Larson: "These limitations on discovery are strictly for the benefit of defendants," who hold all the evidence. Plaintiffs largely bear the cost of depositions anyway. Further discovery disputes will result.

342, Stephen C. Yeazell: "[A]vailable empirical evidence does not suggest a crisis in civil litigation of the scope that would merit the proposed changes. The FJC studies "do not portray a system in need of the[se] wide-ranging changes." They show only that occasional bad lawyers or less-than-diligent judges allow pretrial proceedings to impede justice. The studies contradict the proposals.

349, Valerie Shands: "As lawyers and judges, we suffer from perception bias." "[I]t may be that the length of time for discovery is entirely necessary and proper." Hard research is needed. We do not have it. The FJC analysis of surveys, including one by the American Bar Association Litigation Section and one by the American College of Trial Lawyers, shows remarkable inconsistencies of results. Further, "[t]he trial itself" requires roughly two times the amount of man hours as the discovery process."

Also suggests amending Rule 37 to increase the use of sanctions to teach many attorneys that they can no longer "get away with frivolous motions, irrelevant discovery requests, and unfounded blanket objections."

351, Eric Hemmendinger for Shawe Rosenthal LLP: Discovery is the major reason for the excessive cost of litigation. It often pressures employers into settling nonmeritorious cases.

354, Joseph Scafetta Jr.: Rather than allocate this one paragraph among the several topics it covers, the point is that the rules should be expanded to allow more discovery. Not 10, but 20 depositions; not 25, but 50 interrogatories; unlimited requests to admit. "[C]ost should never enter into the equation defining what is discoverable."

357, Joanne S. Faulkner: Adopt a rule that discovery objections are waived unless the objector initiates and conducts a good faith conference within two weeks of the objection." "[T]ypically I have to chase objecting counsel for weeks on end to get a 'good faith' discovery conference going."

361, Caryn Groedel: From the plaintiff's perspective in employment law, the proposals appear "overwhelmingly and undeniably aimed at chilling the number of lawsuits filed in the federal courts."

364, Sarah Tankersley: In medical malpractice cases, defendants have vastly superior knowledge and much more documentation. "Restricting the ability of parties to obtain relevant information is going to lead to unfair results."

366, Paul D. Carrington: There are occasional excesses, but the FJC data do not support the

claim that discovery is generally excessive. It has been made expensive by hourly billing, but the hourly fees in responding to requests to produce and sending teams of lawyers to depositions are declining, and technology will bring further reductions. "The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the rights of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses."

371, AJ Bosman: In civil rights cases, "[I]t is already next to impossible to obtain necessary discovery in an action, with Defense counsel taking full advantage of the current rules to hide evidence essential" to plaintiffs. "Judges routinely interpret the existing rules against Plaintiffs and in favor of Defendants * * *." "Raising the bar to obtain essential and necessary evidence is just going to leave Plaintiffs and their attorneys at the mercy of big companies and their big law firms — and the Judges with another excuse to favor the Defendants." Remember fee-shifting statutes reflect the role of private attorneys general. Please reconsider, or at least provide some protection for plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: AAJ disagrees with the claim that excessive discovery occurs in a worrisome number of cases, and creates serious problems. These concepts are not defined by the Committee. The FJC study demonstrates there is no pervasive problem with discovery. In complex, high-stakes cases the parties will agree to extend beyond the narrow restrictions set by the proposed rules. The impact will occur only in cases involving smaller plaintiffs against large defendants. And they will create an incentive to maintain information in forms that are costly to access, in order to claim the cost of production outweighs possible benefits.

Additional general observations at pp. 24-25 suggest that the proposals will force plaintiffs "to engage in these mini-trials to prove unknown facts in order to even discover the facts." With less fact discovery, parties will have to rely on more experts to prove their cases; defendants can cover the cost, but plaintiffs cannot.

So, p. 25: "It is worth noting that this Committee and even the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach."

pp. 27-31 examine the "empirical" studies relied on by defense interests to show a crisis in discovery and conclude that the studies are biased. Other studies show discovery is working well.

The conclusion, pp. 31-33, argues that close analysis shows that discovery problems lie not in disproportionate costs imposed by small plaintiffs on corporate defendants, but in defendants that "deliberately drive up the costs of discovery by fighting discovery, hiding relevant documents, and coming up with excuses to avoid producing discovery that will allow the other side to meet its burden of proof." Taken together, the proposed changes will have a devastating impact, and are a solution to a problem that does not exist.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Empirical evidence shows that the discovery system is working well. The presumptive limits would strip judges of the flexibility they now use to manage discovery as they find necessary. The proportionality standard will be impossible to apply.

The proposed changes "are extremely controversial and nearly universally opposed by the plaintiffs' bar." They are not ready for prime time.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): "[T]hese proposed rules appear to be the Committee's attempt to 'legislate' some form of tort reform."

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proposed changes should be considered in the context of other procedural hurdles — heightened pleading, obstacles to class certification, enforcement of arbitration clauses in consumer contracts, and those imposed by the Prison Litigation Reform Act.

383, Alan B. Morrison: "All of the changes move in one direction — less discovery — not just for the mega-cases, which are the only ones with reported problems, but for all cases. * * * [C]umulatively they will have a very negative impact on many plaintiffs." And they will narrow judges' discretion by putting a heavy thumb on the scale of less discovery. Balanced recommendations would include a softening of the impact of the Twombly and Iqbal pleading decisions. The Committee should step back and ask whether these changes, which reduce a plaintiff's chance of prevailing, achieve a fair balance. When it is prepared to recommend adoption, the Committee should seek another, very brief, period of comment on its style choices, not the substance, to ensure the rules are as clear as possible.

The discovery rules have become very detailed, perhaps because of the process of incremental changes. They can become a trap for those who do not regularly practice in federal court. It may be too much to ask the Committee to take a fresh look at making the rules simpler and better integrated, but the problem of increased complexity should be kept in mind in considering these proposals.

384, Larry E. Coben for The Attorneys Information Exchange Group: On the whole, the pretrial discovery system continues to work well. The rules are not broken and do not need fixing. More importantly, the proposed changes will make discovery more expensive, more time consuming, and less productive. Responding to the submission by the Ford Motor Company, offers examples, illustrated by lengthy attachments, of cases in which courts found inappropriate attempts to avoid discovery.

386, Arthur R. Miller: Decisions and rules amendments have erected a series of procedural stop signs that narrow citizen access to court. The effects both reduce individual remedies and curtail enforcement of important public policies. To a large extent defendants, by general motion practice and resistance to discovery, are to blame for high litigation costs. "Some restoration of the earlier philosophy of the Federal Rules seems necessary." These proposals turn away from the original vision of a relatively unfettered and self-executing discovery regime.

Changes designed to narrow discovery began in 1983. "In retrospect, the Committee's and my collective judgment was impressionistic, not empirical. * * * [T]ime has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26. Those doubts continue to be applicable to the comparable assertions one hears today." And the attack on discovery has continued in the 1993 amendments limiting the numbers of depositions and interrogatories and the 2000 amendment that required court permission to discover matters relevant to the subject matter of the litigation. The present proposals would magnify these limitations.

The problems of e-discovery are likely to resolve themselves as information retrieval science and technology prove to reduce costs, accelerate the process, and enhance the accuracy of retrieval through a combination of statistics, linguistics, and computer science.

"The Committee should focus more on how to make civil justice available to promote our public policies." "[O]ur civil justice system has lost some of its moorings." Much can be achieved through more extensive and sophisticated judicial management, and by promoting cooperation between and among counsel. It might even be wise to seek amendment of the Rules Enabling Act, as by removing the restriction to "general" rules so as to support rules that are specific to types of litigation by complexity, dimension, or substantive subject. January Hearing,

p. 36: Professor Miller repeated the same themes, adding that there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect. We should not be preoccupied with the cliched invocations of cost, abuse, and extortion. Abuse is in the eyes of the beholder. Extortion is the settlement you just agreed to.

472, Christopher Benoit: Supports the perspectives offered by Professor Miller. Many more invoke Professor Miller.

387, Morgan S. Templeton: (For want of a more obvious place to summarize:) "I want to let the Committee know that I support the proposed changes * * *."

392, Senators Christopher A. Coons, Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, and Al Franken: Specific mention is made of the reduced presumptive limits in Rules 30, 31, 33, and 36, but the general tenor is addressed to all of the discovery package, expressing the fear that the proposals are insufficient to address excessive discovery and susceptible to limiting access to justice. This is the full summary.

The Senate Judiciary Subcommittee on Bankruptcy and the Courts held a hearing on the discovery proposals on November 5, 2013. Four questions were explored.

(1) "We have no doubt that discovery abuses exist and contribute to excessive litigation costs when they occur." But there is a need for "a lot more empirical data." The Advisory Committee recognizes that in most cases discovery is reasonable and proportional to the needs of the case. Corporate structures and profits have grown; it should be expected that discovery costs will vary in proportion to the stakes of the litigation.

(2) It is doubtful whether the proposals will reduce excessive costs in the worrisome number of cases where discovery is said to be excessive. Attempts to curb perceived abuses are reflected in amendments made in 1980 (adding discovery to the pretrial conference); 1983 (adding proportionality); 1993 (adding presumptive numerical limits); 2000 (narrowing the scope); and 2006 (addressing ESI that is difficult to access). Additional "stop signs" have been erected in pleading, summary judgment, and class certification. All of these make litigation costs a persisting problem. Why would we expect proportionality, and tighter numerical limits, to work where other attempts have failed? "We fear that they would not."

(3) The proposals are likely to have significant collateral effects with "civil rights, consumer rights, antitrust, and other litigation where the government lacks sufficient civil and criminal enforcement resources to achieve optimal deterrence of socially injurious behavior." This is especially true in civil rights litigation, where social disapproval of discrimination means there often is no "smoking gun," forcing plaintiffs to rely on circumstantial evidence that is within the power of the defendant. Only one side is likely to benefit from the new limits in these cases. And the proposals will encourage defendants to increase motions practice before any facts are discovered, imposing especially burdensome burdens on clients with few resources.

(4) Rather than throw plaintiffs under the bus because of dramatic stories about million-dollar discovery cases, other means should be tried. Judicial training should be pursued. More judgeships should be created when needed, and qualified nominations promptly confirmed. Technology may offer solutions to the perceived cost of electronic discovery. And clients can monitor counsel to reduce the incentives created by hourly billing.

397, Patrick Barry: "The proposed amendments are wholly unwarranted and would further tilt the balance against those of limited means and limited power." Lawyers should be trusted to behave professionally, not strangled by new rules.

401, Urs Broderick Furrer: Many of the proposals will streamline litigation, reducing time and expense. The Committee should consider adopting the additional proposals made by Lawyers for Civil Justice.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Begins with a long list of reasons why plaintiffs need much discovery. These are noted with the proposed numerical limits. But includes the observation that defendants in product liability cases commonly disclose the hot documents, plans, prior test results, and prior similar incidents only at the end of discovery, and only after the materials are uncovered after multiple depositions, requests, hearings, and orders. Defendants, further, commonly demand confidentiality agreements as part of settlement, and non-sharing agreements and protective orders to prevent plaintiffs in other cases from easily obtaining the fruits of discovery in concluded cases.

412, Mark S. Stewart for Ballard Spahr LLP: "The high cost of electronic discovery distorts the litigation process." It "tilts toward an asymmetrical burden" because plaintiffs in mass tort or class-action securities cases, and patent assertion entities, generally do not bear the same discovery burdens as defendants. Plaintiffs' counsel "frequently focus on the discovery process itself as a means of obtaining strategic leverage."

424, Patricia Shaler: Supports the discovery proposals "for the reasons set forth by John Kyl, WSJ, Jan 21, 2014." And Rule 11 should be enforced more frequently. "Civil litigation has morphed from its intended purpose to an abusive, pugilistic battleground by lawyers and for lawyers."

426, James Moore: Writes as a non-attorney, inspired by John Kyl's column, noted with 424 above. Supports the proposed changes to Rule 26, having observed actions in which discovery is a fishing expedition, and in which frivolous actions are settled as a business decision to avoid the costs of discovery. Suggests consideration of the British system in which the plaintiff pays defense costs if the plaintiff loses.

428, Dave Stevens: Writes as owner of a small campground to support "any and all rule changes that might reduce the cost of discovery." Discovery and other costs seem to lead insurance companies to just settle. And insurers are no longer willing to cover many of the activities formerly provided at the campground, forcing the owners to withdraw those activities — no diving boards, no rope swing, no renting kayaks, no zip line.

429, Lori Overson: "I second the comments of James Moore [426 above] and Senator Kyl."

430, Attilio Di Marco: Strongly supports the revisions of the discovery rules "because they will decrease the high cost of litigation in federal courts."

431, Tom Ingram: Participated as an "expert witness" in a 9-year litigation. In the first week on the job he wrote a "request for disclosure" that produced the smoking gun. Four years of discovery followed, generating 200,000 pages of discovery that was not nearly as useful. Eventually they settled for \$3.5 million, but the CEO who chose to accept this sum repeatedly said they would have been better off to drop the suit and get back to business. Do anything you can to reduce the delay, cost, confusion, and opportunity for lawyer abuse arising from the discovery system.

432, Michael Croson: "I am in favor of the proposed changes to Rule 26."

437, Craig Rothburd: "The way to streamline litigation is not by placing limitations on information gathering, which harms all litigants and only benefits larger more powerful interests, but instead to provide more flexibility to the Courts in fashioning realistic and measured discovery plans." Many courts do that now.

438, Pat Smith: "These rule changes are common sense and should be enacted."

439, Kate Browne: "I have been a lawyer for almost 30 years and strongly believe the proposed rule changes would be very positive for all litigants."

440, Steve Mack: Writes not as a corporate lawyer but as a stockholder in many companies: "I support the proposed changes to discovery rules that will limit in scope the ability of parasitic plaintiffs/plaintiff attorneys to force defendant companies to spend inordinate sums of money" and to settle meritless claims to avoid discovery costs.

441, Cheryl Conway: The current rules of discovery damage nonprofits as well as for-profit enterprises. This very expensive legal process gives the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer.

442, Christopher Wright: The rules are not broken. Why fix them? The proposals "will only serve to deter meritorious cases, and give corporate defendants a tactical and evidentiary advantage over plaintiffs."

445, Gerald Acker, for Michigan Assn. for Justice: Endorses the comments submitted by AAJ. The proposals lack balance — they help defendants at the expense of plaintiffs, particularly in asymmetric information cases. There is no empirical demonstration of problems that need to be corrected; concerns about e-discovery should not sweep the board. The proposals have a cumulative impact. Less discovery means that more cases will be tried because the parties cannot accurately assess the risks of trial.

447, Charles Crueger: "I have never had a client even suggest that a case should settle because of the cost of discovery." Nor has an opposing party ever settled for this reason.

451, Brian McElwee: Favors the discovery proposals. "You only have to have one experience in a system that requires years to process and costs disproportionate to any possible outcome to know that the system needs to be improved."

452, David Hill: Many years as a chief financial officer of various companies showed the need to seriously curtail fishing expeditions in discovery.

466, Lisa O. Kaufman for Texas Civil Justice League: "[S]trongly supports changes to FRCP 26(b)(1) that limit the scope of discovery to clearly pleaded claims and defenses." Texas has adopted changes that accomplish many of the same goals. "Our members report to us that these changes have reduced discovery costs and promoted better cooperation between parties without in any way impairing full and fair discovery."

471, Robert Fisher: Supports the proposed changes. Discovery is often more about gamesmanship than a legitimate effort to find relevant information.

474, Adam Childers: As an employer representative in employment-related matters, fully supports the proposals as "long past due."

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The proposals will lead only to more law and motion practice. There is no empirical evidence to support them; the FJC study shows that discovery generally is working well, reflecting wise exercise of judicial

discretion. Tools to control discovery already exist. Perhaps the time has come to create two tracks for discovery — one for "complex" cases in which no limits apply, another for other cases in which the current limitations apply (perhaps with some modification).

481, J. Paul Allen: Supports. "Please narrow the scope of discovery to that which is necessary to the dispute."

482, Charles Cavas: Supports the proposals, which will restore rationality. "Tactical abuse of the existing rules has created a system where too often fair resolutions do not occur but rather are driven by extortionist discovery demands and resulting expenses."

484, Torgny Nilsson: Supports the discovery proposals, but notes "that no amendments to the Rules will solve discovery abuses in general until the federal courts start aggressively holding both counsel and their clients accountable through monetary and other sanctions for their failure to abide by their discovery obligations."

485, Peter Morse: Supports the Rule 26(b)(1) changes "and believe that even more practical considerations should be made."

486, Timothy Guerriero: In supporting "the proposed e-discovery amendments," seems to embrace the discovery proposals in general as "just a small step in bringing some rationality and common sense to this aspect of our court system."

490, Patricia W. Moore: Professor Moore opposes the proposed amendments, but focuses on discovery. (1) The FJC Study shows discovery does not impose unreasonable cost or delay. (2) Average case disposition times, the best indicator, have remained essentially stable since 1986. (3) Judges and lawyers are well aware of proportionality, and implement it, as shown by many cases easily retrieved on WestLaw. (4) Federal courts are widely perceived as pro-defendant; these proposals will aggravate this perception. 921, Kevin Marshall: (a practicing lawyer) entirely agrees. 929, D. Richard Jones III: Another practicing lawyer fully adopts. 932, Douglas Alexander; 943, Robert Jensen; 954, D. Chris Russell; 956, Sandra Finch; 970, Jeffrey Rowe; and 972, David Mitchell: Ditto. (More endorsements appear later; this gives the flavor.)

494, Charles R. Ragan: "I have no doubt that some requesting parties have used the existing rules to force settlements on the basis of cost, rather than the merits of a case. On the other hand, I have no doubt that some producing parties have sought to delay merits adjudication or obfuscate factual issues through mischievous production tactics. It does not follow from these perceptions that the Committee should try in the rule-making process to legislate against every potential 'bad actor.'"

540, Alex Dahl for Lawyers for Civil Justice: Supplements comment 267, pointing to the testimony of several witnesses describing the great volumes of information preserved and produced. Discovery is slowing, and often preventing, reaching the merits.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "Important changes have been made to the rules, especially Rule 26, in recent years. Judges and lawyers need time to learn to use the changed rules, so that we can assess the efficacy of the changes that have been made and what further changes might be productive." Sufficient time should be allowed for any of the proposed changes to become part of the legal culture before undertaking any further changes. (1) The FJC study itself shows that discovery is a problem only in a small fraction of federal cases. (2) Past efforts to reduce the burdens of discovery in these cases — involving high stakes,

complexity, contentiousness, big law firms, and hourly billing — have failed. There is no reason to suppose that the present proposals will succeed on this front. (3) But the proposals will impede desirable discovery in many of the cases that now do not present problems. They will limit access to information, particularly in cases where one party holds much more relevant information than another. They will increase motion practice, in part because they are confusing. (4) The causes of high litigation costs may lie outside the Civil Rules. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (5) All of the proposed changes to Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The FJC study shows that discovery is not a problem in the large majority of federal cases. Even cases that involve high levels of discovery may well deserve high levels of discovery. (2) These proposals will not be effective in reducing the burdens of discovery in the cases that do encounter excessive discovery. The causes lie in the nature of the cases — high stakes, complex issues, contentious behavior, big law firms, and hourly billing. Attempts to address these problems in 1993 and 2000 have failed. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (3) These proposals will limit desirable discovery in cases that are not a problem now. (4) The changes, moreover, will engender confusion and invite increased motion practice. (5) All three of the major changes in Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *." 2078, Judith Resnik, joined by 170 additional law professors: supporting this comment. 2316, Phillip H. Miller: (a practitioner who represents regular taxpaying citizens): The analysis of these professors "is solid, but they have been too kind * * *."

630, Jon Kyl & E. Donald Elliott: "The process needs to move to conclusion. Frustrated parties and interests have other options, such as the Congressional action being pursued on patent litigation reform." "Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in, with results that are not always easy to predict."

634, William W. Large, Mark K. DeLegal, and Matthew H. Mears for The Florida Justice Reform Institute: "The current rules do not adequately protect litigants from excessive discovery." "As a whole, the package of Proposed Amendments will be a decisive step forward."

684, Michael E. Klein for Altria and Philip Morris USA: "PM USA has maintained a public website containing documents it has produced in all products liability litigation. Today, plaintiffs have access to more than five million documents — nearly 25 million pages of information that detail virtually every aspect of PM USA's business since the 1930s."

707, David Angle: "These proposed amendments are transparently corrupt." And reprehensible.

729, Stephen B. Burbank: (1) After a detailed review of discovery rule amendments from 1980 onward, concludes: "Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective, further discovery amendments at this time (other than those that address special problems, as in 2006 and 2010) are at best premature. At worst they are

overkill." (2) "[I]t is disconcerting to see how little attention the Advisory Committee has given to the benefits of litigation and discovery." Congress relied on simplified notice pleading and broad discovery in enacting many statutes that rely on private enforcement to substitute for public enforcement in implementing broad economic, political, and social values. The Enabling Act exercises delegated legislative power. It is not an exercise of Article III judicial power. The proposed reductions in discovery risk destabilizing the infrastructure that Congress has relied on. (3) It is a mistake to fixate on the ideal of transsubstantive rules to adopt amendments that aim at the problems generated by a small subset of contentious, high-stakes litigation but inflict serious costs on the much larger range of ordinary litigation.

730, Langrock Sperry & Wool: "[W]e've watched with growing alarm as the federal courts — once the models of even-handed justice in civil cases, where the 'little guy' could hold accountable even well-funded corporate wrongdoers — increasingly tilt in favor of the defense. We urge the Conference to reject" [the discovery and Rule 4 changes].

853, Kenneth Lipper: This letter to Jon Kyl contributes a public comment. (1) There should be a tight uniform set of rules governing all federal courts to deter forum shopping. (2) This should include much earlier consolidation of related cases to protect "hapless defendants forced to comply with a large number of differing discovery demands and withering motion practice by contingency plaintiff's lawyers." If judges believe there must be some discovery to inform a decision whether to consolidate related cases, the discovery should be limited by law to what is absolutely necessary to decide on consolidation or dismissal.

854, Hon. James G. Carr: The cases that involve "worrisome" discovery problems are few and far between. In the vast majority of cases discovery is self-limiting. Plaintiffs lack the resources. Insurers and corporate defendants are increasingly more attentive to limiting discovery, and are increasingly setting caps on fees and costs. The occasional big case will involve massive discovery, and the proposals will not change that.

874, Lisa P [sic]: Limiting discovery in the ways proposed will affect the vital role of the court system "in bridging the gap between first awareness of a harm and the tipping point of knowledge leading to needed regulation or legislation to correct the status quo."

880, Myles E. Eastwood: The real problem is that lawyers cannot get their discovery disputes resolved promptly. Many federal judges in Georgia screen all e-filings in their cases and hold a conference call or hearing in chambers, "where they cut to the real issues." "Proportionality is dealt with on the spot within the framework of the current rules." Do not adopt the proposed amendments.

1102, Seth R. Lesser: (1) There has been a sea change, dramatically reducing the costs of ESI discovery — do not be taken in by the claims of great costs. (2) The complaints about increasing discovery costs can be explained: "competition in the law world has caused a great many lawyers to use discovery as a profit center in a way that would have been almost unimaginable two decades ago." A clear illustration is the insistence on reviewing every document for privilege, even classes of documents that are quite unlikely to include anything privileged; "in nearly every case, defense counsel now refuse to consider the pragmatic use of Rule 502 clawback agreements." (3) Foreign investors find the United States markets attractive precisely because we have "a legal system in which wrongs can stand a fair opportunity of adjudication."

1023, Brett J. Nomberg: The survey prepared for the ABA Litigation Section was prepared by an attorney at one of the largest defense law firms. "Many lawyers who received the questionnaires

wrote back stating that there was a clear bias in the survey questions." The bias pushed toward responses favoring limitations on discovery.

1118, 1252, John Vail: "[T]he primary role of the federal courts is political, not commercial." The proposals sacrifice the political purpose to serve the commercial purpose. Those involved in the large majority of cases are asking: "we are managing well; why are you doing this to us"? It is appropriate to address the needs of the cases that continue to be worrisome, but not by proposals such as these. The Committee should ask whether transsubstantive rules can be adapted to the purpose, whether it is time to reconsider the principle of transsubstantivity. (And agrees with the views of Professors Miller; Burbank; Thornburg; and Hershkoff et al.)

1164, Stuart Ollanik, for Public Justice: Resubmits a comment submitted in March, 2013, before publication. "The more prudent course would allow rules and systems already in place including changes made in the last decade to continue to develop. * * * The rules discussed here are neither the problem nor the solution." Most of the discovery rule changes since the 1980s have addressed perceived discovery overuse, not the form of abuse that arises from evasion in responses. It is a mistake to substantially rewrite the definition of relevance by deleting the "reasonably calculated" provision and moving proportionality up to Rule 26(b)(1).

1184, Mark Ledbetter: The rules "simply tilt defense-ward with each new 'vintage.'" "[T]he law has drooped to its nadir as Anacharsis lamented, 'Written laws are like spider's webs; they will catch, it is true, the weak and the poor, but would be torn to pieces by the rich and powerful.'"

1199, William Royal Furgeson: 19 years on the federal bench showed that the discovery system is not broken. It does not need to be fixed. The changes are unnecessary, and indeed counterproductive. We should leave it to the trial judges and trial lawyers to grapple with the difficult issues.

1279, Edwin B. Spievack: Suggests in various ways that the problems lie not in our rules, but in the need to educate judges in the techniques for managing litigation and in the structure of the legal business that encourages "misfeasance or intentional malfeasance."

1650, Suzette M. Malveau: The proposed rules aim at problems encountered in a small fraction of cases. It is a mistake to adopt them as part of a set of rules that remain transsubstantive; applying them to other kinds of cases will work injustice, particularly for individual employment and civil rights claims.

1666, Stanley D. Helinski: "The proposed changes assume that an opposing party will produce, in good faith, the discovery that is requested — and that they will answer interrogatories as written. However, in practice, this is far from the case: the opposing party takes elaborate measures to hide certain evidence. Without a broad scope of discovery, parties will successfully hide relevant and admissible evidence."

1399, Laurie Briggs & John C. Hopkins: quotes from *Krueger v. Pelican Prod. Corp.*, C/A No. 87-2385-A, slip op. (W.D.Okla. Feb. 24, 1989): "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."

1732, J. Burton LeBlanc for American Assn. for Justice: There is no empirical evidence to support the Rule 26(b), 30, 31, 33, and 36 proposals. The havoc they will cause on court dockets will resemble the ill-fated period of mandatory Rule 11 sanctions. "[T]his 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." "The current attempt fails to honor the liberal discovery regime; it fails to recognize the extent to which intellectual dishonesty and a culture of encouraging cleverness at the expense of truth have infected the profession."

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: One consequence of the extreme costs of unnecessary discovery is that "instead of devoting additional resources to compliance and reporting systems that will enhance fidelity to the law, in-house lawyers must redirect limited funds to litigation holds that will preserve documents with no material effect on the underlying disputes."

2026, Roberta L. Steele for National Employment Lawyers Association: Attaches the NELA summary of the FJC survey of NELA members; the summary was prepared for the Duke Conference. The comment itself seeks to offset comments that 80% of the NELA respondents thought that discovery is disproportionate to the stakes in small cases. The survey summary, p. 13, says that "More than 80% agree that litigation costs are not proportional to the value of a small case (with 43% agreeing strongly) * * *." On the other hand, 51% of the respondents agree that counsel use discovery to force settlement. Two-thirds agree that judges do not invoke Rule 26 limitations on their own. Depositions and requests to produce were found to be very important tools of discovery. Methods identified as very or somewhat cost-effective were requests for hard-copy documents (90%), requests to admit (89%), interrogatories (82%), requests to produce ESI (79%), and depositions of fact witnesses (76%). They currently spend 70% of their time and expense on discovery, but think the number should be closer to 50%.

2063, Kathryn Dickson supplements by pointing to p. 11 of the summary. The "abuse" of discovery NELA respondents find is "things like multiple boilerplate objections; delays in turning over documents; deliberately evasive answers to requests for admissions and interrogatories; overbroad subpoenas for medical records and past employment records; and other dilatory tactics. The 'cost' concern related to the need for endless 'meet and confer' conferences and too many motions to compel to obtain the necessary proof." NELA members overwhelmingly oppose the proposed discovery changes.

2034, William P. Butterfield:(1) The goals of the proposed changes could be achieved without any change in the rules; more active and aggressive case management would suffice. Absent that, two changes are more important than these. (2) "[N]ot until the Rules expressly require meaningful cooperation, rather than obliquely suggest it [as by the proposed Rule 1 amendment], will the costs of discovery, and particularly e-discovery, be meaningfully addressed. "[I]n my experience, even among sophisticated and seasoned practitioners in the federal bar, obstruction, obfuscation and delay in discovery more often rule the day." Some judges exact this now. So do some pilot programs — the Seventh Circuit e-discovery pilot, and the S.D.N.Y. complex litigation pilot. (3) Phased discovery could provide real benefits. "[A] great any courts, under pressure to move cases off their docket, do not allow sufficient time to allow phased discovery to work, setting tight timeframes for conclusion of fact discovery." The result is that, with one bite at the apple, a party must seek out every reasonable piece of discovery, with broad, vague, and ambiguous requests that often must be resolved on motions to compel. Often production is completed under tight time limits, whether necessary to the case or not, for want of time to sort it out.

2154, Jason R. Baron, Bennett B. Borden, Jay Brudz, & Barclay T. Blair, for Information Governance Initiative: An interesting source on the explosion of ESI: Between 2005 and 2020,

the digital universe is expected to grow from 130 exabytes to 40,000 exabytes — 40 trillion gigabytes. The examiner for the Lehman Brothers bankruptcy confronted a universe of 350 billion documents, about 3 petabytes, a volume equivalent to about 300 Libraries of Congress. Attention to information governance should focus on the lifecycle of information, including development of defensible deletion policies. Governance increasingly is seen as including the use of advanced search techniques using predictive analytics and the use of auto-categorization methods for separating out records and information that remain important for long-term retention. The growth of information will dwarf whatever beneficial effects may flow from the proposed amendments of Rules 1, 26, and 37(e).

2178, Michael R. Hugo, for AAJ Section of Toxic, Environmental and Pharmaceutical Litigation: Examines some of the comments and testimony supporting the proposals and urges the Committee not to be fooled or manipulated by the coordinated strategy of the U.S. Chamber of Commerce, "with its obvious bias toward deprivation of individual rights in favor of unfettered corporate hijacking of our judicial system."

2222, Danya S. Reda: The comment provides a copy of Danya Shocair Reda, "The Cost-and-Delay Narrative in Civil Justice reform: Its Fallacies and Functions," 90 Or. L. Rev. 1085 (2012). At 1122: "The very questions implicated by the cost-and-delay narrative — that is, whether civil justice is worth the burdens that it entails — are not questions susceptible to empirical verification." At 1128: "The persistent call to reform civil process to combat (undocumented) cost and delay serves as a proxy for a political struggle over enforcement of legal rights. Paul Carrington characterizes the procedural reform movement as '[o]ne form of deregulation politics' which seeks to limit the regulatory regime established through the grant of broad court access and a multitude of legislative enacted private rights of action." And at 1130: Martha Minow claims that in legal scholarship, "in the latter part of the twentieth century, a broad skepticism had developed about the value of law as a source for truth and justice. [¶] The developments in scholarship reflect the disillusionment with law arising among the elite — and amongst the legal elite in particular." February Hearing, Danya Shocair Reda: p 349 The discovery proposals are too narrow. (1) They overlook "the power to impose costs by discovery avoidance, discovery delay, discovery attrition." (2) They interfere with our societal choice to rely on private enforcement of public regulatory values. Discovery problems are affected not only by information asymmetry, but by the resources a litigant has available to acquire information. They also are affected by fee structure — whether billable hour, contingent, or donor-funded organization.

2266, Stephen N. Subrin: Most of the proposals, including the Rule 16 proposals, will simply add cost and delay to the vast majority of cases where discovery is functioning well and proportionately now. And they will not do much good for the 5% to 15% of cases where something effective should be done.

2267, Brett A. Ross: Approves the changes that will restore "reasonability" to discovery. "If any lawyer with even mediocre skills looks hard enough, he or she will find sufficient prejudicial information against a motor carrier or its driver to leverage a significant settlement. In cases of minimal harm, that should not be the case."

2281, Alex B. Scheingross: This set of proposals "looks like corporate America's wish list to never again be held responsible for anything they do."

November Hearing, Altom M. Maglio: p 28: The proposed changes send the message to magistrate judges and district judges that they have been allowing too much discovery, real

discovery. But real discovery is needed.

November Hearing, Cory L. Andrews for the Washington Legal Foundation: p 42 "[T]he status quo is completely unacceptable." "[D]iscovery-related costs are a competitive drag on the American economy." They deter foreign companies from locating here. They harm the international competitiveness of American business. They are passed on to consumers. This is a matter of fundamental fairness; "[t]he fact that an injustice is visited on litigants with a high net worth is no more reason to ignore it than if an injustice is visited on low net worth litigants." No litigant should be forced to settle an unfounded claim because the discovery costs of defending on the merits are too high. The proposals are "modest, they're incremental, they're common sense. They're not radical. They're not draconian." Costs can run out of control even in commercial litigation between large enterprises — "[T]here's no discounting the role of psychology in litigation."

"[Y]ou might consider adding a materiality element * * *."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 Clients are fleeing the jury litigation system for private arbitrations, or are settling, because of cost. We need to find "an efficient way [to] the key information that will allow the case to be resolved on the merits." This will help both plaintiffs and defendants in § 1983 civil rights cases. Some municipal clients are very tiny townships. In litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Jonathan M. Redgrave: p 70 "I do not believe that we can wait forever for the ever-elusive empirical data to develop." A fourth category of lies may be the absence of statistics. Electronic information is developing at warp speed. The Duke Conference, and many of the written comments already submitted by disparate groups, reflect a consensus that the discovery rules need further amendments. All parties will benefit.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: The amendments should be viewed in a broader context of events that impede access to justice for victims. Judicial vacancies go unfilled and court budgets suffer draconian cuts. Forced arbitration agreements block access. Class actions face increasing limitations. Pleading standards have increased. Limiting discovery will further discourage victims from going to court.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 It is good to narrow the scope of discovery. Studies show that discovery costs range from 25% to 90% of litigation costs; proper scope will help keep it at the 25% end. Cost results from the amount of materials available for searching. Cost harms global competitiveness. It also has a great impact on small businesses. Insurance does not cover the costs incurred by the firm itself, the time, energy, and psychic burden. More fundamentally, the cost of discovery makes it economically rational to settle unmeritorious claims. The proposed amendments will not revolutionize litigation behavior, but they remain desirable. It would be desirable to narrow the standard from relevance by requiring both relevance and materiality.

January Hearing, Henry Kelston: p. 52 Opposes altering the scope and amount of discovery through Rules 26, 30, 33, and 36 for broad reasons. Reaction to the proposals has been polarized because "they are highly skewed in favor of large corporate defendants." "By design, these

amendments will reduce discovery costs for large corporations, simply by reducing plaintiffs' access to the information they need to prove their claims." And there is no evidence that there is a problem with discovery now. Better means can be found to reduce costs: Create incentives to cooperate; revitalize initial disclosure; sanction parties for later production of material adverse evidence. 1708, Henry Kelston: Elaborates on these themes, noting that Professors Carrington and Miller "have expressed to the Committee their doubts that the parties advocating most strongly for changes to the discovery rules are being candid about their motives." Likely others share this view, believing the motive is to shield business enterprise against substantive liability. That view helps to explain the sharp and often bitter divide between the reactions of plaintiffs and defendants.

January Hearing, William P. Butterfield: p. 142 The most important means of reducing discovery costs would begin by adopting a cooperation regime with real teeth. Various local rules and pilot projects provide illustrations. And rather than reduced presumptive limits, phased discovery should be adopted in a real way. The power to direct phased discovery exists in the rules now. But local rules often get in the way.

January Hearing, Henry M. Sneath: p 236 (Speaking for DRI) Generally supports all proposals. Offers the perspective of small business firms caught up in business-to-business litigation. The costs of discovery can be disabling. "Narrowing the goalposts" will provide a much better place to begin the conversations between lawyers about discovery.

February Hearing, Rebecca Love Kourlis, for AALS: p. 39 Overall, the proposals move in the right direction. A supplemental comment will note the results of two pilot projects. (1) A pilot project in New Hampshire seemed to show little difference. But attorneys liked what they were being asked to do because it comported with what they were doing anyway. "So it was a culture issue." But there was one interesting difference -- there was a statistically significant reduction in the number of default judgments against defendants. (2) The Boston Litigation Section project was an opt-out program; the evaluation was by survey of participating lawyers. The net conclusion was that the pilot project rules were better than the existing rules in providing a better resolution, speedier and less expensive resolutions.

February Hearing, William B. Curtis: p. 77 Focusing initially on the numerical limits, but also on proportionality: "You're hearing the defense side and the corporations they represent say, we love it, and the plaintiff side and the folks that we represent saying, you're changing the way the game is played and it's unfair. I think that's a very telling point that we ought to be reminding ourselves of." It is not that discovery is too expensive. It is that disputes about discovery are too expensive. "Rather than restricting the scope * * *, let's restrict the fight about the scope." And it is about defendants who produce millions of pages of documents — the Rule 34 proposals are at least a start, but no more, in aiming for responsible answers.

February Hearing, Bradford A. Berenson: p 111 Offers three examples of General Electric's experience to illustrate "the waste, burden and cost of the current regime." Nuisance-value settlements "go on every day * * * because of the explosion in the cost of electronic discovery." And the use of sanctions for spoliation "creates very strong incentives to gin up sideshow litigation and gotcha games. * * * If they can take attention away from the merits, divert it to this game tactical litigation advantage through ginning up a spoliation fight, they can often obtain settlement leverage, or an adverse inference instruction that will help a weak case."

February Hearing, David Werner: p 185 The main focus is on preservation, but agrees that "[t]he scope of discovery allowed by the rule should be narrowed as the committee has proposed."

February Hearing, Michael L. Slack: p 193 If you want to reduce the costs of discovery, do something about the "return or destroy" agreements. I get the 50,000 core documents in discovery. The case is resolved. Then I get another case growing out of the same defect. In federal court I have to litigate my efforts to discover the same 50,000 documents; defendants resist producing exactly what they produced in the earlier case. In state court I tell the judge the documents I want were produced in another case and the judge tells the defendant to produce them. "[W]e start on a slippery slope by putting technical things in rules, and once we get on that slope, we start tinkering with it, it becomes more technical and more technical and more technical. * * * [T]he problem we have today is we're already technical, now we're ratcheting down further."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Technology changes every three years. It is likely that in three more years technology will solve the problems we now perceive in discovering ESI.

February Hearing, Lee A. Mickus: p 237 The proposals "are likely to sharpen the focus of the discovery process on the real needs of the parties."

February Hearing, Ashish S. Prasad: p 319 The form of technology assisted review known as predictive coding will, of itself, reduce the costs of discovery searches by about 25%. No more than that because lawyers and clients still want eyes-on review to protect personally identifiable information, trade secrets, business-sensitive information, and such. And this saving will be offset by large increases in data volume.

February Hearing, David Kessler: p 342 I have used TAR in dozens of cases, "I'm a huge proponent, but [do] not believe that this committee should rely on it as a solution, as a panacea, or should encourage it in the rules." There is a disturbing trend to force parties, directly, or indirectly, to produce information that is not relevant, or is privileged, or is outside the scope of discovery, on the theory that TAR facilitates identification and Rule 502(d) protects against use of privileged information. A party who wants to review the documents before producing them cannot complain of the cost — that is the party's own choice. But 502(d) does not solve all problems; huge injury can flow from the production.

RULE 26(b)(1): PROPORTIONALITY; TRANSPOSED (B)(2)(C)(III) FACTORS

259, John Scanlon: Opposes all proposed changes. They "unfairly balance the scales against the party seeking information and in favor of a party who is unwilling to produce that information * * *."

263, The Cady Law Firm, by Christopher D. Aulepp: Three of the five factors considered in determining proportionality are criticized, without reflecting that they have been present in Rule 26(b)(2) since 1983. (1) The amount in controversy "sends the message that only multi-million dollar cases are important. This is un-American." Implementation will create a new battleground in litigation. So will the problem presented by cases seeking relief that is not monetary. (2) The importance of the issues: "to my clients, their case is often the most important thing to them." Who decides what is important? If it is Congress, special interests would buy their issue to the top of the list. And it may be difficult to define what the issues are. (3) The parties' resources: No discovery would be available against the bankrupt City of Detroit.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Mistakenly asserts that the amendment eliminates the discovery of nonprivileged matter relevant to a party's claim or defense. Challenges the "five factor proportionality test" without noting present (b)(2)(C)(iii). These factors "would be devastating to individual women seeking to hold massive corporations accountable for their wrongdoing." "The time, expense, and level of litigation would dramatically increase" as the parties litigate the five factors. Judges will apply the factors differently. And this will make it more difficult to discover "subtle issues," such as the practice of medical device manufacturers to arrange "ghostwritten" articles on outcomes the manufacturers select, to be signed by "handpicked doctors."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Eliminating the relevancy standard will increase discovery disputes. The proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases.

266, American Association of Justice Aviation Section, by Michael L. Slack: (The first pages of this comment are a detailed illustration of the need to conduct extensive discovery in many "aviation crash" cases.) Proposed 26(b)(1) will "drastically limit[] the scope of discovery, * * * which will inevitably morph into a new art form aimed at frustrating plaintiffs' discovery." (1) "proportional to the needs of the case" "is flypaper for a defense objection." The proposed factors have too many subjective variables to support consistent application. (1) Will the "amount in controversy" be determined by the tests that apply in establishing diversity jurisdiction? (2) "How can discovery be unimportant in an aviation crash case"? Does importance decline if a plaintiff settles with some defendants, with the effect of discouraging early settlements? Does importance vary with how frequently a product fails? (3) What is the measure of "burden"? Can a defendant multiply the burden by throwing legions of first-year associates at a relatively simple task? Can a plaintiff get more discovery from a wealthy defendant than from a nearly bankrupt defendant?

267, Lawyers for Civil Justice, by Alex Dahl: The emphasis on proportionality, currently in Rule 26(b)(2)(C)(iii), is a great benefit. The concept is routinely ignored. But proportionality will be much better advanced if materiality is added to define the scope of discovery: "any non-privileged matter that is relevant and material to any party's claim or defense." Experience in England "has reportedly resulted in significant curtailment of excess discovery." This would align discovery more closely with the needs of individual cases. 540, Alex Dahl for Lawyers for

Civil Justice: Supplements the first comment by refuting the arguments that the proposal effects a change of burden. The burden of showing that proportionality is not met is on the party who opposes discovery. And both requesting and responding parties have a substantial interest in presenting their best arguments. Rule 26(g) shows that the burden of ensuring proportionality falls on all parties. And those who argue that proportionality means "one size fits all" simply miss the point — proportionality means discovery tailored to the needs of each case.

270, Ohio Association for Justice, by John Van Doorn: The proportionality test "favors those accused of wrongdoing, especially in cases where there is an asymmetry of information." Defendants can hide information by objecting to the scope of discovery. They can take positions based on ill-defined factors. How can a plaintiff test a claim that discovery is too costly? There will be more discovery disputes. The change is unnecessary because present Rule 26(b)(2)(C), including (iii), provides protection. The difference is that the proposal shifts the burden — rather than providing for defendant objections, it will impose a burden on plaintiffs to justify the scope of discovery.

273, Cameron Cherry: Defendants control virtually all information. "[C]hanging the purpose of discovery so that each request must be weighed on a sliding scale" measured by the proportionality factors "will not just hamper, but hamstring justice. Rich and powerful corporations can afford to stonewall discovery, bury relevant documents in a barrage of paper, and file unnecessary objection after objection as it stands." The "studies" offered to support these changes are not impartial.

275, Glenn Draper: As Rule 26(b)(2)(C)(iii) now stands, the burden is on the party resisting discovery to seek protection and justify it. Transferring the same factors to define the scope of discovery will shift the burden to the party seeking information, and it will not have detailed knowledge as to what information is available or the cost of producing it. This is "an attempt to insert additional barriers to prevent the average citizen from confronting powerful corporations on an equal footing in court."

276, John D. Cooney: Eliminating the language that provides discovery of any nonprivileged matter relevant to a party's claim or defense, substituting a cost analysis, would severely restrict the ability of plaintiffs to uncover evidence and hold better-financed defendants accountable for their wrongdoing.

277, Marc Weingarten: Proportionality, measured by five subjective factors, will require a hearing, or at least a motion, for virtually every discovery request. If the parties could agree on the amount in controversy, the case would settle. A party objecting to discovery will not concede the importance of the information. So opinions will differ on expense and benefit. The respective resources of the parties "is usually not even contemplated with respect to the defendant until a punitive damage phase * * * is reached."

278, Perry Weitz: Even without considering purposeful attempts to obscure information by corporate bureaucratic manipulation or unfounded claims of privilege, the proposals will have an unfair impact on mass tort plaintiffs. The change in the scope of discovery will eliminate the well-understood language and presumption that any nonprivileged matter relevant to a party's claim or defense is discoverable. Defendants will habitually object on the basis of the five-factor proportionality test. The delays will be devastating, especially to living but in extremis cancer victims who may lose the chance to have their day in court during their lifetime.

279, Kyle McNew: Now does plaintiff personal-injury litigation, but has been a defense

commercial litigator. Changing the standard from relevance to utility will invite discovery fights — every party will believe the utility of requested information is outweighed by the burden of responding.

280, Oren P. Noah: Changing the standard to require both relevance and proportionality will defeat the presumption that relevant discovery is allowed. A party can simply refuse to provide discovery, forcing a motion to compel — and a well-funded corporate client can easily afford to have its attorneys do this. As cases — including asbestos cases — become increasingly complex, the need for accurate and reliable information increases. And asbestos plaintiffs typically do not have any of the information needed to prove their claims.

281, Daniel Garrie: When a company adopts a new and more efficient information system, it has a choice whether to migrate old information into the new system. Courts should not be afraid to impose the burden of retrieving information from the old system if the company chooses not to migrate it to the new system. There is no need to amend the rule; courts understand this now. But if the rule is amended, the amendment should account for this cost calculus.

282, Susan M. Cremer, Chair, AAJ Federal Tort and Military Advocacy Section: Lawyers in the section litigate many Federal Tort Claims Act actions for medical malpractice. These are complex cases, often involving multiple health care providers. "Under the new rule, the plaintiff would have to argue that the likely benefit of the unknown information outweighs the quantifiable cost and time burden to the defendant. This is an impossible burden." This is followed by a case example. The question was whether the anesthesiologist was present in the operating room when the patient emerged from anesthesia, as standard practice requires. The records did not show him present, but he testified that he was. The defendants resisted the discovery request, but the court ordered production of records from three other operating rooms; one record tended to prove he was in a different room. The plaintiff might not have got this crucial discovery under the proposed rule.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The Foundation champions individual liberty, free enterprise, and a limited and accountable government. The "ever increasing threat of exorbitant discovery costs [must not be] permitted to distort the substantive rights of parties in litigation." "The overly broad scope of discovery * * * has long been a source of mischief." Adding proportionality establishes a balanced approach that is a meaningful improvement. If discovery confined to the parties' claims or defenses produces information suggesting new claims or defenses, the pleadings can be amended. Transplanting the list of proportionality factors to Rule 26(b)(1) is good, because present (b)(2)(C)(iii) too often is ignored or marginalized in practice. But care should be taken to ensure that the emphasis on the parties' resources does not lead to allowing unjust demands simply because a defendant has a high net worth.

The continuing failure of past amendments intended to rein in the scope of discovery suggests that the scope of discovery should be further reduced: "any non-privileged matter that is relevant and material to any party's claim or defense." (Materiality is defined in the 1968 4th edition of Black's Law Dictionary as information that has a legitimate and effective influence or bearing on decision.)

286, Stephen J. Herman: Has experience representing corporate defendants, but writes on behalf of individual plaintiffs. Untested contentions of defense counsel resisting discovery "frequently prove to be incorrect and/or incomplete." There is a "general disincentive" that dissuades "a defendant and its counsel * * * from conducting a thorough investigation, from asking the tough questions, and from disclosing potentially relevant and material information to opposing counsel

and to the court." Given the extreme disparity in knowledge between plaintiff and defendant, the proposed amendment will lead to one or the other of opposing bad results. Plaintiffs may be permitted to conduct preliminary discovery regarding the defendant's claims of burden or expense. Or plaintiffs will not be permitted to engage in such discovery, "thereby risk[ing] dismissal of the action based solely on the untested assertions of one party regarding the existence and nature of potentially relevant evidence." (There follow descriptions of five cases in which crucial information that was not revealed during early stages of discovery ultimately came to light.) "The proposed amendments, if adopted, would greatly foster the potential for additional, albeit unintentional, injustices; may tempt good lawyers to cross the line; and will aid and assist those few unscrupulous lawyers and companies who do have a win-at-all-costs mindset."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: "The availability of the evidence needed to prove liability in an injury or death case against a railroad is highly skewed." The railroad controls the equipment and access to the property involved. Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to (b)(1), where they become a condition of relevant discovery, not a check on abusive discovery, "will inevitably deprive worthy plaintiffs of access to evidence that is relevant and necessary * * *." "Individual plaintiffs should not be punished for corporate complexity they had no part in creating and have no ability to simplify." Discovery is inevitably extensive, "due to both the sheer size and complexity of the industry and to the railroads' use of obstructionist tactics for as long as possible * * *." (A specific example is given.) It is clear that because the railroad controls the information, the burden of discovery falls primarily on the railroad. The proposal risks raising that fact to become an obstacle to necessary discovery.

289, Craig B. Shaffer & Ryan T. Shaffer: Joins the discussion of proportionality with discussion of the proposal to eliminate the provision for discovery that extends beyond claims or defenses to include the subject-matter of the action. The broad conclusion is that although there is little seeming change, as a practical matter these proposals together will have the not undesirable consequence of reducing overbroad discovery requests. (1) "[R]elevance in the context of discovery should be broadly construed." The only limits are that a party cannot rely on speculation or suspicion, cannot roam in the shadow zones of relevancy on the theory that matter that does not presently seem germane might conceivably become relevant. Nothing in the proposals suggests a different measure of relevance. (2) Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) "does not effect any substantive change in the scope of discovery." Rule 26(b)(1) now expressly invokes Rule 26(b)(2)(C) as a limit on all discovery. Rule 26(g)(1)(B)(iii) entrenches the proposition that lawyers are responsible for heeding these concepts on their own. (3) Nonetheless, there may be not undesirable procedural and tactical consequences. All too often discovery requests are recycled or pattern interrogatories and requests for production. The problems are exacerbated when combined with ambiguous or overreaching definitions and instructions. Eliminating the provision for discovery relevant to the subject-matter takes away a safety net that might be relied upon to excuse such excesses. (4) Proportionality is case-specific. The proposed incorporation of proportionality in Rule 26(b)(1) is likely to increase the frequency of objections, but the objections are not likely to be granted more often than other kinds of objections, "particularly in response to carefully drafted interrogatories or requests for production."

290, Randall E. Hart: The present provision for discovery of information reasonably calculated to lead to the discovery of admissible evidence makes the process flow smoothly. Even with it, experience as a contingent-fee attorney finds routine stonewalling and groundless objections, in part responding to the incentives of hourly billing. Adding a multifactor proportionality test will

cause a huge increase in motion practice, impeding the search for the truth.

292, Lyndsey Marcelino for The National Center for Youth Law: The work of this plaintiffs' advocacy group will be impaired by the cost-benefit balancing. Moving this from 26(b)(2)(C)(iii) to become part of the scope of discovery is particularly likely to affect child advocacy work "because the defendants in our cases are likely large public entities with limited financial resources." "'Disproportionate' will become the new 'burdensome,' but with a cruel twist in placing the burden of proof on the plaintiff, in our case — children * * *."

293, John K. Rabiej, Maura R. Grossman, & Gordan V. Cormack: Proposes addition of this paragraph at the end of the first paragraph in the Committee Note to Rule 26(b)(1):

As part of the proportionality considerations, parties are encouraged, in appropriate cases, to consider the use of advanced analytical software applications and other technologies that can screen for relevant and privileged documents in ways that are at least as accurate as manual review, at far less cost.

The proposal is further supported by 24 persons, expressing a consensus reached at the Duke Law Conference on Technology-Assisted Review held on May 2013. This endorsement of the use of advanced analytical software applications and other technologies to screen for relevance and privilege is offered as an offset to the reluctance of some parties to explore these opportunities, the fear that some courts may not sufficiently understand them, and the risk that "an ill-founded opinion may be issued that would further retard the use of TAR."

The proposal is supported by a link to a RAND Study of litigant expenditures for producing electronic discovery and the full text of two articles. Grossman & Cormack, Technology-Assisted Review in E_Discovery, XVII Richmond Journal of Law and Technology, 1-48, concludes: "Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort. Of course, not all technology-assisted reviews (and not all manual reviews) are created equal." The second, published online, is Roitblat, Kershaw, & Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review. This article recounts a comparison of manual review in a real proceeding, conducted by 225 lawyers, with a review of a random and representative sample of the same document collection by different teams of lawyers (5 lawyers for each team) and by technology assisted review. The conclusion is that machine categorization can be a reasonable substitute for human review.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Begins by noting: "Experienced plaintiff firms recognize that the 'game' is now to back a truck of virtual documents up to the courthouse and dump it, that may or may not include the real items requested. As a result, a broad net needs to be cast in the form of requests for production * * *." But the proposals will restrict discovery. Offers as an example discovery against a manufacturer of a generic version of Reglan, a drug used to treat stomach disorders. The request as to produce the label used by the defendant, to determine whether it complied with FDA requirements. It took five years to gain production, which showed the label "was inaccurate and missing bolded warning language." Lengthy appendices describe the efforts to gain discovery. The label might never have been disclosed under the proposed proportionality provision, which will require the requesting party to show the need for full discovery rather than require the producing party to show a burden that justifies restricting discovery. Defendant corporations know what is in their files. Plaintiffs do not.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: The proposed change

would eliminate the well-understood language that allows discovery of any non-privileged matter relevant to a party's claim or defense. Different understandings of proportionality will lead to inconsistent standards even with the same jurisdiction. Parties will litigate each of the five factors, causing substantial prejudice to plaintiffs. "[I]t is not difficult to imagine situations in which discovery issues are litigated for the sole purpose of exhausting the resources of the plaintiffs and their attorneys." With Darvocet and generic propoxyphene, for example, it is often necessary to engage in extensive discovery simply to find out which of several different entities made or sold the drug that harmed the plaintiff. And echoes the comments in 264, the AAJ Transvaginal Mesh Group, that limits on discovery will make it difficult to show that manufacturers have arranged for ghost-written articles on their drugs.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality," 2012 Mich.St.L.Rev. 933-979. Although the Utah rule is given substantial treatment, most of the focus is on present federal practice and the need to adopt an express proportionality limit on the scope of discovery. (1) Among the current practices commended by the authors is the extensive guidelines provided by the District of Maryland. This is a good model, worthy of incorporation in the national rules, but the national rule must be more concise. "While a local jurisdiction perhaps has the luxury of promulgating voluminous procedures and practices, the Federal Rules cannot be cluttered with forty-three additional pages of rules and requirements * * *." (2) The Rule 26(g) attorney certification requirement is incorporated into discovery-motion practice in N.D. Cal. This should be done in Civil Rule 37(a)(1), so that a party moving to compel discovery must certify "that the discovery being sought satisfies the proportionality limitations imposed by Rule 26[(b)(1) and (b)(2)] and Rule 26(g)(1)(B)(iii)." (3) It is anomalous that a party seeking a Rule 26(c) protective order should have the burden of showing that the discovery request is not proportional. Rule 26(c) should be amended to include a provision that "If the motion raises the proportionality limitations imposed by Rule 26(b)[(1) and (2)] and Rule 26(g)(1)(B)(iii), the party seeking the discovery has the burden of demonstrating that the information being sought satisfies those limitations." (4) Proportionality will work better if initial disclosures are expanded. At a minimum, each party should produce copies, not merely identify, documents it may use, and each should produce all documents it refers to in its pleadings. (5) Utah has divided civil litigation into three tiers. The top tier, for cases involving more than \$300,000, imposes limits of 20 interrogatories, 20 document requests, and 20 requests for admissions. Total fact deposition time is restricted to 30 hours. For matters between \$50,000 and \$300,000, these limits are halved. For matters under \$50,000, the limits are reduced to 5 document requests and requests for admissions, and fact depositions are limited to 3 hours total per side; interrogatories are eliminated.

299, Aaron Broussard: If intended to reduce discovery disputes, the proportionality proposal will backfire. Almost every discovery response is preceded by "unduly burdensome"; usually an opposing party thinks your discovery request is worthless, and will not admit its worth even when recognized.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Notes the continuing efforts of bar groups and rules committees to narrow the scope of discovery, going back to 1977. (1) "[T]here has been a continued movement toward proportionality in e-discovery as evidenced in the federal case law." "The Section supports these changes, although it does so with caution." (2) The change likely will lead to substantial litigation regarding application of the proportionality requirement, at least in the beginning. Making proportionality part of the scope of discovery may encourage objections, as compared to current reliance on Rule 26(c) motions for protective orders. (3) To avoid any doubt, the Committee Note should state that existing case law interpreting Rule 26(b)(2)(C)(iii)

applies in determining proportionality. (4) "[T]he new Rule's most important function may be to signal strongly that the scope of discovery should be narrowed." The Advisory Committee thought it had solved the problem when it added the provision that has become Rule 26(b)(2)(C)(iii). The problems have not yet been solved. November Hearing: Michael C. Rakower, p 287: For the section: "[W]e continue to support the proposal, but we do so with caution." It is likely to lead to increased litigation during the early stages while parties and courts become comfortable with the notion and boundaries, but this will even out over time.

307, Hon. J. Leon Holmes: Suggests that making proportionality part of the scope of discovery will generate more disputes, and disputes that "will be less susceptible to principled resolution." This is tied to the proposal to revise the provision that allows discovery of relevant information that appears reasonably calculated, etc., as if this "relevant information" provision now defines the scope of discovery. Whether proposed discovery is reasonably calculated to lead to the discovery of admissible evidence is something that can be decided early in the case. Proportionality cannot be decided without understanding the value of the case and the information available through other sources — information that is not available until discovery is completed, or nearly so, and then will be a subjective matter. And adds that dockets should be managed by judges; cases should be managed by lawyers.

309, Kaspar Stoffelmayr: Writing from Bayer Corporation experience with mass tort cases in MDL proceedings, endorses Lawyers for Civil Justice Proposals. Discovery causes our system to cost far more than the procedure of other countries, with no improvement in results. Most discovery costs are wasted; only a very small fraction of discovery materials are used as evidence. The fact that discovery is practiced in proportion to the needs of most cases should not disguise the fact that 5% of cases account for 60% of litigation costs (a study is cited in n. 4); fixing the system for those cases would be an important advance. Excessive discovery costs systematically increase settlement costs: all parties recognize that a defendant saves the large costs of discovery by settling at a figure well above the expected value of the claim. The proportionality test in present Rule 26(b)(2)(C)(iii) is seldom invoked. It is good to move it to become part of the scope of discovery. But more is needed. Discovery should be limited to information that is material to the parties' claims or defenses. January Hearing: p. 88: Similar, with an example of a case that went to an 8-week trial — Bayer produced over 2,000,000 pages of documents; 0.04% were used as exhibits. It would be hard to transfer the procedures of many other countries to our system, but in Britain they have single-event trials and manage with far less discovery.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Proportionality will frustrate the efforts of plaintiffs in civil rights cases to obtain necessary and vital discovery. Much circumstantial evidence is needed to prove intentional discrimination. Discriminators have learned to "coat various forms of discrimination with the appearance of propriety," or to profess some nondiscriminatory motive.

A special danger is that defendants will self-apply the concept of proportionality in responding to discovery requests, and will monetize the importance of the case. The result will be less diligent efforts to find relevant and responsive information in replying to discovery requests. A defendant will make less effort to respond when a poorly paid plaintiff claims discrimination than when a highly paid executive makes the same claim. Plaintiffs like those who claim widespread abuse of "stop and frisk" police policies will face the same response — individual damages claims are small, or (as in the New York case) no damages are claimed. Present Rule 26(b)(2) leaves implementation of proportionality in the hands of judges. It is a mistake to put it in the hands of those who respond to discovery requests.

Nor is there any showing that discovery costs are a special problem in civil rights cases.

If other types of cases present special problems, changes in the discovery rules should be limited

311, James Coogan: The proposal is "designed to harm a party seeking discovery from a large organization." A party requested to produce will have an incentive to complicate the process in order to complain that discovery is too costly. This "places the burden on the Plaintiff, who is not privy to the operations of a Defendant, to justify the unknown." It will increase disputes and thus delays.

313, Steve Telken: Defending parties will feel compelled to use proportionality "to attempt to block or delay even legitimate discovery requests, lest they be accused of less than zealous advocacy for a corporate client."

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): The current discovery system "is unbalanced and in need of repair." (1) Patent litigation often generates high discovery requests, and offers to settle calculated to fall well below discovery costs. (2) Gamesmanship in personal injury litigation leads to requests for sanctions "to discolor a defendant in the judge's eyes." No matter how careful a defendant is, "there can always be allegations that a page, document, or flash drive has not been produced." (3) Discovery has come to be used to challenge the process of responding. "[P]laintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system's relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions." The changes will be significant steps toward addressing the high, asymmetrical costs of excessive discovery.

Proportionality is the most important principle. The amendment will encourage judges to be active in weighing costs and benefits.

315, David Jensen: Proportionality is a "further invitation for large defendants to continue, or increase, their standard objections based on unarticulated burdens."

317, Steven Banks for the Legal Aid Society in New York City: (This long comment begins with a description of many different types of litigation that would suffer from the proposed proportionality limit and from reducing the presumptive numbers of discovery requests. The background is summarized here, but should be recalled with the comments on other specific proposals.)

Section 1983 actions against municipalities require many discovery events to show custom, policy, or practice of violating the law. Jail and prison litigation often requires proof of a claim under a deliberate indifference standard, and a plaintiff must overcome the deference often extended to prison officials. In Fair Labor Standards Act cases it may be necessary to establish joint employment to satisfy statutory thresholds for coverage; discovery of employment records to show wages and hours can be extensive. In discrimination or retaliation employment cases the defendants possess most of the evidence. *Wal-Mart v. Dukes* means plaintiffs often need discovery for class certification, increasing the number of discovery events. And slashing the limits will be taken as endorsing a more restrictive approach to discovery generally. Finally, many prospective clients must be turned away, and must proceed, if at all, without representation. Their needs should be considered.

The proportionality limit is strongly opposed. Legal Aid clients often have comparatively small damages claims, regardless of the strength of their cases. Discovery should not be curtailed for this reason. Considering the importance of the issues at stake in the litigation "is insufficiently specific to guarantee heightened consideration for civil rights and other

constitutional claims." Rule text or comments should state that constitutional and civil rights claims are presumed to have a high level of importance. And measuring the likely benefit of proposed discovery "is often unknowable at the outset of litigation."

318, Brian Sanford: Excessive discovery is adequately limited now. "The problem is disproportionately low discovery, not high." The \$100,000 claim of a cashier may be as complex as the \$10,000,000 claim of a business owner. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: The proposed changes will have a grossly disproportionate effect on plaintiffs in complex product liability cases. Defendants' information is compartmentalized; plaintiffs' information is a relatively open book. The proposed changes would eliminate the standard that allows discovery of information relevant to the parties' claims or defenses. "By replacing relevance with a cost analysis, these proposed rules would severely restrict the ability of plaintiffs to uncover evidence."

322, Michelle D. Schwartz, for Alliance for Justice: The change "will upset decades of precedent and invite disputes and uncertainty." And the language creates a risk of overreliance on monetary stakes in the cost-benefit analysis.

323, Jonathan Scruggs, Alliance Defending Freedom: "'Proportional to the needs of the case' is an extremely vague standard." "Governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake * * *."

324, Jonathan J. Margolis: Deleting the classic definition of discoverable information — information reasonably calculated to lead to the discovery of admissible evidence — and replacing it with an overriding proportionality standard will mean that relevant evidence is not discoverable as of right. Application of proportionality will be difficult and inconsistent. The "needs of the case" cannot be defined. The amount in controversy will be difficult to assess at the beginning of the litigation, and the inquiry will be unwieldy when equitable relief is significant. The possibility of multiple or punitive damages also must be counted. And balancing will prove inapt when it is necessary to go through discovery to find out what is at stake. And account should be taken of factors not subject to easy quantification, such as pain and suffering or emotional distress. And damages may increase during the course of the litigation. Looking for the amount in controversy could become a self-fulfilling prophecy by constricting the information needed to show what is at stake.

327, Malini Moorthy for Pfizer, Inc.: This change "has the potential to significantly reduce much of the undue burden that Pfizer routinely faces as a defendant responding to discovery requests." With two examples, also provided at the November 7 hearing: one is a litigation in which Pfizer spent \$40,000,000 under a court order to preserve backup tapes for 8 years without any party ever looking for anything there, and also collected multiple millions of documents from 170 custodians and over 75 centralized systems, producing 2,500,000 documents representing more than 25,000,000 pages, to have 400 of those documents marked at trial. Overall, in the year ended October 1, 2013, Pfizer, for as many as 60 ongoing litigation matters, collected roughly 1,000,000,000 pages of documents from 3,000 custodians. Of them about 140,000,000 were identified as potentially responsive. 25,000,000 pages were produced; 5,500,000 of them required at least one (expensive) redaction. "Pfizer is not, and should not be, in the business of discovery." This "is clearly money that could better be spent developing life-saving drugs and improving health outcomes around the world." November Hearing: p 261 Repeats the same

observations.

328, U.S. Chamber Institute for Legal Reform: The proportionality provisions now in Rule 26 have failed to achieve their purpose. Litigants and judges commonly ignore them. Proposed Rule 26(b)(1) "would provide much-needed balance." It would help transform the "anything goes" approach into an approach that protects against the worst abuses. (There are figures for the costs of discovery.)

330, Wade Henderson for The Leadership Conference on Civil and Human Rights: Rule 26(b)(1) is the specific focus of comments addressed to "many of the proposed changes." The proportionality standard will impact plaintiffs, such as victims of employment discrimination, who have the burden of proving their claims "in the face of severe imbalances in access to relevant information. Such information asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." And there is no empirical basis for the proposed changes. The broader statements emphasize the vital importance of private plaintiffs, as private attorneys general, in enforcing civil rights claims. In 2005, out of 36,096 civil rights cases the United States was the plaintiff in 534, 1.5%. The rest were brought by private plaintiffs. And discovery is all the more important in light of recent decisions that "have limited access to the courts for vulnerable Americans," both by substantive rulings and by such procedural rulings as those that heighten pleading standards and expand the reach of arbitration.

343, Doug Lampe for Ford Motor Company: Discovery is used against Ford in personal-injury product liability litigation "to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation." In each of several states Ford has more product litigation than in the rest of the world combined. And it is at a competitive disadvantage because, as a domestic company, most of its documents and witnesses are subject to discovery demands. Its foreign-based competitors have few documents or witnesses subject to discovery compelled by courts in the United States. The emphasis on proportionality invokes factors that are familiar to state and federal courts because they are now in the rules. It makes clear "the reality that discovery necessarily involves a balancing of interests." 450, Vickie E. Turner for Wilson Turner Kosmo LLP: "As counsel for Ford in numerous cases," quotes and adopts the passage quoted above.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The present rules work reasonably well. The changes will adversely affect our clients. Proportionality will be difficult to manage. The party requesting discovery is least in a position to show the cost of producing or the value of information not yet produced. Will there be an evidentiary hearing? Discovery on respective resources? How can the requesting party show the importance of the discovery in resolving the issues when the information remains hidden? Proportionality objections, further, will become boilerplate.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses moving the proportionality provision and limiting discovery to matter relevant to a party's claim or defense. This will help cabin excessive discovery, and may have an indirect effect on the burdens caused by over-preservation.

But, in line with other suggestions that the rules should expressly define the duty to preserve, suggests adding "or preservation" in Rule 26(b)(2)(C) at three points: "the court must limit the frequency or extent of discovery or preservation"; "the discovery or preservation sought is unreasonably cumulative * * *;" the proposed discovery or preservation is outside the scope permitted by Rule 26(b)(1)."

347, Genie Harrison: It is not clear whether this comment addresses a supposed limit on the number of Rule 34 requests, or instead expresses concern with proportionality. Offers an example of a case in which the documents needed to prove a plaintiff's case could not have been asked for "under the rules change."

348, Stephanie Bradshaw: Proportionality will place plaintiffs at even more of a disadvantage to defendants. The Committee Note says that parties must observe proportionality without court order because it is made part of the scope of discovery. "[I]f parties were to miscalculate the proportionality determination, they could thus be exposed to sanctions, which could result in a chilling effect." Reducing the flow of information also will impede settlement, which is more readily achieved when all parties understand each others' positions. Together with the new numerical limits, plaintiffs will be placed at an informational disadvantage from which they are unable to recover.

349, Valerie Shands: "Working for plaintiffs' firms, I know we value transparency above costs. * * * [W]e need to have that information to *know* that it is irrelevant or duplicative, and because its broad scope does occasionally turn up highly probative information." It is hard enough to get relevant information out of defense counsel as it is. "[T]he cost is worth it to achieve justice."

350, Pennsylvania Bar Association: Today, the proportionality factors "are rarely applied because of the notion of some that parties are entitled to discover all facts, without limit, unless and until a court says otherwise." But the Committee Note should emphasize that cost and burden are simply two factors to be considered along with the others. Part of the risk is that cost is the first factor listed.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Proportionality is particularly important with respect to ESI. In employment cases, "plaintiffs' counsel use electronic discovery requests tactically, to pressure the defendant into settlement or to lay the groundwork for a spoliation claim."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: The Committee has long recommended proportionality. But suggests that the Committee Note alleviate an ambiguity by stating that the reference to the importance of the issues at stake calls attention to the fact that importance is not measured solely in monetary terms.

357, Joanne S. Faulkner: "For a \$1,000 consumer protection case, defendants will surely argue that the consumer should be entitled to no discovery." This will thwart the purposes of consumer statutes that often provide a relatively nominal amount of statutory damages, but also provide for attorney fees. "'Monetary awards understate the real stakes.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Plaintiffs in nursing home litigation typically are unfamiliar with the court system. Defendants are represented by many lawyers and control the necessary information. The proposal "would impose a significantly narrower range of factors for a court to consider when determining whether or not to permit particular discovery." Nursing homes typically utilize written policies and procedures; the proposal would make discovery more difficult. In considering the importance of the issues and the importance of the discovery items, the court could inadvertently usurp the role of the finder of fact.

359, Andrew B. Downs: The Rule 26 amendments do not go far enough. The scope of discovery should be limited to what is material.

360, Robert Peltz: The proportionality factors will have to be applied by the court in every case. The standard is too amorphous to be enforced fairly. Tremendous burdens will be imposed on district judges. And a ruling in one case will be much less significant precedent for other cases because a unique balancing of factors is required for each case.

361, Caryn Groedel: Proportionality will have a chilling effect on discovery and the plaintiff's ability to prove the case.

362, Edward Hawkins: Proportionality "will only encourage rule breaking plaintiffs and defendants to withhold evidence." Current Rule 26 provides protection enough.

363, Dean Fuchs, at request of NELA-Georgia Board: Proportionality will encourage defendants to file motions to narrow the scope of discovery, hoping the court will deny plaintiffs access to the evidence they need to prove their claims.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Placing on plaintiffs the burden of proving proportionality is harsh; their resources are generally more limited than defendants' resources. "With little or no information, upon what basis can the plaintiff argue the importance of the issue, the importance of the discovery in resolving it, and/or whether the burden or expense outweighs the likely benefit?"

365, Edward P. Rowan: The subjective weighing of cost and benefit will work an injustice "if a judge opines that discovery should not occur."

368, William G. Jungbauer: Replacing discovery relevant to the claims or defenses with a five-factor proportionality test, moved from 26(b)(2)(C)(iii), changes a shield to a sword, "shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden."

369, Michael E. Larkin: The change "flips the burden of proving the utility of discovery on the party seeking the discovery." It will result in parties opposing discovery without having a burden to show why, generating more motion practice. And the addition of "allocation of expenses" to Rule 26(c)(1)(B) makes the change to proportionality unnecessary.

372, J. Burton LeBlanc, for American Association for Justice: Proportionality is examined at great length. The first statement is that introducing proportionality as a limit on the scope of discovery can be viewed as changing it "from a practical consideration to one that renders critical information off-limits merely because it may be expensive to retrieve." That will fundamentally alter the scope of discovery. (1) The amount in controversy is misleading; many cases are in federal court because Congress made federal law to support claims that seek small damages, or only injunctive or declaratory relief. This problem may not be resolved by considering the importance of the issues because there is no indication of the extent to which any particular court will rely on the importance of the issues. (2) Who determines how important an issue is? The court is not likely to have enough information to make this determination at the outset of the case. (3) As for the parties' resources, when a small plaintiff sues a large corporate defendant, whose resources determine this? Can the defendant argue for limited discovery because the plaintiff's resources are limited? (4) Defendants will argue in every case that the discovery is not important in resolving the issues. Without discovery, there will be virtually no information to support the court's determination. (5) Balancing likely benefit against burden or expense will support an argument in every case that discovery is too burdensome. It will create an incentive to preserve documents in formats difficult to access. "The proportionality test gives defendants a

step-by-step formula to argue that critical relevant information should not be produced"; the argument will be made in every case.

If moving these factors into the scope of discovery is not intended to change the rule, as some have suggested, why make the change? The Committee Note says the revision limits the scope of discovery. The change "likely will be interpreted as a substantive change." The present rule, further, requires the court to make a determination that discovery should be limited; the proposed rule imposes an insurmountable burden on the party with fewer resources and less access to relevant information. Nor does the argument from Rule 26(g) persuade. The Rule 26(g) certification is made to the best of the party's knowledge, information, and belief formed after a reasonable inquiry. The party requesting discovery does not have to prove the requests are not unduly burdensome or expensive; the proposed rule likely will impose that burden.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as defining the scope of discovery under present Rule 26(b)(1), and urges that the multi-element test of proportionality should not be substituted. The test is so subjective that a party could file a non-frivolous challenge to almost any discovery request. This tactical motion practice will have disproportionately negative effects on small business and other plaintiffs. In trademark, copyright, trade secret, and occasionally patent litigation it may be difficult to prove actual damages; if only injunctive relief is sought, the stakes may seem small. There is no need to further restrain discovery. The complaint will already have survived heightened pleading standards. Plaintiffs have little economic interest in pursuing voluminous discovery when the amount in controversy is relatively small. Varying standards will develop across the circuits, "further eroding uniform application of justice and the federal rules." Present protective order practice, and the authority to limit discovery under the same factors in present Rule 26(b)(2), afford protection enough. The default limit in 26(b)(2) should not be amplified as a default limit on discovery.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope. It incentivizes a defendant to claim production is too costly, "shift[ing] the burden to the plaintiff to attempt to explain why evidence the plaintiff has never seen is sufficiently beneficial to outweigh the costs unilaterally alleged by the defendant." In asbestos cases this "will result in the inability of a large number of sick and dying people to prove their cases."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "[P]roportionality is the comparison of two variables, and it cannot be asserted when the variables are unknown. Defining the scope of discovery using a proportionality standard without requiring the party in possession of all the information needed to evaluate proportionality to disclose it" will lead to uninformed rulings. Defendants regularly overstate the cost of responding. "Elevating proportionality from a protection against abuse to a barrier to access will only incentivize such overstatement because the proposed changes do not require defendants to back up such claims." In product liability cases, for example, liability is often "revealed through email communications between employees rather than the testing and design documents."

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): With proportionality, "plaintiffs would be faced with the impossible task of arguing that the likely benefit of unknown information outweighs the also-unknown cost to the defendant to produce it." The change would provide another tool for corporate defendants to avoid producing relevant information, a tool that is guaranteed to be abused.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery

cooperatively and collegially, not as a club to inflict unnecessary costs. Mandating proportionality is desirable. Rule 26(b)(1) generally has it right, but factoring "the amount in controversy" should be placed at the end, and all the factors should be introduced by adding "and also factoring" after the call to consider whether the burden or expense outweighs likely benefit. Surely a party should not be required to take a \$50,000 discovery step in a \$75,000 case. But if this factor is first in the list, "a court may be too likely to require unnecessarily expensive discovery steps in cases involving high amounts in controversy." The rule text, or at least the Committee Note, should explicitly state that the cost of discovery should not exceed or be disproportionate to the amount in controversy, and a large amount in controversy alone should not justify discovery when the burden or expense outweighs likely benefit.

379, John M. Gallagher: The subjective factors considered in determining proportionality invite every judge to apply a personal concept, and would require numerous mini-trials on the factors.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proportionality factors should remain in 26(b)(2)(C), to be invoked on review by the judge. Moving it enables a litigant to refuse to provide discovery if it determines in its own opinion that the request is not proportional to the needs of the case. "At least in our cases, this change would only benefit defendants." Most of the clients of these Legal Services Organizations are indigent, holding claims likely to yield small money damages. "Even cases with relatively limited remedies of[ten?] involve complex facts and proof."

381, John H. Beisner: Imposing a strong proportionality requirement is a marked improvement over the "anything goes" approach. It will help winnow overbroad requests and curtail abuse. January Hearing: p. 61: This is not a radical change. It cures the relative obscurity of a rule that has not produced an avalanche of motions, and will not. Nor will making it more prominent change the burdens. A requesting party already is certifying to proportionality under Rule 26(g). A motion will generate a discussion in which both parties have to contribute. The plaintiff declares the amount in controversy. Each party speaks to available resources. The requesting party speaks to the importance of the discovery. The responding party speaks to the burdens.

383, Alan B. Morrison: (1) Must requesters factor proportionality into their requests? May the responding party object to almost any request on this ground? Or is the provision directed only to judges? This language was directed to judges in (b)(2)(C)(iii). It would help to make a new sentence after "claim or defense" on line 9 of the published rule. The sentence would direct the judge to take into account the factors listed. (2) Delete "the scope of discovery is as follows"; it is unnecessary and confusing. (3) What difference is there between "proportional" and "whether the burden or expense * * * outweighs its likely benefit"? The other factors are not independent tests, but factors or considerations. Say first either "proportional" or the "outweighs" test, then direct the judge to consider the factors. (4) What is meant by "the importance of the issues at stake"? Is the focus on each issue, or on the overall claims? If on each issue, what if some issues are routine but there is a liability or damages issue that is of great importance but the discovery does not bear on the important issue? If the focus is on the claim, "is a constitutional claim always more important than a statutory or common law claim? What if there are several claims, and discovery bears on only some of them? If this factor is to balance the amount in controversy factor, it might be revised to address "the nature and extent of any non-monetary relief sought." (5) The importance of the discovery in resolving the issues is similarly ambiguous. It could be fixed as "the importance of the discovery in resolving ~~the~~ [an][a significant] issues to which it is directed." (6) Proportionality and scope are the same; 26(b)(2)(C)(iii) should be "is ~~outside the scope~~ not permitted by Rule 26(b)(1)."

384, Larry E. Coben for The Attorneys Information Exchange Group: The proposals alter the playing field "by placing expediency above relevancy." The "reasonably calculated" sentence has defined the scope of discovery for more than 60 years. Proportionality changes this. "Each factor will benefit defendants at the expense of plaintiffs who need the information." Congress has created many claims that can be brought to federal court regardless of the amount in controversy. How will the court resolve the monetary value of the case — will experts be called? How is a court to determine the importance of the issues, or the importance of the discovery to resolving the issues? Subjective judgment will be called for, and there will not be enough information to make the judgment. Looking to the parties' resources may lead a wealthy defendant to argue that discovery should be limited because the plaintiff is impecunious — a victim's ability to pay for the needed information should not be a determining factor.

The proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether discovery should be limited to whether discovery should be permitted.

Again, how is the court to judge the accuracy of the parties' submissions? Should it, for example, consider that the case before it may be one of many similar cases, so that the burden of assembling the information should be compared to the needs of all the similar cases, and the costs spread across all of them?

386, Arthur R. Miller: Moving 26(b)(2)(C)(iii) to become part of the scope of discovery effectively converts it to an independent limitation on the scope of discovery. The five criteria are highly subjective and fact dependent, with a dangerous potential to reduce the scope of discovery. It is likely to produce a wave of defense motions that will be difficult to decide "when the challenge comes before the discovery itself." There is no empiric support for this change, nor is it justified. January Hearing, p. 36 at 38: Proportionality "is a major shift in the balance of discovery." 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Professor Miller extensively with approval. 572, John Kirtley: Adopts Professor Miller's testimony to a Senate Committee, "as edited by me."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Proportionality "is particularly important in litigation where the burden of discovery is asymmetrical, i.e., where one side, almost always the defendant, faces far greater expense in responding to discovery." The enormous expense of ESI discovery makes this all the more important.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Moving proportionality up from 26(b)(2)(C)(iii) "is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean in each individual case."

393, Robert Redmond: Proportionality is important. Negligible claims have been settled because a party noticed a Rule 30(b)(6) deposition. A corporate deposition takes a small business owner away from his work for days at a time. Proportionality is the only reasonable means to prevent this type of tactic.

394, Thomas Crane: Proportionality is a concern in representing employees in discrimination cases. The amount in controversy can fluctuate, depending on whether a fired employee finds new work. Employers have the bulk of discoverable material; they resist discovery, I file a motion to compel, and they become cooperative. The system works now.

396, Steven J. Twist: "[T]he civil justice system is dysfunctional." The costs of discovery drive dispute resolution. Proportionality, together with eliminating subject-matter discovery and the "reasonably calculated" provision, is a much-needed reform. This will not shift the burden — whoever bears the burden on the scope of discovery today will continue to bear it after adopting proportionality. Rule 26(g), further, already imposes the burden of ensuring proportionality on both the requesting and responding parties.

398, Shira A. Scheindlin: (1) Proportionality "invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional * * *." This could become a common practice * * *." That will mean the requesting party must make a motion, at considerable expense. (2) The rule does not specify which party bears the burden of proof. "[I]t would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party." (3) Addressing five factors in every motion will be burdensome and not informative. The requesting party says the case is worth \$1,000,000, the responding party says it is worth \$10,000: how is a court to choose? The responding party says it will cost millions to produce, the requesting party says this is an exaggeration: must the court appoint an expert to determine the true burden? How is a court to balance burden and expense against benefit of producing materials that have been identified only in a very general way, at the beginning of the case? Judge Easterbrook and others have observed that proportionality is doomed: judges cannot prevent what they cannot detect, they cannot detect what they cannot define, and they lack essential information to define what is abusive. (4) The current rule works well, as shown by the FJC study. (5) Proportionality has been available for years. It is not often raised. When it is raised, it is at a time in the case when parties and the court have developed significant information about the case that allows intelligent disposition of the objection. Proportionality may be usefully approached early in a mega case, but not in other cases. (6) Rule 26 was amended in 2006. "It is too soon and too often to once again revise this rule and further contract the scope of discovery." This is part of "a continued and systematic effort to respond to a big business complaint that the American system of litigation is somehow bad for American business and reduces our competitive advantage * * *." 0469, Edward B. Cloutman III: Adopts Judge Scheindlin comments by reference. 470, J. Derek Braziel: agrees with Judge Scheindlin's "Careful analysis and comments." 472, Christopher Benoit: Wholeheartedly supports Judge Scheindlin's perspective, as well as those of Professor Arthur Miller and Honorable James C. Francis IV. 476, John Wall: Concurs with Judge Scheindlin. 477, James Jones: Agrees wholeheartedly with Judge Scheindlin. 492, David Wiley: Agrees with Judge Francis and Judge Scheindlin. 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Judge Scheindlin extensively, with approval. Hon. Lois Bloom: Approves Judge Scheindlin's comments. Most problem cases are dealt with by hands-on management.

399, Edward Miller: Moving proportionality to (b)(1) is a modest edit, but will encourage judges and parties to maintain a pragmatic perspective. Proportionality will be an important improvement; the overbroad scope of discovery defined by present (b)(1) "is a fundamental cause of the high costs and burdens of modern discovery." But the rule should be strengthened further by adding a requirement that information be "material" to be discoverable.

400, Gregory P. Stone: Modestly emphasizing the existing authority to insist on proportionality will assist in combating spiraling discovery costs. The ratio between pages produced in discovery and pages used at trial shows that extensive discovery does not aid the parties in preparing their cases. The protests that there is an undue emphasis on the amount in controversy overlook the direction to consider the importance of the issues at stake. "[F]ederal judges and magistrates are well positioned to divine the true stakes in each case — whether important public rights or potential settlement value."

402 Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: Of 78 students, 58 opposed the change. It invites parties to decide for themselves what is proportional; disputes will occur routinely, and a party may decide unilaterally on how extensively to search for discoverable materials based on biased views about what is proportional. The burden of seeking court intervention is moved from the party opposing discovery to the party requesting discovery; "it is better for the truth-seeking function of litigation to err on the side of too much discovery rather than on the side of too little." Parties may take advantage of the subjective nature of the calculus to burden their adversaries with the costs of obtaining court intervention [and because it is subjective, the motions will often be "substantially justified" so as to escape sanctions under Rule 37]. Parties with little pecuniary but substantial non-pecuniary interests at stake, parties with fewer resources, and parties with less ability to obtain information outside of discovery, could be systematically disfavored.

403, Donald H. Slavik for AAJ Products Liability Section: The proportionality factors are subjective and will lead to ancillary issues. Must a plaintiff make a record offer of proof of the amount in controversy? Must there be evidence of the parties' resources? The importance of the issues is highly subjective. The importance of the discovery cannot be known without knowing what the information is. And not knowing that important information actually exists makes it difficult to show that the benefit outweighs the cost. It will almost always be the plaintiff who must carry the burden of showing that these factors justify discovery. February hearing, p 14 at 17: Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The introductory comments decry the cost of discovery and the use of discovery to gain leverage in litigation and force settlement. The costs seriously undermine the jury trial system. Hourly billing is not to blame — clients demand efficiency, litigation budgets have become the norm, and alternative fee arrangements are used more frequently. Civil defense lawyers often ask courts to limit the use of discovery. "Federal discovery practice, in its current form, is the largest component of the increasing costs and is staggeringly wasteful and inefficient." Thus it is time to look for changes that will not encourage excessive motion practice but will bind practitioners by the rules to narrow the scope of discovery without judicial oversight. The IAALS/ACTL recommendation to adopt proportionality for e-discovery points the way to adopting proportionality generally. The proposal "provides a proportionality requirement that has been completely lacking in modern discovery, and DRI strongly supports" it. Prior efforts to limit the scope of discovery, such as the 2000 amendment, "have not produced a different mindset among the bench and bar. These historically broad notions of discovery and relevance could prevent the proposed amendment from fulfilling its potential." That risk can be avoided by requiring that the matter be "relevant and material" to a claim or defense. The DRI comment "contains an excellent discussion of the associated costs and negative impact e-discovery" has. The 2006 amendments did not go far enough.

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) The "drastic change" adding proportionality "would have severe consequences." A party could refuse to provide discovery by deciding the request is not proportional. This would enable defendants to avoid producing critical information plaintiffs need. It will be especially detrimental in civil rights, constitutional, and discrimination cases in which information is asymmetrical. Plaintiffs would be forced to use limited time and resources on unnecessary motions and appeals. The five factors would be litigated for each piece of information.

406, Troy A. Tessier: Clarifying the proper scope of discovery is an important improvement to the current rules.

407, David J. Kessler: (1) "While courts, responding parties, and requesting parties will always value cases differently, proportionality should still be a limiting factor." (2) The five factors will incentivize counsel to carefully consider their discovery requests. (3) The fear that proportionality will stimulate motions is unfounded. Parties can and do attempt to limit discovery under Rule 26(b)(2)(C) now. This mirrors counsel's obligations under Rule 26(g). Bad actors will always seek to lengthen and complicate discovery by motion practice, but moving proportionality to the scope of discovery will give them less ground to stand on. (4) Rule 26(b)(2)(C)(iii) should be eliminated as redundant; retaining it "could lead to mischief and confusion" in implementing Rule 26(b)(1). (5) The Committee has been requested to encourage the use of advanced analytical software in the Committee Note. "I regularly use such technology." But the decision on how to respond to discovery requests should be left to the parties. How they meet their discovery responsibilities is their responsibility. They should not be pressed to use technology they do not want to use, nor need to use. Nor is there any need for encouragement. "The logic and reasonableness of advanced analytical software is winning the day."

408, Elliot A. Glicksman for Arizona Association for Justice: "A plaintiff seeking discovery will have the burden of proof on proportionality." Defendants will resist even clearly relevant discovery. Application of the five factors will lead to inconsistent rulings, endless delays, and collateral litigation. The change will transform federal courts from notice pleading to fact pleading, undercutting a plaintiff's ability to discover facts needed to prove a claim.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Proportionality will increase discovery disputes and the time required to resolve them. The factors are so vague that defendants will invoke them in every case. (1) Looking to the amount in controversy will require evidentiary hearings, or at least extensive presentations, on the injuries in the case (with multiple examples, including such matters as axonal shearing in traumatic brain injury cases, leading to the need to understand secondary biochemical cascades, all involving differing expert interpretations of neuropsychological testing). And should the amount in controversy focus on each case in isolation, or is the determination affected by a showing of numerous injuries or by the consolidation of cases? Is the value of a case affected when there are catastrophic injuries but "difficult liability"? (2) The importance of the issues is hopelessly vague. Importance to whom — plaintiff? defendant? society? How many defendants? How severe the injuries? If some defendants settle, do the issues become less important? (3) How can the plaintiff show the importance of the discovery before it has the discovery? And discovery that does not establish an essential element of the claim still may be important to present the full context, the big picture, as part of persuasion. (4) Burden or expense also is undefined. The plaintiff will not have access to information about the defendant's financial health, and will need discovery on that. 448, Robert D. Curran, tracks 410.

414, John R. Scott: Proportionality should help reduce overreaching discovery demands.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: NASCAT members are involved in the complex, high stakes, contentious cases described by the Advisory Committee and FJC as leading to expensive discovery. But that shows only that discovery is expensive, not that it is disproportionate. Before 2000, except in districts that opted out (?), discovery proceeded apace. But in districts that opted out of mandatory discovery (? disclosure?), defense counsel were essentially encouraged to challenge and defensively parse virtually every request. Such behavior required court involvement. Rule 26(b)(1) proportionality

will fundamentally change the very nature of discovery, inviting litigation of "each of these seven factors in every single federal civil case." The rules already provide means to rein in abuses; Rule 26(b)(2)(C)(iii) already enforces proportionality. Moving proportionality into the scope of discovery will require a plaintiff to justify its requests in advance, without the benefit of knowing what relevant information is in a defendant's possession. The defendant, who knows where the requested information resides, can tailor its objections based on cost. Defendants often are not looking for ways to reduce costs of producing, but to avoid producing. Plaintiffs need discovery to reveal the sources of information not previously known to exist.

420, Daniel A. Edelman: Blends protests about deleting "reasonably calculated" and "subject-matter" discovery into the protest about proportionality. Proportionality will shift the burden to the plaintiff to prove the information it seeks outweighs the burden. That cannot work when the information is almost exclusively controlled by the defendant, so the plaintiff cannot show the benefit. Defendants will take even more aggressive positions than they take now, and will abuse the standard. The result will be greatly increased motion practice. "At a minimum, the defendant shall bear the burden of proof and be required to apply to the court for avoiding discovery on this ground."

421, Louis A. Jacobs: (Writing as a retired professor and long-time employment law practitioner:) The present rules encourage the common practice of cooperative discovery in employment cases. (1) But relocating proportionality to become part of the scope of discovery frontloads it. "[T]he fact that the language is relocated matters." That is why relocation is proposed. The Committee should say so if it means to preserve the law that shifts to the party resisting discovery the burden of adducing specific facts to demonstrate the discovery is beyond the proper scope. If it means to change that approach, it should say so. But still "[t]he proportionality factors tilt against plaintiffs in most employment litigation." Leaving it in Rule 26(b)(2)(C)(iii) forces a motion by the party resisting discovery, and a motion must be preceded by informal efforts that will tell the party requesting discovery the facts that bear on the burden of providing it. If the plaintiff has the burden, the employer will not have much incentive to provide as much information. (2) Damages ceilings for federal statutory discrimination and retaliation claims set the amount in controversy too low to justify extensive discovery. (3) "The importance of the issues at stake depends on the value assigned to equal employment opportunity, protecting whistleblowers, or vindicating constitutional rights. Because that value resides in every case, proportionality can hardly assign it high import." Importance is more likely to reside in the number of plaintiffs. "Proportionality has been rejected in the attorneys' fees context precisely because it undervalues the importance of vindicating civil rights." (4) Looking to the parties' resources is another makeweight. Courts are not likely to count it against employers that they invariably have vastly greater resources than former employees suing them. (5) The importance of discovery in resolving the issues in employment litigation cannot be overstated, so this factor is really just a threshold to cost-benefit analysis." Proportionality will come down to this cost-benefit analysis.

423, Ralph Spooner: "Discovery abuse has grown * * * in the last 15 years. Discovery should be proportional [to] what is at stake in the litigation." Too often the cost of discovery forces parties to resolve a case.

433, Ryan Furgurson: Proportionality "emphasizes the balancing of interests that should take place in any discovery dispute, and is a positive step * * *."

443, Grant Rahmeyer: "Changing the scope of discovery under Rule 26 is an absolute abomination. * * Changing the burden of proof on discovery destroys litigation. It allows

companies to hide documents then claim that the plaintiff isn't 'hurt enough' for us to bother to look for documents." The result will be "mounds of briefs just to get leave to file discovery," followed by more briefs on motions to compel.

445, Gerald Acker, for Michigan Assn. for Justice: This ambiguous standard will mean that discovery will depend on the luck of the draw of judges. Some judges, for example, have likened employment disputes to the divorce cases of federal courts; they will not be sympathetic to the discovery needs of those cases. Nor can a judge determine the importance of a case, or of proposed discovery, without knowing what the discovery will yield.

446, Stephen Aronson: Discovery should be narrowed "to only that truly necessary to address the complaint."

449, Christopher D. Stombaugh, for Wisconsin Assn. for Justice:

(1) As Professor Miller testified to Congress, the proposals lack any empiric justification. Tort case filings are falling.

(2) Relevance and proportionality are contradictory. "If evidence is relevant, how can it not be proportional"?

(3) The proposal makes it clear that the proponent of discovery must show relevance and proportionality. The effect will fall most heavily on important cases of public policy.

(4) Now, by moving proportionality from (b)(2)(C)(iii), the rule directs that courts must limit discovery.

(5) All of the proportionality factors are subjective. Plaintiffs barred from relevant discovery will have little chance of prevailing on appeal.

(6) Looking to the amount in controversy, "given that there is already a monetary threshold for federal jurisdiction in most cases, * * * raises numerous problems, some of which may rise to the level of constitutional issues." Do punitive damages caps limit discovery? Or, as under Wisconsin law, limits on the amount a family can recover in a death case for loss of companionship and society? Does discovery depend on whether one plaintiff sues, or ten cases are consolidated?

(7) Looking to the importance of the issues invites subjective judgments. These questions should be decided more at the pleading stage, not in limiting discovery.

(8) "There should be no dispute that discovery is important to resolve any dispute." And who is the discovery important to?

(9) The parties' resources raises questions — if the plaintiff is represented on contingency, should the attorney's assets be questioned? Will statements of resources be required? "[T]he lack of resources should never be a factor in determining justice.

(10) "The value of evidence cannot be ascertained until it has been obtained and reviewed." This factor, as the others, will generate, not limit, litigation.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Including a proportionality requirement delineates necessary parameters to discovery and remedies the overbroad scope of discovery as defined in the current rule." But a materiality requirement should be added to force the parties to focus on what they really need.

456, Niels P. Murphy writing for eight lawyers: Proportionality is a good idea, but the historically broad notions of discovery and relevance are a factor that could thwart realization of the purpose to reduce the present overbroad scope of discovery. "and material" should be added.

457, Carl A. Piccarreta: "the proposed rule change will undoubtedly have judges acting as referees in evaluating five factors on a repetitive basis." Leave Rule 26(b)(1) alone.

455, Andrew Knight: Supports the amendments to 26(b)(1) to "significantly reduce the wasted effort and great expense of responding to discovery served only to harass."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports incorporating proportionality in (b)(1), but with several suggestions to improve clarity and operation. (1) The Committee Note should state explicitly, in suggested language, that moving these considerations to (b)(1) "is not intended to modify the scope of permissible discovery." The factors should be applied just as they have been. (2) A court may place improper or differential weight on specific factors, such as the amount in controversy or the importance of the issues. The importance of the issues may justify broader discovery even when the dollar stakes are low: "This dynamic is implicated by a large swath of the Department's work * * *." It is also affected by asymmetric information cases, in which the quantity of information available to the defendant is far greater than the information the government has. "Federal agencies also have limited resources to apply to individual cases, and such constraints, which include protection of the public fisc, may warrant imposing limits on discovery." (p. 4 recommends specific note language.)

460, Jo Anne Deaton: Proportionality will reduce the use of discovery "as a tool for 'economic blackmail.'" This technique is used by plaintiffs in employment matters to increase potential fee recoveries, and in product liability cases "where deposition costs, including expert discovery, is used as a hammer to force settlement."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Changing proportionality to define the scope of discovery "may on occasion generate inequitable results." This is an amorphous standard. Early in the discovery process, it may be difficult to determine how beneficial discovery will be in resolving the issues. The amount in controversy and the importance of the issues at stake "will likely be the predominate factors," and the parties will on occasion significantly disagree about the amount or the importance. The other proposed changes to the discovery rules, further, may make litigants more inclined to invoke present 26(b)(2)(C)(iii). "If parties more freely file motions invoking the existing proportionality standard in light of these changes, then there is less of a need to realign the available scope of discovery." It might be better to amend Rule 26(b)(1) "to specifically refer to proportionality as an important limiting principle that should be invoked in appropriate cases."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The comment on proportionality essentially renews the Rule 16 comment: the proportionality analysis should not be conducted without an in-person conference with counsel to discuss the court's views.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Proportionality "will foster greater communication among counsel and allow for more effective case management."

468, Karen Lamp: Proportionality will "allow necessary and relevant discovery without requiring the parties to devote substantial resources to producing routinely requested overbroad discovery that in many instances will never even be read."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: The first part of the comment details several pilot projects and state court rules that adopt proportionality as a limit on discovery. Utah Rule 26(b)(2)(F) includes, as one factor bearing on proportionality, whether "The party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information." Utah Rule 26(b)(3) directs that the "party seeking discovery always has the burden

of showing proportionality and relevance." In the second part, commenting on the published proposals, the "attempt to bring a proportionality evaluation to document requests" is applauded, with this further observation: "With specific reference to electronic discovery, we recommend that a proportionality determination should 'take into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.'"

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: Proportionality is subjective. The five factors "are quite limited in nature." Although the cost of responding can be shown, neither party will be able to objectively describe the value of the proposed discovery, nor can the court make a rational determination, having no idea as to the substance of the evidence. Parties will hide behind expense to avoid producing even relevant and admissible evidence that reasonably should be produced. The results will be catastrophic in cases of asymmetric information.

478, Joseph Goldstein: The proposals "are long overdue." "[T]he rules of discovery are routinely abused for the sole purpose of forcing a settlement of a dubious claim."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: As Professor Miller testified, the proportionality proposal is a threat to the jugular of the discovery regime. The scope would be changed from relevance to proportionality. Defendants would be able to avoid producing relevant information a plaintiff needs to prove the case, especially when the cost of discovery is expensive relative to the amount of damages or requested relief. "Civil rights litigants will be the ones most hampered." The gap between the party who controls the information and the one who needs it would widen. And there would be "a massive increase in aggressive collateral discovery motions."

480, James Wilson: Strongly supports, which "will potentially provide a much-needed and common-sense improvement" to reduce runaway discovery costs.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Proportionality provoked the most detailed discussion at the conference. (1) Many plaintiffs' attorneys feared a significant and detrimental limitation of discovery. There is a risk that this will become a subjective standard, administered differently by different judges who have different "know-it-when-you-see-it" visions of proportionality. Many also feared this would shift the burden to the party requesting discovery, and that it is difficult for that party to show proportionality when the responding has all the information about the nature, location, and types of requested information. They feared disproportional effects on some kinds of cases, including "civil rights" cases. (One participant from Colorado offered the anecdotal impression that the Colorado pilot project with proportional discovery has not had the effect of limiting the parties' ability to get needed discovery.) (2) Most defense attorneys supported proportionality. It will refocus the court and parties on the importance and usefulness of requested discovery. "To the extent the changes bring the court into the process * * * this is a good thing." This will move away from boilerplate discovery and discovery sought for tactical benefit. And Rule 26(g) already obliges requesting parties to honor proportionality. (3) A judge thought this will encourage and increase judicial involvement. Another suggested that "for judges who are actively managing discovery, this would not change the equation at all." Plaintiff and defense attorneys agreed that increased judicial engagement is a good thing that changes for the better how the attorneys approach a case. "Unfortunately there was also agreement that active judicial engagement was the exception." (4) Some participants thought a different phrase should be substituted for proportionality: "relevant to any party's claim or defense and consistent with the needs of the case, considering * * *" (5) There was broad support for moving "the amount in

controversy" further down the list; some suggested that if it is removed entirely, "the resources of the parties" also should be removed. (6) A broader proposal was to tie proportionality analysis to the stage of discovery. Discovery could be staged, with initial discovery focused on what is needed for settlement, then on motions for summary judgment and responses.

494, Charles R. Ragan: Participated in the IAALS conference, and proposes the substitution of "consistent with the needs of the case" for "proportionality."

499, Beth Thornburg: Proportionality, subject-matter discovery, and "reasonably calculated" proposals are addressed together (along with the proposed numerical limits). (1) Empirical studies show that discovery works well in most cases; the problems are confined to 5%, or at most 10% of all cases. High stakes cases, complex cases, and contentious litigators will continue to arise no matter what is done with the rules. If large firms and hourly billing continue, that impetus to costly discovery also will remain. Nor is it shown that high costs in these "worrisome" cases are too high as a normative matter. (2) Across-the-board changes are not likely to succeed. More focused reform, based on empirical study of the problem cases, is more likely to succeed. Account should be taken of a study indicating that plaintiffs tend to use discovery to explore the fundamentals of a case, while defendants tend to believe in a more retaliatory model. Past attempts to cabin the problems of the atypical cases have failed. So it is quite unlikely that complex cases will be limited to 5 depositions or 15 interrogatories. (3) Forces outside the procedure rules will persist. Reasonable cooperation is "devilishly difficult to mandate." Many common types of cases "are particularly polarized," and lawyers come to identify with their clients and see only one side. There is a "dramatic lack of trust," and even a feeling of entitlement to use whatever strategies might be necessary to thwart opponents. Small wonder that more judicial involvement is what is most requested by lawyers on both sides of the docket. (4) The proposals will create new problems. Eliminating "subject matter" discovery leaves an unclear claim-or-defense scope that may be infected by arguments that, just as for pleading under Twombly and Iqbal, "conclusions" do not count in defining the claims or defenses. The uncertainty will be magnified by eliminating the "reasonably calculated" language and incorporating proportionality. (5) The result of all of this will inappropriately limit the exchange of information. (6) There is a particular risk that moving proportionality into (b)(1) will lead to a result not intended, imposing the burden of justifying discovery on the requesting party. At the least the Committee Note should make it clear that this is not intended. It would be better to cast proportionality as a defense in the rule text: discovery extends to anything relevant to claim or defense "unless the party opposing discovery proves that the requested discovery is not proportional to the needs of the case, considering * * *."

519, J. David Stradley: In a bad-faith settlement claim against an insurer, discovery of the adjuster's personnel file showed he had been promoted for using "the low and slow method of negotiating," the very wrong claimed. That discovery would not be allowed under the proposal.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Advances the arguments generally made by civil rights plaintiffs, taking the perspective of disability discrimination actions. In commenting on "the parties' resources," it notes that it often litigates against municipal defendants. What counts as the defendant's resources? The amount budgeted for this action? The amount budgeted for the particular facility or program at issue? The entity's entire budget? These budgets result from political decisions.

524, Joel S. Neckers: Class action plaintiff lawyers have an incentive to propound needless discovery to run up the hours they can claim in attorney fees.

525, Victor M. Glasberg: For plaintiffs' civil rights litigation, proportionality "would have to take into account the life circumstances of the plaintiff and what success would mean to him or her."

528, James Ragan: The problem is that defendants produce thousands of pages of irrelevant documents and either object to producing relevant documents or hide them in the tens of thousands of others.

566, David Addleton: "Proportionality, if considered at all, ought to focus on disparities in power and economic resources between litigants and operate to handicap rich and powerful litigants to level the playing field in our courts * * *."

579, Chet Roberts: To further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefit of the discovery substantially outweighs its burden or expense.

599, Bradford A. Berenson for General Electric Company: The comment provides specific case examples of multi-million dollar discovery expenses. In civil discovery, "boiling the ocean is the norm." The company's adversaries drive up discovery costs to exert settlement pressure; they cast a very broad net in hopes of supporting a claim of spoliation or discovery misconduct, particularly when their case is weak on the merits; and, since requests carry no marginal cost, they hope for an offchance of discovering something that may have some marginal use. The scope contrasts markedly with the scope of inquiry undertaken in internal investigations, where the company does only what it needs to answer an important legal question for its own internal purposes. That is sharply focused, quick, and inexpensive. The proposed Rule 26(b)(1) revisions will not bring a tradeoff of "just" disposition for "speedy and inexpensive" disposition; to the contrary, they will advance just dispositions and reduce cost and delay. The present scope of discovery is counterproductive. In addition, the change will further the purposes of proposed Rule 37(e) to reduce the pressures to over-preserve.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Similar to the concerns expressed by many comments that fear disadvantages to plaintiffs and advantage to defendants.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proportionality proposal. Making this part of the scope of discovery, not a mere limitation, "is a significant change in theory and practice." "Relocation * * * underscores the obligation on the part of the discovery proponent to tailor its demands to the needs of the case, and squarely places the burden of defending the scope of those demands on the proponent rather than the recipient."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no showing that lawyers or judges fail to read past (b)(1) to find present (b)(2)(C)(iii). The parties are required to observe these requirements now through Rule 26(g); there is no need to highlight them by relocating them. The amendment creates a risk that the present language will be read more restrictively, and will be misinterpreted to place on the requesting party the burden of showing the request is not unduly burdensome. This risk arises precisely because the factors are already established and familiar; that is why so many of the comments perceive the change as one that makes the overall discovery standard more restrictive than it currently is. An alternative would be to suggest discussion of the proportionality factors at the 26(f) conference. 2078, Judith Resnik for 170 added law professors: supporting this comment.

650, Craig Miller: Proportionality should not apply to oral depositions; it will only lead to stonewalling, refusals to answer questions, and motions.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors narrowing the scope of discovery, including moving the proportionality factors.

677, Noah G. Purcell for Washington State Attorney General's Office: Strongly supports proportionality. "The state is particularly vulnerable to overreaching discovery demands by opponents due to the state's huge ESI repositories. Private parties often erroneously assume the state has unlimited financial resources to respond to discovery."

720, Phillip Robinson: It is unfair to limit discovery by a plaintiff who did not elect a federal forum, but got there by removal. The list of factors should be revised: "considering the amount in controversy and which party sought the federal forum."

729, Stephen B. Burbank: A major change of course is likely from "the proposal to transmogrify proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself — its status since 1983 — into an integral part of the scope definition." The argument that this will not change the burden in discovery disputes is fallacious. Given Rule 26(g), courts now presume the legitimacy of discovery requests and the burden is on the opposing party to demonstrate the opposite. The change will not only increase transaction costs. It also may prevent a party, because of the transaction costs of discovery disputes, from securing discovery necessary to its claims or defenses. Those who discount these risks reflect "inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs." Proportionality will replace burdensomeness as the preferred objection. And this is exacerbated by moving proportionality to the scope of discovery — now it is likely to be faced after discovery is well advanced, so the judge has an informational basis for making the determination. When it is part of the scope of discovery, the judge will be called in at the outset, when there is no sufficient informational basis to make an informed decision.

787, Richard Wynkoop: "Colorado has been under a pilot project for a couple years now that ties proportionality to discovery. It doesn't work. Rather than streamlining litigation it increases it because 'proportionality' has no definition."

799, Mark S. Mandell: "Cases are not static. They exist and develop in a continuum of understanding." Proportionality will impede the flow of information that will redefine the proper scope of discovery, wearing down plaintiffs and hiding relevant information.

850, Henry Butler for Law and Economics Center, George Mason University School of Law: Reports on a survey of 357 state and federal judges conducted in January, 2014. The responses show that the reforms needed to respond to the explosion of discoverable material "has already begun organically, as three-quarters of the judges have started taking costs into account at least some of the time when ruling on discovery issues. However, the judges are looking for more guidance and further codification in the Federal Rules of Civil Procedure * * *."

915, Andy Vickery: "Unlike most of my colleagues in the plaintiff's bar, I do not view" proportionality "as necessarily draconian. In this, as in most civil justice matters, it depends on the judgment and discretion of the trial judge."

916, Steve Garner: "Imagine writing an appellate brief about a case you were not involved in, without benefit of the record, the testimony or any of the exhibits. That is the burden this rule would place on the party seeking discovery."

922, Pamela Davis for Google Inc.: "The positive impact of proportionality and cost-shifting are already palpable in those district courts that have employed similar measures to control the scope and expense of discovery." Examples are those courts that apply the e-discovery model order created by the Federal Circuit advisory committee.

933, Jennifer Mathis for David L. Bazelon Center for Mental Health Law (and others): Although these considerations must be taken into account under Rule 26(b)(2)(C), "having the party from whom discovery is sought make these determinations is very likely to frustrate legitimate discovery."

934, Hon. Anna J. Brown: Experience from 22 years as a trial judge, 15 as a federal judge, gives great concern over the proportionality proposal. It is wholly unnecessary in light of existing authority to control discovery under Rule 16 and 26(c). And it "will undoubtedly spawn needless, expensive, and time-consuming satellite litigation."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes the proposal. It will deny discovery in cases where counsel consciously overreach under the current rule. (1) The FJC findings that discovery ordinarily is proportional reflects what happens when counsel act in good faith and courts diligently exercise oversight and authority. The rule is addressed only to the uncooperative minority, who might better be controlled by encouraging stricter enforcement of the rule against speaking objections, and by requiring greater clarity in responses to interrogatories and document requests. (2) Much current concern reflects discovery of ESI. It arises from the distrust engendered when a producing party refuses to disclose the means used to search ESI. That problem could be addressed by requiring open discussion prior to production, or disclosure of the means of search with the production, or instructing courts that work-product protection should be narrowly construed in this setting. (3) Summary procedures for resolving discovery disputes are effective — frequent status conferences, pre-motion hearings, submission by brief letters. (4) The small minority of lawyers who create problems should be discouraged by being held to public account; courts should be encouraged to threaten or impose sanctions more frequently than they have in the past. (5) The concept of proportionality is not a standard; it is vague, and will be applied differently by different courts.

1025, Senator Jeff Merkley, Senator Ron Wyden: Proportionality "would risk denying * * * harmed persons access to the documentary proof needed to develop their judicial case * * *." "Civil rights litigants will be particularly hampered by these changes," given the "severe imbalances in access to relevant information. A proportionality standard would only widen the gap between the party who controls the information and the one who needs access to it to pursue justice." And it shifts the burden of production to plaintiffs, entirely upending the system of discovery. A defendant need only object that a request is proportional to force a plaintiff to show that its request meets the proportionality tests.

1028, J. Brad DeBry: The 2011 Utah move to proportionality "has not accomplished its aims, it has made litigation more difficult and expensive, and it has caused a host of ancillary litigation and disputes * * *. To the fullest extent possible, we try and stipulate around the new rule changes because of the burden and lack of effective discovery." Any adoption of proportionality for the federal rules should be postponed for a few years to study the effects in other jurisdictions that have tried similar schemes.

1054, Assn. of Bar of the City of New York: A majority approves adding proportionality and moving the factors to (b)(1). This change is appropriate in light of the substantial increases in discovery, both of ESI and of other forms of information. Properly applied, the principle can aid individual and small-firm litigants as well as large entities. The move from (b)(2)(C)(iii) will make it clear that proportionality applies to initial demands. But the Committee Note should make clear that the amendment does not shift the burden of proving proportionality; that the rule is not intended to shift the playing field in favor of one set of parties or against others; that it is not intended to effect an across-the-board reduction in the scope of discovery, and that in many cases the amendment will have no effect at all; that the amendment is designed for the distinct minority of cases where proportionality is not already being applied in practice. It also should be made clear that all factors must be considered, not only the amount in controversy, and that initial proportionality calculations are subject to recalculation as the case progresses.

1107, Jacob Inwald for Legal Services NYC: Fears that proportionality "will create a presumption that cases brought on behalf of low income individuals and groups, although they may have very substantial impacts on the lives of the plaintiffs and involve complex legal and factual issues, may be deemed undeserving of thorough discovery simply because the monetary sums in controversy are modest * * *."

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: The discovery proposals may preclude plaintiffs with meritorious claims from having access to justice. More often than not, the parties have asymmetrical access to relevant information. The barriers to access have already been raised by Supreme Court rulings on arbitration, class certification, and heightened pleading. The proportionality factor has been opposed by a broad cross-section of well-respected public interest organizations: "This fact alone should warrant a reexamination." Proportionality, moreover, has an overwhelming substantive impact if it is made an independent limitation on the scope of discovery. The problem is exacerbated by several of the factors — many important rights are hard to value in dollars, and the difficulty is compounded when considering injunctive relief; the importance of the issues is highly subjective; and it is difficult to weigh cost and burden early in the discovery process.

1147, Joseph D. Garrison: Plaintiffs oppose the proportionality proposal because they perceive that proportionality will impose no limits on discovery in mega cases, while cutting off discovery needed by individual plaintiffs to establish claims of low dollar value. It is difficult to define proportionality through the proposed factors. "The definition of proportionality which has been part of the Rules for years has perhaps been so widely overlooked because its definition is so subjective. To elevate it to the position of importance that it will have, i.e., the equivalent of relevance, with almost complete absence of empirical data verifying what it actually means, is an elevation too soon." Empirical investigation is important, and it must be sophisticated. If proportionality works in Utah and Colorado, it may not work elsewhere. In Connecticut, "the plaintiff and management employment bar * * * is closely knit and cooperative, but I regret to say that when a large New York City firm represents a defendant in Connecticut, the culture of cooperation changes to a much more adversarial process." It may be better to explore the possibilities of improving cooperation, "by Rule if possible."

1157, Edward H. Rippey for Covington & Burling: Supports proportionality, but urges deletion of "the parties' resources." "[W]e believe that discovery limits should apply equally to litigants regardless of real or apparent wealth. Litigation between parties with grossly asymmetric means should not give rise to overly broad and unduly burdensome discovery requests simply because one of the parties has sufficient means to subsidize the other's requests." (The meaning of this is uncertain: it seems to suggest that a poor party should not be able to have discovery that would

be allowed a wealthy party; perhaps the implication is that a poor party should not be allowed to impose the costs of discovery on an adversary when a wealthier party would be allowed the same discovery only on paying part of all of the costs of responding.)

1204, Utah Supreme Court Committee on the Civil Rules of Procedure: For two years, the Utah rules have required proportionality in discovery. They begin with expanded initial disclosures that are subject to a continuing duty to supplement: disclose a brief summary of the expected testimony of each fact witness, and a copy of each document, the party may offer in its case-in-chief. Then cases are assigned to one of three tiers, with different presumptive limits for discovery. Tier 1, in which all parties' claims for damages are \$50,000 or less, allow 3 hours for all fact depositions, no interrogatories, 5 requests to produce, 5 requests to admit, and 120 days to complete discovery. Tier 2, for cases between \$50,000 and \$300,000 (and also cases seeking only injunctive relief) have 15 total fact deposition hours, 10 interrogatories, 10 requests to produce, 10 requests to admit, and 180 days to complete discovery. Tier 3 cases have 30 total fact deposition hours, 20 interrogatories, 20 requests to produce, 20 requests to admit, and 310 days to complete discovery. The factors that bear on proportionality are similar to those in proposed Federal Rule 26(b)(1), adding — to address asymmetric information cases — "taking into account the parties' relative access to the information." The Utah rule states that the party seeking discovery always has the burden of showing proportionality and relevance, but in practical effect this "is really a designation of who goes first." There is an expedited process to resolve discovery disputes; most are decided quickly on letter briefing and with a telephone conference. The National Center for State Courts has done three surveys of Utah attorneys. Many are reserving judgment, but a growing number believe the reform is having its intended effect. Adoption of similar principles in the Federal Rules would encourage other states to move in the same direction — and many states are currently considering discovery reform.

1220, Nancy Gertner, for Legal Momentum (formerly NOW Legal Defense and Education Fund): Whatever the Committee intends, moving proportionality from (b)(2) to (b)(1) will convey a message that the party requesting discovery has the burden of justifying it. Civil rights cases have not involved abuses of discovery. But the defendants hold all the information. The rationale for the proposal is identical to the rationale for Twombly and Iqbal -- to reduce the transaction costs of litigation for defendants who have done no wrong, while ignoring the obstacles placed in the paths of plaintiffs who have been wronged. Defendants in employment cases have been extraordinarily successful in winning summary judgment. And with discovery now limited to "plausible" claims, matters will only get worse. The proportionality test will require the court to make judgments at a time when few if any judges fully understand the merits of the case.

1263, ARMA International: ARMA is an association of more than 27,000 professionals engaged in records and information management. The comment mostly addresses preservation. "A core principle of information governance is that documents have a life cycle." The introduction of proportionality to Rule 26(b)(1), eliminating subject-matter discovery, and eliminating the "reasonably calculated" provision, will all indirectly ease the burdens of over-preservation. The scope of preservation, for example, has been tied to the possibility of subject-matter discovery. So of "reasonably calculated." "When practically any piece of information could be considered 'relevant,' a records manager is left second-guessing otherwise reasonable and efficient data retention policies." "At its heart, proportionality is about 'value and cost,' something that is intrinsic to information governance and records managers."

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Concurs in establishing proportionality as the standard. But suggests that if a request is unduly

burdensome, the court should not simply forbid the discovery. Instead, it should consider conditions that would allow the discovery to proceed, including a condition that the requesting party pay part or all of the costs of production.

1294, Stephen Watters for National Association of Manufacturers: Strongly supports proportionality and the factors. Also supports deletion of the "reasonably calculated" provision.

1339, Sandy D. McDade for Weyerhaeuser Co.: Strongly supports moving proportionality into (b)(1). The parties should have the initial responsibility to consider proportionality — "The court's resources are too precious, and the detailed decisions required for proper ESI preservation too numerous, to have a court undertake these tasks on the motion of a party." Proportionality, moreover, arises in confronting the duty to preserve information before any litigation is filed, "far ahead of the actual discovery phase of a case." The present rule, focusing on action by the court, has no positive impact on these preservation decisions.

1356, Catherine C. Carr for Community Legal Services of Philadelphia: Vigorously opposes the proportionality language, expressing concern that "the 'amount in controversy' is likely to be the one most frequently relied on, and is therefore the most dangerous." Legal Services cases typically involve quite low amounts in controversy. "Yet the issues are of paramount importance to our clients — whether they can save their homes, or their jobs, or have enough money to survive."

1360, Evan S. Stolove for Fannie Mae: Approves deleting the "reasonably calculated" and "subject-matter" provisions, and moving proportionality into Rule 26(b)(1). The proportionality element "would require the responding party to come forward with sufficient facts to show that requested discovery does not violate the proportionality test."

1366, corrected in 1388 Jonathan Marcus for CFTC: The "parties' resources" factor could impede civil prosecutions. "Individuals who orchestrated Ponzi schemes, for example, often have few resources because they have lost substantial money (their own as well as their customers'). This asymmetry of resources should not serve as a barrier to the CFTC's ability to engage in discovery." (A reminder that at times a plaintiff sues a defendant who lacks resources to respond to a money judgment.)

1368, Hon. Donald W. Molloy: "Our district is a trial court. We are not an administrative court predicated on disposition of cases by motion practice." The proposals will inevitably shift trial "to an administrative process," first on the pleadings, then to challenges to proportionality in discovery, then to a challenge to experts, and finally to summary judgment. "The latest amendments create an even greater paradigm shift than did the 1993 and 2000 amendments to the civil rules, a shift that seems to have a purpose to push litigation back into the dark ages of ambush and arcane procedure * * *."

1376, Hon. Charles E. Schumer: This comment springs from a hearing before the Senate Judiciary Subcommittee on Bankruptcy and the Courts. The rules have been amended five times since 1980 in an effort to curb perceived discovery abuses, but seem to have failed. Is there any reason to believe that another amendment will succeed? It may be better to encourage judges to take a more active role in limiting discovery. The factors identified in considering proportionality "include some level of subjectivity, at best, and are weighted towards the defendant, at worst." As Judge Scheindlin has commented, the result will be to encourage defendants to withhold information on the basis of a unilateral determination of proportionality. That forces a plaintiff to move to compel, from the untenable position of having to prove the

importance of material she has not seen. The inexorable result will be a shift in the burden of production, and not just a barrier to entry but what Professor Miller calls a stop sign. Civil rights cases may face the greatest threat of unwarranted roadblocks because they often involve relatively small amounts of money; the importance of the issues may be overlooked. Contingent-fee attorneys may not be able to afford motions to compel. Proportionality may exacerbate the Catch-22 created by the *Twombly* and *Iqbal* decisions — discovery is needed to plead the case, and the ability to get discovery will be subjected to the five-part proportionality test in almost every case.

1411, Jerome Wesevich for Texas RioGrande Legal Aid (and many additional Legal Aid organizations): "The Committee should be much more specific about when it expects small amounts in controversy to be decided on less than full discovery." "[A] valid \$10,000 claim should always justify \$50,000 in discovery costs." And the costs need not be \$50,000. It is the defendant's choice to hire a \$500 per-hour lawyer rather than a \$100 per-hour lawyer. Defendants pay for luxuries we cannot afford, such as real-time transcript screens. They pay third-party vendors to scan and recognize text in their documents; we do that ourselves. Defendants control the costs of discovery because they have most of the information to be discovered. The Committee should consider adding a statement to the Committee Note for Rule 1, recognizing that the new limits on discovery are based on the expectation that litigants will cooperate in an honest effort to ensure that all information needed to decide cases is available to the parties. (This comment is endorsed by 1560, Arthur N. Read for Friends of Farmworkers, Inc.)

1434, Su Ming Yeh for Pennsylvania Institutional Law Project: "The scope of discovery on the 'importance of the issues at stake' could be problematic due to the unpopularity of our [inmate] clients."

1437, Dimple Chaudhary for Natural Resources Defense Council: Proportionality may require NRDC "to prove or refute arguments about the value of the environmental and public health protections it seeks to uphold, which are often difficult to monetize."

1451, Michael Buddendeck for American Institute of Certified Public Accountants: Adding teeth to the current proportionality requirement "is consistent with the recommendations of multiple commentators and legal analysts." And it is also desirable to eliminate subject-matter discovery and the "reasonably calculated" provision.

1453, Timothy C. Bailey: "I can find no legal precedent that the cost of the truth preempts the discovery of the truth."

1512, Jeanette Zelfhof for LEAP: The perspective is that of "a legal advocacy network comprised of ten direct civil legal services providers in New York City." They strongly oppose proportionality, for fear of the impact on all of their cases, which typically involve either very low money claims or injunctive relief only.

1527, Ross Pulkrabek: Experience with proportionality in the Colorado pilot project persuades him to oppose the proposal. A responding party can get away with repeated objections, forcing needless work; judges are reluctant to impose sanctions for this. Some Colorado lawyers like the pilot project rules, but these rules include features missing from the federal rules that help, including mandatory and early initial disclosures, comprehensive expert disclosures, and a ban on expert depositions.

1535, Valerie M. Nannery & Andre M. Mura for Center for Constitutional Litigation: Details the familiar arguments against the proportionality proposal, and proposes that proportionality be left where it is in Rule 26(b)(2)(C)(iii), while making it "part of judicial management by explicitly referencing it in Rule 16. This would foster early attention to the concept of proportionality."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports proportionality, but urges that "the parties' resources" be eliminated. This factor bears on burden as it now appears in 26(b)(2)(C)(iii), but it does not fit a proportionality calculation — it might imply that more discovery is permitted against a wealthy party.

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports proportionality. New York "has approximately 1,700 open cases in federal district court alone." "e-discovery is extremely expensive." "Courts generally see municipalities as 'deep pockets' despite myriad demands on their budgets." In practice, the balance "has often tilted in favor of more (expensive) discovery in the chimerical hope that it will be of significant benefit to the merits." Proportionality will "stri[k]e a realistic balance between the needs of a given case and the parties' resources."

1567, Eric Angel, Chinh Q. Le, & Christopher Bates for Legal Aid Socy. of D.C.: In small-dollar cases, proportionality could raise undue limits on discovery in actions against "government agencies with staffing or budget constraints." They might credibly argue that even a small request for documents imposes undue burden or expense, requiring Legal Aid to justify the request.

1572, Hon. Dennis James Hubel: Rule 26 gives all the discretion a magistrate judge needs to embrace and enforce proportionality. It is wrong to shift it to (b)(1) because the shift will suggest to lawyers a major sea change in discovery, generating substantial litigation while they feel their way along the new rule.

1585, Dante A. Stella: This comment devotes 5 pages to Rule 26(b) that are too rich to summarize in fewer than 4 pages. There is extensive discussion of "discovery on discovery," related to "meta discovery." It is urged that the rule text should explicitly address phased discovery as a partial solution to excessive "pro forma" discovery. Shortcomings in technology assisted review mean that it is not a cure-all for the expenses of discovery. Eliminating "subject-matter" discovery and moving proportionality into Rule 26(b)(1) are applauded.

1588, Leigh Ferrin for Public Law Center: Proportionality will complicate every discovery motion, making matters even more difficult for pro se litigants who will be hard-put to articulate the reasons that make their requests proportional.

1594, Richard R. Burke for Utah Assn. for Justice: Urges that experience with the Utah discovery rules adopted in 2011 should not be taken as a guide to federal discovery. The proportionality requirement is set into a 3-tier system. The limits on discovery are so tight that counsel routinely stipulate around them, even in face of uncertainty whether they have authority to do that. Utah explicitly imposes on the requesting party the burden of establishing proportionality; absent clear language to the contrary, the proposed federal rule might be read this way.

1597, Laura Zubulake: As plaintiff in the Zubulake case, reminds the Committee that an individual inspired the case that established the standards for e-discovery. "Limiting depositions, requestor party pay, and proportionality (depending on how it is handled) have the potential to

make it more difficult for individuals to pursue justice."

1608, Jonathan M. Redgrave: "[U]niform application of proportionality is a key missing ingredient to the realization of the promise of Rule 1 * * *." Enhancing proportionality is not an inherent benefit to defendants. "Proportionality, when properly understood, is the holistic understanding of what a case 'means' and the tailoring of the discovery scope to address the needs of that case." Judge Scheindlin "has shed critical light on the need for *the parties* to take initial ownership of the proportionality dialogue." Often the parties fail to provide sufficient grounds for the court to divine a fair resolution. Proportionality "will indeed require greater attention by the parties, more work by their counsel and more case management by the district court at the beginning of a matter. But more work at the outset of the case can yield far greater dividends * * *." The parties must make an effort to have early discussions and resolutions of disputes in terms of relevance and proportionality.

1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: Rule 26(b)(2)(B)(iii) is being utilized. It has been cited in more than 100 opinions in the last 6 months. "In our experience, almost every conversation with opposing counsel regarding discovery issues includes a discussion about the burdens of the proposed discovery and how to minimize those burdens." ESI has not increased the burdens; "the parties should be incentivized to utilize the available tools to more efficiently manage ESI," including many computer-based tools. The proposal will "encourage producing parties to overstate their burdens and strong-arm unilateral decisions regarding search methodology to arbitrarily limit the scope of discovery." Proportionality will be interpreted as effectively shifting the burden to the requesting party — "Any amendment should not reward or encourage blanket and unsupported assertions of burden, but encourage parties to engage in cooperative problem solving on how to expedite discovery." Nor will amending Rule 34 to require specifically stated objections cure the problem — specificity is not likely to reach the necessary details of the burden associated with each request, including information about electronic systems and data resources. The current rule is working. But if proportionality is to be adopted, it should include language to clarify that the burdens have not been shifted and to require the producing party to provide adequate information about the burdens of responding. And it should be made clear that a party's decision to maintain a disorganized system should not become a basis to limit discovery.

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "The concept of proportionality is critical to restoring a balanced approach to discovery." We frequently face "all documents" requests designed as a deliberate effort to pressure our clients to settle. But the Note should make clear that a high demand for damages does not automatically justify costly discovery — the amount in controversy informs the balance of cost and benefit, but is not the only concern.

1634, Ben E. Dupre: Consumer protection cases involve no physical injuries, no real damage. The factors will be used to deny discovery that is essential to expose "the lies, the cheating, and the stealing" business practices that affect many beyond the plaintiff.

1680, Patrick Oot: Illustrates vendor costs for ESI discovery services. Research "reveals great variance in both cost and responsiveness." We need much more emphasis on the reasonable inquiry certification standard under Rule 26(g). "Requesting parties have far too much adversarial oversight into the discovery practices of the producing party, and are demanding a close-to-perfection standard of performance in discovery when the actual standard is a reasonable inquiry. Reasonableness is far from perfection." Requests, responses, and court orders that demand "every and all" documents be produced "completely and entirely" are a matter of

concern.

1685, Stewart W. Fisher & Carlos E. Mahoney: "We also expect governmental and corporate entities to use the proportionality standard to resist depositions of elected officials and corporate officers."

1703, Hon. Michael H. Simon: Applauded Rule 26(b)(2)(C)(iii) proportionality when it was first added, and has applied it when ruling on discovery disputes. It should be available only on motion by a party or on the court's own action. Moving it to the scope of discovery opens the door to responses that purport to be complete but that omit relevant and potentially damaging information because the responding party has made a unilateral determination that full discovery is not proportional to the needs of the case.

1726, M. Megan O'Malley: "[M]aking proportionality a condition to even obtaining discovery goes against the very principles and values of our judicial system."

1878, Roger L. Mandel: The proportionality approach may violate the Rules Enabling Act. Congress has created rights and conferred federal jurisdiction without imposing any amount-in-controversy limit. This proposal "allows courts to decide whether certain cases over which they undisputedly have jurisdiction are 'important' enough or 'significant' enough to proceed by allowing them to prevent persons who cannot proceed without discovery from obtaining that discovery on the subjective basis that the requested discovery is not justified by the uncertain cost of discovery."

1896, Margaret L. Wu for the University of California: The University is the third largest employer in California and the fourth largest health-care provider. It supports proportionality as a means to "fairly provide the parties with the information they need to resolve a particular dispute while minimizing the waste of resources that could be better devoted to supporting the University's public and educational mission."

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: The IPO supports the proposed amendments to Rule 26(b)(1), including proportionality. "Discovery in patent infringement matters is often prohibitively expensive. Some parties (including both patent holders and accused infringers) use the threat of this expense to extract settlements in cases for reasons other than the merits of the case."

1913, National Assn. of Consumer Advocates: Defendants' motions for protective orders against burdensome requests are fairly routine in litigation over financial transactions with low-income consumers. They "are typically weighed expeditiously and with the appropriate level of care by judges." The responding party bears the burden of proving the request should be disallowed. The proposal unnecessarily shifts the burden to the party with the least information about the volume of documents involved and the costs of producing them. Worse, the proposal intentionally narrows the scope of discovery. It devalues claims that seek few dollars but involve matters of public importance and that may expose bad corporate practices and change bad corporate behavior. The importance of the issues is subjective. And the test will be applied at a time when the potential benefits of discovery cannot be assessed.

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Opposes because proportionality "(1) disproportionately affects some parties more than others, (2) overlooks the costs discovery imposes on the requesting party, and (3) ignores the non-pecuniary public benefits of civil rights litigation." So it would be wrong to allow more discovery when a highly

paid employee claims discrimination than when a poorly paid employee claims discrimination. The importance of the public interests involved in civil rights cases is reflected in many rulings that an award of attorney fees need not be proportional to the amount of the judgment.

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: Approving elimination of subject-matter discovery and the "reasonably calculated" formula, and approving proportionality, suggests that in applying proportionality "courts can and should take into account the global aspects of a case. The fact that documents and other information are maintained abroad or are not in English may justify a narrower scope of discovery * * *." Key-word searches may not as relevant in the semantics of many other languages as they are in English.

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: "[T]he five part proportionality test provides instructions on what language to use in order to circumvent a discovery request."

2018, Justin Browne: To satisfy the proportionality factors — to show the importance of the issues, the importance of the discovery, and the benefit of discovery — the requesting party will be forced to explain why they need what they need, giving opposing counsel critical insight into mental impressions and strategies well beyond what emerges in typical case management discussions.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. Proportionality is already utilized by many courts.

2073, John Sadwith for Colorado Trial Lawyers Assn.: Opposes the proportionality proposal. Some members would support it because they favor the Colorado Pilot Project rules. But there are important differences. The Colorado Project requires mandatory initial disclosures 21 days after filing a pleading; that allows for early identification of issues and any deficiencies in discovery. It also helps to counteract the negative aspects of the proportionality standard. In addition, the Pilot Project requires comprehensive expert disclosures and prohibits expert depositions, significantly reducing costs and delay.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: The civil rules were adopted in 1938 to provide access to the courts. The proposed amendments will limit access by civil rights litigants; "[r]obust discovery is especially vital in civil rights cases as a defendant holds most or all of the evidence * * *." The proportionality requirement will shift the discovery process "from one intended to give injured parties access to justice to one that would allow defendants to avoid producing critical and relevant information * * *. Defendants would be able to hide behind the excuse of 'burden' and withhold documents that are critical to the plaintiff's case." Proportionality reviews will inevitably lead to disputes that waste the time and resources of both parties and the court.

2110, Miriam Hallbauer & Richard Wheelock for LAF: (Noted because, as a group devoted to representing or assisting disadvantaged persons, they agree with several of the proposals. Not all.) Proportionality has the potential to arbitrarily decrease discovery in civil rights cases. It may devalue the importance of the rights claimed by persons whose personal damages are small, and also in cases seeking only injunctive or declaratory relief.

2146, John J. Rosenthal: (1) A materiality standard should be added. "[R]elevancy alone can no

longer be the standard, as there is simply too much information available, and the costs of discovering such information is negatively impacting parties (of all sizes) ability to prosecute and defend actions. Proportionality must become more central in defining the scope of information subject to preservation and discovery." (2) "Preservation" should be added to the preamble to Rule 26(b)(2)(C) and to (b)(2)(C)(i), so as to authorize a court to limit preservation that is unreasonably cumulative, duplicative, etc.

2155, Patti Goldman for Earthjustice: Add environmental protection plaintiffs to the lists of those who fear the Rule 26(b)(1) and (c) proposals.

2197, Scott C. LaBarre, for the Disability Rights Bar Assn.: The proposed changes in Rule 26(b)(1) "have the potential, if adopted, to prevent the effective enforcement of important rights of our most underserved citizens."

2205, David E. Hutchinson: A new "consideration" should be added for determining proportionality: "whether the discovery or preservation at issue involves a reasonably tailored protocol on the available technologies for data management and the volume of data covered."

2229, David J. Beck (former member of Standing Committee): Strongly supports the proportionality proposal.

2336, Michael R. Boorman: Similar to quite a few comments that approve proportionality as a means of curtailing "exploitation by discovery," including "discovery on discovery" -- "our opponents interrupt the pursuit of relevant facts in order to attack a defendant's *process* for responding to discovery requests (rather than the *outcome* of that process) in order to uncover a purported basis for a motion for sanctions due to some contrived deficiency in that process."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions, and a board member of DRI.) Discovery costs drive settlement. Adopting proportionality will help to reduce discovery costs; although the concept is in the rules now, courts continue to issue orders that are too broad. It is important to also revise the "reasonably calculated" provision.

November Hearing, Jeana M. Littrell: p. 15 ff: The criteria of proportionality are embodied in present Rule 26(b)(2)(C)(iii) and (g). The requesting party now has the burden to ensure and certify that requests are proportional. Moving this to the most prominent part of the rule is the best way to educate judges and litigants. The emphasis on proportionality will become increasingly important as there is more and more "discovery on discovery" — even before beginning discovery on the merits, parties seek extensive information about information systems and details of preservation capabilities and efforts. Typically this discovery is disproportionate. Nor will this disadvantage plaintiffs in employment discrimination cases — they must first take a claim to the EEOC, which has investigative powers and subpoena powers far broader than civil discovery. The argument that the change will shift the burden of showing proportionality to the requesting party misses the mark — Rule 26(g) imposes that responsibility now.

November hearing, John C.S. Pierce p. 22, ff: As chair of DRI trial tactics committee, favors the right to jury trial. Expensive discovery often forces settlement of cases that should go to trial. Proportionality is a good concept. "How much are we willing to spend to find needles in haystacks, these peripheral, marginal facts that really don't bear on the substance of a case"?

November Hearing, Altom M. Maglio: p 29 "Almost every discovery request will require a hearing on proportionality." Defendants make proportionality objections now by the often default response that a request is overly burdensome. The defendant has to explain why it is burdensome. By shifting the proportionality calculation from a limit on discovery to the scope of discovery, the new rule will require the plaintiff to explain why the request is not overly burdensome to the defendant — and the plaintiff can do that only by having discovery on discovery. This process will create a perverse incentive for a defendant to make it as burdensome as possible to locate and collect potentially incriminating information.

November Hearing, David R. Cohen: p 32 Trials are disappearing. "[T]he main reason is the expense, and the main driver of expense is the cost of discovery." Cases settle "because the discovery costs are out of proportion. It's not about the merits anymore." My practice group has 65 attorneys devoted to discovery. Our experience reflects the surveys — less than 0.1% of the documents we produce are typically used as exhibits in depositions or trials. My firm has invested in predictive coding technology, but "we frequently can't use it because we can't get the other side to agree." When there are many related cases pending in different courts, we often do not try to get agreement because we know we cannot get it from that many counsel and judges. "Plaintiffs have very little incentive to agree to that technology if it's going to reduce the burden on the defendant because they know that this is great leverage for them * * * and that leads to settlements." Proportionality is already there in Rule 26(g), "but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks' attention."

November Hearing, Paul D. Carrington: p 56 The Competitiveness Commission wanted to get rid of Rules 26 through 37 "because it costs a whole lot of money, and it makes American business less profitable, and consequently we can't compete as well in the international global market." p 63: the underlying purpose seemed to be "to make American business more competitive by protecting it from liability."

The Enabling Act has its roots in the deep troubles of the American legal system at the end of the Nineteenth Century. Roscoe Pound identified the need to convince everyone their rights would be enforced. That was the purpose of the Civil Rules. Efforts to economize can jeopardize someone's interests. The cases where it seems obvious that a lot of money is wasted on discovery tend to be big cases with big enterprises on both sides. Hourly billing has contributed to this. "So the proportionality question is less of a problem than it is sometimes presented to be." We should be cautious about trying to save on discovery costs at the expense of making individual rights harder to enforce. The concern that individual plaintiffs are being denied access to federal court because of the costs of litigating, as compared to being denied access by limitations on discovery, meets "my sense * * * that the individual plaintiffs are not the ones who are complaining very much about the cost of presenting their cases or defending themselves." Apart from episodic cases, the FJC data suggest there is not a serious problem with excessive costs in civil rights cases.

The often lamented costs of discovering electronically stored information may be balanced by "the fact that the same engineering that produces the technology also produces ways of tracing and tracking and getting information out of a huge pile of documents." And document review can be outsourced overseas.

Countries succeed when ordinary citizens have a sense that they have some role, some participation, some sense of mutual commitment. The Civil Rules were designed to do precisely that.

366, Paul D. Carrington: Proportionality will weaken private enforcement of many public laws and further diminish the transparency of the judicial process.

November Hearing, Jonathan M. Redgrave: p 70 The proportionality test is present now in Rule

26(b)(2)(C)(iii) and 26(g). The current proposal "gives meaningful life to the promise of proportionality envisioned by the 1983 amendments." The 1983 effort failed for three reasons. "[P]artisan courts quite frankly ignore the proportionality factors altogether." When parties argue proportionality, they miss the point by failing to focus on the discovery device and whether it's worth the candle — they just cite to a factor. And, since there is no consistent approach, courts tend to default to the view that reversal does not follow for allowing too much discovery. The proposed changes reinforce the need to consider proportionality in every case. Proportionality is "party and position neutral. Proportionality helps those seeking discovery as much as those seeking to limit discovery. What the rule does is require lawyers to do their jobs better." It is not a new tool given to large corporations to beat down individuals. It "will help those requesting parties better translate what they need for their claims to articulate why the discovery they seek from a large entity is proportional." I agree with Professor Carrington that we need a rule set that everyone believes gives them a fair shake in court. Proportionality is consistent with this. It is infinitely elastic. If you can justify enormous discovery, you can have it.

November Hearing, Paul J. Stancil: There are two core problems with proportionality. "[I]t's unlikely in the extreme that * * * judges will be able to make any meaningful assessment of the likely value of the proposed discovery." Typically the problem will arise in cases that involve "significant informational asymmetry." The proponent of discovery will be least likely to demonstrate the likely benefit. Judges will rely on their own prior views of categories of litigation, and that is dangerous because those views are likely to be unreliable. To be sure, proportionality is required by Rule 26 now. But "it turns out to be very difficult to move judges to change behavior." The proposal "very deliberately in a very high profile way make[s] this issue of proportionality much more salient to judges and to litigants to some degree."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 (The statements about proportionality also apply to revising the "reasonably calculated" sentence and reducing the presumptive limits in Rules 30 and 33.) These proposals increase costs and the burden of litigation, impairing the ability of litigants to gather evidence from defendants and third parties. Plaintiffs in antitrust cases face information asymmetry. Others control information about the product, market, and alleged conduct — particularly pricefixing. This evidence is dispersed among far-flung third parties. The need for discovery is exacerbated by recent decisions that raise the barriers to class certification, requiring discovery on certification issues. And the Class Action Fairness Act brings into federal court cases that involve the laws of multiple states.

Under the present rule, a party resisting discovery as too burdensome must bear the burden of showing the burden. The proposed rule imposes a multifactor proportionality standard that will place a heavy burden on the party seeking discovery to satisfy proportionality. And proportionality is unworkable at the outset of a complex case — a party who lacks information needs discovery to show that discovery is proportional. The result is to protect larger parties who have a monopoly on information. 1166 is a text for his testimony.

November Hearing, Peter E. Strand on behalf of the Defense Research Institute: p 119 Addresses 26(b)(1) in general terms, and also by applauding revision of the "reasonably calculated" provision. The proposals should be adopted, with the modifications suggested by Lawyers for Civil Justice. We have lost focus on jury trial; today we focus on trial by litigation and trial by discovery. In patent cases, a troll comes in. They demand all documents for all time over everything you have ever done related to all your products. "[I]t will cost \$10 million to produce 100 million documents. And the first thing your client says is how fast can we settle this." "By eliminating that reasonably calculated language, you are focusing the issue on what is the claim about." Another example: a Rule 30(b)(6) deposition notice regarding ESI processes. "[W]e're

going to spend \$100,000 fighting about ESI discovery right off the bat."

November Hearing, Dan Troy: p 123: (General Counsel, GlaxoSmithKline): "[T]he U.S. legal system harms the U.S. competitiveness in the world marketplace." "[O]ur annual U.S. external litigation case costs have been as much as 50 times higher than our non-U.S. costs." If we can opt out of courts by ADR clauses, we do so. Courts are too expensive, too burdensome. But if we cannot get an ADR clause, we often litigate in the United Kingdom, because it is less burdensome, less costly. "[O]ften in certain kinds of complex cases, I'm a lot better off in front of a judge than I am in front of a judge and a jury." "[O]ur system is the ridicule of the world."

"The current overly broad scope of discovery * * * creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at trial." In one recent federal MDL we produced 1.2 million documents; 646 were included on the plaintiffs' exhibits list. The proposed changes are good, but should be strengthened by adding a materiality requirement. It is difficult to define materiality, but "we know it when we see it. * * * [It] does have a sense of there's something important as opposed to being trivial." Present Rule 26(b)(1) is interpreted to reach anything that could potentially be relevant. Would this simply make document review more costly, by adding a further layer after identifying everything that is relevant and responsive? Well, it could work by shrinking the massive amounts of information that each side is dumping on the other. Plaintiffs' lawyers do not want that much information dumped on them. It becomes a needle-in-the-haystack problem.

(In response to a question whether it would help to expand initial disclosures to require identification of information harmful to a party's position, refused to endorse any specific approach. But did urge "a much more focused approach to discovery.")

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: The proposals give defendants more tools to avoid discovery. Proportionality "shifts the discovery process from a focus on relevancy to an economic calculation." Each of the five factors will become the focus of collateral litigation. Defendants already argue burden and expense in almost every case, but codifying this factor gives the argument added credibility. And it upends incentives for defendants to preserve documents in an easily accessible format. An example is provided by a recent 6-year qui tam litigation that involved 25 fact depositions, 5 expert depositions, and the files of 350 nursing home patients to prove fraud by billing for services so deficient as to be essentially worthless. That was expensive and a burden for the defendants, but essential to prove the case. Relocating this factor will make it more complicated and challenging for plaintiffs to meet. It works to discuss proportionality in a Rule 16 conference, but it should not be emphasized by codifying it at the beginning of Rule 26.

November Hearing, Wayne B. Mason: p 142 Focuses mainly on eliminating the "reasonably calculated" language, but ties the same arguments to approving proportionality as a way of restraining massive discovery. "The proportionality, those five factors, I don't see how that increases the burden and expense to plaintiffs."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 Proportionality will increase disputes and litigation. It depends on "five subjective and very fact-dependent criteria." Adding materiality would make it even worse. The Institute litigates constitutional claims against governments. The government defendant will resist discovery "based on its own subjective belief that the request is not proportional to the action." Relocating proportionality shifts the burden — under the existing rule a defendant must prove a request is disproportional, while under the proposed rule a plaintiff must prove the request in fact is proportional. Although Rule 26(g) requires a requesting party to consider burden and expense, it "comes into effect where the signing the discovery requests indicates that you are aware of all these factors and

you're considering them." This means you have determined that the requests are relevant to the claims or defenses and do not trespass into discovery of the subject-matter of the litigation that is available only on court order. The revisions will invite more disputes, requiring judicial intervention. It is not clear how Rule 56(d), allowing time for more discovery before disposition of a motion for summary judgment, would work with the proposed rules — now, summary-judgment motions usually happen after discovery is closed. But it does not seem that Rule 56(d) would be an adequate safeguard, or it would come into play a lot more often.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Moving proportionality up, "make[s] it so that that burden is placed on the proponent of the discovery at the outset."

November Hearing, Andrea Vaughn: p 173: Defining proportionality by the amount in controversy will put low-wage litigants at a distinct disadvantage in litigation for nonpayment of wages. This is in direct conflict with the remedial purpose of the Fair Labor Standards Act. Although this is in the present rules, moving it into the scope of discovery enables parties to resist discovery, "whereas now it would be a question for the court." Yes, litigators would agree that discovery is a collaborative process. In the District of Maryland a discovery motion must be preceded by very extensive discussion among the lawyers, and by an exchange of briefing. But the change allows defendants to resist discovery from the onset. They can do that now, but the difference is that this will make it easier to resist discovery.

November Hearing, Alexander R. Dahl (Lawyers for Civil Justice): p 191 Discovery costs too much. It is abused. Those who say they oppose proportionality are really afraid of not having proportionality. The point of proportionality is that in each case, a party requesting discovery give thought to the case and claims and confine discovery to what is related to the claims and defenses. The concern that somehow the burdens are changed by bringing proportionality into the scope of discovery is surprising. What will happen is what happens now: requests are made, they are resisted, and a motion is made either to compel or for a protective order. As a practical matter, there will be no difference.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 See the general discovery summary. Favors the proposed changes.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 The risk of proportionality is that discovery will be more limited in employment cases involving low-wage plaintiffs than in cases involving high earners. Much less discovery will translate into a higher rate of dismissal on summary judgment. And the Committee relies on statistics that show that at least 80% of all cases involve five or fewer depositions; that shows there is no serious problem with disproportionate discovery.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 Moving proportionality up to the scope of discovery will allow courts and lawyers to focus on the issue early in the case. Proportionality will not eliminate meritorious claims. It will address problems of expensive and extensive discovery at the beginning as lawyers, or lawyers and a judge, craft a discovery plan. It will reduce the use of discovery for leverage, encouraging discovery as a search for truth. This will not provide a new range of tools for objections and satellite litigation. Now, and under the rule as proposed, an objecting party is responsible to show why a request is burdensome or not proportional to the needs of the case. Ultimately, the objections will narrow the focus of the discovery, much as we do now in, for example, negotiating the scope of topics to be covered by a Rule 30(b)(6) deposition.

November Hearing, John P. Relman: p 253 Typical individual discrimination claims — housing, lending, disability, employment — involve damages of \$50-60,000. The defendant will almost always say it costs more to search the e-mails, to examine the loan files, than the amount of the claim. But the discovery is essential. (An example was offered of a housing discrimination claim in which the plaintiff offered a cosigner, to prepay a second month's rent as security, then to prepay a whole year's rent. The offered reason was that they did not do that. After the court ordered discovery the files proved this was pretext — they did do that.) Moving proportionality puts the plaintiff at the mercy of the defendant — in every case the plaintiff will have to fight for the discovery, and will have the burden to show the value outweighs to cost. "I think this sets civil rights back."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Relevance now defines the scope of discovery. Limiting it by proportionality will lead to a dramatic reduction that will be particularly harmful to civil rights plaintiffs. Discrimination has become more subtle and sophisticated, so that plaintiffs face an even higher burden in relying on circumstantial evidence. Focus on the amount in controversy is particularly troubling because it will be used to minimize the significance of the civil rights cases that often do not involve large sums of money. The present rule places review for proportionality squarely in the hands of the judge, and federal judges do this job well. There are no empirical data or research showing that civil rights cases are categorically prone to exorbitant discovery costs. Nor has that been our experience. The proposal, indeed, is likely to have the unintended consequence of making discovery processes longer and more costly through greater motion practice. We rely on individual plaintiffs to enforce the civil rights laws as private attorneys general. We should not undermine that function.

November Hearing, Wendy R. Fleishman: p 273 (Speaking for New York State trial lawyers, and AAJ members involved with toxic tort, environmental tort, and product liability litigation.) There is no evidence that the proportionality mechanism in Rule 26(b)(2)(C)(iii) is ineffective. In many instances a Rule 16 conference addresses any issues of abuse of discovery. Moving proportionality into the scope of discovery will, like *Daubert*, generate a plethora of new motions and discovery disputes by encouraging defendants to make more objections. Defendants have huge amounts of money. Individual and small-business plaintiffs do not. "We cannot know the value of a piece of information until we get the information." We got the critical information in the Vioxx litigation only because the judge "used Rule 26(b)(2)(C) to control that discovery." If this becomes part of the scope of limitation, not a judge-managed device, "the plaintiffs would have to show that the information was available, that the information existed. And without doing the discovery, they couldn't show that * * *." Defendants will say it is not proportional. If such cases are aggregated through the MDL process, then "the position of power changes." But the Vioxx cases were not aggregated, and there were many small claims.

November Hearing, Patrick M. Regan: p 278 Concerns with proportionality are explained by discussing the proposal to reduce the presumptive number of depositions to five. The summary appears with Rule 30(a).

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: Proportionality, and the numerical limits on the numbers of requests under Rules 30, 31, 33, and 36 will have a disproportionate and unfair impact on private civil-rights plaintiffs. Congress counts on private attorneys-general to enforce the civil rights statutes. The overwhelming majority of civil-rights actions are brought by private plaintiffs. The Supreme Court has limited access to courts by recent substantive and procedural rulings. "[I]nformation asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." The crisis facing the federal

judiciary would be better approached by confirming pending judicial nominees.

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297
Includes Rule 26(b)(1) in lamenting the unfair burdens the proposals will place on civil-rights plaintiffs, joining it with a more detailed statement opposing the numerical limitations in Rules 30, 31, 33, and 36.

January Hearing, Joseph D. Garrison (NELA): (1) Moving up proportionality will mean that the rote objection becomes "proportionality." It may be administered by requiring the requesting party to show proportionality. That is wrong. The requester should have to show relevance; the objector should have to show lack of proportionality. It will work only if administered that way. (2) The factor looking to the amount in controversy should be stricken, or at least put last in the list. To be sure, this is an appropriate consideration in cases that involve only money. But employment cases involve much more. Suppose similarly wrongful discharges of an employee making \$500,000 a year and one making \$30,000 a year. The case may be more important to the one making \$30,000 who faces foreclosure, losing a car, going on food stamps, and embarrassment. Those of us who know what we are doing look to the value of a case before taking it. Doing \$60,000 of discovery in a \$30,000 case is six times as much as should be. We can be effective for a client only if the case is effective for us as well.

January Hearing, Timothy A. Pratt for Federation of Defense and Corporate Counsel: p. 26
Moving proportionality to the scope of discovery is "critically important." Administering it will not be a question of burden of proof. p. 34: "This is a balancing of the interests with both parties contributing information that will allow the court, if they can't reach an accommodation mutually, to decide what the level of discovery ought to be allowed."

January Hearing, Jon L. Kyl: p. 45, at 48: "[M]oving the proportionality language * * * will be very helpful."

January Hearing, P. David Lopez (EEOC): p 68 The EEOC often seeks nonmonetary relief. "This is a law enforcement function and it is something that cannot be monetized."

January Hearing, Kaspar J. Stoffelmayr: p 88: Discovery is proportional now in many simple cases. It is not in a very important group of large cases where the disputes are asymmetrical. But in other large cases, where the discovery burdens will be symmetrical, large corporate parties tend to get by with far less discovery.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery. Elevating proportionality "could give them another tool to engage in resistance to legitimate discovery requests."
2196, James A. Ferg-Cadima for MALDEF: Elaborates the views stated in the Saenz testimony.

January Hearing, Michael R. Arkfeld: p. 104 Very few cases even discuss proportionality. Litigants do not realize it's there. Moving it up will generate more motions, raising the costs for requesting parties and decreasing access to justice.

January Hearing, Jocelyn D. Larkin: p. 125 Proportionality will impede institutional reform litigation. The important relief is injunctive, not monetary. The amount in controversy is not relevant. And the importance of the issues at stake lies in the eye of the beholder. 1413, Jocelyn D. Larkin for Impact Fund and others: Systemic institutional reform cases "are especially

vulnerable to a defense strategy of obstruction and delay." Often they begin on behalf of only one or two plaintiffs; it is only through discovery that larger policies or systemic breakdowns are uncovered. Proportionality will complicate every discovery motion. Some may believe that the absence of any monetary claim should be counted. The importance of the issues is subjective.

January Hearing, Quentin F. Urquhart for IADC: p 133 Adding proportional as a word, and moving up the factors to become more prominent will "bring a needed degree of pragmatism." Proportionality "isn't just dollars." The inquiry should not "front-load" examination of the merits. Who is right, who wrong, should not be explored at that stage. Lawyers can rationally discuss the importance of a civil rights case, or a purely economic case, in terms of what they are arguing, not who will prevail.

January Hearing, Elise R. Sanguinetti: p. 151 Representing individuals in wrongful death and catastrophic injury cases, proportionality is a radical change. The amount in controversy in a wrongful death action may be limited. Now we generally can reach agreement with defense counsel on the discovery we need. Proportionality will require us to negotiate through the factors; defendants will claim retrieval from storage is costly. The same is true for the importance of the issues, and the burden-benefit analysis. I prefer California courts now because discovery is so open. If proportionality is added, "I'm very concerned about what's going to happen in the future.

January Hearing, Kathryn Burkett Dickson: p 160 Think of proportionality in terms of employment plaintiffs. "I represent female farm workers who are sexually assaulted in the fields, all the way up to corporate executives." The executives "can give me informal discovery" — the names of people, how things are organized. Farm workers generally do not know even the last name of their supervisors. "[I]t's the people at the bottom sometimes who need the most discovery."

January Hearing, Larry E. Coben, Attorneys Information Exchange Group (AAJ Sub group): p 169 Moving up proportionality will change the burden of proof. The plaintiff will have to show the importance of something it does not know, and the court will have to rule in equal ignorance. Consider the design of an automobile fuel system. You need information about system designs for other models, and often generic design guidelines that apply to all vehicles. Suppose, for example, you had a client with a minor burn injury; proportionality could foreclose discovery of information supporting the claims of many victims, many seriously injured or killed.

January Hearing, Paul D. Weiner: p 177 Proportionality is the bedrock principle of any contemporary system of justice. It should apply to preservation not only in proposed Rule 37(e), but also in Rule 26(b)(2)(C): "the court must limit the frequency or extent of preservation and discovery"; "the discovery or preservation sought is unreasonably cumulative," etc.; "the burden or expense of the proposed discovery or preservation," etc.

January Hearing, Hon. Derek P. Pullan: p. 205 (1) None of the factors in the proportionality calculus is primary. (2) Utah Rule 26 was amended two years ago to require that all discovery meet the standards of proportionality, and at the same time beefed up initial disclosures to include a summary of the testimony of each witness a party may call and a copy of each document it may use. In addition to the factors in Federal Rule 26(b)(2)(C)(iii), Utah adds the "opportunity to obtain the information, taking into account the parties' relative access to the information." This factor is intended to address the problem of asymmetric information. (3) The Utah Rule also expressly provides that the party seeking information has the burden of showing proportionality and relevance, no matter whether it is a motion to compel, a motion to strike, or a

motion for a protective order. But it is a "burden of proof soft" — some information bearing on the factors may be more readily available to the responding party. (4) Cost-shifting orders may be entered to ensure proportionality. (5) Beyond that, Utah has divided discovery into three tiers, with presumptive limits that are deemed proportional. Anything beyond these limits is called "extraordinary discovery." Some federal courts have adopted pilot projects or local rules that require proportionality. (6) Without proportionality, "[p]arties with meritorious claims but modest means are denied access to the courts. Specious claims settle to avoid the discovery bill." (7) The IAALS is undertaking a survey of experience with the new rules: younger lawyers really like the changes; many are reserving judgment; a high percentage "have not realized their fears"; a lawyer recently told me he is more and more advising clients to file in state court because discovery costs are more predictable. (8) This is a cultural shift; continuing efforts are made to educate judges.

January Hearing, Richard B. Benenson: p 316 A pilot program in Colorado State courts requires court and parties to address proportionality at all times, beginning with the first meet-and-confer and the initial case management conference, and continuing. "[T]he process is working." Requiring discussion facilitates proportionality, and continuing conversations. This is not one-size-fits all; in asymmetric information cases, the side without much information may need more discovery than the other side. In medium-size business cases, both plaintiffs and defendants benefit. Access to courts actually increases by reducing the need to resolve cases to avoid discovery costs rather than on the merits. (A survey of the program has started.)

February Hearing, Ralph Dewsnup, for Utah Association for Justice: Utah has had an express proportionality rule for two years. The rule goes far beyond the federal proposal. It lists 11 factors, without standards. Counsel often recognize the impracticality of the specific numerical limits, measured by tracks and the amount in controversy, and agree among themselves on more depositions or interrogatories. All a party has to do to halt discovery is to object on proportionality; then the plaintiff has the burden to show compliance with all 11 factors. The federal rules already have sufficient proportionality standards. People are not using the opportunities that exist. The problem is not so much proportionality as the lack of guidance on who has the burdens.

February Hearing, Maja C. Eaton: p 29 (1) Proportionality is important. It would be helpful to add a statement in the Committee Note that an MDL proceeding does not, without more, justify greater discovery on the common issues of liability simply because many cases are combined. What happens today is that MDL proceedings are seen as a carte blanche for unfettered discovery and a "gotcha mentality." (2) The proposal does not change a burden of "proof." Discovery disputes are more a matter of persuasion.

February Hearing, Michael O' Cowles: p. 47 Violations of Title VII and the FLSA are "often done through informal means and off the books." Discovery enables plaintiffs to pursue ancillary documents that color in the full extent of their claims. The burden of proving proportionality undoubtedly will fall on the requesting party. Often we do not know what it is we are looking for. The change will lead to greater discovery conflict.

February Hearing, John W. Griffin: p 57 In litigation on behalf of court security officers deemed unsuitable because they used hearing aids, and FBI agents deemed unsuitable because they had diabetes, we did not know at the beginning that the defendants acted under general policies. There were no written statements. It was only through extensive discovery that we uncovered de facto general policies. It was the discovery that made itself proportional. The defendants did not question proportionality. If they had, we would have been hard-put to get the necessary

discovery.

February Hearing, Mary Nold Larimore: p 68 Although it is true that proportionality is not getting enough attention because it is buried in 26(b)(2), the best reason for moving it to rule 26(b)(1) is that it is not simply something a party should invoke after discovery has gotten out of hand. It is an important part of the process that should be made part of the initial plan for appropriate discovery.

February Hearing, J. Michael Weston: p 87 The discovery process now is very contentious. The Rule 26(f) conference often is no more than a step on the way to a motion to compel. Good practice is illustrated by a recent class action in which the magistrate judge managed discovery, with limited initial discovery, a conference, another level of discovery, and so on until both sides understood the merits and settled. That is how it should work. Moving up proportionality, and eliminating "reasonably calculated," will be "an opportunity to get involved early on at the Rule 167 conference. I think more of them will be held." Magistrate judges will become more involved. And it gives criteria for resolving disputes.

February Hearing, Suja A. Thomas: p 93 The Committee recognizes that discovery is proportional in at least 85% of federal cases. It is a mistake to adopt a rule for atypical cases when the rule also will have an impact on typical cases. It would be better to move away from transsubstantivity and craft a special rule for the atypical cases that create the problems. But if a general rule is devised, Rule 37(a)(1) should be amended to state that the party requested to produce bears the burden of showing the request is not proportionate. And Rule 26(b)(5) should be amended to require a proportionality log. Adding something to the Committee Note is not adequate protection. The surveys that show greater lawyer dissatisfaction with proportionality seek opinions divorced from actual cases; the FJC closed-case survey is stronger research. 1185: Her written comment provides suggested rule text for 37(a)(1) and 26(b)(5), and elaborates on the themes stated in her testimony.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 Proportionality gives another battleground, another reason to withhold relevant evidence. Boilerplate objections are made to almost every request. This will add one more threshold motion. And it is unclear where the burden lies.

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 "Proportionality is not the standard right now. It's something I have to raise * * *." Under the proposal, lawyers will bury the courts with motions. Under the proposal, I can force the other side to file a motion to compel. "I would not just object. I would unilaterally withhold relevant documents based on my client's subjective evaluation of whether the documents are proportional to the kind of case we're in." So if the plaintiff's patent seems weak, I will say there are problems with the case and at this point only limited discovery is proportional. If the case comes to seem stronger after initial discovery, more will be proportional. "I like phased discovery like that." As an alternative to the proportionality language, consider E.D.Texas Rule CV-26(d): "what reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Moving proportionality up is desirable to make it part of the scope of discovery, not merely a limitation, and to provide clarity about what the scope of appropriate discovery is. "[I]t will not shift the burdens that are available right now."

February Hearing, John H. Martin: p 172 In the late 1990s Texas adopted as a limitation on discovery the proportionality language that then appeared in Federal Rule 26(b)(2), and placed it up front. Texas requires a party invoking proportionality to file a motion. This practice has not generated a lot of motions. It is discussed far more often in negotiations with opposing lawyers — and those negotiations work better with "the gray-haired lawyers" "than if we had somebody younger."

February Hearing, Michael M. Slack: p 193 Proportionality functions differently in the Texas rules. First, it does not have the primacy it does in the present proposal. Discovery works best by agreement, and by and large that happens. But the proportionality limit is there "for the parties and the court when agreement escapes reason." It facilitates collaboration among the parties and court; Texas courts provide status conferences every 30 days, and informal discussions. "I like phased discovery."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 We will need discovery to determine what is proportional. There will be fights to determine what is the amount in controversy, what is the importance of the discovery, and so on. "[E]very discovery request becomes a mini trial on the merits or class certification." And objections will be made when I attempt to get discovery of the IT structure when I need to show prejudice from the loss of ESI.

February Hearing, Donald J. Lough: p 248 The comments opposing proportionality show the need to reinvigorate this concept to the role that has been intended since 1983. "The burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof." Courts require both parties to discuss proportionality. There may be more motions during the break-in period, but the incentive to make motions will disappear "once it becomes clear what the rules are, and that they will be enforced."

February Hearing, Gilbert S. Keteltas: p 254 (1) Proportionality should not be raised for the first time in an objection. Proportionality is achieved by talking with your adversaries about what matters, who matters, what are the topics in dispute. When adversaries fail to cooperate, I walk them through the rules. "But it's harder work than it should have to be." It works by leaving room to reconsider proportionality as discovery proceeds. "In reality a lot of proportionality issues and objections will be addressed iteratively. Why don't we start small and get bigger? Maybe we don't know the answer today. We can work through it." (2) "The resources of the parties" should be omitted from the list of factors. "Litigants shouldn't be deprived of the benefits of proportionality simply because they have resources." (3) The fear of routine proportionality objections is countered by the need to meet and confer before making a motion, and by Rule 26(g) — the objection cannot be made unless it is reasonable.

February Hearing, David A. Rosen: p 262 The proportionality proposal, along with Rule 37(e), "would create * * * a path for protection of corporate interest at the expense of the rights of individuals damaged by corporate malfeasance."

February Hearing, Stuart A. Ollanik: p 266 "Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery." When we overcome the resistance and get the documents, we find that the reason for invoking cost was that the documents prove our case. "Proportionality is too subject to manipulation." And if the burden is on the plaintiff, the plaintiff lacks information on the burden of producing. "It's too easy for defendants to manipulate, misrepresent, inflate those costs, and hide very important relevant truths." 1164 supplements the testimony. Adds an example of a defendant spending a fortune to resist discovery of documents already produced in other cases. And some courts will combine proportionality with cost-

shifting, shutting down access to justice in valid cases.

February Hearing, J. Bernard Alexander, III: p 272 Moving proportionality to the front will let the defendant say this is a big deal. "In my [employment] cases, at the beginning of the case I don't know enough information oftentimes to be able to address why I need this information in detail." "Proportionality is just another arrow on the defense side * * *."

February Hearing, Susan M. Rotkis: p 296 Plaintiffs uniformly oppose the proportionality proposal. From the perspective of consumer credit-statutes cases, the proposal is one-sided. All five factors will establish a threshold that plaintiffs will have to fight to cross at the very front end. Congress created statutory damages and fee shifting to facilitate private enforcement; this proposal will impede it. Our judges and jurists can implement proportionality when it is raised on a motion to compel.

February Hearing, Ariana Tadler: p 325 Proportionality is unfair. It increases burdens on those who already have stringent pleadings and burdens of proof. It will inevitably lead to increased motions practice that actually thwarts effective case management because judicial resources are already stressed.

February Hearing, Brian P. Sanford: p. 356 The proportionality proposal assumes the problem lies in the requests made by plaintiffs. The problem lies instead in obstructive discovery tactics by defendants that force plaintiffs to settle for inadequate sums.

RULE 26(b)(1): ELIMINATE EXAMPLES

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees, but with caution. Some litigants will argue that deletion of these examples means that such matters are no longer discoverable. The Committee Note should reflect the Committee's view that discovery of such matters is deeply entrenched and that it continues to be available.

398, Shira A. Scheindlin: The examples are useful to encourage early identification of sources and persons with knowledge. It has governed since 1970, without causing difficulty. Eliminating it will lead lawyers to argue that the elimination means a difference. There is no harm in leaving it in.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The rule text illustrating examples of discoverable matter should be restored, or at least the Committee Note should include the advice in the Transmittal Memo stating that discovery of such matters "is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples."

487, Peter J. Mancuso for Nassau County Bar Assn.: "Since the concept is still recognized and supported, there is no reason to delete it." Removing it will incorrectly imply it is no longer valid.

494, Charles R. Ragan: It is imperative that the Committee Note explain the Committee's view that discovery of these matters remains proper. The proposal already has led to statements that it would eliminate "discovery about discovery," a grave mistake with respect to the need to identify potential avenues for eDiscovery.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": The Note should say that this is not a substantive change. It is only a measure to remove clutter.

995, William P. Fedullo for Philadelphia Bar Assn.: Agrees that discovery of these materials is so well entrenched there is no remaining need to list them in the rule.

1054, Assn. of Bar of the City of New York: Agrees, but urges the Committee Note should state that all of these things remain discoverable.

1209, Christopher Heffelfinger: The language proposed for deletion "is important so that Courts will understand that foundational discovery is fairly contemplated * * * and essential to obtaining admissible evidence, and ensuring that all potentially relevant sources of locations were searched for responsive documents." Consider the foundational requirements to treat the statement of a coconspirator as an admission, or the requirements to satisfy the business records rule.

1690, Vicki R. Slater for Council of State Trial Lawyer Presidents: "This language is not extraneous. * * * Elimination * * * will be used by parties and courts to deny the disclosure of these important, essential facts * * *."

1700, Craig Ball: "The standard practice of e-discovery is malpractice. Parties cannot safely assume their opponent is competent to identify and produce responsive ESI." It is essential to protect discovery of metadata. The language to be deleted does not expressly refer to metadata,

but it is the only anchor in the rules for essential discovery. Opponents already are arguing that the proposed amendment bars inquiry into metadata. The language should be preserved. And the Committee Note — or, better, rule text — should make it clear that matters relevant to any party's claim or defense include: "1. Discovery of relevant or functional metainformation; 2. Inquiry into a party's methods and processes used to store, identify, collect, process, search, review or produce information; or 3. Inquiry into forms of information and production or the use, operation and structure of relevant information systems."

1930, Andrew M. Pardiek: Lawyers will cooperate in discussing ESI discovery if a tool is available to make them reveal the details of their ESI systems. Take away this language and that tool may be weakened. "[P]racticitioners often do not find it manifest or obvious that a party can engage in discovery of meta-information."

2072, Federal Courts Committee, New York County Lawyers' Assn.: This proposal "removes language that appears redundant and unnecessary considering the fact that a party has to disclose any information relevant to a party's claim or defense."

January Hearing, Lea Malani Bays: p 283 (Represents investors in securities class actions.) Sets the importance of rule language allowing discovery of the existence, description, nature, custody, condition, and location of any documents against Rule 26(f) conferences discussing ESI. This language facilitates effective conference discussions. It is important to tailor discovery by exchanging clear, transparent information about the nature and capacities of ESI systems. What sources? Has deduplication been done? What about e-mail threading, concept searching, clustering, predictive coding? Is it useful to sample sources that are expensive to access? Remove this language, and responding parties will argue that none of this information is relevant to the claims or defenses in the action. Already panelists at eDiscovery conferences are saying that after this rule change, they will not have to provide any information about ESI systems. Information about the systems is essential to evaluate the proportionality of discovery. It would help, further, to expand the list of topics for discussion in Rule 26(f), a broader checklist of subjects that must be discussed. The specific-objection requirement proposed for Rule 34 will not do the job alone. 1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: similar.

RULE 26(b)(1): ELIMINATE SUBJECT-MATTER DISCOVERY

267, Lawyers for Civil Justice, by Alex Dahl: It is good to eliminate discovery relevant to the "subject matter involved in the action." The parties' claims and defenses provide a clear anchor, and a tie to what is potentially discoverable.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Eliminating the provision for extending discovery to the subject-matter involved in the action is good; it clarifies that discovery is delimited by the claims and defenses found in the pleadings.

289, Craig B. Shaffer & Ryan T. Shaffer: "As a practical matter, eliminating 'court-managed' discovery under Rule 26(b)(1) may have little effect on a party's ability to pursue reasonable discovery." This ties to the broad interpretation given to determining whether information is "relevant" to a claim or defense — relevance is found unless the information can have no possible bearing on a claim or defense, "if it reasonably could lead to other matter that could bear on any issue that is, or may be, in the case." The current proposals do not suggest a narrower or different standard for measuring relevance. But eliminating subject-matter discovery, along with the newly explicit focus on proportionality, may have not undesirable consequences in lawyer behavior in drafting and responding to discovery requests, as summarized with the discussion of proportionality. Removing subject-matter discovery eliminates a safety net that might be invoked to justify over-broad requests.

292, Lyndsey Marcelino for The National Center for Youth Law: Discovery of the subject matter should remain available as a discretionary tool "to retain the ability, upon a showing of good cause, without a consideration of proportionality." [This may mean to say that proportionality should be measured against the subject matter, rather than only the pleaded claims and defenses. Present Rule 26(b)(2)(C)(iii) limits subject-matter discovery.]

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees with the proposal. "There is no justification for the current system of two-tiered discovery — one tier party-controlled, and the other tier court-controlled."

328, U.S. Chamber Institute for Legal Reform: Supports elimination of the "subject-matter" provision. But one further step should be taken: discovery should be limited to information "not only * * * relevant, but also material to a party's claim or defense."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Redefining discovery to focus on claims and defenses will help reduce the excessive costs of discovery. It would help to further limit discovery by requiring that the information be material to any party's claim or defense. January Hearing, p 26: Again approves removal of "subject matter" discovery.

345, Kim Stone for Civil Justice Association of California: Applauds limiting discovery to claims and defenses, "and not to 'any matter relevant to the subject matter involved in the action.'"

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses deletion of discovery relevant to the subject matter involved in the litigation. This will help cabin excessive discovery, and may have a marginal benefit in reducing over-preservation.

349, Valerie Shands: Eliminating subject-matter discovery may reduce the number of "fishing expeditions," but this will be another bar to effective discovery of the information plaintiffs

need.

353, Kenneth D. Peters, John T. Wagener: Substituting proportionality for "any matter relevant to the subject matter" will reduce costs and burdens.

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: There is no evidence that the discretion to extend discovery to the subject matter of the litigation has been abused. Although it is difficult to foresee many circumstances in which distinguishing between claims and defenses and subject matter will be decisive, discretion should not be restricted absent strong reason.

356, Richard McCormack: It is good to make clear that discovery is defined by the claims and defenses identified in the pleadings. Discovery should be further limited by requiring materiality.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Protests deletion of the court's authority to order discovery of any relevant matter. This may mean to address deletion of the provision for discovery relevant to the subject matter of the action beyond the parties' claims or defenses.

381, John H. Beisner: "Limiting the scope of discovery to matters relevant to a party's claim or defenses is an important step to curtailing abusive discovery." Litigants too often seek information only tangentially related to the claims or defenses at issue.

383, Alan B. Morrison: Courts have been able to use "subject matter" discovery to avoid the need to decide on relevance. With the change, defendants will press the relevance point much harder and judges will be forced to decide it in the early stages when little is known about claims or defenses. Defendants will have an incentive to decline to produce on grounds of relevance. This can be fixed by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: Deletion of this language is not justified. Subject-matter discovery has been a safety valve that reduces the need to address relevance. Defendants will be motivated to contest relevance more aggressively. January Hearing, p. 36 at 40: the same.

390, J. Mitchell Smith for International Assn. of Defense Counsel: It is a meaningful improvement to limit discovery to what is relevant to the parties' claims and defenses. But historically broad notions of relevance counsel that this should be tightened further by limiting discovery to matter that is relevant and material.

391, Paul K. Stecker: The 2000 Committee Note says that discovery relevant to the subject matter was not intended to be an entitlement to develop new claims or defenses not already identified in the pleadings. But the distinction has proved unworkable. Defendants are often dissuaded from arguing that proposed discovery is not relevant to the claims or defenses because the plaintiff will argue there is good cause to explore matter relevant to the subject matter. Discovery is frequently ordered on matters far beyond the scope of the pleadings. The Colorado Supreme Court interpreted the identical Colorado Rule in *DCP Midstream v. Anadarko Petrol. Corp.*, 303 P.3d 1187 (Co. 2013), noting that courts seem to apply broad relevancy principles that appear unchanged from pre-amendment practice. Rather than attempt to define the distinction, it took a practical approach, ruling that when judicial intervention is invoked the actual scope of discovery should be determined by the reasonable needs of the action. That is similar to proportionality, and the right approach.

396, Steven J. Twist: Eliminating subject-matter discovery as part of the proportionality revision is good.

398, Shira A. Scheindlin: "I have not heard any disputes regarding the scope of permissible discovery" since the distinction between claims and defenses and subject matter was adopted. "I suspect the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not." Eliminating this distinction will send a signal that the scope of discovery is being narrowed. There is no reason to do that. And some experts have claimed that restricting discovery to what is relevant to a claim or defense "might preclude discovery of significant metadata accompanying electronic records that is necessary to permit the use of technology assisted review."

402, Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: This change "will prevent legitimate claims and defenses from being raised." The claim or defense may never come to light, or it may come to light too late and either be precluded or become the subject of a costly second action. And it ignores the plight of parties who reasonably believe they have a claim but lack the information needed to plead it to the standards required by Twombly and Iqbal. It systematically favors parties who have better access to information outside the discovery process.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: It is better to require proportionality and relevance to the parties' claims or defenses "than being guided by the amorphous standard of 'relevant to the subject matter involved in the action.'"

407, David J. Kessler: Eliminating subject-matter discovery is appropriate. "[C]urrent Rule 26(b)(1) is often abused and discovery is allowed into tertiary issues of only marginal relevance * * *." Reducing the scope is necessary; a reactive approach that tries to find cheaper ways to produce is doomed to failure because the exponential increase in the amount of information defeats any ability to control costs once the data is discoverable.

408, Elliot A. Glicksman for Arizona Association for Justice: The proposal turns the focus of discovery from the subject matter of the litigation "to the specifics of often yet unknown but relevant and discoverable facts."

414, John R. Scott: Substituting proportionality for any matter relevant to the subject matter should help reduce costs and ease discovery burdens.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: "This deletion removes from a court's discretion the power to order discovery it deems relevant while not expressly connected to the four corners of a complaint." There is no clear dividing line to separate information relevant to the claims or defenses. In securities cases, for example, pre-class period discovery is often permitted to help establish a defendant's state of mind: that seems to bear on the claims or defenses, but why require that the line be drawn? Or in an action based on a false or misleading audit opinion, discovery of audit manuals is allowed: will that still be? One result will be that plaintiffs will draft still longer and more detailed complaints.

418, Harlan I. Prater, IV: Eliminating subject-matter discovery "would reduce the unnecessarily high costs and burdens of modern discovery."

427, John F. Schultz for Hewlett-Packard Co.: It is good to ensure that discovery is limited to the claims and defenses set forth in the pleadings. But this should be tightened further by requiring that the matter be "relevant and material" to the claims or defenses.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports elimination of "subject matter" discovery. "Creating a unitary standard for the scope of permissible discovery will simplify the discovery practice." (p. 4, n. 1, recognizes that the Department opposed separating out subject-matter discovery for a good cause showing in the 2000 amendments, but has concluded that intervening developments warrant the proposed amendment.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Limiting discovery to the claims and defenses, as opposed to the subject matter, "should help to reduce costs and discovery burdens."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: This comment provides a detailed opposition to the change, strongly recommending that it be abandoned. Very few discovery disputes now focus on the distinction between what is relevant to the claims or defenses and what is relevant to the subject matter. The parties know the court will decide what discovery is appropriate without paying attention to the distinction, and if pushed will decide that what is appropriate relates at least to the subject matter. In most cases, the present rule establishes a "distinction without a difference." But eliminating it will encourage litigious parties to make objections they do not make now. It also will encourage parties to plead broad claims that will become subjects of motions to dismiss on the pleadings. And it will work to the disadvantage of an inarticulate party who cannot explain why requests are relevant to a claim or defense. The 2000 Committee Note offered impeachment information as something properly discoverable "although not otherwise relevant to the claims or defenses"; the change may have the unintended consequence of curtailing such discovery. Time should be allowed to develop experience with the proposed proportionality provision before considering whether to abandon subject-matter discovery.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) Decisions applying the provision allowing discovery relevant to the subject matter of the litigation for good cause "suggest that courts have exercised their discretion sparingly and appropriately." (2) "It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims." In an action against an individual government official, for example, is discovery that would enable the plaintiff to find the facts necessary to impose liability on the governmental employer relevant to the plaintiff's claim? 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports limiting discovery to what is relevant to a party's claims or defenses.

729, Stephen B. Burbank: "The elimination of subject matter discovery (upon a demonstration of good cause) can only seem 'modest' or 'moderate' if one neglects the history * * * and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination would have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so."

785, J. Bernard Alexander III, Wendy Musell, for California Employment Lawyers Assn.: It is

quite normal and necessary to discover information relevant to the subject matter, although not to a claim or defense. Discovery may be needed of a defendant's computer systems or information hierarchies, though this is never relevant at trial. Information may be needed to test a claimed privilege.

797, Michael Murphy: Decries "attempts to discover information in a filed action that is not relevant to the filed action but may be relevant to some other matter being handled or considered by the same plaintiff's attorney in a different venue."

995, William P. Fedullo for Philadelphia Bar Assn.: "[T]he proposed amendment will not impair a party's right to obtain the discovery it actually needs, and it will protect the responding party or nonparty from the burdens imposed by discovery that, in the end, provides no benefit to anyone." Many courts and commentators have observed that the separation of subject-matter discovery from claim-or-defense discovery in 2000 "did not bring about a major shift in the scope of party-managed discovery."

1054, Assn. of Bar of the City of New York: A majority favors the proposal. "It is rare that a party expressly seeks discovery of matters that cannot reasonably be tied to the claims or defenses already presented in the case, and rarer still for the court to grant such discovery." Discovery "was never intended to provide an opportunity to seek evidence to support other claims that have not been alleged." But the Committee Note should say that leave to amend should be freely granted.

1413, Jocelyn D. Larkin for Impact Fund and several others: "There is no evidence that this language has led to excessive or unduly expensive discovery, but it serves as an important safety valve in rare cases. In systemic reform cases, the facts pertaining to the individual plaintiffs' claims may not encompass every aspect of a challenged policy."

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports. "The revised language would compel parties to articulate their need for specific discovery in light of practical considerations pertaining to the case and parties."

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "For example, if a plaintiff has not specifically alleged that the defendant was driving under the influence of drugs in the complaint, the new rule might limit discovery of mandatory drug tests and prevent discovery whether a driver was on drugs or had a history of driving on drugs."

1692, Jan M. Carroll for Barnes & Thornburg: Approves deletion of the "subject-matter" provision. "All too often, we have seen opposing parties seeking discovery that has no bearing on the present action, and instead is designed to develop theories for future litigation."

1703, Hon. Michael H. Simon: Subject-matter discovery has not created undue burdens for the court or parties. It should remain available in the court's discretion.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The distinction between information relevant to claims or defenses and information relevant to the subject matter of the action is unclear. The 2000 Committee Note shows that the actual scope of discovery should be what fits the reasonable needs of the action; "ultimately the distinction between the two tiers of discovery is irrelevant. The fact is that the maintenance of a separate category of discovery * * * is likely only to lead to additional satellite litigation." And it is difficult to see

why discovery not relevant to any party's claim or defense should be allowed."

2209, Richard Talbot Seymour: Recent interpretations of Rule 8 combine with Rule 11 to limit the allegations that may properly be made. Eliminating subject-matter discovery will make it much harder to uncover the information needed to plead a meritorious claim that cannot be pleaded without discovery.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 "The big change is moving away from being able to ask a judge for evidence that's relevant just to subject matter * * *." But "I've never sat down and argued with somebody about whether or not something is discoverable because it's related to subject matter. They always argue that it's relevant, and relevance is a very, very broad concept."

January Hearing, Jocelyn D. Larkin: p. 125 In litigation seeking reform of governmental and corporate conduct, discovery of the subject matter beyond the pleaded claims and defenses can be important. When the object is systemic institutional reform, "it may go beyond the specific facts of that person" who appears as plaintiff claiming one specific form and incident of discrimination. The Committee may contemplate a generous interpretation of what is relevant to claim or defense — a systematic practice of discrimination may help prove the individual claim. But the change will be read to narrow the scope of discovery.

February Hearing, Mary Nold Larimore: p 68 This change will go a long way to culling out the irrelevant custodians whose hundreds of thousands of documents are currently being collected and produced and reviewed.

RULE 26(b)(1): NEED NOT BE ADMISSIBLE — "REASONABLY CALCULATED"

Revealing misquotes: A number of comments quote the current scope of discovery as "relevant or likely to lead to the discovery of relevant evidence."

270, Ohio Association for Justice, by John Van Doorn: It is a mistake to delete the present provision for discovering relevant information that may lead to admissible evidence. Rule 11(b) recognizes the legitimacy of claims founded on a reasonable belief that reasonable opportunity for discovery will provide evidentiary support. The 1946 Committee Note recognizes that discovery that yields useful information is successful, even if it does not produce testimony directly admissible.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Striking the sentence allowing discovery of information reasonably calculated, etc., is welcome. "[B]oth practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material." The sooner it is deleted, the better.

290, Randall E. Hart: The premise in discussing the proportionality factor is that the "reasonably calculated" provision "creates a presumption of discoverability" that makes discovery flow smoothly. The multifactor proportionality test will undercut this.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The "reasonably calculated" provision "has been misapplied by courts and litigants to expand the scope of permissible discovery * * *." The Committee Note "should clarify that the deleted language was misconstrued and that is the reason for the deletion." The substitute language, focusing on information within the scope of discovery as defined by Rule 26(b)(1) is proper.

307, Hon. J. Leon Holmes: See the summary on proportionality. Opposes the change, in terms that seem to rely on the "reasonably calculated" provision to define the scope of discovery as Rule 26(b)(1) stands now.

309, Kaspar Stoffelmayr: Everyone understands that hearsay should be discoverable. But the "reasonably calculated" provision is repeatedly taken by courts "to articulate an extremely broad standard for the scope of discovery." Relevance is interpreted to allow discovery of anything except information that "has no possible bearing on the subject matter of the action." Materiality should be required.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): This proposal "helps focus discovery on relevant information and can stem the tide of overly broad document production."

327, Malini Moorthy for Pfizer, Inc.: Endorses eliminating the "reasonably calculated" language.

328, U.S. Chamber Institute for Legal Reform: This change is important. "[S]ome courts have found that information is presumptively discoverable as long as there is 'any possibility' that the information relates to the 'general subject matter of the case,' and that resisting discovery is only appropriate where the information sought has 'no possible bearing' on the issues pled in the complaint or those that may arise during the litigation."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: The "reasonably

calculated" standard is vague and overly broad. It has driven up the costs and time of discovery.

338, Steven D. Jacobs: Discovery works well now in civil rights and employment discrimination cases. Substituting "a proportionality rule for the broad and eminently workable 'reasonably calculated' standard[] will only serve to make the courts essential referees in the discovery process." There are no empirical data showing widespread abuse.

343, Doug Lampe for Ford Motor Company: "[P]arties justify their discovery requests by stating that such requests may 'lead to the discovery of admissible evidence' — all but ignoring the rule's express invocation of a relevance standard — and by identifying a policy expressed nowhere in the rules themselves — that discovery should be 'liberal and broad.'" Removing this troublesome phrase will require the parties to focus on discovery necessary to assert a claim or present a defense.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The reasonably calculated standard is well understood. "It does not permit limitless discovery." Lawyers understand this as the scope of discovery standard. Changing it will cause more problems than will be solved. Proportionality will become a boilerplate objection. "The reason that our present Rule works so well is that it recognizes the importance of permitting all potentially relevant information to be uncovered."

345, Kim Stone for Civil Justice Association of California: Applauds deletion of the "reasonably calculated" sentence.

351, Eric Hemmendinger for Shawe Rosenthal LLP: The "reasonably calculated" provision "is commonly misread as allowing virtually unsupervised discovery." The rule should be strengthened by requiring that requested information be material, not only relevant.

353, Kenneth D. Peters, John T. Wagener: Deletion of "reasonably calculated" "should further streamline the discovery process."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: The present standard is well understood and workable. Removing "reasonably calculated" "significantly narrows the scope of discoverable information," severely impacting the ability of those who most need discovery, typically plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: Removing the "reasonably calculated" phrase broadens the scope of discovery. The new language contains no limits. Proportionality does not provide any guide to what is relevant. And it will become the primary focus, with its five factors.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as the present definition of the scope of discovery. Substituting proportionality is challenged.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope.

381, John H. Beisner: "[B]oth courts and counsel have interpreted the 'reasonably calculated' wording in the rule in a manner" that broadens the scope of discovery beyond relevance and obliterates all limits. It should be deleted.

383, Alan B. Morrison: Couples this with the "subject matter" point: it may be acceptable to delete the "reasonably calculated" part, but this should be ameliorated by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: "What is the purpose of this change"?

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: The "reasonably calculated" language "too often allowed relatively unfettered acceptance of the need for further discovery." It is properly eliminated.

390, J. Mitchell Smith for International Assn. of Defense Counsel: The "reasonably calculated language" "has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery." Eliminating it would effect substantial reductions in unwarranted discovery.

396, Steven J. Twist: Eliminating the "reasonably calculated" sentence is good.

398, Shira A. Scheindlin: "There is no empirical evidence that this language has caused any real problems." The rule specifically requires that the information be relevant, meaning relevant to a claim or defense. "It does not expand the scope of relevance or create an exception that swallows the rule." This will be seen as another signal narrowing the scope of discovery.

399, Edward Miller: The "reasonably calculated" language "has erroneously been used to establish a very broad scope of discovery." This is a necessary and important change.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The "reasonably calculated" language "has become a common justification for discovery 'fishing expeditions.'" It also limits what Courts can do to restrict the volume of information sought. However, the use of this language in this fashion is erroneous. But "both practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material."

407, David J. Kessler: The Committee is right. "The current formulation of this rule has confused courts and parties, expanding discovery beyond what was intended" by the "reasonably calculated" sentence. "The fact that a party is seeking information that would not be admissible at trial should not prevent it from seeking discovery, but neither should it expand the scope of discovery beyond its defined limits." Indeed the case law reflects a growing trend "to pressure, or even order, responding parties to produce non-relevant or privileged documents to opponents for the sake of speed or cost-effectiveness." The idea seems to be that the availability of clawback agreements and Evidence Rule 502 mitigate the risks of privilege waiver. But these devices do not bear on the many other reasons for review and nonproduction, including withholding data privacy information, culling irrelevant data, and learning about the documents at issue." The Committee Note should state that documents that are actually privileged or not relevant are outside the scope of discovery, and courts should not compel production.

408, Elliot A. Glicksman for Arizona Association for Justice: The "reasonably calculated" language is "some of the most important language that courts have traditionally used to permit broad discovery." The Rule 26(b)(1) proposal significantly narrows the category of potentially discoverable materials.

412, Mark S. Stewart for Ballard Spahr LLP: "Discovery is not an unfettered right." Relevancy has been construed to encompass any matter that reasonably could lead to other matter that could bear on any issue in the case. That leads to such requests as those for "any and all documents" related to a particular topic. Litigants sometimes seek irrelevant data to expand the scope of the issues or to find evidence for other cases. They share general liability documents — in drug cases, for example, they seek documents concerning drugs not specifically relevant to their claims to supplement discovery in other cases or to create a basis for pursuing other cases. And the volume of discovery in multidistrict or coordinated proceedings may become a basis for allocating global settlement costs and fees among plaintiffs' firms. Requiring greater specificity in requests will force more fruitful negotiations about the proper scope of discovery. The "reasonably calculated" approach will be deflated. But to make sure, "materiality" should be an added limit on the scope of discovery, at least in the Committee Note.

414, John R. Scott: Supports abandoning the "reasonably calculated" standard.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

418, Harlan I. Prater, IV: The "reasonably calculated" language "is often erroneously used to establish an overly broad and costly scope of discovery." The proposed amendment preserves the original purpose to clarify that inadmissible evidence such as hearsay can be within the scope of discovery so long as it is relevant.

419, William R. Adams: The "reasonably calculated" language is unnecessarily broad, "and allows for improper 'fishing expeditions' by opponents whose theory of the case has either never been fully developed or, through discovery, has proven to be incorrect." Eliminating it will be a significant step toward reducing unnecessary costs.

421, Louis A. Jacobs: First suggests that "The Committee could remedy excessive discovery by removing the 'reasonably calculated' language; relocating proportionality is overkill." But later suggests that removing this language will hamper party negotiations about the scope of discovery. Starting with the view that discovery abuse is rampant would lead to deleting this sentence. But starting with the view that abuse is sporadic would preserve the sentence and the precedent interpreting it.

434, James Moynihan: The volume of material produced in discovery has grown at an almost incomprehensible rate. Elimination of the "reasonably calculated" phrase is particularly welcome, as is proportionality.

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: As both defendant and plaintiff, supports Rule 26(b), endorsing comments by Lawyers for Civil Justice, Bayer Corp., Ford Motor Co., and Pfizer Inc. Rather than repeat those comments, offers several examples of cases in which only a tiny fraction of documents produced in discovery were listed as trial exhibits. In one of the examples, 391,000 documents were produced; the plaintiff listed 805 as trial exhibits, and 146 were admitted.

445, Gerald Acker, for Michigan Assn. for Justice: The "reasonably calculated" standard is relatively objective, calling for discovery "to be directed at possibly locating admissible evidence." It should not be replaced by proportionality.

452, David Hill: Drawing on many years as CFO of various companies, supports focus on the claims and defenses, not any information that might lead to admissible evidence.

454, John Brown: Supports narrowing discovery to focus on the claims and defenses, not "searching for information that might lead to admissible evidence."

455, W. Michael Scott for CrownQuest Operating, LLC: The "reasonably calculated" provision is overly broad. Discovery should be limited to what is actually relevant and material to the claims or defenses.

456, Niels P. Murphy writing for eight lawyers: Eliminating the "reasonably calculated" provision "would help curtail unnecessary discovery and reign [sic] in the very broad scope of discovery erroneously brought about by this language."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Removing the "reasonably calculated" language is "intended to remove awkward if familiar language rather than change substantive standards." Additional language in the Committee Note could avoid the risk of uncertainty among practitioners, some of whom may see this as narrowing the scope of discovery. Suggested Note language: "Although the 'reasonably calculated' language is deleted because it has been misconstrued to permit discovery of non-relevant information without limitation, the scope of what is discoverable under the Rule remains unchanged."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Removing the "reasonably calculated" language "marks a significant change in the manner in which relevance is defined * * * and raises questions regarding the continued validity of numerous cases decided based on the existing standard." It would be better to retain it in some form, perhaps: "This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence." Supports abandoning the "reasonably calculated" standard.

467, Michael Freeman: (Tort counsel for Walgreen Co.): The "reasonably calculated" provision "has been broadly interpreted, resulting in significant discovery costs — particularly to corporate defendants." It is good to replace it with proportionality, a limitation that "is reasonable, open to fair interpretation and proper enforcement."

483, Kenneth Wittenauer: The "reasonably calculated" provision "has been broadly interpreted, resulting in significantly increased discovery costs — particularly to corporate defendants." Striking this provision, and inserting proportionality into the scope of discovery, are supported.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Defense lawyers at the conference noted that the "reasonably calculated" language "tended to overshadow the rule and distort the scope of relevancy."

501, Martin D. Stern: In both small- and large-stakes litigation, "reasonably calculated" leads to discovery that does not speak to any case issue; courts are hesitant to deny "since there is a plausible argument that it could somehow lead to admissible evidence."

524, Joel S. Neckers: "Reasonably calculated" "has created immense and unsustainable burdens." But the tradition of overly broad discovery is so well established that the amendments may not be effective.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no "documented problem" with the "reasonably calculated" provision. The Committee's concerns seem to rely on anecdotal impressions. Since

2000, the rule requires that the information be relevant. The amendment will suggest that there is an area of information reasonably calculated to the discovery of admissible evidence but is not relevant to the claims or defenses, hence not discoverable. This in turn will be read to narrow the meaning of what is "relevant." 2078, Judith Resnik for 170 added law professors: supporting this comment.

642, Cal Burnton: "[T]he only constants about company records are that things are not organized, easily found, or even generally known to exist." The "reasonably calculated" standard provokes searches far beyond what is warranted.

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

995, William P. Fedullo for Philadelphia Bar Assn.: The "reasonably calculated" phrase "has led to an overly expansive definition of the scope of discovery." It tends to creep beyond the original purpose to arguably expand the scope of discovery beyond relevant information and documents. (A dissent argues for retaining this well-developed concept.)

1054, Assn. of Bar of the City of New York: Supports "the objective of this change * * * to better express the scope of discovery that has always been intended." The Committee Note should observe that the amendment will not affect the discoverability of metadata relating to particular electronic documents or information about a party's computer system.

1206, Karen R. Harned for National Federation of Independent Business: "The typical NFIB member employs 10 people and reports gross sales of about \$500,000 per year." A 2011 report shows that in 2008 the total tort liability expenses of businesses with less than \$10,000,000 in revenue was \$105.4 billion, including all expenses and sums paid to plaintiffs. These businesses bore 81% of business tort liability costs, but took in only 22% of total revenue. Their concerns with litigation are different from the concerns of large enterprises. They lack the sophisticated legal advice that in-house counsel can provide. Federal litigation is inefficient, expensive and fraught with uncertainties that have nothing to do with the merits. The Rule 26(b)(1) proposals will provide some measure of relief, particularly deleting the "reasonably calculated" provision.

1228, William E. Partridge: In one case the defendant produced a document with one page missing from the sequential numbers. After many motions, confronting repeated denials that the page existed, the page was produced and proved to be the "smoking gun." The discovery would not have been allowed if the "reasonably calculated" provision had not been available.

1269, Robert L. Levy for 309 companies: 309 companies sign on to this comment. The "reasonably calculated" provision "has been abused by parties and misconstrued by many courts." Eliminating it will bring the scope of discovery back to the reasonable intention of the original drafters.

1608, Jonathan M. Redgrave: "This is a critical change." The reasonably calculated phrase "appears in over 2,400 reported decisions, although few have any discussion of the genesis or meaning of the language. Worse, many of the cases immediately equate the phrase with the concept of 'broad discovery' as a right, resurrecting notions of discovery that pre-date the limitations identified as appropriate in 1983 and 2000."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: The "reasonably calculated"

standard "has, in practice, been used to swallow any reasonable limits on discovery." "Far too often litigants have no explanation as to how the discovery they seek is relevant or conceivably admissible," but fall back on this refrain.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: Many forms of information that do not seem to bear on claims or defenses may be vitally important; the "reasonably calculated" provision enables discovery. "For example, a log book and toll booth receipt from a week before the collision may not seem relevant to what occurred the day of the collision, but have led trucking experts to the conclusion that log books were falsely maintained, which has led to further discovery to show the log books were false the day of the crash, or which have been used to show a pattern and practice of log book abuse."

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: Removing the "reasonably calculated" requirement broadens the scope of discovery "such that a litigant conceivably could ask for discovery that has no bearing on the issue at stake." [Misquotes the proposal as "Information within the scope of discovery, rather than "this" scope of discovery. That may account for the comment.]

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The "reasonably calculated" provision "has too often been interpreted to include any and all discovery that may somehow lead to finding some relevant information."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions; a member of DRI board.) Along with adopting proportionality, it is important to revise the "reasonably calculated" provision. It "is too broad to define." It leads to discovery orders that are too broad. An example is provided by a product liability action involving a medical device. FDA approval rested on predicate devices that are comparable in performance, but not in design or type of technology. But the court in such a case ordered discovery as to all of the predicate products as reasonably calculated to lead to discoverable evidence. That included dissimilar products and adverse events. In this case, all the predicate products were made by the defendant. In other cases, nonparties might be afflicted with the burden of such discovery.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 Revising the "reasonably calculated" provision is troubling for all the reasons that make proportionality troubling.

November Hearing, Wayne B. Mason: p 142 The most important proposal is the one that removes the language with respect to "reasonably calculated." Many lawyers mean it believes "you could pretty much have anything you wanted." This happens in state courts and in arbitration as well as in federal courts. Rule 26 has become an issue of leverage. "E-discovery has changed the world." Massive information is available, even from small businesses and individuals who have smartphones and tablets. Once you identify the documents they have to be reviewed for privilege, work-product protection, "and things like that." "Reasonably calculated" means I have to produce 2 million documents, while only two dozen of any significance wind up in trial. The same two dozen would be discovered with a narrower scope of discovery — any lawyer with the intelligence to pass a bar exam can frame requests that will lead to production. Predictive coding is a good idea, "but it is only one step and it is not the answer. * * * You can't get agreement on it. You can't afford to use it. And so, as a practical matter, it's used very little." And you still would have to review a ton of documents.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Taking out the

"reasonably calculated" language will increase corollary litigation.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 It is clear that the "reasonably calculated" provision was never intended to define the scope of discovery, but eliminating it and pushing proportionality into the scope of discovery "will allow us then to focus on proportionality as it relates to the discovery that is necessary for the type of case that is being prepared."

January Hearing, Jon L. Kyl: p. 45, at 47: "Many have misunderstood this language as really reflecting the real standard for discovery."

January Hearing, Quentin F. Urquhart for IADC: p 133 "Reasonably calculated * * * has really swallowed the entire rule," allowing discovery "based on the hope that this search might, quote, lead to, closed quote, some other type of information that might be admissible at trial."

February Hearing, Mary Nold Larimore: p 68 This change will go a long way toward focusing on what is important.

February Hearing, Michael J. Harrington: p 121 Offers examples of vastly expensive discovery, and offers support for Rule 26(b)(1) — the greatest benefit "is the changed language to get away from the old standard, which I think is very broad, and leads to excessive discovery." This seems to reflect not so much proportionality as either "reasonably calculated" or "subject-matter" discovery, or all of them.

February Hearing, Leigh Ann Schell: p 179 Moving away from relevance to the subject matter, and especially eliminating the "reasonably calculated" phrase, is important. "Reasonably calculated" was not intended to expand the scope of discovery, but it has been overused and overblown. The proposal is a return back to what was intended in the first place.

February Hearing, John Sullivan: p 231 "Reasonably calculated" generates "the hugely open-ended standard we have always had." Adopting a tighter standard is good.

February Hearing, Donald J. Lough: p 248 "The root of this over discovery problem is the reasonably calculated clause in Rule 26." The comments that oppose removing this language, arguing that it is the core standard of relevance, show that it is misconstrued. Courts too often delay a determination of relevance until it is too late — they punt on the discovery objections, and then at trial time the documents are excluded as not relevant.

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Endorses eliminating "reasonably calculated" because it "has turned into a giant loophole."

RULE 26(b)(2)(A): ALTER NUMERICAL LIMITS, RULE 36

No comments. See Rule 36.

RULE 26(b)(2)(C)(III)

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Discovery will be mandatorily narrowed if the court finds an item does not meet the rigors of 26(b)(1). "[O]ther vehicles for discovering those materials will be off-limits."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

RULE 26(C)(1)(B): ALLOCATION OF EXPENSES IN DISCOVERY ORDER

267, Lawyers for Civil Justice, by Alex Dahl: This is a small but important step toward the more important goal of revising the default "rule" that a producing party must pay the costs of responding. 540, Alex Dahl for Lawyers for Civil Justice: And the proposal should go further to recognize expressly that a protective order can protect against overly costly preservation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section agrees that this cost-shifting power is implicit in present Rule 26(d). But the rule text, or the Committee Note, should make it clear that allocating expenses does not alter the American Rule and does not authorize allocation of attorney fees incurred in connection with disclosure or discovery. Attorney fees are not the kind of expenses that should be allocated. And notes that "[t]he cases are not uniform on whether courts have authority under the Rule to shift costs associated with the search and review of accessible data." November Hearing: Michael C. Rakower, p 287: The Section does not think the proposal is intended to change the American Rule, but it might be advisable to say so in the Committee Note.

311, James Coogan: Individual plaintiffs may be saddled with immeasurable costs. This creates an incentive for defendants to increase costs.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): "[W]hen our clients have included cost-shifting provisions within their Rule 26(c) protective orders, opposing parties have asked for fewer documents and focused their requests * * *." "[T]he amendment explicitly encourages courts to take an active role in shifting the costs of discovery."

325, Joseph M. Sellers: Present Rule 26(c) authorizes cost allocation. It is a mistake to emphasize it further; if the proposed language is added, "the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources." And as with Comment 303, New York State Bar Association, it should be made clear that attorney fees are not among the expenses to be shifted to the requesting party — that would be an unwarranted departure from the American Rule. And three more points: (1) Cost shifting is unnecessary to deter excessive requests: the requesting party incurs costs to conduct depositions, and to review and analyze responses to interrogatories and documents. This is particularly true with electronically stored information — a party requesting it has ample economic incentive to make narrow requests. (2) The responding party is in the best position to control costs. If it bears the costs, it has every incentive to reduce costs; if it shifts the costs, it has less incentive to maintain records in readily accessible formats or to employ efficient search strategies. (3) Particularly in civil rights and employment cases, there is an asymmetry in the parties' resources and their access to evidence without formal discovery. If ordered to pay, a plaintiff may forgo discovery and be forced to proceed without the information.

328, U.S. Chamber Institute for Legal Reform: The root cause of our broken discovery system is the rule that generally the producing party bears the costs of producing. "This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself." The problem is exacerbated by electronically stored information. A RAND study found that the median total cost for ESI discovery among the firms who participated totaled \$1.8 million per case. The present practice deprives the producing party of its property — the money spent to produce — without due process of law. There is nothing but the plaintiff's unilateral allegation of liability, no judicial hearing. Even a hearing on

a motion to dismiss or for judgment on the pleadings does not provide the required process before inflicting these costs. The costs of discovery should be placed provisionally on the person asking for it, giving incentives for the optimal level of production. A safety valve can be incorporated for the unusual case considering "whether the party from whom information is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies." "This system would also facilitate greater and more direct court involvement in discovery."

Failing that, a more modest "solution would be presumptive cost-shifting for electronic discovery." The result would be narrower requests, reducing the prospect of infringing a defendant's due process rights. Or, failing that, "[t]he Committee might codify the factors articulated by" the ABA Section of Litigation Civil Discovery Standards, 29b.iv.A-P (2004).

343, Doug Lampe for Ford Motor Company: "In Ford's experience, judges are almost uniformly unwilling to consider meaningful cost-allocation proposals even in cases of clear discovery abuse." Defendants sometimes settle meritless claims to avoid the cost of onerous discovery demands. "Making explicit the provision for protective orders that allocate the costs of discovery would deter parties from engaging in abusive discovery tactics." The problem is illustrated by a specific case in which a state court ordered Ford to retrieve records from more than 1,300 other lawsuits and 1,200 witness transcripts, many involving closed cases and off-site archived records maintained by outside law firms. This effort cost \$2,000,000, and yielded nothing actually admitted in evidence at trial. The court allowed Ford to recover only the few thousand dollars incurred for reasonable copying costs.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: This will have a chilling effect on discovery. Individual plaintiffs have no way of assessing the cost of production. "Permitting cost shifting will encourage efforts to thwart discovery by making it expensive to locate and produce evidence and/or artificially inflating the cost of locating and producing evidence." The rule will discourage development and use of archival systems that reduce the cost of production.

351, Eric Hemmendinger for Shawe Rosenthal LLP: "Cost sharing is the best single method of forcing counsel to ask whether discovery is really necessary." Many employment plaintiffs have limited means, but "even partial cost sharing would cause counsel to engage in a cost-benefit analysis before conducting discovery." And it should be remembered that many collective and class actions "are essentially business ventures organized by plaintiffs' counsel."

353, Kenneth D. Peters, John T. Wagener: "This provision * * * will force parties to think twice before seeking large amounts of discovery which may prove marginally useful."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: The amendment is superfluous because the authority is already there. In nursing home litigation, it is common to be allowed discovery of incident reports documenting injuries only under a protective order. "[T]he proposed change appears to deliberately enumerate the awarding of costs as a formalized duty for the court." [This seems to say that costs must be awarded whenever a protective order is granted for any reason.]

360, Robert Peltz: Practices maritime law in S.D.Fla. A combination of a ruling by a Florida appellate court and forum-selection clauses in cruise ship contracts means that the overwhelming majority of actions by injured passengers must be filed in S.D.Fla. Passengers from around the

country can ill afford to litigate there now; adding responsibility for the defendant's costs in responding to discovery would make it economically impossible for many individuals with meritorious cases to bring them.

372, J. Burton LeBlanc, for American Association for Justice: Does not object, but the Committee Note should be expanded to say that these new words do not change the presumption that the responding party should bear the costs of producing discovery. Any more general "requester pays" rule should be limited to litigation between large corporations.

381, John H. Beisner: Writes at length to urge broad expansion of "requester pays." Due process interests are at stake in a system that enables one party to inflict the costs of discovery on another party without any pre-deprivation hearing. One approach would be to establish a general rule that each party pays the costs of discovery it requests, subject to adjustment by the court on considering such factors as whether the responding party preserved information in forms costly to retrieve, failed to provide relevant information during initial disclosures, or drove up the price of discovery through its litigation strategies. Alternatively, the rules might simply mandate that the court consider cost shifting in any case in which discovery of ESI is sought. The need for some such relief will only grow as third-party litigation financing expands. Investors in litigation are almost assured that they can recoup the investment because it is possible to impose such great discovery costs as to coerce settlement on terms that at least cover a plaintiff's litigation expenses.

383, Alan B. Morrison: Allocation of expenses can be a reasonable element of a protective order. But the Committee Note should make it clear that this should not be routine, but used only "where the losing party was unreasonable in either the making of an objection or pursuing the request."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Considering the cost of discovery will have a welcome tempering effect on the desire for additional discovery.

398, Shira A. Scheindlin: "[C]ost-shifting has crept into the rules and the more often it does, the more likely we are to see a change in the American system of litigation." In 2006 the Committee suggested that cost-shifting can be a condition for producing ESI that is difficult to access. The new rule, in combination with Rule 26(b)(2)(B), "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without." That should not become our default position.

414, John R. Scott: This proposal "will offer substantial relief from excessive costs of discovery. The mere existence of this rule will likely cause litigants to be more thoughtful in making their discovery demands."

427, John F. Schultz for Hewlett-Packard Co.: "The ability to allocate the expenses of broad discovery requests to the requesting party would likely reduce the scope of such requests and encourage greater cooperation by the parties agreeing to search terms or custodians and taking other measures to reduce the overall burden of discovery * * *."

428, Dave Stevens: Writes as owner of a small campground to support "increasing judicial authority to charge the plaintiffs for unreasonable costs they generate on such things as discovery."

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: This may be the most

important, and have the greatest impact, of all the proposals. "[I]f properly and routinely applied by courts, the amended rule should focus discovery on information critical to the parties' claims and defenses." "But the key is the application * * *." The authority exists now, and is seldom used. Change must include consistent application.

446, Stephen Aronson: The rules should adopt a requester-pays system to reduce unreasonable time and cost in discovery.

447, Charles Crueger: (This comment may interpret the proposal as a general requester-pays rule:) It is unwise to have the requesting party pay. The requester almost never knows what documents the other side has, and cannot predict whether the discovery will be worth the cost. The producing party has an incentive to maximize the costs of production. In large cases, the parties have an incentive to opt out of cost shifting. Much expense, for that matter, results from persisting in reviewing ESI as if it were paper; computer retrieval and review can be much less expensive.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Holding parties accountable for the cost of excessive requests encourages tempered discovery and reinforces the purpose of the amendments to Rule 26(b)(1)."

452, David Hill: Drawing on many years as CFO of various companies, urges that the requester should pay the costs of discovery, and further that we should switch to a rule that the loser pays the winner's costs.

454, John Brown: Favors confirming authority to allocate the costs of discovery to the requesting party, "because then the requester will decide to pay for information they need."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal. "The authority already exists, but expressing the authority in the Rule will clarify any uncertainty."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In some cases the parties have agreed by contract on who bears the risk of counsel fees and costs. Or a statute allocates the risk. But where there is no contract or statute, this proposal is likely to result in shifting the cost to the more affluent party. (The example is a bit puzzling: a large entity objects to the burden of a request by an individual plaintiff, but may be left to bear the cost of responding.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: "the mere presence of this rule will likely cause litigants to be more thoughtful in making discovery demands."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: In the first part surveying various state-court practices and pilot projects, it is noted that a New Hampshire pilot project included proportionality in addressing discovery of ESI, and provided that when a request is considered out of proportion, the court may determine the responsibility for the reasonable costs of producing the ESI. The comment on proposed Rule 26(c) observes that the cost of preserving and reviewing ESI generally should be borne by the producing party, but courts should not hesitate to arrive at a different allocation in appropriate cases.

487, Peter J. Mancuso for Nassau County Bar Assn.: The Note should make clear that "expenses" does not include attorney fees; a fee award would violate the American Rule.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference generally divided along party lines — plaintiffs oppose, noting the authority is already in the rule and fearing that the amendment will imply that shifting costs to the requesting party is the preferred outcome. One suggested that at least the Committee Note should state that the authority to allocate costs does not include attorney fees; the "American Rule" should be honored. Defense attorneys suggested the proposal does not go far enough. Attorneys seldom talk about how much it will cost to produce requested discovery and whether the costs make sense for the case. And one observed that the Committee Note does not say "should"; the purpose of the proposal is to facilitate conversation about the need and justification for proposed discovery.

499, Beth Thornburg: Cost-shifting has been limited to a handful of e-discovery cases that raise unique problems. It should be studied further before anything is done to encourage it.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses without further elaboration.

630, Jon Kyl & E. Donald Elliott: The "producer pays" system of discovery creates perverse incentives. Rather than create incentives that require judicial management, the rules should provide direct incentives for appropriate behavior. "Requester pays" for discovery does provide proper incentives, with needed exceptions for the poor and for exceptional cases. The Committee Note should provide examples that illuminate appropriate requester-pays orders. (1) If an administrative agency has approved the safety of a drug or chemical substance, a party who seeks to second-guess that determination should pay for discovery. (2) When the need for information is in doubt, judges today typically face a choice between allowing discovery and denying it. Requester-pays orders provide an intermediate option — a modicum of free discovery can be allowed, and beyond that allocating the costs to the requesting party creates the proper incentives. (3) When a claim or defense is barely above the pleading and Rule 11 standards, but implausible — unlikely to prevail — requester pays is appropriate.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors the proposal. "Cost sharing is an extremely important issue, and we commend the Committee's plan to focus in the future on potential cost sharing in lieu of the current presumption that the responding party should bear the costs imposed by discovery responses."

677, Noah G. Purcell for Washington State Attorney General's Office: "[S]trongly support[s]" the proposal. The possibility of bearing the financial burden of disproportionate demands "hopefully will encourage reasonableness."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal because it does not substantively alter the current rule. Courts have discretion to award expenses in addition to attorney fees. (A dissent urges that this amendment be postponed for consideration in the projected broader study of possible "requester pays" provisions.)

1040, Pamela Davis for Google, Inc.: Many courts and judges have adopted the recommendations for e-discovery created by the Advisory Council to the Federal Circuit. They include presumptive limits on the production of custodial e-mail data, coupled with cost-shifting for requests exceeding those limits. Google's experience is "that when appropriately employed, such rules reduce the burdens of discovery, without interfering with a party's ability to have its case litigated on the merits."

1164, Stuart Ollanik, for Public Justice: Resubmits a comment from March, 2013, submitted before publication. "One author of these comments has faced multiple situations in which parties responding to either discovery requests or subpoenas have presented wildly inflated cost estimates in seeking a protective order, and many other attorneys report the same thing." The proposal will add incentives to make it more expensive and difficult to access archived information.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that a more aggressive approach to cost-shifting is needed. The presumption that the producing party bears the costs incentivizes over-broad requests; indeed there is a perverse incentive. Asymmetry of information encourages excessive demands by parties who are not subject to countervailing requests. Due process interests are jeopardized by allowing imposition of staggering discovery costs without a preliminary judicial finding of wrongdoing. The rule should establish a presumption that the requesting party pays all or part of the costs of responding. "The presumption could be rebutted by a showing that: (a) the producing party has engaged in intentional, bad faith conduct designed to impede discovery or make production especially burdensome; or (b) the requesting party has established (i) an inability to pay all or a portion of the costs of its requested discovery; and (ii) that the discovery requested is vital or crucial to the litigation." Relevant factors could be discussed in the Committee Note — can costs be shared among a group of plaintiffs, as in MDL proceedings, an organized litigation group, or a class action; or is the lawsuit being financed by the plaintiff's attorney or a third party as part of a profit-making enterprise. The presumption likely would be rebutted on showing that a civil rights lawsuit was initiated by a non-profit organization or an attorney working pro bono.

1461, Larry A. Tawwater for AAJ: This proposal is unnecessary — courts clearly understand they have authority to order cost-shifting under Rule 26(c); see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). This proposal is especially problematic when combined with the proposed numerical limits on discovery — it will become routine to insist that the requesting party should pay for any discovery that goes beyond the presumptive limits. The same problem will arise from arguments based on the new proportionality concept. If this proposal is to be adopted, it should be balanced in several ways. The most important is to abandon the proposed numerical limits. Failing that, the Committee should clearly state that exceeding the presumptive limits is not itself a reason to impose cost-shifting. The rule text, or at least the Committee Note, should reaffirm the presumption that the responding party pays the costs of discovery. Language should be added to exclude attorney fees from "expenses." Language also should be added requiring courts to consider the relative resources of the parties and the intent of the party seeking a protective order, "to ensure that a party who can afford the cost of discovery doesn't simply use Rule 26(c) as a tool to crush its opponent."

1540, Benjamin R. Barnett & Eric W. Snapp: "[D]iscovery cost allocation should be the standard in most cases, rather than just an available remedy."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "When our clients have succeeded in including cost-shifting provisions in their Rule 26(c) protective orders, opposing parties have been far more likely to seek relevant discovery but not discovery that serves only to increase costs and impose additional burdens. We have seen this effect with Rule 45 discovery requests as well: when we offer the subpoenaing party whatever discovery they want as long as they cover costs, requests are dramatically narrowed to what the party truly wants and needs."

1732, J. Burton LeBlanc for American Assn. for Justice: "AAJ does not object to the

Committee's proposed change to Rule 26(c)(1)(B) *per se*." But the Committee Note should make it clear that this does not change the presumption that the responding party should bear the costs of producing discovery.

2072, Federal Courts Committee, New York County Lawyers' Assn.: The 1970 Committee Note to Rule 34 noted that courts have ample power under Rule 26(c) to protect against undue burden or expense, by "requiring that the discovery party pay costs." "The Committee endorses the idea of limited cost shifting as it can reduce overbroad requests, yet cautions against a total abandonment of the American Rule." The Committee Note should state whether this includes cost shifting with respect to attorney fees entailed in fulfilling the discovery requests — presumably it does — and whether it permits allocation of costs "when the data is accessible for search and review but is excessively voluminous."

2146, John J. Rosenthal: Rule 26(c) should be enlarged to reach not only parties, but also a person "who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things." That would facilitate early resolution of preservation disputes by the court if the parties cannot agree.

2223, Megan Jones for the Committee to Support the Antitrust Laws: This proposal "will likely make stipulated protective orders a thing of the past. * * * Inevitably, before discovery even starts, the parties will be turning to the courts to determine who pays for what at a time when knowledge about what ESI exists is at its most basic."

November Hearing, Jeana M. Littrell: p. 16: This amendment is needed. Experience shows that judges are too reluctant to order the requesting party to bear the cost of discovery in appropriate circumstances.

November hearing, John C.S. Pierce: p. 25: Favors cost allocation.

January Hearing, Jon L. Kyl: p. 45, 48: Allocation "gets the incentives right." "[A] party who determines that he really or she really needs something should have the ability to get it if that party is willing to pay for it." This is not a general requester-pays rule, nor one that assumes that some core of discovery is free while anything more is requester-pays. But to be effective, the rule should explain how the power is to be used. Examples should be given. One example would be a presumption for requester pays when the litigation advances a position contrary to an administrative determination — for example, a determination that a drug is safe.

February Hearing, Mary Nold Larimore: p 68 The Committee Note in 1970 observed that the court has ample power to protect against undue burden and expense, including by a requirement that the discovering party pay costs. This proposal "is going to give judges the opportunity once again to put sensible cost allocation into place." An example is provided by a case in which we won an order allowing us to make available a document repository created by a co-defendant. The order set a price of 8 cents per page for access. Over more than a year, no one has made any effort to look at anything in the repository. "One of the best ways to find out the marginal value of these document productions is to assess the cost." But cost allocation should be routine.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p. 104 Some courts and litigants think courts already have this power. If the proposal is adopted, it should be made clear that the default rule is the American Rule that each party bears its own costs. One party should be made to pay another party's efforts to collect and analyze information only in extreme and unusual circumstances.

February Hearing, Donald J. Lough: p 248 In cost-sharing jurisdictions, "when we are able to present a bill to our adversaries for their fair share of the cost of discovery, they very quickly can make a decision about what they need, and what they don't."

RULE 26(d)(2): EARLY RULE 34 REQUESTS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems. (The comment is ambiguous as to which part of Rule 26(d) it addresses.)

292, Lyndsey Marcelino, for The National Center for Youth Law: Serving discovery requests before the Rule 26(f) conference is likely to improve discovery for this plaintiffs' advocacy group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports the proposal, agreeing that it would facilitate the Rule 26(f) conference. "The Section also does not believe that initial requests made before the Rule 26(f) conference are likely to be any broader than requests served after the conference, although that is a possibility." And over-broad requests can be appropriately narrowed at the conference or, if necessary, by the court. November Hearing: Michael C. Rakower, p 287: Repeats the support. Early Rule 34 requests will mean the parties can face actual, real-life issues during the Rule 26(f) conference.

381, John Stark: There is a need for much greater control of Rule 34 requests. Encouraging even earlier requests goes the wrong way.

383, Alan B. Morrison: (1) Supports the idea, but asks why it is limited to Rule 34. Rule 33 interrogatories and Rule 36 requests to admit will give a better idea of what the case is about. (2) Rather than include a complicated provision for the date of service, it would be better to provide: "(B) Time for Response. The time and place for a response to the request shall be stated in the scheduling order under Rule 16(b)."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ny benefit of the proposal's accelerated schedule likely will be outweighed by a lack of focus in prematurely promulgated discovery requests. Instead, the Department recommends amending Rule 26(f)(3)(B) to clarify that anticipated document requests are to be discussed during the 'meet and confer' process." That will accomplish the goal. The discussions are needed to develop a better understanding of what discovery will be relevant. Pre-Rule 26(f) requests "typically will be less tailored or more burdensome," leading to increased motion practice. The requests may be satisfied or narrowed by agreement as to initial disclosures or the scope of the dispute. And a party who delivers early requests may become committed to them. There is a particular risk with requests formulated before the parties confer on the proper scope of ESI discovery. Finally, the time to respond should be geared to the conclusion of the complete 26(f) conference process, not to the first 26(f) conference.

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

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was not much discussion at the conference, but there was support. And some suggested that this approach should be extended to other forms of discovery.

494, Charles R. Ragan: Neutral, but the Committee Note should emphasize that the requests should be tailored to the claims and defenses, not the traditional "any and all re X category."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "[S]trongly opposes. We believe that it would aggravate rather than reduce the adversarial nature and expense of discovery." Requests will be framed without the advantage of initial disclosures or the Rule 26(f) conference. The proposed provision "will devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage. That, in turn, will lead to disputes at the Rule 26(f) conference that will actually impede the progress of the case."

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

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": This is not likely to streamline the process, but "most of us do not feel strongly about this change."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. This device is already permissible, and "gives the parties the opportunity to address substantive discovery issues concretely at the Rule 26(f) conference and, thereby, promotes a more efficient discovery process."

1054, Assn. of Bar of the City of New York: "This proposed change serves a potentially beneficial purpose with no practical downside." Often additional time will be needed to respond, but the parties and court should continue to be amenable.

1413, Jocelyn D. Larkin for Impact Fund and several others: This is "a small but important change because it allows the parties to immediately begin planning discovery and identifying concrete issues that may require early court intervention."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This is beneficial. * * * For parties who choose to take advantage of this rule change, it will make Rule 26 conferences more productive and focused." "

1481, George Dent: "In state court [apparently Alabama], we often serve requests for production with the complaint * * *." This "would make the conference more informed and productive."

1522, Michael P. Lowry: As a matter of professional courtesy, and to move the case forward, I often draft interrogatories, requests for production, and (if necessary) requests to admit and serve them on the parties before discovery opens. My letter explains that the answering party is not yet obligated to respond. When the discovery period opens I send a letter reminding them that responses are due in 30 days. The proposal should be expanded to include interrogatories and requests to admit.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1665, Laurie C. Barbe for Defense Trial Counsel of West Virginia: There should be a provision addressing discovery requests served before an action is removed from state court. The rule should be that discovery must be refiled after removal.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "[I]t is advisable to permit early Rule 34 requests, which may result in the discussion of more substantive discovery issues at the Rule 26(f) conference, promoting efficiency in the discovery process." The Committee Note should advise that the requests designate the form for producing ESI, lest the responding party begin to produce in a form the requesting party does not want, and allowing the parties to

better negotiate the form.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports as well designed to reduce costs and delay.

2141, Kevin N. Ainsworth: There is no reason to impose a waiting period, much less one with an anomaly that allows requests to be served without delay on any additional defendant that has been served. It should be simply: "A request under Rule 34 may be delivered before a Rule 26(f) conference."

2209, Richard Talbot Seymour: This proposal is well-taken. A further step would be to require the use of the discovery protocols in employment discrimination cases involving pretext analysis.

November Hearing, Jeana M. Littrell: pp 14-15: (From the perspective of defending employment actions.)The early exchange of discovery requests will support more efficient resolution of cases, with less ancillary litigation. It should be extended beyond requests to produce.

November Hearing, Paul J. Stancil: p. 83,84-85, 90-93 Plaintiffs will want to deliver early Rule 34 requests. But this disturbs the calm that otherwise remains up to the time of the Rule 26(f) conference. Early requests will start the meter running for defendants, as a way to expand the time available to amass the Rule 34 materials. Work will start immediately. That may stiffen the resolve to resist potentially valid claims or defenses, and may increase the temptation to file frivolous claims or defenses. The proposal will disproportionately advantage plaintiffs over defendants.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 26(d)(3): ORDER OF DISCOVERY — STIPULATIONS

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

RULE 26(f): PRESERVATION, RULE 502 ORDERS

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

281, Daniel Garrie: (1) There is no need to add preservation of ESI to the discovery plan. And it will not work because the timing of the 26(f) conference is too early to develop a preservation plan. Before that can be done, the parties must determine the universe of ESI that must be preserved, the software and hardware from which it has to be collected, and the form in which it is currently stored.

(2) Finds an implication that adding "under Federal Rule of Evidence 502" limits the scope of agreements the parties may reach with respect to privilege and trial-preparation materials. It "forecloses discussions of protection that don't fall under" Rule 502.

287, Lynne Thomas Gordon, for the American Health Information Management Association: The comment seems to focus on all of Rule 26(f)(3)(C). As with the parallel Rule 16 changes, the Rule 26(f) conference "is critically important and should not only involve counsel but also a qualified and credentialed HIM professional."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Adds to the reasons offered for supporting the parallel amendments to Rule 16(b). There are many preservation issues to be discussed. "Because the duty to preserve is triggered when a party reasonably anticipates litigation, it is almost impossible, if not impractical, for a party not to have begun making critical decisions regarding preservation before conferring with its opposing party." There is fertile ground for dispute. The discovery plan should discuss the issues on which the parties agree, and those on which they disagree. When they disagree, the plan should include a brief summary, devoid of argument, a brief statement of each party's position, and a proposed solution designed to foster agreement. This will put the court in a better position to usher the parties toward middle ground.

The reference to Evidence Rule 502 should refer specifically to a Rule 502(d) order, "to emphasize that the parties should specifically ask the court for such an order — as failure to do so will leave them only with the protections of Rule 502(b) and the case law * * *, rather than the more fulsome protections of a Rule 502(d) order."

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

494, Charles R. Ragan: These proposals are modest. Rule 26(f) is crucial in appropriately shaping ESI discovery. It will work better if the parties are required to prepare an executive summary stating, without argument, the issues they agree on and the issues that they do not agree on. That will provide a good introduction to the more detailed report.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, "and believes that it will encourage the use of Rule 502 orders."

1654, Kimberly Baldwin-Stried Reich: Supports "in the context of healthcare litigation."

RULE 30(a)(2) NUMBER OF DEPOSITIONS (ALSO RULE 31(a)(2))

(Many comments treat Rule 30, 31, 33, and 36 numerical limits together. Those that pick out Rule 30 as the main focus are summarized here without adding duplicate summaries for the other rules.)

261, David McKelvey: A business can get affidavits from its employees for summary judgment, while the 5-deposition limit will prevent plaintiffs from getting their testimony at all. Five depositions often are not enough even for expert witnesses.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Often it is necessary to take more than 10 depositions in product-liability actions, involving multiple officers in different branches of the defendant corporation. Five "is overly restrictive."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Many civil rights cases involve five or more defendants. Offers an illustration of suit against 8 defendants who placed a child they knew to be a rapist with an adoptive family, and who failed to notify the parents of any of his 12 other victims. 27 depositions were needed to secure the important information.

266, American Association of Justice Aviation Section, by Michael L. Slack: A presumptive limit of 5 depositions is "absurd in aviation cases." The present limit is too restrictive. The limit should be set to allow unlimited depositions of retained experts and unlimited Rule 31 depositions on written questions, and 10 oral depositions of other witnesses. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

267, Lawyers for Civil Justice, by Alex Dahl: The fears expressed by some, particularly those involved in employment litigation, are exaggerated. Rule 30 says the court must grant leave to take more than 5 to the extent consistent with Rule 26(b)(1) and (2). But the Note should be revised by adding the language in the Rule 33 Note: the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

270, Ohio Association for Justice, by John Van Doorn: This provides a general objection to presumptive limits that will increase inefficiencies, impose additional burdens, and encourage plaintiffs to craft broader requests to obtain the same amount of information while keeping within the presumptive limits. This reads on Rules 31, 33, and 36 as well; there is even a reference to Rule 34.

273, Cameron Cherry: A general statement that limiting the numbers of depositions, interrogatories, and requests for admission, and limiting the duration of depositions, will limit access to full justice.

274, James Jordan: "[W]hen was the last time you had a complex commercial case and could limit it to 5"?

276, John D. Cooney: Mesothelioma cases provide a good example of the need for more than 10 depositions. Reducing it to 5 is overly restrictive. In addition to multiple officers in different branches of a corporate defendant, it may be necessary to depose a plaintiff's coworkers to

preserve their testimony.

278, Perry Weitz: Depositions are critically important to gather evidence not only for trial, but as a prelude to settlement. The need for more than five is manifest. (Then a paragraph using mesothelioma cases as an example; it is verbatim the same as a paragraph in 276, noted above.)

279, Kyle McNew: For all the limits, Rules 30, 31, 33, and 36, decreasing the number will spawn more litigation. "This proposal exacerbates the problem by making the one-size-fits-all product smaller * * *."

280, Oren P. Noah: In asbestos litigation, there often are more than five defendants. Plaintiffs would have to pick which defendants to depose. And the problem will be vastly increased if the limit is applied to expert witnesses.

282, Susan M. Cremer, Chair, AAJ Federal Tort Liability and Military Advocacy Section: Medical malpractice cases under the Federal Tort Claims act commonly involve multiple health-care personnel and many experts. Examples are given of cases requiring well over 5 depositions per side.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Each of the revised limits in Rules 30, 31, 33, and 36 is welcome. They will help ensure proportionality in discovery. But other presumptive limits should be adopted for document discovery. So Stephen Susman suggests a limit to five custodians for the first round, followed by five more custodians for a second round, and more only for good cause.

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: Depositions and document requests are the most effective means of discovery. "Most rail law cases require more than five depositions, even excluding experts. * * * Responsible lawyers do not use the presumptive 10 if 10 are not warranted by the case." Reducing the number will create problems that do not now exist.

289, Craig B. Shaffer & Ryan T. Shaffer: Ties together the proposed numerical limits in Rules 30, 31, 33, and 36, suggesting that rule text should reflect some of the situations that frequently call for greater numbers of discovery events. (1) Some critics of the proposals seem to be inconsistent — they are willing to retain judicial discretion to expand discovery to the subject-matter of the action, but are unwilling to rely on judicial discretion to determine the number of discovery events. (2) Limiting a litigant to 5 depositions may often be unreasonable. Suppose an adversary identifies more than 5 witnesses in the initial disclosures? Or suppose there are several expert witnesses? What if witnesses necessary for trial are beyond reach of a trial subpoena? It can be argued that de bene esse depositions should not count against the limit, or perhaps that expert trial witnesses should be excluded. And the limit may need to be expanded if defendants, heedless of the uncertain impact of *Twombly* and *Iqbal* continue to plead boilerplate defenses in general terms. (3) In seeking relief from numerical limits, counsel should consider the interplay between depositions and interrogatories. Interrogatories are less expensive. But if a party plans a Rule 30(b)(6) deposition of an organization, it may be more difficult to justify an over-limits number of interrogatories. (4) A responding party's patently deficient or obfuscating responses may justify going over the limit, as a mirror of the Rule 26(b)(2)(C)(i) provision for limiting the frequency of discovery where the inquiring party has had ample opportunity to obtain discovery. Similarly, violation of the Rule 26(g) certification requirements may justify an appropriate sanction. [If the "sanction" is discovery above the presumptive limits, it may be wondered whether it need be called a sanction at all.]

292, Lyndsey Marcelino for The National Center for Youth Law: In a class action the Center had 11 plaintiffs who had spent from 10 to 14 years under the care of the State of Nevada. They had multiple caseworkers, doctors, foster parents and therapists. One, for example, had seven caseworkers and seven foster parents. Five depositions are not enough.

295, Andrew Horowitz: Recently completed 9 depositions in a single-plaintiff case under the Age Discrimination in Employment Act. The firm invested substantial time and court reporters' charges — it has an incentive to take only depositions that promise a reasonable chance of securing testimony important to the case. There is a risk that the court would not have granted leave to take 9 depositions, as it would regard the case as a "run of the mill" single-plaintiff case.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Drug manufacturers too often produce corporate representatives for depositions who do not know the information designated in the notice. They can "burn up the five available depositions with no useable information." Deposition transcripts are attached to illustrate this practice. "Oral discovery games are already too prevalent under the current rules."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: In pharmaceutical cases it is often necessary to take more than 10 Rule 30(b)(6) depositions of as many different departments in a single defendant.

299, Aaron Broussard: In 95% of the cases that meet the \$75,000 jurisdictional amount, each side will exceed 5 depositions.

300, Maria S. Diamond: Follows up pre-publication comments by offering an example of a recent case in which, following responses to requests to produce and to identify fact witnesses, a series of 7 depositions continually revealed information that should have been provided in response to the initial requests but was not. "This example is by no means unusual in my thirty years of practice as a plaintiff's personal injury attorney."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[T]here is no objectively reasonable basis to justify a reduction" from 10 to 5 depositions. (1) The empirical findings of the FJC belie any need. The numbers of depositions, and the median costs of discovery, are reasonable. (2) There is no showing that the present presumptive limit of 10 depositions has caused widespread problems. The FJC figures suggest that only 11% to 18% of the cases in the narrowed data base involved more than 5 but no more than 10 depositions; the change will affect only a small slice of current practice. (3) Deposition costs are almost always considered in deciding whether to take a deposition. (4) Depositions are often needed to ensure the use of testimony by a witness who is beyond the reach of a trial subpoena. (5) The provision in Rule 30(a)(2) directing that leave be granted to exceed the limit is scant comfort. The burden is on the party seeking to exceed the number, and it will be a burden to overcome a lower presumptive limit. This shifts the leverage in any negotiation. And it will be natural for judges to assume that they should be reluctant to grant leave to go above the presumptive limit. (6) The concerns of "some judges" expressed at the Duke Conference seem to rest in part on the comparison to criminal trials. But in criminal trials the government must disclose witness statements and exculpatory material to the defendant, and the government has effective investigatory powers. (7) The argument that ADR is effective without depositions "ignores the fact that depositions are, in fact, often used in arbitration." (8) That depositions are seldom used for effective impeachment overlooks the fact that one purpose of taking the deposition is to lock the witness into the testimony, so it cannot be changed. (9) "[A] single plaintiff suing multiple defendants already is given the presumptive equivalent of the

number of depositions as all defendants combined." {That is, one plaintiff gets ten depositions; ten defendants share ten, giving one each.} (10) The new proportionality requirement will provide sufficient new restrictions on discovery. Any further restrictions should be implemented by the court during the Rule 16 conference.

The Section separately notes that the Rule 30 revisions do not attempt to address unanswered questions that now arise. How to count Rule 30(b)(6) witnesses? Is it one deposition, or two, if the same person both appears as a corporate witness under Rule 30(b)(6) and is deposed in a personal capacity? Must leave be obtained to take a second Rule 30(b)(6) deposition of the same entity, and does it count against the limit? "[A]gainst whose side [should] third-party defendant depositions" be counted?

November Hearing: Michael C. Rakower, p 287: Renews the Section's questions. The data do not seem to support a reduction in the numbers of discovery requests in any of the rules. The problem of cost is not so much that any side is abusing the system, but rather that costs run up when "parties each take their fair share of depositions collectively." The Section has a cross-section of lawyers, who do not see an extensive amount of abuse.

307, Judge A. Leon Holmes: Opposes all the proposed numerical reductions. The present limits are sufficiently generous that E.D.Arkansas sees few disputes. But many cases cannot be adequately prepared for trial with 5 depositions and 15 interrogatories; those limits will give an advantage to the party with the information, and will generate discovery disputes.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Offers two generic examples of civil rights claims that require several depositions. Section 1983 claims challenging municipal policies and practices require several depositions to fully understand the issues. And claims brought under statutes with a burden-shifting practice require depositions not only to establish the prima facie case but also to rebut asserted justifications for the challenged conduct. Lowering the presumptive numerical limits will make a difference. Courts "impose a heavy burden on parties seeking to go beyond those limits," and parties will increase their resistance.

311, James Coogan: Many depositions are often needed because "[t]he complexity of modern corporate structures results in widely divided responsibilities for corporate functions." Increased disputes, costs, and delay will result from lowering the limit.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases a plaintiff always faces a need to take more than 5 depositions. Motions to take more will increase.

317, Steven Banks for the Legal Aid Society in New York City: (Background is sketched with Rule 26(b)(1) above.) Examples are given of a case challenging discriminatory enforcement of criminal trespass laws that required 35 depositions, and a case involving excessive force by correction staff that required some 140 depositions — and the number of depositions was accorded favorable consideration as helping support the class-action settlement. And employment cases often involve several individual defendants and several corporate defendants. Even in smaller employment cases, more than 5 depositions are needed — a particular example is cases involving trafficking of domestic servants, which often involve multiple defendants.

318, Brian Sanford: Increased summary-judgment practice makes it necessary to depose a witness for the summary-judgment record, when otherwise the witness would just be called at trial. Reducing the numerical limit is unwise. (319, Christopher Benoit, is verbatim the same.)

320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: Usually 10 depositions are not enough in products liability actions. Mesothelioma cases are an example. Plaintiffs must depose multiple officers in different branches of the corporate defendant. Because of the long latency, retired officers and employees must be deposed. Coworkers must be deposed to preserve their testimony, lest they be too ill by the time of trial to testify. This concern applies to Rule 31 limits as well.

322, Michelle D. Schwartz, for Alliance for Justice: The changes in the limits in Rules 30, 31, and 33 "will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants." Frequently the evidence is in the defendant's hands. More cases will be dismissed before trial because plaintiffs cannot procure the evidence needed to proceed to trial.

323, Jonathan Scruggs, Alliance Defending Freedom: Opposes all of the numerical limitation changes, including the 6-hour time limit for oral depositions. The limits "will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations." The Alliance advocates primarily for First Amendment rights. It must identify a government policy, and prove that a particular official was personally involved, and in some case prove a required level of intent. "But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork." Plaintiffs need extensive discovery to cut through the bureaucracy.

324, Jonathan J. Margolis: Reducing the number of depositions is the most questionable of all the proposed changes. Some courts will begin by refusing leave to take more than 5. They will be affirmed because there is no abuse of discretion. The practice will spread. Most defense attorneys will come to resist any increase beyond 5, in part because they believe that adequate representation requires this course. There is no significant evidence that depositions are often so numerous as to be abusive.

325, Joseph M. Sellers: Lawyers engage in cost-benefit analysis now. It costs money to take a deposition. Adopting a one-size-fits-all limit is unwise. "In my civil rights and employment practice, I cannot recall a case against an employer in which depositions were conducted and we took fewer than six." We typically represent plaintiffs on contingency, and advance costs; we engage in only the discovery that is important. And employment cases typically involve plaintiffs who have little discoverable information, while defendants have most of the information necessary to prove the case. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

327, Malini Moorthy for Pfizer, Inc.: Endorses the limits in Rules 30, 31, 33, and 36. "Viewed through the lens of proportionality, we believe that parties will mutually agree on reasonable discovery limits * * *."

328, U.S. Chamber Institute for Legal Reform: Supports all the numerical limitations, and the 6-hour deposition that will streamline discovery without denying any party the ability to gather information for its claims or defenses.

333, Racine Miller: Addressing police misconduct and prisoner rights cases: there is no problem with excessive discovery. There are incentives to limit it. But there are cases that, in part due to information asymmetry and often due to the sheer numbers of witnesses, require more depositions, and "I have concerns about either getting consent from defendants or an order to enlarge discovery in every case where it would be necessary under the new rules." Ordinary

citizens can get to court only through contingent-fee attorneys, and by making discovery harder the proposals will make representation less accessible. They are completely one-sided; they "do not do much of anything to penalize obstruction in discovery."

334, Rose Weber: "[T]here are often numerous defendants in police misconduct cases and of course all must be deposed. Essentially these rules 'solve' a problem that doesn't exist, and by giving an unfair advantage to one side."

335, Rebecca Heinegg: "Regarding the proposed limitations on depositions, parties already have an incentive to minimize the number and length of depositions, as each side must bear the costs of each deposition[] taken. The new limits are also too low for many serious or complicated cases, and will have a disproportionately negative impact on Section 1983 plaintiffs [as in police misconduct cases], due to the inherent information asymmetry in these cases, and the high burden of proof that such plaintiffs must meet."

336, William York: Excessive discovery is not a problem. No worthwhile practitioner uses every single deposition, interrogatory, or request to admit "just because they are permitted." Some cases — including civil rights and immigration cases — require many discovery devices. Current incentives for self-limiting discovery are adequate. The lower presumptive limits are far too low for many serious or complicated cases. Government works in complex bureaucracies, "and getting to the truth of the matter in five, shortened depositions and only 15 interrogatories * * * would severely limit my effectiveness to litigate." Far from making litigation more accessible to everyday citizens, many clients seek attorneys on a contingent-fee basis; the changes will make representation less available. And the result will be more contentious motion practice.

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: All of the proposed numerical limits are welcome. "We fully expect * * * that parties will routinely agree to additional discovery where necessary and motion practice will not be needed." January Hearing: p. 26, at 31-32: Similar.

338, Steven D. Jacobs: The present numerical limits work. The presumption is that the initial disclosure avoids the need for more extensive discovery. The parties resolve most discovery disputes on their own.

342, Stephen C. Yeazell: Reducing discovery "in a number of cases would be a regrettable and unjust result." The reduced limits "will not work injustice in the hands of wise and impartial judges who are also skilled at managing litigation." But other parts of the proposed amendments "express implicit skepticism about how wise, impartial, and skillful these judges are. The asymmetrical limits will be most likely to have an adverse effect on cases involving claims against large institutions — public and private." Although not all cases have merit, it is important not to stack the deck against such claimants, as many of the proposed amendments do.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Less discovery will mean more trials in cases that should settle. It will have a disproportionate impact on the party with the burden of proof. Reducing the number of depositions sends an implied message that there are too many depositions — it will become more difficult than it is now to get permission to take 12 depositions in a case that needs that many. The Committee relies on data showing that 5 depositions are inadequate for as many as 23% of cases. The suggestion that the parties can be expected to agree when more than 5 depositions are needed "relies upon the faulty assumption that both sides will need more than 5 depositions."

In addition, account should be taken of the cumulative effect of all the reduced limits.

Deposition time is effectively reduced from 70 hours (10 depositions of 7 hours) to 30 hours (5 depositions of 6 hours). But the limits on the less expensive modes of discovery — interrogatories and requests to admit — will leave more work to be done by depositions.

347, Genie Harrison: The proposed limits will make litigation impossible for government employees victimized by first amendment retaliation, whistleblower retaliation, and other unlawful harms. "The illegal acts of governmental employers uniformly involve dozens of actors and witnesses * * *." In a current case a fight was necessary to get leave to take more than 10 depositions. The 20 depositions establish a slam-dunk case. Employers keep people quiet by implied threats of retaliation.

348, Stephanie Bradshaw: The proposed reductions in numerical limits in Rules 30, 31, and 33, together with the new limits in Rule 36, "are minimal, and would not result in a huge savings of time," but they "could be devastating to an information-starved plaintiff hungry for evidence to support his claim."

349, Valerie Shands: The upfront and incidental costs of depositions "ensures that their number almost always remains as low as necessary." The need to seek court permission to take more than five will spawn delay and additional costs.

350, Pennsylvania Bar Association: The default number of depositions should be 7 or 8. And for all the proposed default limits, there is a risk of "a new hesitancy among some judges to alter those limits." A "blind, unreasoned one-size-fits-all discovery plan" is inappropriate. The Committee Note should instruct that each case must be approached with an open mind, allowing more discovery where appropriate.

351, Eric Hemmendinger for Shawe Rosenthal LLP: (From the perspective of defending employment cases.) Five may not be sufficient in all cases, but it is the correct starting place for discussion. (The preface adds that attorney-fee provisions for most employment and employment litigation provide an incentive for plaintiffs to expand the amount of discovery.)

353, Kenneth D. Peters, John T. Wagener: The proposed reductions in time and length of depositions, and in numbers of interrogatories and requests to admit "will * * * cause litigants to carefully think about the evidence they need and go about obtaining it in the least intrusive manner."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Without specific comment, notes that the narrowing of presumptive limits "has the potential to increase satellite litigation about the scope of discovery."

356, Richard McCormack: Treating Rules 30, 31, 33, and 36 together, "It's about time this was done."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Litigation involving nursing home abuse or neglect often requires more than 5 depositions. Deponents often disclaim knowledge and imply that another potential witness is the one to ask.

359, Andrew B. Downs: "While I often take more than five depositions in my cases, I can justify" them. If I cannot justify them, they should not be permitted.

360, Robert Peltz: Five depositions are not enough even in a routine automobile negligence

action — the limit is exhausted by deposing the other party, the investigating police officer, two eye witnesses, and a single doctor. The problem is exacerbated when the limit has to be allocated between multiple parties plaintiff, defendant, or other. It is further exacerbated in courts that count each witness in a Rule 30(b)(6) deposition as a separate deposition. And the frequent circumstance that one party has almost all the necessary information is a further problem. The general provision for protective orders provides all the protection we need.

361, Caryn Groedel: The limit will adversely impact plaintiffs (in employment actions).

362, Edward Hawkins: Even routine cases require more than 5 depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: In employment cases defendants need depose only the plaintiff. The plaintiff needs to depose decision-makers, human resources personnel, currently employed witnesses who observed the discriminatory conduct, the corporation itself, and medical providers to the employee. In wage and hour cases plaintiffs need to depose payroll personnel, supervisors and coworkers who observed when the plaintiff was working, and IT personnel or records custodians. Five is too few.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Generally suggests that experience may not bear out the belief that judges will exercise sufficient flexibility to ensure fairness in discovery. Offers an example of a case that required depositions of 33 fact witnesses in addition to experts and Rule 30(b)(6) depositions to support a claim that the defendant's 2,500 miles of sidewalks lacked accessibility to persons with visual or mobility disabilities. And another case with more than 30 depositions to support discrimination claims arising from "property flipping."

367, Edward P. Rowan: "In even the most simple cases, fact witness depositions can exceed five depositions. This will violate Plaintiff's right to due process if he cannot bring testimony because of a deposition limit."

368, William G. Jungbauer: In FELA actions, 5 depositions are nowhere near sufficient to prove the negligence of a corporate entity such as a railroad. The defendant may identify multiple witnesses for a Rule 30(b)(6) deposition, "exhausting the plaintiff's deposition limit even faster." Defendants also may be disadvantaged. There may be multiple defendants — not only the railroad, but also the entity that controls a crossing. In an FELA case it would be rare to have five defendants, but when that happens there would be one deposition each. Relief will have to be sought from the court in virtually every case.

370, Thomas D'Amore: Addressing Rule 30, 31, 33, and 36 numerical limitations, says that often he cannot reach agreement with defendants on additional discovery. "The judge, when faced with reduced presumptive discovery limits, may be unlikely to grant me as much discovery as I need." "Depositions are often the most efficient and effective way to gather the evidence * * *." Many more than five are likely to be needed in, for example, a wrongful death case (the victim is deceased), or product liability cases. And restricting the number of depositions may make it impossible to survive the almost certain motion for summary judgment.

372, J. Burton LeBlanc, for American Association for Justice: FJC data do not support the proposed limits, as shown by the reexamination looking for cases involving more than 5, or more than 10, depositions per side. The reduction will have a particularly negative impact in civil rights, employment discrimination, qui tam, and intellectual property cases. Frequently a plaintiff does not even learn who the critical deponents should be until later depositions.

Experience with cross-examinations in criminal trials of witnesses who have not been deposed cannot illuminate the needs for civil trials. Depositions, moreover, serve to gather facts and prepare for trial, not merely to support cross-examination. Introducing the proportionality test will aggravate the consequences of reducing the number — the other side will always object that it is too burdensome or expensive to provide more discovery. This alone will make it much harder to get more than five depositions. The belief that more will be allowed when appropriate ignores the clear demonstration of "anchoring" effects: the rule presumption will become the received standard. The result will incentivize defendants to hide information.

Later, p. 24, adds an observation addressed to all the numerical limits: "most of the proposed amendments would essentially let judges off the hook for having to actively manage cases; when faced with such a marked increase in discovery disputes, judges who do not now manage will simply use the shorthand of the new Rules to limit discovery in most cases to the new limits."

373, Michael L. Murphy for AAJ Business Torts Section: "[T]en depositions would be barely adequate in many, if not most, civil matters." Speaking with practitioners, not a single one took fewer than 5 depositions in any of their cases, nor did any think those cases could have been adequately litigated with fewer than 5. There is no evidence that parties are intentionally taking unwarranted depositions; to the contrary, the incentive is to avoid unnecessary cost. And "there have been numerous reports of plaintiffs having a difficult time securing such an agreement [to exceed the rule number] from the defendants."

374, Christopher Placitella for AAJ Asbestos Litigation Group: "Depositions are the cornerstone of litigation." More than 5 are routinely needed for plaintiffs in personal injury litigation; defendants typically need fewer. "[D]efendants have the ready ability to refuse to stipulate or cooperate in allowing additional depositions," forcing plaintiffs to seek relief from the court. And without sufficient deposition discovery, both plaintiff and defendant are less likely to understand the strengths and weaknesses of their positions. That will deter settlement, leading to more trials.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: As plaintiffs' attorneys, there is no incentive to spend money on meaningless depositions. But depositions are used as an extremely effective and efficient way of gathering necessary information. Corporate depositions explain the reporting structure, identify core individuals who made the key decisions, and show how ESI is maintained and stored. A limit to 5 depositions would, in many instances, prevent plaintiffs from obtaining the information needed even to certify a class. At the least, the limit should not apply to complex, class action, multidistrict, or other aggregate litigation.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): 5 is too few.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: Treats Rules 30, 31, 33, and 36 together.

"Lowering the presumptive limits on discovery has the potential to severely hamper our ability to litigate to redress violations of federal laws. * * * [O]ur experience is that judges consider the current limits * * * as a fairly firm baseline when considering requests to expand the scope of discovery. We fully expect that the proposed limits would increase judicial resistance to increasing discovery."

381, John H. Beisner: Supports all the numerical limits. They will streamline discovery but still enable a party to gather information. The court can modify or alter the limits.

383, Alan B. Morrison: The reduction to 5 may be justified on its own, but not as a cumulative

matter of reducing the ability to gather needed information.

384, Larry E. Coben for The Attorneys Information Exchange Group: Although the parties can agree on, or the court can order, more than 5 depositions, "why propose a rule which will be applied as the exception rather than the rule"? Most cases require more than 5. Strict application will foster motion practice. The better approach is to allow the court to manage each case under Rule 16.

386, Arthur R. Miller: Plaintiffs have learned to live with 10, but they tell us both that they have no incentive to take unnecessary depositions and that 5 is not enough. Relying on court permission to take more simply generates motion practice, and permission will be made difficult because the proposal sends "a restrictive message regarding discovery to the Bench" that defendants will exploit.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Addressing Rules 30, 31, 33, and 36 together, welcomes the changes in the belief that in MDL and other complex litigation the parties will think harder about the "wish list" of discovery "and will tilt courts and special masters in the direction of imposing less onerous discovery."

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 30, 31, 33, and 36 proposals without further comment.

398, Shira A. Scheindlin: Disputes are rare with the 10-deposition limit. Parties in large cases routinely agree. The cost of resolving objections to the number will fall disproportionately on parties in smaller cases. Most lawyers believe the amount of discovery in their cases is just about right. This is a mistake.

399, Edward Miller: Addresses all the limits proposed for Rules 30, 31, 33, and 36 together. They will have a beneficial effect, encouraging parties to make discovery proportional to the true needs of each case.

400, Gregory P. Stone: The reduction will adjust litigant expectations, in line with the renewed emphasis on proportionality. Those who fear courts will become reluctant to increase the number overlook the direction that the court must grant leave when consistent with the scope of discovery. "[T]here is no reason to believe that litigants' general ability to reach agreement on an appropriate number of discovery requests will dissolve in the event that the Committee adjusts the presumptive number of interrogatories." Moreover, "it is in my experience uncommon for parties to agree to a downward adjustment"; better to start at 5, with room to move up.

403, Donald H. Slavik for AAJ Products Liability Section: Most product liability cases require four groups, often with more than 5 witnesses in each group: fact witnesses; a manufacturer's employees; experts; and damages witnesses. In dealing with large international defendants, it often is not possible to get agreement to go beyond 10. It will be at least as difficult to get agreement to go beyond 5, "given the clear message to judges * * * that even less than ten depositions are needed * * *." February Hearing: p. 14 Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: Treats all of the presumptive limits proposals together. They are "a welcome step in helping to reduce the overall costs and burdens of discovery in many cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Depositions are

the cornerstone of litigation. A plaintiff may join five or more defendants, and the defendants could refuse to permit more than five depositions, forcing recourse to the court.

408, Elliot A. Glicksman for Arizona Association for Justice: Addresses the proposed limits in Rules 30, 31, 33, and 36 together. "[P]resumptive limits, regardless of the number, often are the starting point for the maximum number a defendant will consider." The proposals will cause the greatest harm in cases that "are fact intensive, including civil rights, aviation, employment cases, commercial trucking, product liability and bad faith insurance cases."

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]here is no need to change the presumptive limit on the number or duration of depositions."

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The problem addressed by reducing to 5 depositions is not clear. More than 5 are routinely required in personal injury cases. More than 5 may be required on initial matters such as personal jurisdiction and forum non conveniens. There may be several witnesses on a Rule 30(b)(6) deposition; several fact-occurrence witnesses; experts on many subjects including the cause of the accident, the cause of injuries, the extent of injuries, "before and after" witnesses on such matters as loss of the enjoyment of life, the actual cost of future medical care, and so on. Expert witnesses commonly base their testimony on other depositions. The presumptive number should be increased to 15. 448, Robert D. Curran, tracks 410.

411, Richard Smith: Representing plaintiffs of limited financial means in environmental and environmental justice cases, it is common to involve numerous depositions on both sides, to make extensive use of requests to admit, and to use interrogatories up to the limit of 25. Reducing the numbers, and the length of depositions, will interfere with plaintiffs' ability to prosecute their cases, and will increase costs.

414, John R. Scott: Supports the presumptive numbers in Rules 30, 31, 33, and 36, and the 6-hour time for depositions. Counsel will be forced to focus discovery efforts. Abuse for tactical advantage will be avoided. In appropriate cases the parties can agree on more, or the court can so order.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing from 10 to 5 will have no benefit in complex litigation, but will require more court involvement. The real impact will be in the cases that now involve between 5 and 10 depositions — the FJC shows a considerable number. In complex cases today, negotiations up from 10 often fail, and plaintiffs are disadvantaged by the 10 limit.

419, William R. Adams: The presumptive numerical limits in Rules 30, 31, 33, and 36 are welcome. "It has been my experience that the limits currently in place are slightly excessive." If more are needed, a simple application to the court will get them.

420, Daniel A. Edelman: "In complex litigation involving multiple, obstructionist, corporate defendants, depositions are by far the most effective discovery tool [for] over-matched plaintiffs." Cutting the number will in many cases preclude the plaintiff from deposing witnesses with relevant and admissible testimony. "We suggest that five hour depositions be permitted for each corporate party and its officers and employees."

442, Christopher Wright: Treats Rules 30, 31, 33, and 36 together, including the 6-hour time for depositions. "These proposed changes seek only to hamstring a plaintiff's capability to prove his or her case." "I have yet to prosecute a medical malpractice case where discovery of fact witnesses included 5 or fewer witnesses."

445, Gerald Acker, for Michigan Assn. for Justice: Witness lists are almost never limited to 4 or 5. "Counsel should not be in a position of guessing which of a dozen witnesses" to depose.

455, W. Michael Scott for CrownQuest Operating, LLC: Treats all the proposed numerical limits, and deposition time, together. When more discovery is needed, the parties will routinely agree. The court can order it if the parties do not agree.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Begins with a general statement on presumptive limits. The proposed limits are "insufficient as a general matter for the type of cases in which the Department is involved." The current rules strike the right balance. The Committee should encourage the use of case-specific limits in implementing the proportionality principle.

Turning to depositions, many cases brought by the government involve nationwide investigations, scores of fact witnesses, large corporate defendants, many actors, and a need for fact-intensive showings. Cases brought against the government often share these characteristics. More than 10 depositions are often needed. Department attorneys generally do not encounter difficulty in obtaining leave of court, but there have been situations where courts have refused such requests or granted them reluctantly. These difficulties will become more frequent if the number is reduced to 5. Adversaries now often oppose an increase to 20 by arguing it doubles the limit. Reducing it to 5 will change the argument to opposing an increase that trebles or quadruples the limit. If the reduction goes forward, the rule text should be amended to state that exceptions should be freely allowed when appropriate. The Committee Note could offer examples "including public interest cases in which the government enforces statutory rights or obligations and other similar complex litigation," as well as cases involving multiple parties or expert witnesses.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "Lawyers may wonder whether it will be difficult for a party to secure a court order allowing depositions beyond the presumptive number." Courts may view the new presumptive limit as a screening device of an inflexible barrier. And one side may use the limit as a tactical device to stall and constrict discovery. It would be better to amend Rules 30 and 31 to expressly allow motions to limit the number based on the proportionality principle in Rule 26(b)(1).

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The limit to 5 depositions is the most troubling of all the proposals. (1) The Committee observations about criminal trials are inapposite. The government has vast investigative resources; the defense has Brady, the Jencks Act, and similar statutes. (2) Of course few witnesses are impeached at trial by depositions — very few cases go to trial, and at trial a witness is careful not to contradict the deposition. (3) Deposition testimony may conduce to settlement. (4) A deposition may be needed for a dispositive motion because the witness may be reluctant to provide a declaration. (5) A deposition may be needed to secure testimony at trial when the witness is outside the jurisdiction. (6) The limit "might become enshrined in practice as a ceiling rather than as a starting point." We often need more than 5. Our cases are often complex, involve multiple parties, and transcend state lines.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Treating all the limits, including

the 6-hour deposition together, they "will force counsel to be more focused in their discovery."
"We are confident that in an appropriate case, the parties will be able to agree to an appropriate number and/or that the court will properly decide applications for relief."

464, Douglas A. Spencer: Describes recent litigation that consolidated a wrongful death claim with two personal injury claimants. Initially there were ten defendants; discovery revealed more defendants the plaintiffs had not known of. The plaintiffs alone identified 12 expert witnesses. It is not uncommon to have ten or more experts even when there is only one defendant. Limiting the number of depositions and other discovery devices "would have tied our hands."

465, Neil T. O'Donnell: Frequently there are more than five defendants. And there are numerous witnesses of various kinds — eyewitnesses, witnesses as to an organization's supervision or policies, information technology providers, damages witnesses, and yet others.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The limit to 5 depositions, and the reduction to 6 hours, will simply lead to a great deal more law and motion time. The FJC study did not specifically identify depositions as a current and general problem. The same concern applies to Rule 31.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Treats the proposals for Rules 30, 31, 33, and 36 together. Plaintiffs "will have to waste limited judicial resources asking for additional" discovery.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support among the participants for decreasing the numerical limits on depositions. There is no problem with current limits. Decreasing the limit may be less efficient.

499, Beth Thornburg: The numerical limits will have an anchoring effect, inappropriately limiting discovery.

531, W Michael Wimer: The proposed limits would have defeated my successful discovery from a third party of documents the defendant intentionally hid.

588, Veronica Richards: Defendants commonly provide witnesses with limited information for a Rule 30(b)(6) deposition, necessitating "multiple depositions." (This is one of many comments that seem to overlook the statement in the 1993 Committee Note that a Rule 30(b)(6) deposition counts as one "even though more than one person may be designated to testify." The alternative explanation is that the party noticing the 30(b)(6) deposition gives up and relies on deposing persons designated in the notice.)

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Ten depositions commonly are not enough in catastrophic injury cases; indeed ten Rule 30(b)(6) depositions may be needed.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The ten-deposition limit works well. Reducing the limit will lead to more motion practice in cases where one party needs more than 5 and the other party sees a tactical advantage in attempting to limit the number. The number of depositions can be addressed in the initial scheduling order.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: All of the proposed numerical limit reductions are ill-advised.

Rules 33 and 36 are efficient, low-cost modes of discovery. The reduction in the number of depositions is the most ill-advised of the lot. No attempt has been made to show empirical justification — the reanalysis of the FJC study data shows that there is none. Nor is it safe to rely on gaining permission to exceed the limit. An express limit in a rule has an anchoring effect. Suppose a case legitimately needs 12 depositions. That is a 20% increase on the present limit of 10. It is a 140% increase on a limit of 5. Judges will naturally require a far stronger showing if the limit is reduced to 5. And if a party confronting the 5-deposition limit guesses wrong in choosing the first 5 deponents, an attempt to show that other deponents are more important to the case will encounter resistance from the appearance that the first 5 were not used wisely. 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports the limits proposed for Rule 33 and Rule 36, but opposes reducing the presumptive number of depositions. There is no need for the limit; in cases where more than 5 depositions are taken, they are rarely taken for frivolous or improper purposes. A too-low cap "would risk giving one side a powerful tool for limiting discovery unfairly," and will increase contested applications.

729, Stephen B. Burbank: Addresses the number of depositions and interrogatories pretty much together. "[T]he complex, high-stakes cases that, as empirical evidence consistently demonstrates, are most likely to occasion disproportionate discovery, will usually not be affected, because the parties will stipulate out of the limit. No, here the effects will be felt most often in cases with parties that have asymmetric discovery demands and asymmetric resources." "The need to manage down under the current Rules has not been demonstrated in enough cases to cause concern; District Court judges should not be given still more dubious management tasks that keep them out of the courtroom * * *."

786, Frederick B. Goldsmith & E. Richard Ogradowski: In Jones Act cases we cannot wait for trial to cross-examine the key fact witnesses. Crew members are itinerant — we videotape most crew member depositions. And our expert witnesses rely on the deposition testimony to establish the fact basis for their opinions. (Further, initial disclosures do little to obviate the need for full-on discovery.)

951, Frederick Schlosser: "I have witnessed and participated in trials in which effective cross examination through the use of depositions has been critical to the outcome of a trial."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. Many cases need more than 5 depositions. Full discovery enhances settlement. The reduced limit may encourage one party to refuse to stipulate to more. And there is a risk that the court may refuse to approve a stipulation. (A footnote decries the use of discovery cutoffs far too short for the case, increasing costs by the need to go full-bore to meet the deadline.) Encouraging case management is often beneficial, but judicial resources must be spared for substantive issues.

1025, Senator Jeff Merkley, Senator Ron Wyden: Addressing all the limitations, observes: "A plaintiff in an employment discrimination, product liability, or simple personal injury case must often conduct many depositions in order to fully understand an employer's policies, a product's makeup, or the cause of an accident."

1054, Assn. of Bar of the City of New York: Generally more than 5 depositions per side are needed, "and a party should not be dependent upon the reasonableness of its opponent or its ability to persuade a judge in order to be entitled to do the discovery it believes necessary."

Criminal cases are different — and defendants have the benefit of Brady and Giglio rules. Assuming that witnesses are rarely impeached by deposition testimony, depositions are vitally important in pre-trial preparation. If a party seeks an unreasonable number of depositions, relief is available. And if a 5-deposition limit is adopted, it should apply only to fact witnesses; a party may take 3 or 4 fact-witness depositions, only to have another party disclose several expert witnesses.

1109, Robert Kohn for Federal Bar Assn.: Reducing the number will increase the temptation for the deponent to "pass the buck," claiming that someone else is a better source of information. All parties share an incentive to reduce the numbers of depositions.

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: All of the proposed numerical limits impede access to justice and should be rejected.

1147, Joseph D. Garrison: The proposals shrink "the fundamental engine of the search for truth from seventy hours to thirty hours." "There is simply no strong empirical evidence, not even weak empirical evidence, that reducing the presumptive limit for depositions will substantially reduce the expense of litigation."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): Opposes. "Depositions are critical for both summary judgment and settlement purposes," and these are the chief ways of resolving federal litigation. There is no showing that the limit set at 10 creates any problems.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes, offering on behalf of defendants the arguments often advanced on behalf of plaintiffs.

1522, Michael P. Lowry: "The Committee's memorandum documented a belief among some judges that depositions are over utilized and offer limited value." In fact they are very valuable, even if not used to impeach a witness at trial. I represent attorneys against malpractice complaints. I do not agree, but there is a view that the standard of care requires an attorney to depose every witness; that weighs against the proposed limit.

1907, James Cudahy for National Court Reporters Assn.: Freelance court reporters, who do depositions, have a front-line experience that shows the importance of depositions in supporting equal access to justice. Neither number nor duration should be reduced.

1547, John P. Relman & Jennifer I. Klar: The present rule works. But if there must be some change, it should adopt a limit on the total hours for depositions — fifty hours per side would work better than the proposal.

1899, Craig Gurian for Anti-Discrimination Center: The faith that attorneys generally will agree to an appropriate number of depositions "has little to do with real-life practice. While there are some honorable exceptions, the fact is that the discrimination defense industry as a whole operates on the principle of minimizing cooperation, maximizing delay, and maximizing the cost to victims of discrimination of getting the discovery to which they are entitled."

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Explores at length the "anchoring effect" of suggesting a presumptive number. Even judges who fully understand the authority to permit a greater number will be influenced by "five" to permit fewer depositions than they would permit if the number remained at "ten." And emphasizes the lack of empirical support for the proposed reduction.

2058, Richard Broussard: The presumptive numerical limits in Rules 30, 31, and 33 are truly unworkable. They should be deleted. Even if a party is fortunate to find a judge who understands the need to gather information, it is necessary to disclose the exact intent of the request. "One need not be extremely naive to realize that informing a resourceful corporation what you want to obtain will assure that you don't obtain it."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Five depositions or fewer suffice for a majority of cases. A court is more likely to order an increase from five than to order a decrease from ten. The reduced limit increases the likelihood of settlement by encouraging earlier negotiation.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: All of the proposed numerical limits on discovery impede plaintiffs' access to the courts and generate added work for the courts and parties.

2130, Steven Skalet: The change should be in the opposite direction: "ten depositions plus two depositions for each party in any case with more than two parties."

2241, Robert J. Anello for Federal Bar Council: opposes.

November hearing, John C.S. Pierce: The numerical limits are desirable "to make lawyers sit and think about their cases at the very outset."

November Hearing, Altom M. Maglio: p.28 ff As a contingent-fee attorney in medical product cases "I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions." The first five depositions usually are used to show that the people identified as knowledgeable in response to interrogatories do not know about anything but marketing, and to identify the people who do have the appropriate knowledge and should be deposed. I often need more than ten depositions. I get permission, but it is a fight. The present limit of 10 is taken as a yardstick of what is supposed to be done in a typical case.

November Hearing, David R. Cohen: p 41 Most of the cases my firm handles — mostly for defendants — tend to be bigger cases. Very often there are more than 10 depositions. When shown good cause, most judges allow more than 10. Indeed, the parties usually agree when they know there is good reason. But it is useful to have a numerical limit because it gets people thinking. Contingent-fee attorneys do have an incentive to take only necessary depositions, but all kinds of commercial cases do not involve contingent-fee attorneys; "most cases that have 20 depositions can use far fewer."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 In § 1983 litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 As contingent-fee attorneys, we have an incentive to hold down the cost of discovery. In antitrust cases, which almost always are MDL cases, "dozens of depositions are often required to gather evidence from far-flung witnesses and to preserve testimony of witnesses that will not be available for trial." Experts play a very large role — one side may have more than five experts.

At a minimum, experts should be excluded from the proposed limit. Third-party depositions also should be excluded. And reducing the limit from ten to five "significantly alters the bargaining position of the parties." We get more than ten now, often far more. But if we are allowed 60 now, six times the presumptive limit, there may be a tendency to think that 30 is an appropriate number as six times a presumptive limit of five. And there are litigants who do not have the knowledge they need to rise above the presumptive limit. At the very least, the Committee Note should observe that courts should be expected to vary the presumptive limits in complex and large cases.

Finally, the rule "could include a clarification that the presumptive limit on depositions is per party and not per side."

November Hearing, Anna Benvenuti Hoffman: p 110 From the perspective of "serious police misconduct" and other civil rights cases — offering two examples of actions that followed DNA exoneration of wrongly convicted plaintiffs. One case led to an agreement to videorecord police interrogations, and the other to an audit of a crime lab. There is a strong incentive to keep costs down — the attorney has to carry them for years, and may never recover them. The cases often have to be proved through circumstantial evidence, elicited from "witnesses who generally will not talk to us outside of a deposition, defendants, other police employees, prosecutors, and witnesses who testified against our clients at their criminal trials." Although the needs that require many depositions will remain unchanged — judges will be looking at the same cases — the reduction to five "send[s] a strong signal that you think there's too much discovery." Judges will respond to that." 15 depositions would become three times the presumptive limit, not one and a half. And some judges are hostile to the plaintiffs we represent. Yes, five depositions may be sufficient for the simpler actions that involve less dramatic wrongdoing, but that does not help in the more complex cases. 1918 supplements this testimony.

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: In toxic tort and environment cases, there once were problems in getting the numbers of depositions needed to prove the case. But practice has matured; "we now generally enter into consent arrangements with the defendants concerning depositions." The concern is that reducing the number will make five the new normal, and it will be much more difficult to get the 25 that are the norm in these kinds of cases.

November Hearing, Wayne B. Mason: p 142 "I'm not here to talk about limits because I'm not exercised about whatever you decide on that * * *."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 The Institute litigates constitutional claims of plaintiffs and defendants that "are moderate in size." Typically they are resolved by summary judgment. Trials last one to five days. "Routinely they require more than five depositions, although rarely more than 10."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, we often litigate around labor broker arrangements or rental worker schemes. "These all have multiple employers, which often require several 30(b)(6) depositions" "to take out the facts around control that is required to show joint employment under the federal employment laws." Employers typically control the facts. The only way to get them is through depositions and interrogatories. Decreasing the numbers will leave numbers inadequate to generate the evidence a plaintiff needs to prevail.

November Hearing, Barry H. Dyller: p 183 "[A] limit of five depositions is a disaster." In government wrong cases we have to depose parties, eyewitnesses, supervisors, people involved

in making government policy, document custodians, medical providers, and countless others. This is necessary not only to survive summary judgment, but also to make a convincing case to a jury. And I want defendants to take as many depositions as they want so they can evaluate my case and decide whether to go to trial or to try to resolve it. I do not have empirical studies of how many depositions are needed, but personal experience suggests it is generally more than five. Federal judges are more than capable of stemming abuses. I have never had a problem in getting permission to exceed the limit, but I may encounter a problem — and changing from 10 to 5 "is a message to judges. You know, we want you to limit this."

November Hearing, John F. Karl: p. 208 Employment cases commonly require proof of intent. It is not possible to prepare for summary judgment and trial with only 5 depositions. In some cases, many depositions are required simply to identify the person who made the decision that is being challenged. You need to find corroborating testimony, and also conflicting testimony. Employment plaintiffs cannot afford the extra costs in seeking agreement for more depositions, or for asking court permission. When counsel is experienced, there is no trouble in getting agreement. But a case may be staffed with young attorneys who do not have authority to agree. "I hate to bother the judges." The fear that reducing the number will create problems arises from dealing "with a number of obstreperous attorneys who have given me a hard time on behalf of the institution that they represent." And some employment cases are document-intensive, increasing the number of people who must be deposed.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 Plaintiffs are interested in getting in front of a jury as quickly and efficiently as possible. "Running up the clock and running up the bill are classic defense tactics, not the plaintiffs' bar." The employer controls access to documents and people, and makes broad claims that every employee is represented so as to prevent the plaintiff from talking even with those who are willing. And gag orders in settlement agreements and severance agreements are common, as are broad confidentiality agreements covering even personnel policies and internal evaluation forms. Yes, it is possible to examine a witness at trial without a prior deposition, but to get to trial we have to survive summary judgment. "[S]o we practice defensive lawyering," taking many depositions to prepare for summary judgment.

One common problem is to identify who made the challenged decision. In one case we had to depose nine people to get the first clues — and many depositions remained for other matters.

"[Y]ou never get agreement to exceed the number of depositions in the rules from opposing counsel." They assert the client forbids agreement. And they pay no cost when they lose the motion to take more.

Judges who manage actively under the present rules address these problems. The proposed rules will not prod the other judges to take prompt actions on motions for more depositions. The motions will languish for months. Meanwhile, "we're afraid to use up our five, not knowing if we're going to get seven or eight or 12."

Motions for summary judgment often are supported by the affidavits of people who have not been deposed. A good rule would require advance production of affidavits a party plans to use on summary judgment, paving the way to depose the affiants. Or Rule 56(d) should be revised so that when the defendant has refused to agree to more than the rule number of depositions "you should almost presumptively get more discovery once you see what they put in their summary judgment motion, the people you haven't talked to, people haven't examined yet."

November Hearing, Jennifer I. Klar: p 227 In a recent employment case the initial disclosures listed many witnesses. I had to fight for permission to depose them — the judge "pushed very hard on why is your case so different" that you need extra depositions. The order limited the

depositions to two hours, and required me to pay for my transcript and the transcript for the other side. The defendant called the witnesses at trial — obviously they opposed the depositions while they intended to call them, "which is a gotcha that will happen more and more often if the number is reduced."

November Hearing, Robert C. Seldon: p 240 Describes two cases that manifestly required more than the five that would be allowed if "this awful rule were put in place." One involved retaliation against a whistleblower in the corrections department by generating a phony report that he beat up a first degree murderer. The other involved an employee who "was intentionally exposed to asbestos in the workplace by the Department of Commerce."

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 The five deposition limit is appropriate. Most cases will fit within it. In 20 years of handling hundreds and hundreds of cases, only once was it necessary to go to the judge to get permission to exceed the present limit; in all other cases, the question was resolved by agreement. There is no problem with the 10-deposition limit. But lowering it to five will encourage lawyers to think more carefully at the beginning of the case about how many depositions they need.

November Hearing, John P. Relman: p 253 For fair housing, fair lending, disability, employment discrimination, the limit will make it much more difficult for plaintiffs and will not affect defendants. The key to individual discrimination cases is to show pretext by showing surrounding circumstances. You have to show how similarly situated people are treated. Ethically, plaintiffs' attorneys are often barred from speaking with employees of companies. When multiple reasons are given for the adverse action, the number of similarly situated people increases. It even takes a deposition or two to find out who was the actual decision-maker. The defendant has access to all of its employees and can conduct informal discovery without restriction — one deposition of the plaintiff is enough. So the defendant has every incentive to insist on observing the presumptive limit. The fear of misuse by plaintiffs is misplaced — contingent-fee attorneys front the costs of litigation, and have no incentive to take unnecessary depositions. If there is to be any limit, it would work better as a limit on the total number of hours of deposition time. That would be more flexible.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Lowering the limit will make it harder for civil rights plaintiffs to get access to the discovery they need.

November Hearing, Patrick M. Regan: p 278 Rests on experience with between 300 and 400 federal-court cases, and trying more than 50 jury trials. Representing the estate of a young construction worker killed by a nail gun, with damages capped at roughly \$750,000, the first dozen deponents all said the gun was appropriate for use on construction sites. The 13th or 14th deponent testified that the manufacturer had recommended that the gun be used only in shipyards, where it is used to attach two-inch thick steel plates to each other. The case was resolved, with the great benefit that the guns were taken off construction sites throughout the country. "I would have failed the proportionality test." And if there were a presumptive five-deposition limit, the judge might have allowed seven; I would not have got to the 13th or 14th critical witness. There is no problem with the current limit of ten. Most of my cases involve more than five but fewer than ten. Defense counsel will not agree to go beyond five, because that would make trouble with their clients. So there will be work-making motions. Yes, I have lost cases, but that does not mean that the claims were nonmeritorious or that discovery would better have been curtailed. The current rules provide more than enough tools to curtail abusive practices. There is no incentive for contingent-fee plaintiffs' attorneys to take unnecessary

depositions. Yes, it would help to have the Committee Note explain that five is the norm, and that the rule is not intended to create a presumption that more than five are inappropriate. But it is better not to be subject to even discretionary limits when there is no need for them.

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: p. 293 Lists Rules 30, 31, 33, and 36 along with Rule 26(b)(1) in opposing further restrictions on discovery that will have a disproportionate impact on civil-rights plaintiffs, who commonly litigate in the face of information asymmetry. A more extensive summary is provided by Rule 26(b)(1).

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Most of the focus is on the proposed numerical limits in Rules 30, 31, 33, and 36. Federal courts are the last bastion of the disenfranchised. "There should be a compelling reason to roll back the protection," and there is none. The data show that across the board in federal court, most cases conclude with fewer than 5 depositions per side. But there are complex civil rights cases. An informal poll at the Committee found that in recent years no one had litigated a case through most of the discovery process that involved fewer than 10 depositions. Most of these were class actions. The debate over the efficiency of discovery appears intractable. The volume of criticism by corporate defendants has not diminished. Repeated changes in the rules, particularly the 1993 changes, have had a particularly significant impact on civil rights cases." "[C]ontentious litigation is in fact a good part of the reason that there are unnecessary costs in discovery." Early and active case management is a better solution. Letter motions, and hearings by phone, are being used to good effect.

January Hearing, Joseph D. Garrison (NELA): Keep the 10 limit.

January Hearing, P. David Lopez (EEOC): p 68 The numerical limitations are a blunt instrument, particularly in cases with asymmetric information. Over the past three years the EEOC took more than 5 depositions in over 40 percent of systemic cases, and more than 25 requests to admit. Many judges are flexible about the limits, "but not all judges." Cooperation among the parties is more likely in systemic cases because defendants also want to take many depositions. It is a greater problem in a case involving one or two workers and a great asymmetry of information.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery, even when they would prefer to be more cooperative. The presumptive limits may exacerbate these problems. Voting rights cases under § 2 rely on a totality of the circumstances test; successful litigation requires a great deal of evidence. Local laws governing immigration rights often are subject to facial attack, but an as-applied challenge looking at specific practices and policies used to implement a law that is unclear on its face again requires much discovery. Some judges, familiar with § 2 litigation, understand the needs for extensive discovery. "In other cases, it's a lot of education. It's a lot of argumentation that's required."

January Hearing, Jocelyn D. Larkin: p. 125 From the perspective of institutional reform litigation, 5 depositions are insufficient. Lowering the limit creates a new first-line defense that will impose transaction costs even if the limit is expanded. And it is much more difficult to plan discovery at the outset when you do not know whether the limit will remain fixed at five.

January Hearing, Quentin F. Urquhart for IADC: p 133 Supports presumptive numerical limits. The reduced number will add support to a lawyer in discussions with a client about discovery

limitations. It is "atmospheric." "It sets a tone for the parties to have discussions with their clients about do we really need all of this"?

January Hearing, William P. Butterfield: p. 142, 149: "When I have 40 parties in a case and when it says I can take five depositions, that is not a meaningful rule anymore."

January Hearing, Elise R. Sanguinetti: p. 151 The lower limit is a big problem in representing single plaintiffs in wrongful death and catastrophic injury cases. Now we attempt to work with the other side, "but I've run across roadblocks many, many times." We seek to hold depositions to a minimum because it is difficult to explain to contingent-fee clients that their recovery is reduced by the cost of the depositions.

January Hearing, Kathryn Burkett Dickson: p 160 The proposed numbers would work if discovery is phased — they are much like the agreements with defense counsel in employment cases, planning an initial phase of discovery to prepare for early mediation. They are not sufficient to prepare to defeat summary judgment or go to trial. Defendants always put on more than 5 witnesses, and they are beautifully scripted witnesses. Cross-examining them without a deposition will be wasteful; limiting discovery will not improve trial advocacy. Counting my cases over the last five years, the number of combined depositions [for both parties?] ranged from 22 to 28 for the cases that went to trial. Employers typically propose 18 to 38 trial witnesses, although they call fewer, usually between 10 and 15. And videotaped depositions are used for trial testimony: "It's not just discovery." And I have had difficulty getting permission for more than 10; indeed, in a recent case in which the defendant agreed that it was appropriate to have 10 to 15 depositions, the judge rejected the stipulation and set the limit at seven.

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section p 1 28: The problem with reducing the number from 10 to 5 is that it creates a mindset "where the young insecure litigator on the other side is going to get locked in and say you got your five and that's it."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Most routine employment cases today are resolved with fewer than 5 depositions. But it is good to reduce the presumptive limit because that will force the parties to have a discussion about proportionality.

February Hearing, Michael M. Slack: p 193 I just made a deal for 15 depositions. Drop the limit, and "I just don't get that deal. I get six or seven on the best day."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Practice has come a long way in cooperation. Lowering the presumptive limits could have a deterrent effect on cooperation.

February Hearing, J. Bernard Alexander, III: p 272 In a typical employment case that goes to trial, at least a dozen depositions are necessary. With a base at 10, there is little difficulty in getting them. If the base is reduced to 5, "it means that there are other things that we have to horse trade in order to get what we need." The rules are no problem when the other attorney is cooperating. They are a problem when there is no cooperation. Often you have to take depositions to get the proper witnesses — "I have oftentimes taken ten depositions in a day, one hour at a time, to get to 20, 25 deponents * * *."

February Hearing, Jennifer Henry: p 334 Five depositions should not be a problem. The lower limit will cause people to be more selective. If they want more than 5, that will happen by

agreement — I have been able to reach agreement in every case in which I have needed more than 10.

February Hearing, Brian P. Sanford: p. 356 In individual employment cases I always bump up against the 10-deposition limit. Many times the other side agrees to go over, but most of the time they do not. The last time I asked, the court denied permission to take more than 10. This is a real problem for employment cases.

RULE 30(d)(1): 6-HOUR DEPOSITIONS

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: A deponent's "custodial file" may contain 10,000 to 50,000 documents. Reducing the time for a deposition will eliminate questions on many documents "with discovery value." Often it is necessary to secure agreement to exceed the present 7-hour limit. And time limits encourage evasiveness, failure to cooperate, and failure to give straightforward answers.

266, American Association of Justice Aviation Section, by Michael L. Slack: Reducing it to 6 hours "probably will not make much of a difference in fact witness depositions." But it will make it easier for cagey expert witnesses to run out the clock, avoiding answers to crucial, case-dispositive questions.

274, James Jordan: "7 hours is often not enough in a complex commercial case; and lawyers tell their clients to drag it out so you get less info."

292, Lyndsey Marcelino for The National Center for Youth Law: The reduction in the amount of time, joined with the reduction in the number of depositions, may hurt the chance of getting beyond summary judgment and prejudice the outcome of trial.

296, William B. Curtis, for Reglan Litigation Group, AAJ: "[T]he typical deposition is filled with repeated and unnecessary speaking objections, questions being re-read, and other clock-burning delay tactics. If the deposition is artificially shortened by an hour, the manufacturer's lawyer will have an easier time 'running out the clock.'"

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Reducing the limit to 6 hours "would make it much more difficult to discuss documents in a deposition." And echoes 264, the AAJ Transvaginal Mesh Litigation Group.

299, Aaron Broussard: "I see no problem in decreasing the number of hours * * *, although this is not a major change." (Reducing it to 5 depositions is a major change.)

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "There are no facts cited to demonstrate what percentage of federal depositions extend past normal business hours, nor whether any parties or litigants cite such 'after hours' work as a major problem in litigation." Anecdotes about lunch breaks and comfort breaks do not mean much. Analogy to the 4-hour limit in Arizona overlooks the strictly enforced disclosure rules in Arizona. And the rule does not address the question whether excessive delays by counsel or by a witness to run out the clock should be counted toward the overall time limit.

317, Steven Banks for the Legal Aid Society in New York City: Seven hours are often needed in many of complex cases. And "[a] six-hour time limit would be especially onerous in our cases in which either or both of the parties need translation." In employment cases, "we have deposed non-English speaking corporate officers or managers * * *."

338, Steven D. Jacobs: Depositions rarely last 7 hours. "I'm curious to know the salutary effect that reducing that time by one hour is thought to have."

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Artificial time limits accomplish little. The time is not solely controlled by the questioner. "An evasive or long-winded witness and/or obstructive lawyer can easily turn a four-hour deposition into an 8 hour

deposition. * * * Time limitations on depositions can actually make depositions longer and more expensive by creating the incentive to cause mischief in order to 'run out the clock.'

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Depositions of corporate or management personnel in nursing home litigation are often detailed and slow-moving. Witnesses often respond with "I don't know" and "that depends" answers that must be unpackaged. Shortening the time limit will encourage such time-killing tactics.

362, Edward Hawkins: Depositions routinely last more than 6 hours, even in routine case.

363, Dean Fuchs, at request of NELA-Georgia Board: The reduction is unnecessary and will spawn more motion practice.

372, J. Burton LeBlanc, for American Association for Justice: Notes that the reduction to 6 hours is not as dramatic as the reduction to 5 depositions, but that in combination these changes would provide less than half the current time for depositions.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): Six hours does nothing to address the obstructionist tactics of defense attorneys to use up the limited time allowed now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions." And counsel improperly inject themselves into the deposition. They engage in lengthy speaking objections or instigate lengthy discussions regarding discoverability, relevance, and admissibility. They commonly instruct witnesses not to answer based on relevance or admissibility, "which is improper."¹

383, Alan B. Morrison: (1) Reducing it to 6 hours is appropriate. This works in many states. An extra hour at the end of the day is not likely to matter. (2) The cross-reference, here and in the other rules should be to 26(b)(1) alone; (b)(2) adds nothing.

374, Larry E. Coben for The Attorneys Information Exchange Group: 6 hours is a step in the right direction. Limiting the time for expert depositions to 4 or 5 hours would provide a significant saving for all concerned.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: A 7-hour day is quite lengthy, "causing even resilient witnesses to tire in the final hour." "Argumentative questioning" is still common — limiting the time will reduce the practice.

398, Shira A. Scheindlin: Reducing the time limit is worse than reducing the number of depositions. It will lead to disputes that must be resolved by a phone call to chambers. Lawyers will try to run the clock to protect a witness. This is an invitation to mischief and gamesmanship.

¹ Many lawyers in the Cohen & Malad firm wrote apparently identical letters (examined by comparing the first and last lines on each page). They are noted here only: Scott D. Gilchrist; Irwin B. Levin; TaKeena M. Thompson; Arend J. Abel; Brian K. Zoeller; Greg L. Laker; Melissa L. Keyes; Richard M. Malad; Jeff A. Hammond; Kelly J. Johnson; Julie M. Andrews; Michael W. McBride; Richard E. Shevitz; Lynn A. Toops; Edward B. Mulligan; Maggie L. Sadler; Jonathan A. Knoll; Gabe A. Hawkins; Vess A. Miller; and David Cutshaw.

400, Gregory P. Stone: "Adequate preparation and skillful questioning" is more important than an extra 60 minutes. Six hours will almost always be sufficient, and enable a deposition to be completed in single day, saving time and travel costs. This is true even for Rule 30(b)(6) depositions.

403, Donald H. Slavik for AAJ Products Liability Section: The need for more than 6 hours is graphically illustrated by products cases involving foreign defendants, whose witnesses often require translators. It takes at least three times as long as with witnesses that testify in English.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The duration should be extended to 8 hours. Depositions can be especially lengthy in document-intensive actions. In a Rule 30(b)(6) deposition, which can be used at trial, it is important to establish the authenticity, best evidence, lack of hearsay, and explanation of documents in order to get them into evidence. "In cruise line cases, for example, the corporate representatives provided are the same every time and are in-house lawyers in the claims department * * *. These representatives are experienced, skilled witnesses who are experts at avoiding and evading answers." 448, Robert D. Curran, tracks 410.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing to 6 hours "simply invites more gamesmanship than currently exists." (With an example.) Courts resolve these disputes, but reducing the length will only lead to more disputes.

420, Daniel A. Edelman: A general reduction in the time is ill-advised. Evasive witnesses and delay tactics by defense counsel abound now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions. And counsel inject themselves by lengthy speaking objections, or lengthy discussions of discoverability, relevance, and admissibility. And they commonly instruct witnesses not to answer on the basis of relevance or admissibility objections, "which is improper." (But concludes by suggesting that 5-hour depositions be permitted of each corporate party and its officers and employees.)

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Reducing it to 6 hours will not be an appreciable time saving. A protective order can be used when necessary to avoid undue inconvenience for the deponent. The full 7 hours are often needed to depose expert witnesses, party representatives, or key witnesses. And "disputes occur over the number of hours that other parties' counsel can question the witness." But if the reduction goes forward, the Committee Note should recognize that extensions often will be needed for such witnesses.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In multiparty cases, each party needs to interrogate the witness, "if only for a short time." As the time draws down, there will be disputes where one or more parties did not have time to examine the witness.

465, Neil T. O'Donnell: (Addressing a 4-hour limit) "[I]t will be very easy for intransigent witnesses to frustrate legitimate efforts to obtain information."

487, Peter J. Mancuso for Nassau County Bar Assn.: Little good is accomplished by reducing it to 6 hours. In commercial litigation, written exhibits are submitted to the deponent and are the subject of much questioning. The deponent's review of an exhibit is itself time consuming.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support at the conference for decreasing the hourly limits. This may make discovery less efficient.

607, Christopher Carmichael: Illinois state courts limit depositions to 3 hours "and that is generally considered to be enough time even in the most complex and high-stakes cases."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the 6-hour limit. "[S]ix hours of actual deposition time easily consumes a full day. The limitation should especially benefit non-parties who are being deposed."

635, Matthew D. Lango for NELA/Illinois: The 6-hour limit is a hardship for employees, who typically cannot interview the witnesses informally. And the limit will force the parties to spend more time preparing for the deposition in order to ensure retrieval of the needed information.

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position, unless the Committee Note is revised to encourage courts to reopen depositions plagued by speaking objections and other common delay tactics. Absent such supervision, the potential for running out the clock is unacceptably high.

1054, Assn. of Bar of the City of New York: "We do not believe that reducing the time limit by 1 hour will promote efficiency, nor do we see a demonstrated need for this limitation."

1109, Robert Kohn for Federal Bar Assn.: A one-hour reduction will not cause a significant reduction in costs. But it will "increase the perceived effectiveness of evasive witness behaviors and disruptive conduct by counsel that aim to run out the clock."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): "Under the current 7 hour limit, it frequently is difficult to complete the examination, including affording sufficient time for cross-examination, especially in multi-party cases." Experience with 4-hour depositions in Arizona affords little guidance, given the extensive initial disclosures required in Arizona, which "provide a framework for completing the depositions within the 4 hour limit."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Supports. "In Illinois state court, the limit is only 3 hours, and in our experience, most partes are able to complete depositions within that time frame, and will most often agree to a reasonable extension when the circumstances warrant."

2072, Federal Courts Committee, New York County Lawyers' Assn.: "The vast majority of depositions can be completed in six hours, and seven hours 'on the record' is extremely difficult to fit into a single-day deposition."

2255, Michael M. Marick: The 3-hour limit in Illinois works well.

November Hearing, Altom M. Maglio: p. 29 As a contingent-fee attorney in medical product cases, I bear the expense of depositions. "[O]nce I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours." p 31: When I find out a deponent is not the person with knowledge, the deposition is "fairly quick once you realize you've got the wrong guy."

November Hearing, David R. Cohen: p 41 "I think most depositions that take seven hours can be done in six * * *."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p 101 "[O]ftentimes seven hours needs to be split between multiple parties." We have shared time with the Department of Justice, or state attorneys-general, or with opt-outs.

November Hearing, Anna Benvenuti Hoffman: p 110 Most of the witnesses in our police-misconduct civil rights actions are hostile to us. "[T]he depositions are slow-going, with even basic facts conceded only begrudgingly." With lead defendants we often have to take more than 7 hours. "And frankly, a lot of that is because of the obstruction by both the defendants and the defense lawyers. They say they don't remember anything, they won't admit anything. There's lots of speaking objections, all kinds of things which are not permitted by the rules but which everyone does and you don't want to run to the court every single time * * *."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, an interpreter is often needed for non-English speakers at deposition. That doubles the time needed. The need to argue for exceptions could deter reliance on such witnesses at all. We have not actually had a judge deny a request for more time to meet this need. Typically we are able to come to agreement with defendants on the number of hours when an interpreter is needed.

November Hearing, Barry H. Dyller: p 183 Most of my depositions are less than 4 hours. But many are more. And reducing the time invites abuse. A deponent who was a corporate president paused 25 to 30 seconds after every question. "What is your name"? "and we would wait and we would wait and we would wait." "I think it's a waste of the judge's time for me to go and say, you know, Mr. Smith, you know, paused a lot, please, judge, make him come back."

November Hearing, John F. Karl: p. 208 The time limit is already severe, but we have learned to live with it. There is an incentive to run out the clock. In document-intensive employment cases you have to go over the documents with the witnesses, asking specific and precise questions. "And sometimes there's just obstreperous conduct on the other side." In one whistleblower case counsel made an average of 3.2 objections per transcript page, taking up time. Shortening it to 6 hours "runs the risk of encouraging this sort of conduct in other cases."

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section: p 128 Supports the reduction to 6 hours. "[A]t 7:00 at night a witness is really tired."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 7 hours is not enough for a foreign language deposition — and usually the greatest extension we get is 2 hours. Then there may be three groups of plaintiffs fighting for the 7 or 9 hours.

February Hearing, Jennifer Henry: p 334 Texas has a 6-hour limit. Only once have I needed more than 6 hours, and then the parties agreed. The saying is that a good trial lawyer does not need more than 6 hours.

RULE 31: NUMBER OF DEPOSITIONS

266, American Association of Justice Aviation Section, by Michael L. Slack: There should be no limit on the number of depositions on written questions. They are useful to put records in admissible form, and dealing with other matters more efficiently than oral depositions. At the least, there should be a separate 10-deposition limit for Rule 31 that does not count any Rule 30 oral depositions against the limit.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30. A worthy idea. Amend the Note to add the Rule 33 Note encouragement to think carefully.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Written depositions are seldom used in nursing home abuse and neglect litigation, but they may be used to substitute for Rule 30(b)(6) corporate depositions. The reduced limit could be exhausted without gaining substantive information.

604, Lawrence Marraffino: "Not relevant as written depositions are rarely used."

RULE 33: 15 INTERROGATORIES

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: The present limit "isn't broken." Interrogatories help identify potential witnesses, theories, documents, and even additional defendants.

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Reducing the number of interrogatories will be wasteful because lawyers, now careful to frame narrow interrogatories, will be forced to write their questions more broadly, leading to more objections.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of interrogatories.

274, James Jordan: "# of rogs — again, in a simple case maybe that would work. Not in a complex commercial case"

276, John D. Cooney: Reducing the number "will lead to overly broad and compound questions." They are needed to discover additional defendants and, as an example, additional asbestos-containing products that plaintiffs do not recall forty years later.

278, Perry Weitz: All but the final sentence is, with one word change, verbatim the same as 276, noted above. The final sentence predicts that the effect "will be to cause extraordinary and systemic delays and motion practice."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The reduction is unnecessary and counterproductive, as with reducing the number of depositions.

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

296, William B. Curtis, for Reglan Litigation Group, AAJ: Typical pharmaceutical cases are complex. "If only 15 interrogatories were allowed, there would be no practical way to discover the basic information needed to intelligently learn how the company makes and sells its drugs." An illustrative first set of interrogatories for Reglan litigation is attached, showing that a reasonable set of questions would exceed the limit.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Echoes 264, the AAJ Transvaginal Mesh Litigation Group, adding that Darvocet litigation involves a product "marketed for decades by numerous pharmaceutical companies." The universe of discoverable information is massive.

299, Aaron Broussard: This is a Catch-22. "If you make your request too detailed, you can use up half of your interrogatories in one request. If you make your request too wide-open, so that it encompasses everything with fewer words, the opposing party will object to it as vague and you will never know whether you have all of the requested information." It would be more effective to provide that a party answering an interrogatory "shall include all information, including documents, that the language of the request encompasses under all reasonable interpretations." And a party who objects must explain what tasks are not being performed because they are too burdensome, or what terms require further explanation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No data are offered to show the need to reduce the number of interrogatories. No attempt is made to address disputes about whether subparts are discrete or logically related. Reducing the number will encourage more broadly worded and burdensome interrogatories. And the problem will be aggravated by the parallel reductions in other discovery devices.

307, Hon. A. Leon Holmes: Opposes the reduction. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

311, James Coogan: "This rule change is particularly disturbing." Issues often appear that can be resolved only by written answers to written questions. Twenty-five, the present limit, at least has a rational relation to these needs.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases many areas of discovery are inexpensively accomplished by interrogatories. Reducing the number will increase motions for leave to ask more. (Also opposes the new proposed rules' limits on the number of requests for production.)

317, Steven Banks for the Legal Aid Society in New York City: "Interrogatories, used properly, are an efficient means of eliciting factual information (such as the identity of witnesses and involved persons * * *) which would be considerably more burdensome to elicit through depositions." Improper use, as to seek extensive narrative answers that can be got more efficiently through depositions, can be controlled directly.

321, Timothy M. Whiting: Reducing the number "will lead to overly broad and compound questions." In mesothelioma cases interrogatories have led to discovering additional defendants and additional asbestos-containing products.

324, Jonathan J. Margolis: "In employment cases * * * it is far more efficient for a plaintiff to ask the defendant to identify those who made the decision to fire or demote the plaintiff in an interrogatory than to parse out perhaps thousands of documents or to ask multiple deposition witnesses." And interrogatories can be useful to determine whether affirmative defenses are real or mere boiler-plate. Interrogatories also can be an efficient way to identify witnesses. There is no empirical evidence of a need to reduce the number.

325, Joseph M. Sellers: Presumptive limits that are too high for some cases may encourage over-discovery. When too low, they encourage broader requests in lieu of a higher number of more tailored requests, and engender collateral disputes. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: "Well-crafted written discovery has always been the cheapest, most reliable and efficient means to obtain information." The severely limited numbers for Rules 33 and 36 will force litigants to ask broader questions, further limiting the usefulness of written discovery.

350, Pennsylvania Bar Association: The default number of interrogatories should be left at 25.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Fifteen is more than sufficient for employment and labor cases (from a defending perspective).

357, Joanne S. Faulkner: "For low income consumers, often written discovery is all they can afford." Interrogatories and requests to admit are often the only way to get beyond evasive answers to the complaint. The number should not be reduced.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing home litigation often covers a number of different events and circumstances. That requires many interrogatories. And interrogatories often help shape other discovery, including depositions. The reduced limits are a mistake.

359, Andrew B. Downs: "As a general proposition, interrogatories are useless." The questions are cumbersome. The answers are evasive, opaque, "jello-like." They should be abolished. Reducing the number is but a step in the right direction.

360, Robert Peltz: The impracticality of the proposed reduction is illustrated by attaching standard interrogatories approved by the Supreme Court of Florida for general negligence, automobile, and medical malpractice actions. For plaintiffs they run in the 20s, up to 29 in medical malpractice cases.

361, Caryn Groedel: Reducing interrogatories will require plaintiffs to spend more money on depositions.

362, Edward Hawkins: The 15 interrogatory limit "is simply unrealistic."

363, Dean Fuchs, at request of NELA-Georgia Board: Written discovery through Rule 33 and 36 "can be an extremely effective tool to not only discover information * * * about [] claims and defenses, but also * * * to frame cases for a ruling on summary judgment and to narrow issues for trial." The misuse of marginally relevant boilerplate interrogatories should not distract from the importance of carefully drafted interrogatories and requests to admit. Limiting the number will increase satellite litigation in counting disputes and in requests to exceed the limit.

365, Edward P. Rowan: "Interrogatories cut down the complexity of depositions, and even eliminate the need for some depositions." The restriction is unwise.

368, William G. Jungbauer: "Interrogatories allow a party to identify witnesses, additional and relevant facts, and documents." Reducing the limit will lead to overly broad and compound questions.

369, Michael E. Larkin: Interrogatories are efficient. They reduce the likelihood of unnecessary depositions and other discovery. The proposal is unnecessary, and will lead to more work for the court.

370, Thomas D'Amore: "Interrogatories are an unobtrusive way to identify witnesses, additional and relevant facts and documents." Defendants often do not agree to discovery beyond the presumptive limit, and judges may grant fewer if the presumptive limit is lowered.

372, J. Burton LeBlanc, for American Association for Justice: "Interrogatories are a useful,

inexpensive and unobtrusive way to obtain basic background information." They are a critical information-gathering tool. Many comments made in March 2013, several of them by government agencies, protested. There is no evidence supporting a presumptive limit at 15.

373, Michael L. Murphy for AAJ Business Torts Section: Do not lower the limit. Interrogatories are used "for many purposes, including identifying witnesses, gaining an understanding of the organizational structure and lines of responsibility, narrowing or ruling out potential claims and theories, and identifying potentially relevant evidence." A reduction is likely to lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: Interrogatories and requests to admit are a simple and inexpensive means of acquiring information. Responses often focus and drive oral discovery. Limiting them will force attorneys to cast a wider net. Consider a product liability case. More than 25 interrogatories may be needed on each of five different topics -- the identity of the employees responsible for design, assembly, or manufacture; the design history, including component part suppliers or manufacturers and other models using the same component or system; computer modeling and physical testing methods used to judge safety of the product before its sale; field performance of the product and claims and lawsuits similar to the instant litigation; alternative designs studied before the product was released for sale.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Interrogatories are used "to inexpensively identify witnesses, obtain information relating to damages, and even identify the size of the class for numerosity purposes." They should not be further limited.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): For both Rules 33 and 36, the Committee should "put more teeth into enforcement, as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

379, John M. Gallagher: There is no good reason to reduce the number of interrogatories, nor to limit requests to admit.

383, Alan B. Morrison: Opposes the reduction. Answering interrogatories is rarely burdensome in the way that responding to Rule 34 requests can be. They are an inexpensive way of obtaining information, "and often reveal something about the requester's thinking about the case, from both a legal and factual perspective." There are few cases where requests for interrogatories are the culprit in claims of discovery abuse. And this reduction seems incongruous with the proposed limit to 25 requests to admit — "the burdens of investigating and properly answering these Requests seem very similar to the burdens under Rule 33."

386, Arthur R. Miller: The reduction to 15 "is particularly questionable." Interrogatories are not burdensome and are inexpensive. "There are very few cases, if any, in which interrogatories are the source of discovery abuse." If a question seems onerous, a party can respond as best seem reasonable, and allow the judge to decide whether anything else should be required.

394, Thomas Crane: In employment discrimination cases, 15 interrogatories are not enough. Interrogatories are an efficient way to obtain critical information. Depositions by written questions tend to be costly.

398, Shira A. Scheindlin: "There is no empirical evidence that 25 interrogatories has caused any

problems * * * It is a change only for the purpose of signaling a narrowing of the scope of discovery." It will increase cost and delay in resolving disputes.

400, Gregory P. Stone: Interrogatories are important and cost effective. The information exchanged is important in determining whether to go to trial, and — if trial is had — in avoiding the need to approach a trial "blind."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Limiting the parties to fewer interrogatories will force them to write their questions broadly, leading to litigation over the propriety of the questions.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The present limit of 25 is severe and unwarranted. The model interrogatories for personal injury actions in Florida list 23 questions. Nor is there any clear problem that warrants a reduction. Interrogatories establish simple facts and stances of the parties, and obtain basic information such as the identity of witnesses, ownership of vehicles, and other important matters. Further limits will require extremely broad interrogatories, eliciting objections and motions. 448, Robert D. Curran, tracks 410 without the Florida interrogatories.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. They seek very basic information at the beginning of a case, and help prepare the case in later discovery for summary judgment and trial. Often in securities fraud cases the defendant will request that the plaintiff use interrogatories instead of a Rule 30(b)(6) deposition; limiting the number will impede this efficiency. Interrogatories, including contention interrogatories, may lead to elimination of claims and defenses.

420, Daniel A. Edelman: Combines Rules 33 and 36. Do not reduce the numbers. Instead, find ways to put teeth into enforcement, "as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

421, Louis A. Jacobs: "As for whether Judges should 'manage up' discovery by starting with limits, rather than 'manage down' discovery by starting with liberal discovery, the Committee should not drink this law-and-economics flavor of Kook-Aid." Limiting the number of interrogatories is "yet another recipe for more judicial involvement * * *. From my perspective, counting as a discrete interrogatory the subparts of a single interrogatory dooms discovery in employment litigation." "For example, we always ask in a single interrogatory for the identity of the decisionmaker, as well as each individual who provided input on which any decisionmaker relied, for specific employment decisions, ranging from termination and discipline, through evaluating performance or investigating misconduct, to assignments and opportunities." "If each employment decision is deemed a discrete interrogatory, the ceiling is in many cases bumped on the first one."

445, Gerald Acker, for Michigan Assn. for Justice: "[P]arties simply do not produce relevant documents during initial disclosures, as a matter of course." Interrogatories are needed to flesh out the case. And they are efficient.

457, Carl A. Piccarreta: There is no need to reduce the limit. The system is not broken.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Interrogatories are useful to

narrow the range of disputed issues and as an efficient, low-cost form of discovery. Government cases regularly see the full use of the 25 limit.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "In all but the most straightforward cases, 15 interrogatories may not suffice." Either the rule text or the Committee Note should emphasize the need for flexible application.

464, Douglas A. Spencer: Limiting the number of interrogatories would make prosecuting or defending cases next to impossible.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "This proposal will only encourage more aggressive law and motion practice."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference agreed that interrogatories are useful, and that there is no general problem with the limits set at 25.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Offering a not complex disability discrimination example: "15 questions, even if consisting solely of contention interrogatories, would be insufficient."

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Reducing it to 15 interrogatories "will lead to overly broad and compound questions."

614, Lars A. Lundeen: "I have honed my initial set of interrogatories in the typical auto collision court case, filed in State court, to 33." Setting a limit of 15 for more complex cases is unworkable.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes the proposal, which "will produce more motion practice without meaningful benefit."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes.

1054, Assn. of Bar of the City of New York: Supports, on condition the proposal is revised to direct that the court must increase the limit consistent with Rule 26(b)(1) and (2). But notes that "interrogatories can (and often do) impose great burdens on litigants, because they can require searching reviews of documents and factual investigation in order to respond, even though the same work could be done by the requesting party based on the documents produced in discovery."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Strongly opposes, advancing for defendants the arguments often advanced for plaintiffs.

1588, Leigh Ferrin for Public Law Center: More than one-third of civil actions in federal courts involve at least one pro-se litigant. They cannot afford depositions. They need interrogatories. In civil rights cases, for example, they often need 5 to 10 interrogatories just to figure out the identities of the individuals who allegedly violated the plaintiffs' constitutional rights.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Interrogatories have long been disfavored as ineffective, costly and often not justified. * * * An additional reduction in the number * * * would be beneficial in most cases."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 The proposed reduction to 15 interrogatories is problematic for the same reasons as the reduction in the number of depositions.

November Hearing, Andrea Vaughn: p 173: For the reasons that reducing the number of depositions will impede actions for unpaid wages, reducing the number of interrogatories will also be an impediment.

November Hearing, Barry H. Dyller: p 183 In litigating constitutional violations by government employees or actors "I rarely use interrogatories, so I don't care how many there are personally."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Increasing the number should be considered.

January Hearing, Elise R. Sanguinetti: p. 151 For contingent-fee plaintiffs in wrongful-death and catastrophic-injury cases, interrogatories are an inexpensive, "really critical" way to obtain necessary information while holding costs down.

February Hearing, J. Bernard Alexander, III: p 272 Although answers to interrogatories are filtered through counsel, they provide some information, narrow the scope, narrow the issues.

RULE 34(b)(2)(A): EARLY SERVED REQUESTS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes because it opposes the proposal to permit requests to produce before the Rule 26(f) conference.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 34: SPECIFIC OBJECTIONS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that by adding a "specificity" requirement "the Committee may finally eradicate" the practice of boilerplate objections.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The proposal "appear[s] reasonably calculated to address the goal of requiring greater specificity in parties' responses to document requests * * *."

372, J. Burton LeBlanc, for American Association for Justice: Requiring specific objections is a positive step toward preventing parties from evading discovery requests. November Hearing, Burton LeBlanc, President, American Association for Justice: p 139, 141: In general terms, "we support the [Rule 34] proposals as written."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: It is common for defendants to assert undue burden without articulating what that means, or to assert a general privilege objection. Information is withheld until the court, usually in response to a motion to compel, orders the defendant to provide evidence estimating the costs. "A responding party's inability to back up their vaguely stated objections has, in many cases, led to the production of highly relevant information." Requiring specific objections is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: "It should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart" when there is a general objection applicable to all of a counterparty's requests. The Committee Note should make this clear.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

407, David J. Kessler: (This comment makes many suggestions for the Rule 34 proposals that are difficult to compress into a summary. Detailed rereading is well worthwhile.) The proposed obligation to state objections with specificity should be linked to the particularity of the request. Rule 34 works well only when there is communication between the parties that crystallizes and clarifies the scope of the responding party's search and production. Problems become acute when the parties are not even aware that they disagree about the scope of the requests. The lack of consequences for overbroad requests creates an incentive to make overbroad requests. (1) Many courts have already instituted the specific-objection requirement. (2) The Committee Note might usefully say that when a request on its face violates Rule 26(g) it is enough to make that objection without making any other objections or any obligation to respond. (3) The obligation to object with reasonable particularity should be tied to the specificity of the request.

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

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 34(b) proposals.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: The Rule 34 proposals were generally supported by the conference participants.

499, Beth Thornburg: This extremely limited proposal will not prohibit laundry-list objections, nor deter or raise the cost of objecting, nor ease the burdens on the discovering party.

581, James Robson: Eliminating boilerplate objections and baseless assertions of privilege "is an excellent idea."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. It corrects a gap between Rule 33 and Rule 34.

635, Matthew D. Lango for NELA/Illinois: Supports "the proposal to bar generalized discovery objections."

1054, Assn. of Bar of the City of New York: Supports. Particularized objections support reasoned negotiations and the court's assessment of objections. The Committee Note should state that an objection is sufficiently specific if it states the limits that have controlled the search for responsive and relevant materials.

1413, Jocelyn D. Larkin for Impact Fund and several others: Endorses the amendments "regarding responses to document requests. Evasive responses, coupled with vague references to 'rolling' production at some unspecified future time, significantly contribute to delay and inefficiency in the discovery process."

1462, Margaret M. Murray: "Requiring the responding party to state objections with specificity is fundamental and long overdue." "Any process requiring * * * extensive meeting and conferral or judicial intervention to gather information merely to evaluate a responding party's stated objection is not effective."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: Massachusetts Superior courts require specific objections. It works. "Blanket objections are not tolerated."

2072, Federal Courts Committee, New York County Lawyers' Assn.: All the Rule 34 proposals "will clarify discovery obligations and expectations. * * * [T]he requesting party will know if it has reason to consider moving to compel. The procedures set forth are in line with existing law and good practice."

2110, Miriam Hallbauer & Richard Wheelock for LAF: This is "a sensible way to discourage litigants from attempting to evade discovery with rote, essentially meaningless objections."

January Hearing, P. David Lopez (EEOC): p 68 Agrees with the proposal.

January Hearing, Jennie Lee Anderson: p 271 Many inflated discovery costs are inflicted by defendants on themselves. Rule 34 requests to produce are often met with two or three pages of objections to each request, and no production at all. Extended negotiations follow. Defendants refuse to make specific objections, and give no real information on the cost of responding. Then defendants are unable to prove the claimed burden and production is ordered. Requiring specific objections will encourage more candid exchange of information, earlier.

February Hearing, William B. Curtis: p. 77 "[T]he proposals to Rule 34 are a very good start,

because what they do is they eliminate prophylactic objections."

February Hearing, Ariana Tadler: p 325 Supports the "(b)(2)(B)" proposals.

RULE 34: PRODUCTION — TIME FOR PRODUCING

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this provision "should ultimately provide greater clarity and increased understanding surrounding productions of ESI."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section supports, but believes the Committee Note language should be transferred to rule text stating that when production is made in stages, the response should specify the beginning and end dates of production.

372, J. Burton LeBlanc, for American Association for Justice: Codifying the general practice of producing, and requiring the producing party to disclose when production will occur, will streamline production of documents. And it will allow parties to anticipate when production will occur, particularly when production takes place in stages.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has become standard practice for responding parties to refuse to produce any documents until all discovery disputes have been resolved," and to start producing on a "rolling" basis without estimating a time to complete production "or, in some cases, even confirm when a production is complete." The proposal is desirable.

374, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).t

407, David J. Kessler: (This comment addresses the choice to produce, and timing, in great detail.) (1) Producing, rather than permitting inspection, is a well-established practice. But there is a growing tendency in courts to defeat a party's choice whether to produce or permit inspection by too readily providing direct access to documents or computers in an attempt to reduce the overall cost of discovery. "Even if no privileged documents are at stake, this solution is too great an intrusion into a responding party's private affairs." "[A] court should not compel inspection over a responding party's choice to produce except where production is technically impossible or there is evidence of discovery abuse that mandates inspection." The Committee Note should say that "absent abuse, it is the responding party's choice to either produce * * * or permit inspection."

(2) There is an "iron triangle" that joins cost, schedule, and scope. Reducing cost and accelerating the schedule reduces the quality of the production. A large discovery can be done quickly, but that will be expensive. It can be done quickly and inexpensively, but it will not be very good. "[W]hat can be reasonably accomplished in discovery is a question of both time and money." [A] There is little case law on what it means for a requesting party to specify a reasonable time for inspection or production. Nor is it clear how the requesting party's specification bears on a responding party's choice of a time to produce. Because a party does not review documents provided for inspection [?], production takes longer than inspection. [B] It is difficult to determine how long it will take to produce, and the time is controlled by factors that may not be known when the initial response is made. These factors include volume, format, location (both geographically and technically); various languages; the nature of the requests; requirements to issue code or compartmentalize electronic data; whether data is searchable; the amount of privileged information; the complexity of the litigation of review; the amount of redaction; and "etc." These factors may be understood only as discovery unfolds. [C] The time to produce will be affected by changes in the scope of the request in response to negotiations or motions to compel. The proposal may create an incentive for responding parties to make

aggressive objections, hoping to narrow the scope of discovery so they can state a shorter time for production. [D] It is not clear how stating a proposed time to produce "would interact with contingent productions like phased discovery or production from not reasonably accessible data sources under 26(b)(2)(B). Sources not reasonably accessible should be searched only after reasonably accessible sources have been searched and produced. [E] So it is not clear how the stated time to produce would be integrated with the Rule 26(e) duty to supplement — would a party be chastised for supplementing after the stated time to produce?

"Given these concerns, it does not seem practical to include this proposed amendment in the Rules." But if it is, "I would make it clear in the Notes that it is reasonable and expected that responding parties may need to update or supplement the date by which their production will be completed.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Often it will not be feasible to produce at the time for inspection stated in the request. But referring to a later "reasonable" time "will engender disputes about whether a production has been unreasonably delayed." "Reasonable" should be deleted. "[T]he parties frequently negotiate that productions will be made on a rolling basis." Difficulties arise where there is little or no negotiation, "not because of the terms of the current Rule."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. A response may state that documents will be produced, without specifying a time for production. "That practice is a frequent source of frustration, disputes and motions."

1054, Assn. of Bar of the City of New York: Supports. But the Note should observe that it suffices to state a time when it is anticipated that production will be complete. Precise predictions may be difficult in undertaking large-scale productions.

1462, Margaret M. Murray: "[I]n most of our firm's class action cases, we receive responses to discovery requests without a single responsive document provided." Defendants refuse production of documents until all discovery disputes are resolved. When production begins they say only that it is "rolling," and refuse to identify an estimated date for completion. In some cases, they will not even confirm whether production is complete.

1463, N. Denise Taylor for Association of Southern California Defense Counsel: The amendment reflects common practice, and eliminates discovery battles over access to original files.

1552, Esther L. Klisura for State Bar of California Committee on Federal Courts: As proposed, there is a risk that the rule will be read to give the responding party unilateral control in determining what is a reasonable time. "reasonable" should be deleted, and this sentence added: "*If the later time stated in the response has not been stipulated to or previously ordered by the court, the requesting party may move to compel an earlier production.*"

1608, Jonathan M. Redgrave: Amend the rule to read: "or by a later reasonable time specifically identified in the response taking into account factors such as the volume and complexity of the production. When it is necessary to make the production in stages the response should specify the beginning date of the production and anticipated end dates of the production."

1878, Roger L. Mandel: "The use of boilerplate objections combined with the refusal to state when documents are actually being withheld based on the objections and to commit to document production within reasonable certain periods of times are the single biggest problems with

discovery today and greatly increase the time, expense and difficulty of discovery. I strongly favor the proposals to deal with these issues."

RULE 34: STATEMENT OF WITHHELD ITEMS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this requirement "could make Rule 34 responses more straightforward and less evasive."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The goal is desirable, but there may be unintended consequences. The proposal "would seemingly require a responding party to obtain extensions of time to respond until it knows whether documents [responsive] to a particular request are being withheld. Such a response can only be accurately made after there has been a sufficient document review to enable an accurate response. Yet, it does not appear to be desirable written response for that reason. This problem could be cured by making it clear in the proposed rules that a party can respond by saying in effect, that it has not yet determined whether responsive documents are being withheld to the request, but it will supplement its response to provide that information within a reasonable time."

357, Joanne S. Faulkner: This "is salutary, and a similar provision should be added to Rule 33." Indeed, written discovery should be governed by the same principle as Rule 30(c)(2) applies at depositions — the requested information should be provided along with the objection. Nervous lawyers could be reassured by adding a provision that production does not waive objections to admissibility and relevance.

372, J. Burton LeBlanc, for American Association for Justice: The practice of stating objections and then producing subject to the objections makes it difficult to assess what has not been produced and which objections go to whatever has not been produced. The proposed change will discourage parties from evading discovery on procedural grounds and enable the requesting party to assess whether further discovery will produce evidence to support its claims.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has * * * become commonplace for parties to respond to discovery with a litany of boilerplate objections without revealing whether they are actually being relied upon to withhold information." It is impossible to determine whether anything has been withheld, and if so on what grounds. Countless hours of meeting and conferring are required. This proposal is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: Refers to 26(b)(2)(C), but means 34. The idea is good. But if a party objects to making a search at all, either because unduly burdensome or vague, it cannot know whether it is withholding responsive documents. The statement in the Committee Note that a party can state the limits that have controlled the search is adequate to the task, but should be moved into rule text.

381, John Stark: The proposals place greater emphasis on document requests, restricting other modes of discovery. This is mistaken, for the reasons described with the suggestion that numerical limits and many other limits should be placed on Rule 34. So requiring a statement whether responsive materials are withheld goes in the opposite direction.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: This proposal is undesirable. A producing party does not "withhold" a document it believes is not discoverable. The result will approach a need to produce a "log" of "withheld" material. A typical Rule 34 request is broad —

"every document that mentions widget X." The responding party may believe that is too broad, and produce a set of documents it has identified. It should not be required to search for every document mentioning X so as to be able to describe those it is not producing. Such a duty would only encourage broad requests.

407, David J. Kessler: (This the third part of this detailed comment on the Rule 34 proposals).

(1) "Withhold" is not an appropriate term. "As a general matter, we have not historically required parties to identify the documents they are not producing or that did not fall within the document request, properly construed." "Requiring responding parties to establish why they did not search in a specific location or produce a specific document turns discovery on its head"; all they need do is object. For example, it is common to use search terms, "but a party is not withholding documents that are not identified by its search terms." Nor should it be required to disclose the search terms, which by all the better authority are protected as work product.

(2) As a practical matter, even responding parties who take their Rule 26(g) responsibilities seriously "may not know exactly how they will search for the documents they agree to produce. Nor may they be aware if any documents are going to be excluded from the production that would otherwise be responsive but for the objections."

(3) The rule should instead focus "on what [the] responding party is agreeing to search for and produce. * * * [T]he court should ask whether the scope of what the responding party has agreed to search for and produce is reasonable and whether the requesting party and the court can clearly understand what the responding party is agreeing to produce. Too often responding parties provide a series of objections and responses, but never describe what they actually agree to search for and produce."

(4) Rule 34(b)(2)(C) should instead be amended:

(C) Objections. An objection to part of a request must specify the part and ~~permit inspection of the rest.~~ state with reasonable clarity what information the party will either produce or for which it will allow inspection. Where a party objects to a request in its entirety and does not plan to produce any documents in response to the request, the party should so state.

The Committee Note would be revised in parallel, see p. 11 of the comment. February Hearing, David Kessler: p 342 "Many objections to discovery requests do not withhold any documents whatsoever, but rather limit those stems [sic] of proper scope of discovery under the rules." A party is not withholding anything when it states the limit of the inquiry. It would be better to direct that the responding party state what it is looking for.

421, Louis A. Jacobs: "[E]mployers regularly * * * raise boilerplate general and 'to the extent' objections, and the Committee's effort to eradicate this abuse is wonderful. Conditionally couched discovery responses leave us wondering what information or documents have been withheld, and requiring an indication of that shortfall facilitates resolution of disputes."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department agrees that some litigants do not disclose whether anything has been withheld. It "supports the proposed amendment insofar as it does not create a detailed disclosure requirement, which would be unworkable." Responses often are due while still gathering information about the categories of documents that will or will not be provided by the agency. The Department supports the proviso in the Committee Note that a statement of the limits that have controlled the search qualifies as a statement that the materials have been withheld.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: This "will increase transparency, requiring parties to communicate whether otherwise discoverable information is being withheld."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: This proposal is long overdue. Often the first question at the meet-and-confer after a Rule 34 response asks whether anything has been withheld under the objections. "Usually the response is that nothing has been withheld. Now that information will be in the response." But in cases where production occurs over time, counsel may not yet know whether anything will be withheld. The producing party ought to be able to make the objection, and be required to amend the response to state whether documents have been withheld.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

540, Alex Dahl for Lawyers for Civil Justice: This proposal imposes an added and unnecessary burden. Any confusion typically is resolved at a meet-and-confer. "The root cause is often a failure to object with specificity." "The requesting party also has a duty to propound specific demands."

558, Richard Alembik: Proposed 34(b)(2)(B) and (C), to eliminate boilerplate discovery objections and baseless privilege assertions, is a very good idea.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. "The magistrate judges have seen many motions addressed to the ambiguity" of responses that state objections, and then state that without waiving the objections, certain documents will be produced, but do not state whether other responsive documents will be produced.

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

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": (Probably fits here:) "We strongly support the amendments of Rule 34 to prevent evasive answers to document requests."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, along with the specific objections proposal. This is workable because the Note recognizes that a statement on the scope of the search functions as a statement that anything outside the scope is "withheld."

1054, Assn. of Bar of the City of New York: Sort of supports the proposal. A better method for curbing evasive responses would be to prohibit conditional responses — "subject to, and without waiving" objections. Coupled with the requirement that objections be specific, this could go a long way. The practical difficulty is that objections typically are prepared early on, in the early stages of searching for responsive documents or even before the search has begun. You cannot know then whether anything will be withheld. If the proposal goes forward, it should be modified to require notification of withholding only at the conclusion of the document production.

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports this and the specific objections proposal.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Approves both the specific objections proposal and the requirement to "delineate which, if any, responsive documents are being withheld based on any objections."

1393, Camille Godwin: While opposing the other proposals, endorses the Rule 34 changes. They

will reduce "time needlessly spent by courts and litigants ferreting out the basis of routinely overbroad objections which often serve only to mask the existence of materials known to be responsive and which defendants hope will remain uncovered."

1462, Margaret M. Murray: A laundry list of objections "necessitate[s] countless hours of meeting and conferral, simply to determine whether documents were withheld and, if so, why. * * * The change will substantially lower the extent to which court intervention is required."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This amendment is extremely helpful."

1476, Zenola Harper for Horizon Blue Cross Blue Shield: "This amendment is problematic because it would likely spawn a new genre of discovery disputes through which the requesting party attacks the log of documents identified as withheld * * *."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: "The Massachusetts Superior Courts adopted this rule and it works. * * * Requiring an objecting party to disclose if it is actually withholding documents saves everyone time."

1521, R. Stanton Dodge for DISH Network: "[I]t is rare that a party knows, at the time it serves its responses, exactly what it has and what it will or will not be producing."

1536, Lisa Tate for American Council of Life Insurers: Overbroad and ambiguous requests to produce make it difficult to know what has been "withheld." The proposal should be withdrawn.

1732, J. Burton LeBlanc for American Assn. for Justice: Supports all the Rule 34 proposals.

1883, Norman E. Siegel: Eliminating "the unfortunately popular tactic of not disclosing whether documents are being withheld based on a particular objection" will eliminate unnecessary discovery disputes.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This will aid litigants who are at a disadvantage relative to their opponents because they lack sufficient access to know what discoverable information even exists."

2141, Kevin N. Ainsworth: The objection also should state "whether and to what extent the objecting party limited its search for responsive materials."

2264, Scott A. Kane: Common requests ask for all documents relating to any allegation in the complaint. It is difficult to state what is withheld when faced with an overbroad request. The Committee Note should state: "The sufficiency of the identification of materials withheld on the basis of objection should be measured by, among other things, the degree of specificity of the description of materials sought in the request."

November Hearing, Jeana M. Littrell: p. 17-18, 20-22: Opposes this proposal. An affirmative statement that documents are being withheld will undoubtedly lead to follow-on discovery asking what has been withheld, and why. We do not now get such follow-on discovery, even though we do make the common boilerplate objections that a request is overbroad, unduly burdensome, and that subject to these objections we are producing. We should not do that, but we do. What happens next is that the requesting party calls, and we work it out.

January Hearing, Janell M. Adams: "Withheld" creates difficulties when TAR is used — you do not know what documents you have not produced when you have not identified them. We use TAR now only on agreement with the other parties. So they know we may not have identified every relevant document. But we use other methods to sort out responsive documents from the set of relevant documents, and we do not tell other parties "which word searches, which particular methodologies, analytics, whatever" guided the choice of responsive documents. We should not have to provide that information to identify what has been "withheld."

February Hearing, John H. Martin: p 172 Texas requires a statement of withheld items only for privileged items. That has worked well, and should be considered with this proposal.

February Hearing, Stuart A. Ollanik: p 266 Supports the proposal.

RULE 34: NUMERICAL LIMIT

After prolonged discussion, the Advisory Committee decided to abandon drafts that would have amended Rule 34 by imposing a presumptive numerical limit on the number of requests to produce. Many of the prepublication comments addressed this proposal. It is addressed in some post-publication comments as well.

257, Todd Croftchik: "Even a reasonable limit of 50 requests would significantly reduce the attorneys' fees and costs expended in responding to hundreds of requests for production in a single product liability case."

258, Peter Sturmfels: Verbatim the same as 257 above.

260, William LeMire: Verbatim the same as 257 above.

269, Mary Novacheck: Verbatim the same as 257 above.

307, Hon. A. Leon Holmes: the limitations presently in place on requests for production are sufficiently generous that there are few disputes. (This is combined with Rules 30, 31, 33, and 36; it may reflect a local rule.)

318, Brian Sanford: "Rule 34 should not contain a limit on requests."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Carries forward a pre-publication comment protesting the adoption of a limit on the number of Rule 34 requests.

372, J. Burton LeBlanc, for American Association for Justice: Calls to reinstate the abandoned proposal to impose a numerical limit on Rule 34 requests "are ill-advised."

381, John Stark: Makes a number of suggestions for Rule 34, collected here. Both the number and scope of requests should be limited at the outset of litigation. Indeed, the rules should identify categories of cases — for examples, administrative record cases, absolute or qualified immunity cases, time-barred cases — where discovery planning and discovery requests are presumptively prohibited. It is a mistake to limit the numbers of depositions, interrogatories, and requests to admit; the result will be to force ever more discovery into the costlier Rule 34 requests. Amendments should require "more focused and limited questioning," and allow more than 30 days to respond. Rather than allowing requests for any relevant information, the focus should be on "getting 'just enough' to understand the case." And the requesting party should be made to bear some of the burden of production if there is to be true proportionality.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: "[P]resumptive limits on document discovery should be considered." "Susman's Checklist," for example is an agreement among the parties that discovery be limited to five custodians in the first instance, to be followed by five more custodians in a second round. The requesting party identifies the custodians. After the second round, further custodians can be discovered only on showing good cause.

465, Neil T. O'Donnell: Opposes the abandoned proposal to add a presumptive limit of 25 requests to Rule 34.

635, Matthew D. Lango for NELA/Illinois: Any presumptive limits would lead to broader requests and more discovery disputes.

637. Louis Lehr for Trial Attorneys of America: Recommends a limit setting a presumptive number of Rule 34 requests.

RULE 36: NUMERICAL LIMITS ON REQUESTS TO ADMIT

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of requests.

274, James Jordan: "If you limit everything else and then limit RFAs???"

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The limit is shortsighted. In railroad litigation, requests to admit are frequently used to eliminate the need for fact witnesses and additional expert witnesses. They eliminate the need to prove facts that are truly not in controversy.

289, Craig B. Shaffer & Ryan T. Shaffer: Rule 36 requests are not "discovery" tools. As a practical matter, a motion for summary judgment provides an alternative means to obtain admissions when the nonmovant fails to identify evidence creating a genuine dispute. And if a lawyer raises issues of authentication — most logically at a Rule 26(f) conference — and is rebuffed, that should be a basis for exceeding the limit. [It is not clear whether "authentication" is used in a sense that expands beyond documents, which are not included in the presumptive limit.]

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

299, Aaron Broussard: Combines Rule 36 limits with Rule 33 limits: the problem is that a smaller number of broad requests will support disingenuous responses.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No empirical data are cited to support the proposal. The presumptive limit to 25 requests "will create more issues than any it purports to solve." As with Rule 33, parties will dispute what are discrete subparts. There will be disputes whether a request is truly directed at admitting the genuineness of a document as opposed to some other purpose. Consider, for example, a forgery case: will a request to admit genuineness count against the limit? There is no demonstrated need. Do not make the change.

307, Hon. Leon Holmes: Opposes. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

317, Steven Banks for the Legal Aid Society in New York City:
"Admissions are particularly useful for establishing uncontested background facts such as the staffing of a government agency and the allocation of staff to different locations and functions." In employment cases, requests can be critical where the employer's records show violations on their face. More than 25 requests have proved useful in streamlining important evidentiary disputes. And courts can readily evaluate requests against arguments of burden or other impropriety.

322, Michelle D. Schwartz, for Alliance for Justice: The limits pose a threat to plaintiffs with

limited resources. "High-quality requests for admission serve to reduce the number of issues that must be decided at trial." Limiting the number will force plaintiffs to devote more resources to trial proofs that could have been avoided.

324, Jonathan J. Margolis: Failures to admit can be followed up by interrogatories seeking the supporting facts; that may make lawyers less likely to deny anything they think the other side cannot prove. There is no empirical evidence that abusive numbers of requests are made so often as to warrant a new restriction.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Written discovery requests are more efficient. Reducing the number will diminish the utility, and force broader requests. And this will increase the need for deposition discovery.

349, Valerie Shands: "Why on Earth would one want to *reduce* the number of things the parties can agree upon before trial?" And if a judge unjustifiably denies an increase, there will be further cost and delay "while one is forced to appeal an issue * * *."

350, Pennsylvania Bar Association: Supports the 25-request limit.

357, Joanne S. Faulkner: Interrogatories and requests to admit are often all that a consumer can afford. A request for admissions can be a poor person's deposition. Do not impose numerical limits.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Requests to admit are seldom used in nursing home litigation. But they are used to request an admission that documents are admissible. This use should be protected by amending Rule 36(a)(1)(B) to provide for requests to admit the genuineness and admissibility of any described document. (The proposed numerical limit does not apply to requests under 36(a)(1)(B).)

361, Caryn Groedel: Limiting the number of requests will result in plaintiffs having to spend more on depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: Imposing limits on Rule 36 is even worse than reducing the number of interrogatories, "given their great effectiveness in narrowing issues for trial, framing summary judgment motions, and the relative ease to which Requests for Admissions are responded." This should be a non-issue; "I have never heard or experienced any complaint about the abuse of Rule 36."

365, Edward P. Rowan: Limiting requests to admit will increase time and cost, because they are efficient and inexpensive.

369, Michael E. Larkin: Requests to admit are valuable, allowing the parties to resolve issues in an efficient manner and to determine the issues the opposition asserts.

370, Thomas D'Amore: "I often use requests for admission to limit the number of issues in the case so that I don't have to do discovery on issues." Why impose a limit "[i]f efficiency and cost savings is the goal"? "I would question the motives of the proponents."

372, J. Burton LeBlanc, for American Association for Justice: Requests to admit "are cheap but essential discovery tools" that enable smaller plaintiffs to establish critical information and are almost cost-free. Imposing a numerical limit will encourage broader requests, making it even

easier than it is now for defendants to deny. There is no evidence to support the limit. And the exemption of requests to admit the genuineness of documents favors defendants and large corporate interests — most document-heavy cases involve large corporations on both sides, so they do not face the same limits on requests to admit as plaintiffs with smaller cases.

373, Michael L. Murphy for AAJ Business Torts Section: Do not impose a limit. Requests to admit "are used for a host of reasons, including authenticating evidence, establishing the basis for stipulation, and narrowing the fact issues for trial." A limit will lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: The reasons to abandon the proposed limit are advanced in opposing the reduction to 15 interrogatories under Rule 33.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Requests to admit generally are used sparingly to achieve efficiencies by streamlining issues and focusing discovery, and by establishing undisputed facts related to liability. Limits need not be imposed.

394, Thomas Crane: Requests to admit "are a fairly efficient way to obtain pointed information efficiently." There is no need to create a limit — "I have personally never seen more than perhaps 35."

400, Gregory P. Stone: "I've been able to use fifty to sixty requests to admit to save days of trial testimony in vehicle defect cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) "Plaintiffs rely on requests for admission to eliminate the need to produce at trial proof of facts that are not in controversy." If plaintiffs are forced by numerical limits to frame broad requests, it will be easier for defendants to deny, increasing litigation costs.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: The limit to 25 requests, excluding requests regarding the authenticity of documents, is reasonable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: "In a standard personal injury action against a cruise line on behalf of a passenger, we propound a set of approximately 25 requests for admissions." The proposal is a solution in search of a problem. 448, Robert D. Curran, tracks 410 without the cruise line example.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. (See Rule 33 summary.) Requests to admit may obviate the need for motions in limine with respect to certain exhibits or testimony.

445, Gerald Acker, for Michigan Assn. for Justice: Requests to admit "are cheap and effective tools for discovery." They should not be limited.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Requests to admit are a useful tool for narrowing the issues for trial. They do not impose the same burdens as requests for documents or testimony. Limitations will gain little in efficiency, and that will be at the risk of increased trial time. "The Department has handled many cases, affirmative and defensive, in which responses to more than 25 requests have been useful to narrow the claims or defenses * *

*."

460, Jo Anne Deaton: The presumptive limit "is long overdue." Plaintiffs' counsel have served large numbers of requests to admit "for no apparent reason other than to 'churn' discovery and increase fees."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "This change will require parties to be more selective in their use of requests of admission and to focus on the material issues in dispute * * *."

464, Douglas A. Spencer: Limiting the number of requests to admit is inappropriate. They are an invaluable tool to limit the issues presented at trial.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "Reasonable requests for admission * * * are perhaps the most simple and direct discovery tool allowing the parties to narrow the issues to be tried." No empirical data support imposing a limit.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was more discussion of this proposal than the other proposed numerical limits. Some defense attorneys argued that requests to admit are abused, and that 25 is a reasonable presumptive limit. But "multiple plaintiffs attorneys noted that requests for admission are very effective discovery tools, sometimes in larger numbers than 25."

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Requests to admit result in fewer objections than other types of discovery. But defendants tend to deny most requests, and plaintiffs cannot know which they will admit. Adopting a presumptive numerical limit is unwise.

524, Joel S. Neckers: "I have handled several cases in the recent past where opposing counsel filed literally thousands of request for admission," imposing thousands of hours of time to litigate and respond to the requests.

589, Kathleen M. Neary for Employment Rights Section, AAJ: "Requests for admissions are often times utilized to establish that medical or counseling bills that were incurred as a result of the unlawful employment practices are fair, reasonable and were necessitated by the employment practice."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses. "The magistrate judges have seen instances in which the requests for admissions have been excessive and burdensome." The number can be addressed in a scheduling order. If the question arises later, the parties can work it out or make a motion.

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. (Also opposes the other proposed numerical limits.)

1054, Assn. of Bar of the City of New York: Supports. "[E]xcessive or irrelevant requests for admission can be overly burdensome or harassing." A number of courts have adopted local rules setting a presumptive limit of 25 requests.

1560, Arthur N. Read for Friends of Farmworkers: Rule 36 requests can be linked to requests to produce documents by seeking an admission that requested documents not produced do not exist

— this is particularly valuable as to documents a defendant is required by law to make and keep. Requests to admit are particularly important with respect to defendants who simply ignore discovery requests because failure to timely respond effects an admission. And they can summarize in an undisputable manner the results of document discovery, including the accuracy of summaries of voluminous records.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Substantive requests for admission have also become disfavored and are largely viewed as unproductive, leading to objections and/or vague or incomplete responses and, sometimes, needless motion practice for additional responses." But it is good to exempt requests concerning the authenticity of potential trial exhibits.

November Hearing, Darpana M. Sheth, for the Institute for Justice: There is no empirical evidence of problems with burdensome or excessive requests to admit. If there is a problem, it is that litigants do not use Rule 36 enough. Admissions serve vital purposes beyond laying the foundation to admit documents into evidence. They narrow the issues, and facilitate proof with respect to the issues that remain. Admissions that the casket monopoly in Louisiana did not serve any health or safety purposes shortened the trial to 3 hours from an expected 3 days.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Their use should be encouraged, not limited.

November Hearing, Patrick M. Regan: p 278 "The limit on requests for admissions * * * is a solution in search of a problem." The purpose is to narrow the issues. Why should we want to limit that worthy goal? In litigating between 300 and 400 cases in federal courts, and many in state courts, I've never, "ever, ever had a problem with the excessive number of requests for admissions."

January Hearing, P. David Lopez (EEOC): p 68 Requests to admit "can be a very, very effective tool." It is really important to draft them right. And if one formulation triggers an objection, it is often important to craft an alternative.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. "[O]ften requests for admissions in particular play a significant role in streamlining the pursuit of these cases."

January Hearing, Elise R. Sanguinetti: p. 151 In single-plaintiff wrongful-death and catastrophic-injury cases, requests to admit are often used. It is rare to ask more than 25, but "I want to be able to do that" when necessary to save the client money.

February Hearing, Donald H. Slavik: p. 14 At 22-23: "[O]ur complaint is a set of requests for admissions." The proposed limit may not cause problems for plaintiffs. "The defense may be more harmed. I get requests * * * 40, 50, 60, but if it helps narrow the scope of the issues going to trial, I think they're important."

February Hearing, J. Michael Weston: p 87 In a recent case the plaintiffs served a little under 1,000 requests to admit, asking for authentication of documents that had been produced in other cases around the country, but that were offered here in different forms that made it difficult to figure out which was what.

February Hearing, Leigh Ann Schell: 86 requests to admit have been served in a recent case. Many of them involve matters that must be resolved by expert testimony. Negotiations have failed to win any relief. The present rules allow us to seek relief, and we will. Adopting a presumptive limit will at least encourage the parties to take a more surgical, narrow approach.

February Hearing, J. Bernard Alexander, III: p 272 Requests to admit are a way to whittle down a case. I have never had an issue where an adversary has asked a judge to cut the number of requests.

RULE 37(a)(2): COMPEL PRODUCTION

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves the corresponding Rule 34 proposal, and so endorses this conforming proposal.

OTHER

256, Hon. Scott Crampton: This comment makes suggestions for AO Form 88, a subpoena form being revised to reflect the 2013 amendments of Rule 45.

263, The Cady Law Firm, by Christopher D. Aulepp: After criticizing parts of Rule 26(b)(1): "We are also opposed to the other proposed changes." The effect will be opposite to promoting justice, efficiency, and economy of resources.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Overall, the limits on discovery "will * * * make it much more difficult for individuals to find evidence when suing a massive — and sometimes multinational — company."

268, Craig Smith: Do not adopt the changes. Many "would negatively impact almost all plaintiffs, but would particularly harm plaintiffs in cases involving multiple defendants, complex litigation, and cases where the defendant holds a disproportionate amount of information compared to the plaintiff."

271, J.C. Metcalf: Prior rules changes, including disclosure, have been a farce. Corporate defendants produce little or nothing. A successful assertion there is nothing to produce in one case may be followed in another case by producing numerous documents claimed not to exist in the first case. "The proposed rule changes will exacerbate this dynamic." They "are a nightmare for the fair and orderly administration of justice."

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Rule 8 should be amended to reflect the plausibility standard adopted in the Twombly and Iqbal decisions. At the very least, a new Committee Note should be added to acknowledge those decisions and to explain their relationship to Rule 8.

295, Andrew Horowitz: The Western District of Pennsylvania has an innovative and resoundingly successful early ADR program that has been copied by other districts. And it has "recently launched a voluntary expedited litigation program where the parties consent to mutual limits in discovery and motions practice to reduce costs and bring about faster resolution." Such experiments should be continued.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The Sedona proposals include several recommendations to address preservation in Rule 16 and at various points in the discovery rules. These proposals overlap the comments on Rule 37(e). But several may be described here because they address topics that go beyond preservation.

Rule 16(a) The purposes for a pretrial conference would be expanded:

(3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C);

(3) (4) managing discovery and discouraging wasteful pretrial activities * * *.

Rule 26(c) The protective order provisions would expressly address preservation:

(1) In General. A party or any person from whom discovery is sought or who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things [may move for a protective order] * * *. The court cannot consider the motion ~~must include~~ unless it receives a certification [of meet and confer], and [the motion] is accompanied by a report that conforms to the requirements of Rule 26(f)(5). [Rule 26(f)(5) may be the 26(f)(3)(F) set out below.]

A protective order could specify the terms of preservation; limit the scope of preservation; or "reliev[e] a party from preserving certain documents, electronically stored information, or tangible things."

Rule 26(f) The discovery plan provisions of Rule 26(f) would be expanded to include this as a new (3)(F):

(F) If the parties are unable to resolve issues discussed during a Conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:

- (i) A section stating the issues during the conference and summarizing areas where agreement was reached on each issue;
- (ii) A section, containing no argument, providing a brief statement identifying each issue for which agreement was not reached, including:

- a short and plain statement of the position of each person or party on each issue in contention and;
 - the proposal of each party for reaching a resolution of the issue.

494, Charles R. Ragan: endorses these Sedona proposals.

636, Jonathan Harris: Supports the proposed change to the rule for expert witness disclosures...

1031, Steven Thompson: "[T]he rules should require a more thorough 'initial disclosure' by the defense. The defense should be forced to disclose all documents and information that support or relate to the claim against them, not solely the defense to the claim. In many cases, the defense has all of the documents, drawings, data and other material necessary to get to the truth about the plaintiffs' case * * *."

1197, Auden Grumet: We should expand the scope of information and evidence produced by mandatory disclosures.

1209, Christopher Heffelfinger: Rule 34(b)(2)(D) should be amended to direct that a privilege log must be served no later than 90 days following service of the request to produce.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that there is a need to recognize in the rules the problems of discovering information housed in foreign jurisdictions that have privacy laws restricting the transfer of personal information to other countries. The Sedona Conference International Principles on Discovery is a good guide. Rule 26(b) should provide that the court give due consideration and regard to a party's compliance obligations with any conflicting non-U.S. data protection law. "The burden of establishing that a conflict exists would rest with the producing party." Factors to consider would include availability of the information from another source — as in the United States — not subject to the privacy constraints; whether compliance with both laws is possible, for example by anonymizing the data or producing in redacted form; and phasing discovery to allow additional time to comply with the foreign law. If the producing party proves it impossible to comply with both laws, the burden would shift to the requesting party to show that the information is crucial to the litigation. If discovery is allowed, it should be narrowly targeted to reduce the risk of noncompliance.

1919, Fenn Little: This is one of a few suggesting that Rule 68 should be amended to allow a plaintiff to make an offer of judgment.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 107
Proposes that "contention interrogatories * * * not be required to be answered until the close of discovery."

COLLECTIVE SUMMARIES

Many comments make virtually identical arguments to make the same points, whether to support, criticize, or oppose a proposal. The following pages summarize comments from 487 to 600 in a form that illustrates what a "vote-" counting tally would look like. The count was abandoned at that point on the view that it has no substantial value.

General: Pro

Many brief comments can be summarized as generally supporting or opposing the proposals with little elaboration.

Others decry the costs of discovery. Assertions that the cost of discovery forces defendants to settle meritless claims are common. And there are some comments that the costs of discovery deter plaintiffs from ever filing, or lead to abandoning an action after filing, or force settlement on unfair terms.

490, Wes Blumenshine

510, John Olinde

514, Andy Osterbrock: General support. Deleting "reasonably calculated" is particularly important because it has been misused to stretch discovery beyond any reasonable intention.

517 Jeffrey D. Smith

580, Norman Jetmundsen for Vulcan Materials Company

General: Con

Many opposing comments emphasize the sharp divide between plaintiffs and defendants, and urge that rules amendments should be adopted only with substantial support from both plaintiffs and defendants. In related vein, many comments urge that the proposals will further tilt the balance of federal courts toward favoring defendants and disfavoring plaintiffs. This concern is often tied to laments about recent developments in pleading standards, class actions, and expert witnesses, along with the uses made of summary judgment.

An occasional comment underscores the divide between plaintiffs and defendants by "question[ing] the motivation behind those proposing the" amendments.

Some argue the restrictions will be unconstitutional. The more specific focus is on the right to jury trial, and depriving plaintiffs of the information needed to escape summary judgment or judgment as a matter of law.

It also is common to observe that discovery now works well in most cases. And the present rules give all the power judges need to make discovery work well in all cases.

512, Joseph R. Neal, Jr.

513, Laura Zubulake: As plaintiff in the eponymous series of cases, suggests that limiting oral depositions, requester-pays, and proportionality (depending on how it is handled) "have the potential to make it more difficult for individuals."

516, Dale Irwin

522, Kenneth Allen: The proposals will endanger public safety by hampering product-liability litigation.

523, Craig Davis

527, Samuel Bearman

533, Joanne Doroshow: Much of the discovery costs defendants complain of arise from their efforts to hide information or prevent disclosure of documents.

534, Jeff Schulkin

536, Steve Saks

544, Scott Hunter

546, Tye Smith

547, Chris Nidel (One of those that questions the motivations)

550, Jacob Lebowitz

558, Richard Alembik: Most of the changes are unnecessary.

561, Margaret Simonian

565, Robert Hill: "[T]he corporate defendants control Congress and the Courts, including the rule making process. Sad day. Justice for sale in America."

566, David Addleton: The proposals "violate fundamental fairness, equal protection, and due process principles."

567, Michael Ford

573, Bryden Dow

594, Sidney Cominsky

Rule 1: Pro

The arguments supporting the Rule 1 proposal emphasize the need for cooperation, at times pointing to local rules or standards requiring cooperation. Some urge that "cooperation" should be written into Rule 1 text.

497, Kenneth A. Lazarus for American Medical Assn.

Rule 1: Con

Two basic points are made in opposing the Rule 1 proposal. One is that rules of professional responsibility bear heavily on cooperation; the civil rules should not confuse the subject. Cooperation is a matter of professional aspiration in a system that remains fundamentally adversary. The other is a fear that the proposal is a lure for sanctions, with accompanying motion practice. Experience under the 1983-1993 version of Rule 11 is invoked.

524, Joel S. Neckers

Rule 4: Pro

(None of the comments from 487 to 600 require a note.)

Rule 4: Con

Opposition to shortening the time to serve reflects concerns that some defendants evade service; some are hard to find; some may be buried in layers of interlocking ownership that makes it difficult even to identify the defendant; serving multiple defendants may complicate matters; service by the Marshal's Service often is delayed. Plaintiffs have no incentive to delay service. Unless they want to delay to settle before service, or to perform the Rule 11 inquiry that tardy clients push beyond the limitations period. Requests to waive service will be discouraged because there will be only a brief period to accomplish service after the plaintiff learns that the defendant will not waive. The defendant is not prejudiced if service takes 120 days. Several comments point to the time required to effect service in another country; the most that can be said for this argument is that it implicitly relies on an ambiguity in the provision in Rule 4(m) that excepts service under Rule 4(f) or 4(j)(1) — service on a foreign corporation outside any judicial district of the United States is made under Rule 4(h)(2), which calls for service "in any manner prescribed by Rule 4(f)," not "under" Rule 4(f).

503, Patrick Malone 590, E. Craig Daue, agrees

504, Kenneth Behrman

521, Lincoln Combs

528, James Ragan

537, Victor Bergman

538, A. Laurie Koller: "I have had several cases settle after filing and before service."

541, Jessica Sura

542, Justin Kahn

545, David Rash

548, Kevin Hannon

549, George Wise: "Busy doctors are frequently hard to catch and serve in person."

551, Gregory Smith

552, Daniel Ryan (Draws from 553)

553, William Smith

554, Hubert Hamilton

557, John Lowe

558, Richard Alembik Perhaps 90 days would suffice.

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

564, Joel DuBoff

570, Nicole Kruegel

577, Clark Newhall

578, Christian Bataille

581, James Robson

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

Rule 16(b) Case Management Pro

The comments favoring the Rule 16(b) proposals tend to be general — enhancing early and active case management is desirable.

497, Kenneth A. Lazarus for American Medical Assn.: Supports.

583, James Howard: Agrees "with the provisions which reduce delays and create earlier deadlines."

Rule 16(b) Case Management Con

Most of the opposition to the Rule 16(b) proposals focuses on the acceleration of the time for the first scheduling conference. 60 days often is not enough, particularly for defendants whose lawyers need to find out what the case is about well enough to participate effectively in the conference. The problem is aggravated when a defendant takes some time interviewing firms before choosing counsel. And with large organizations time may be needed to sort through the layers of bureaucracy. The Department of Justice expresses particular concerns that arise not only from the complexities of the Department's own organization but also from the complexities of the agencies it often represents.

Rule 26(b)(1): Pro

The comments supporting Rule 26(b)(1) generally pick up the themes advanced by the Advisory Committee. Proportionality has been in the rules since 1983, both in what has become Rule 26(b)(2)(C)(iii) and Rule 26(g). The factors are familiar and well understood when someone thinks to invoke them. But proportionality is too often overlooked, or overcome by mistaken expansion of the "reasonably calculated" provision. Making proportionality an express part of the scope of discovery, measured by the factors that have been in force for thirty years, will make good on the promise made in 1983 but not yet fulfilled. Some urge that the proposal should go further, limiting the scope of discovery to matter that is both relevant and "material" to the parties' claims or defenses. Many comments also give specific examples of producing huge volumes of information, as compared to relatively minuscule fractions used as exhibits at trial. The high costs of responding to discovery requests also are detailed, particularly by corporate counsel.

The argument of opponents that bringing proportionality into the scope of discovery will impose a new burden of justification on the party requesting discovery is mistaken. (1) Just as now, argument to the court will not be a question of burdens. Each party will be called on to advance the information best available to it — the requesting party to explain relevance and importance, the responding party to explain costs and burdens. (2) Present Rule 26(g) requires the requesting party to consider all of these matters and to certify to them in making the request.

It is, moreover, important to do something to rein in the costs of discovery. Cost can thwart access to justice by dissuading plaintiffs from filing actions, or from persisting when the cost of discovery becomes apparent. Cost also can force compromise and settlement. The costs of litigation in the United States, moreover, are far higher than in other countries, placing United States firms at an increasing disadvantage in global competition.

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

488, Robert Buchbinder

496, James Edwards: (Ambiguous, but seems pro.)

497, Kenneth A. Lazarus for American Medical Assn.

498, Jose I. Rojas

576, Glenn Hamer for Arizona Chamber of Commerce and Industry

January Hearing, Robert Hunter: p. 200 Over the last five years, the amount Altec has paid for settlements is 61% of what it has spent on discovery. In part that is due to succeeding at trial.

January Hearing, Steven J. Twist: p. 243 "The triumph of cost over merit is a direct result of the current rules." Eliminating subject-matter discovery, discarding "reasonably calculated," and moving proportionality up to (b)(1) will cause parties and judges to pay much needed attention to the standard. There will be no change in "burdens" when a dispute is taken to the court.

January Hearing, L. Jill McIntyre: p 259 Proportionality goes hand-in-hand with the Rule 37(e) proposal, to guide preservation by what is proportional.

January Hearing, Patrick J. Paul: p. 265.

January Hearing, John J. Rosenthal: p 305 The package is modest. It will reduce costs, and will not inhibit anyone's ability to put on claim or defense.

January Hearing, Andrew B. Cooke: p 323 "Too often discovery is used * * * to gain tactical or settlement leverage for discovery on discovery or for setting up requests for sanctions."

Rule 26(b)(1): Con

The arguments in opposition focus most intensely on "proportionality." (1) The multiple factors are subjective. (2) Parties asked to make discovery (commonly identified as defendants) will seize the subjective character of the factors to refuse discovery of anything. (3) It is impossible to administer the factors because the importance of discovery, and the benefits to compare to the burdens, cannot be known until the discovery has shown what there is to discover. (4) Emphasis on the amount in controversy invites responding parties and courts to throttle discovery in cases that involve small dollar amounts but matters of great public interest. Individual employee claims are a common example. (5) Moving the factors up from (b)(2)(C)(iii), where they function as a limit, to the scope of discovery in (b)(1), will change the burdens on discovery motions. Now the party resisting discovery has to show the request is outside the limits. Under the proposal, the requesting party will have to show that the request is within the scope of discovery as defined by proportionality factors. Many comments are framed in terms that ignore the obligations imposed by present Rule 26(g).

It also is said that courts accurately understand and enforce proportionality under the present rules.

Omitting the examples of discoverable material — documents, witnesses, and the like — raises concerns that courts will conclude that such things are not relevant to the claims or defenses in the action, and are even more likely to deny discovery needed to understand an adversary's electronic information systems and to identify the custodians whose electronically stored information should be preserved and produced.

Opposition to deleting the phrase that allows discovery of inadmissible matter "reasonably calculated" to lead to the discovery of admissible evidence tends to assert that this sentence has become the operating definition of the scope of discovery.

Opposition to deleting the provision that extends discovery beyond the parties' claims or defenses to include the subject matter of the action on showing good cause urges that this discovery may be necessary to uncover new claims or defenses, or to reach information that is relevant to the original claims or defenses.

As with the proposed numerical limits on depositions, interrogatories, and requests to admit, a great many comments predict that the proposed rules will add to cost and delay by generating many more discovery disputes, disputes that often will be taken to the court.

All of the proposals that seem to curtail present discovery practices also are met with the observation that courts have ample power under the current rules to ensure that discovery is confined to limits appropriate to the needs of the case. The problems with discovery are generated by defendants who obstruct and delay by motions, provide requested information only late in the game, or simply fail to provide relevant and responsive information.

On a broader level, the discovery package as a whole is challenged as a distortion of the transsubstantive structure of the Civil Rules. All of the empirical evidence shows that discovery works well in a high proportion of all cases. Serious problems arise only in a small fraction, cases that typically are complex and involve both high stakes and contentious adversary behavior. Attempting to address these cases in rule provisions that apply to all cases will degrade access through discovery to information necessary to prove the claims of many plaintiffs, particularly in such areas as employment claims, civil rights, and consumer protection.

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

495, Jillian Estes

502, Peter Everett

503, Patrick Malone 539, Craig Currie: "Echo[es]" Malone

506, Richard Davis

505, Jason Itkin

509, Allegra C. Carpenter

511, Les Alderman

515, Steve Conley

518, Robert Stoney

521, Lincoln Combs

526, Jonas Jacobson

529, Robert Palmer

530, Travis Larsen

532, Ann Pinheiro

537, Victor Bergman

538, A. Laurie Koller

541, Jessica Sura

542, Justin Kahn

545, David Rash

547, Chris Nidel

548, Kevin Hannon

549, George Wise

551, Gregory Smith

552, Daniel Ryan (draws from 553)

553, William Smith

554, Hubert Hamilton

555, Patrick Mahoney: Including a lament about removing "reasonably calculated"

556, Jerry Spitz

557, John Lowe

559, Patrick Cruise

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

570, Nicole Kruegel

571, Fletcher Handley

574, Barry Julian

575, Eugene Brooks

577, Clark Newhall

578, Christian Bataille

581, James Robson

582, John M. Feder for Consumer Attorneys of California

583, James Howard

584, Christopher Bouslog

585, Dan Mordarski

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

600, Corrina Hunt

January Hearing, Janell M. Adams: p. 187.

January Hearing, Paul V. Avelar: p 250 The proposals will shift the burden of justification to the party requesting discovery.

January Hearing, Jennie Lee Anderson: p 271.

January Hearing, Jonathan Scruggs: p 328 Worries about "the amount in controversy" from the perspective of litigating First Amendment religion cases that involve nominal damages.

Rule 30 (and 31): Numerical and Duration Limits: Con

The most common theme in opposing all of the numerical limits proposals is that the result will be increased disagreement, more motions, and more cost and delay.

A second common theme is that the rules are functioning well as they are. There is no evidence to support the belief that a presumptive limit to 10 depositions per side is too high, that 25 interrogatories are too many, that there is a need to limit requests to admit. This position is supported by pointing to many different types of litigation that commonly require more than 5 depositions or 15 interrogatories. Requests to admit simply have not generated problems that require a numerical limit. The need for depositions ranges from individual employment cases to complex and multiparty litigation. Interrogatories are described as inexpensive and efficient means of shaping other discovery, particularly document requests and depositions. Requests to admit are described in similar terms — they may help shape other discovery (most likely requests made early in the process?), and to eliminate issues for summary judgment or trial.

A third theme is commonly put in rather guarded terms. The belief that lawyers will cooperate to expand presumptive limits when appropriate is addressed by recognizing that this cooperation happens frequently now. But in a worrisome number of cases it does not. Lowering the limits will encourage obstruction, often lawyer-driven but at times client-driven. (Cases involving government parties are singled out as leading politically motivated clients to insist on obstructionist tactics.) Bargaining will start at a lower floor. And when the outcome of bargaining is an appropriate level of discovery, the cost often is paid by trading away something else. Trust in the courts to get it right when bargaining among the lawyers fails also is doubted, albeit in respectful tones. The theme is that some judges do not want to be bothered with the burdens of effective discovery management. These judges will present a particular problem with reduced limits because they will take a presumptive limit as a judgment that ordinarily discovery beyond the limit is unwarranted.

487, Peter J. Mancuso for Nassau County Bar Assn.: 10 is appropriate.

492, David Wiley: Plaintiff employment claims.

494, Charles R. Ragan

497, Kenneth A. Lazarus for American Medical Assn.: (All proposed numerical limits.)

500, Arnold White: Employers fight unceasingly to withhold information needed by employees. The proposed numerical limits will destroy "the very concepts upon which the rules were founded."

502, Peter Everett

503, Patrick Malone 590, E. Craig Daue, agrees

505, Jason Itkin (All numerical limits)

506, Richard Davis (All numerical limits)

507, George Garrow (All numerical limits)

508, Sanjay S. Schmidt (All numerical limits)

509, Allegra C. Carpenter (All numerical limits)

511, Les Alderman

512, Joseph R. Neal, Jr.: Explicit focus on numerical limits, but may be more general: the proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.

518, Robert Stoney (All numerical limits)

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund

524, Joel S. Neckers (All numerical limits)

528, James Ragan (All numerical limits)

529, Robert Palmer (All numerical limits)

533, Joanne Doroshow (All numerical limits)

537, Victor Bergman (All numerical limits)

538, A. Laurie Koller: (All numerical limits) "I feel the same way about the proposed rule changes to 33 and 36 that medieval criminals felt about thumbscrews."

541, Jessica Sura (All numerical limits)

542, Justin Kahn (All numerical limits)

543, Robert Hall (All numerical limits, "adding a layer of 'proportionality' on top.")

545, David Rash (All numerical limits)

547, Chris Nidel (All numerical limits)

548, Kevin Hannon (All numerical limits)

549, George Wise (All numerical limits)

551, Gregory Smith (Depositions and interrogatories)

552, Daniel Ryan (All numerical limits; draws from 553)

553, William Smith

554, Hubert Hamilton (All numerical limits)

557, John Lowe (All numerical limits)

559, Patrick Cruise: Focus on depositions, but has no objection to shortening the length.

560, Jason Monteleone (All numerical limits)

562, Teresa McClain (All numerical limits)

563, James E. Girards (All numerical limits) 591, David Rudwall, agrees

568, Brent Hankins

569, Karen Allen (Depositions; interrogatories reduce the need for depositions — 15 is too few)

570, Nicole Kruegel (All numerical limits)

574, Barry Julian (All numerical limits)

577, Clark Newhall (All numerical limits)

578, Christian Bataille (Depositions and interrogatories)

582, John M. Feder for Consumer Attorneys of California (All numerical limits)

583, James Howard (All numerical limits)

584, Christopher Bouslog (All numerical limits)

585, Dan Mordarski (Depositions and interrogatories; 6-hour depositions OK, although the reduction is not necessary)

586, Tom Carse (All numerical limits)

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ (All numerical limits)

592, Geoffrey Waggoner (All numerical limits)

595, John McGraw (All numerical limits)

596 Kenneth Miller (All numerical limits)

597, Michael Blanchard

598, Mark A. Gould (All numerical limits)

January Hearing, Paul V. Avelar: p 250

January Hearing, James C. Sturdevant: p 296 Many years of experience with individual and class actions protecting plaintiffs' consumer, employment, civil, and other rights. Examples of cases that legitimately required discovery well beyond the proposed limits. Lower limits will send a message to judges to deny needed discovery, and will increase costs and delay in litigating

discovery disputes.

Rule 33 Numerical Limits: Pro

(None of the comments from 487 to 600 require a note.)

Rule 33 Numerical Limits: Con

One common theme is that the present presumptive limit of 25 interrogatories is working well. There is no evidence of any need to reduce it.

A second theme is that interrogatories are an efficient and inexpensive means to get discovery of some facts and to help frame the use of other, more expensive discovery devices. Identification of documents and witnesses are common examples. Multiple claims require multiple interrogatories.

Reducing the number will mean that interrogatories are drafted in broader terms — 25 better-focused interrogatories will be more productive and less burdensome than 15 broadly focused interrogatories.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. mancuso for Nassau County Bar Assn.

504, Kenneth Behrman

515, Steve Conley

556, Jerry Spitz

564, Joel DuBoff

600, Corrina Hunt (Also against Rule 36 limits)

Rule 36: Pro

(None of the comments from 487 to 600 require a note.)

Rule 36: Con

The arguments against imposing a presumptive numerical limit of 25 requests to admit parallel the arguments against reducing the presumptive limit in Rule 33.

Requests to admit are said to be useful in narrowing the scope of discovery by showing that some potential issues framed by the pleadings are not in fact disputed. Later in the progress of discovery they help to narrow the issues further. Many comments say that Rule 36 is an inexpensive and useful tool that has not been used to impose undue burdens. And some cases genuinely deserve more than 25.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

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

494, Charles R. Ragan: Rule 36 can be very valuable. If any presumptive limit is imposed, it should be 50, not including requests addressed to the genuineness of documents.

2013 CIVIL RULES PROPOSALS: PREPUBLICATION COMMENTS

Many comments on what became the proposals published for comment in August 2013 were submitted before the Advisory Committee met in April. The comments were based on the Committee's report to the Standing Committee for its January meeting. They were assigned civil comment numbers 3 through 255, although at least a couple of them were assigned two numbers.

Substantial portions of many of these prepublication comments addressed two tentative amendments that were withdrawn before publication. The early sketches included a presumptive limit of 25 requests to produce under Rule 34 and reset the presumptive length of a deposition to 4 hours.

Comments addressed to the proposals that survived to publication focused primarily on the discovery proposals. Proportionality received a fair amount of attention, but the most common focus was the reduction in the presumptive number of Rule 30 and Rule 31 depositions, the reduction in the presumptive number of interrogatories under Rule 33, and the adoption of a presumptive limit on requests to admit under Rule 36 (not counting requests to admit the authenticity of documents).

The comments overwhelmingly, although not universally, opposed the proposed limits on discovery. Most of them reflect the difficulty plaintiffs encounter in discovering information they need to avoid summary judgment and prove their claims. Lawyers representing plaintiffs in employment actions provided a great many of these comments. Some of the comments, particularly from employment lawyers in California, track other comments quite closely, often verbatim in many parts. One of these, number 91, adds this refreshing observation: "Although the rest of this letter may not be my original words, I agree 100% with everything that follows, as it states my position on these matters perfectly."

The concerns expressed by the employment lawyers are faithfully reflected in many post-publication comments. Virtually all of them address the reduced or new presumptive limits on the number of discovery requests. Many address the reduced scope of discovery. Employee plaintiffs typically have little information, while employers command the other employees and files that have what may be much information. Discovery by the employer is likely to be complete on one deposition of the plaintiff employee. The employee, on the other hand, may need several depositions simply to identify the people, or group of people, who made the challenged decision. Plaintiff's counsel typically takes the case for a contingent fee, advancing the costs of discovery, and has strong incentives to take only the most promising steps for discovery. Both interrogatories and requests to admit are efficient, less expensive means of shaping the action and identifying the persons who need be deposed; even 25 interrogatories may be too few, as illustrated by the form interrogatories approved for use in employment actions brought under California state law. The belief that the limits will be expanded when appropriate by agreement among the adversaries or, when needed, by the court, is unrealistic. Some judges now limit depositions to fewer than the presumptive ten. A worrisome number of judges treat the presumptive numbers as limits that should seldom be exceeded. And as to scope, there is a risk that arguments will be made, and perhaps accepted, that information as to treatment of comparably situated employees will be found not relevant to the discrimination claim. The emphasis on the amount in controversy will encourage defendants to protest that the cost of discovery should not exceed what may be a relatively low level of damages, with the confounding complication that a plaintiff who was very well paid may have much greater access to discovery than a low-paid employee who needs the small recovery more desperately than the well-paid employee needs a large recovery. And it is continually emphasized that employment actions (as well as several other categories of litigation) advance important public policies, yet courts may be insensitive to the "importance of the issues at stake." Finally, it is often noted that as discriminatory practices have come to be increasingly shamed, most employers leave no open traces of discrimination. Only discovery that sorts through many circumstances can generate the information needed to prove discrimination.

Many of these prepublication comments provide cogent explanations of the positions they advance. But almost all of the positions and explanations are stated with equal clarity and force in the comments and testimony submitted during the official comment period. Some of those who provided these prepublication comments also provided comments or testimony after publication. Summarizing all the comments now would add needless repetition to the already lengthy summaries of the post-publication comments and testimony. Only a few novel points need be noted here.

118, Robert H. Wilde: Utah state courts adopted rules amendments in 2011 that "are similar in many ways to the proposals now before the Committee. My experience leads me to the conclusion that the proposed amendments are a solution in search of a problem." The present limits on discovery are reasonable for almost all of my cases representing employees or employers. The proposed limits will seriously disadvantage employee plaintiffs. The restrictions on discovery in Utah "were offset to some degree by broader initial disclosure requirements." Implementing the discovery protocols proposed for employment cases would alleviate some of these concerns. If the federal proposals are adopted, broader disclosure requirements should be adopted, at least in employment actions.

119, Michael S. Wilde: (In the same firm as Robert H. Wilde, no. 118 above:) "Utah has recently experimented with cutting back on the amount of discovery that may be performed in cases and created a tiered system whereby cases with more at stake receive more discovery. In my opinion the implementation of these rules, which are similar to ones being considered in the federal system, has been nothing short of a train wreck * * *." The limitations often impose inadequate discovery, forcing motions, dragging the judges into micromanagement they do not want.

127, Scot G. Dollinger: "In Texas, we can serve discovery with our petitions and I do so in every case. As a result, * * * defendants have answered discovery and made disclosures within 60 to 90 days of filing suit. * * * I almost never have a discovery dispute." 188, Laurie Higginbotham, also suggests adopting the Texas practice.

148, Mark Ledbetter: "[I]t is not only wrong but galling that these back channel corporate believers are making their way again into the procedural rules. Efforts to tilt the table of justice for the tortfeasor abound in the state houses all over America. It is sadder still when the Federal Judiciary begins its own assault on the Plaintiff." "I realize that I cannot remove corporate counsel from this Committee, as Plaintiff's attorneys practice in small firms like mine and do not have the time to serve on these Committees * * *. As if it were not enough to be a member of large firm, representing large corporations, it is unfair and unfaithful to the ideals of the American legal system to shrink and shrivel the rights of the Plaintiff in such a bald effrontery."

158, Richard J. Vaznaugh: Attaches form interrogatories approved for use in employment cases in California Superior Court. After instructions and definitions there are many pages of interrogatories, most with several subparts. 201, Wendy Mussell for California Employment Lawyers Assn.: Also attaches and commends California form interrogatories, both for employment cases and for general cases.

163, Richard R. Renner: Suggests "that the rules require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms." Parties still print out emails and produce the hard copy, or convert documents to PDF forms by scanning hard copy or otherwise making the PDF file non-searchable.

173, Salvatore Graziano v. National Assn. of Shareholder & Consumer Attorneys: (It is not clear whether this suggestion is made only if the presumptive limits on discovery requests are adopted as proposed, or is made for the present rules as well:) Rule 26(b)(2)(A) should encourage expanding

the limits: "By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30, and leave to alter such limits shall be freely granted in complex litigation, consistent with the principles set forth in Rule 26(b)(2)(C)."

189, Mark P. Herron: Suggests discovery could be improved by expanding initial disclosures to require disclosure of witnesses who have discoverable knowledge and documents relevant to all claims and defenses, without regard to whether the disclosing party plans to use them. And initial disclosure should be further expanded to require the exchange of basic information regarding how ESI is maintained; N.D. Ohio has a local rule, Appendix K, requiring this.

[No number -- between 194 and 195], 252 Robert B. Fitzpatrick: Contrasts experience litigating in the 1960s, 70s, and 80s, when lawyers cooperated, with the "warrior mentality" too often encountered today. The fault is not in our rules, but in the warrior approach and the ways it encourages lawyers to use the rules. The focus of reform should be on providing the structure and incentives to ensure the tools are used responsibly. "[T]he judiciary needs to actively and forcefully involve itself at an early stage in requiring counsel to cooperate on a reasonable, enforceable, discovery plan." The Initial Discovery Protocols for Employment Cases are attached; their wider use should be encouraged.

199, John Vail, Center for Constitutional Litigation: (1) Colorado Pilot Project Rule 1.3 requires that all process and costs be proportionate to the needs of the case. AAJ members practicing under the program report that the result is boilerplate objections with the burden on the party requesting discovery to demonstrate proportionality and admissibility. At an initial conference, moreover, the judge may be asked to assess proportionality "based simply on the unsubstantiated assertions of each party about the value of the case." One example: plaintiff asserted a \$5,000,000 value in a matter of public importance; the defendant asserted it was a purely private dispute with a maximum value of \$300,000.

(2) Relying on rules framed to encourage judges to manage up, rather than manage down, relies too heavily on flexibility informed by judicial discretion. The First Amendment right to petition the government protects the right to bring a lawsuit. See *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2494 (2011). "In a contest between managerial flexibility and constitutional values, managerial flexibility should lose."

207, Alireza Alivandivafa: In cases not covered by approved form interrogatories, California limits "specially prepared interrogatories" to 35. It also limits requests for admissions to 35 (not counting genuineness of documents). This is noted, not to argue that the limits are set at the right number, but to observe that both for interrogatories and requests to admit the procedure for increasing the number is simply to serve them with a "Declaration of Necessity." The simple procedure works.

221, Richard T. Seymour: The experiment with presumptive limits has failed. Managing up is a myth. "The false assumption of attorney incompetence and the existing restrictions on discovery * * * divert the time and attention of judges into process, and away from the merits." Thus Rule 36 requests to admit used to be useful because each request was accompanied by an interrogatory that asked the reasons for any failure to admit and by a request to produce any documents identified as a reason. The limit to 25 interrogatories ended that practice. It would make more sense to start high, perhaps with 250 interrogatories and 50 depositions per case, and ask the parties to justify managing down.

225, L. Steven Platt: (1) "[T]he agencies charged with the responsibility for investigating charges of discrimination, the local branches of the EEOC, do a dreadful job. They find that there is probable cause to believe that discrimination has occurred in 2.5% of the cases they see." (2) For the length of depositions, "[w]e have lived with a two-hour rule in Illinois and it has worked, much to

everyone's surprise." Limiting depositions to three hours is no problem, so long as more time is allowed on demonstrating need to a judge.

226, Peter J. Neufeld, Barry C. Scheck, Nick Brustin, David Rudovsky, John L. Stainthorp, Jan Susler, Russell Ainsworth: In representing plaintiffs whose convictions have been vacated on proving innocence by DNA evidence, we find civil defendants frequently balk at admitting the DNA proof. "We typically serve similar requests [to admit] on the same issues, breaking down the DNA testing step by step, and often receive admissions to some, but not all, of these requests." Limiting the number will make it less likely that undisputed matters are admitted.

228, Tami Smith for National Court Reporters Assn.: Opposes reductions in the numbers and length of depositions.

I.B. RULE 37(e): FAILURE TO PRESERVE ESI

Introduction

During its meeting in April, 2014, the Civil Rules Advisory Committee voted unanimously to recommend adoption of a new Rule 37(e) to replace current Rule 37(e). The new rule differs from the proposed amendment published for public comment in August, 2013, but the Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the Advisory Committee on this subject.

The public comments on the package of Civil Rules amendments were strikingly, perhaps uniquely, comprehensive and vigorous. A total of 2,345 written comments were received and posted on Regulations.gov. Many of the comments submitted later in the process referred to or built upon comments submitted earlier. Three public hearings were held, with a total of more than 120 witnesses speaking. The rule revisions made after publication respond to the public comments.

At the end of this Report is the proposed new Rule 37(e) and the recommended Committee Note. The amendment proposal is presented as an amendment to the current rule, which seemed simpler than presenting it as a revision of the published proposal. For purposes of background, an Appendix to this memorandum presents the published amendment proposal. Also included in the agenda materials should be a summary of written comments and of the testimony on Rule 37(e) at the public hearings.

This Report introduces the issues the Advisory Committee (and its Discovery Subcommittee) have addressed during this redrafting effort, and which inform the rule proposal below.

Background

Present Rule 37(e) was adopted in 2006. The Advisory Committee recognized then that the continual expansion of electronically stored information (“ESI”) might provide reasons to consider a more detailed response to problems arising from the loss of ESI. A panel at the Duke Conference in 2010 presented a unanimous recommendation that the time had come for a more detailed rule.

Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. The courts agree unanimously that a duty to preserve ESI arises when a party reasonably anticipates litigation. But they differ significantly in the approaches taken after finding a loss of ESI that should have been preserved. A new rule that illuminates the purposes and methods of responding to the loss can do much to promote uniformity and to encourage desirable judicial responses.

The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation. An accumulation of

information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.

During the two years following the Duke Conference, the Subcommittee considered several basic approaches, including successive drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by a Duke Conference panel, which called for specific rule provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. In the end, however, it became apparent that the range of cases in federal court is too broad and too diverse to permit such specific guidelines. The Subcommittee chose instead to pursue a different approach that addresses court actions in response to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

Under this approach, as with present Rule 37(e), the proposed Rule 37(e) does not itself create a duty to preserve. The new rule takes the duty as it is established by case law. Cases uniformly hold that a duty to preserve information arises when litigation is reasonably anticipated. Although some comments urged that the rule should eliminate any duty to preserve before an action is actually filed, the Advisory Committee continues to believe that a rule so limited would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in the comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

The Published Rule 37(e) Proposal

The published rule proposal is in the Appendix. It included a number of features that were modified after the public comment period. It relied on a distinction between curative measures and sanctions, invoking Rule 37(b)(2)(A) as a source for the latter. The published proposal provided that a court could take steps to cure the loss of information such as permitting additional discovery, ordering curative measures, or ordering the party that lost the information to pay the reasonable expenses, including attorney's fees, caused by the loss. It provided that a court generally could not impose sanctions unless it found that the loss of information caused substantial prejudice and was willful or in bad faith. But it also provided that sanctions would be permissible without that finding of culpability in the rare case in which the loss "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed rule also included a list of factors to be applied in determining whether a party failed to retain information it should have retained in anticipation of litigation, and whether its failure was willful or in bad faith.

The invitation for comment included five questions: (1) whether the rule should be limited to ESI; (2) whether the rule should allow sanctions when the loss "irreparably deprived a party of

any meaningful opportunity to present or defend against the claims in the litigation”; (3) whether present Rule 37(e) should be retained; (4) whether the phrase “substantial prejudice” as used in the rule proposal should be defined; and (5) whether the term “willful” should be defined.

As a review of the summary of comments shows, there was a great deal of comment about the language in the published proposal and these five questions. In particular, both the “willful” and “bad faith” standards for sanctions were questioned by many who commented. Many also argued that the “irreparably deprived” provision might “swallow the rule” by permitting judges to circumvent the culpability requirements for sanctions. Other comments stressed that the “substantial prejudice” standard for cases in which actions were proven to be “willful or in bad faith” was too demanding, and that those culpability requirements would be too difficult to satisfy in many cases.

Modifications Based on Public Comments

The Advisory Committee’s Discovery Subcommittee began deliberating on appropriate reactions to the public comments with a half day meeting in Dallas immediately after the third public hearing. The Subcommittee held six conference calls after that meeting, carefully examining the issues raised by the public comments. Many of the public comments reinforced conclusions previously reached by the Subcommittee, while others provided valuable new insights. Some of the general conclusions will be addressed here, with more specific explanations provided in the discussion of specific rule recommendations.

The Advisory Committee remains firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed. The explosion of ESI in recent years has affected all aspects of civil litigation; the preservation of ESI is a major issue confronting parties and courts; and the loss of ESI has produced a bewildering array of court cases.

Loss of electronically stored information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.

At the same time, the public comments made the Advisory Committee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI. Among other steps after its Dallas meeting, the Discovery Subcommittee took an intensive look at cases addressing the loss of information relevant to litigation. The public comments and this analysis highlighted the

wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.

The public comments also made clear that the explosion of ESI will continue and even accelerate. One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years — more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere in the “cloud,” complicating the preservation task. In other words, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants. The need for broad trial court discretion in dealing with these challenges will likewise increase. The Advisory Committee accordingly concluded that the published proposal’s approach of limiting virtually all forms of “sanctions” to a showing of both substantial prejudice and willfulness or bad faith was too restrictive.

The value of preserving judicial flexibility was reinforced by a related conclusion. One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized by many; the hope was that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Advisory Committee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain — the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations rather than the prospect of litigation, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.

The Advisory Committee also concluded that any reference in the new rule to “sanctions,” or to Rule 37(b)(2)(A) as a source of sanctions, should be deleted. The Advisory Committee concluded that allowing curative measures was clearly appropriate for the loss of ESI, and found that drafting a rule became quite complicated if it sought to distinguish between curative measures and sanctions. Another concern was that the sanctions listed in Rule 37(b)(2)(A) are justifiably called sanctions because they result from disobeying a court order, whereas the same measures in other settings might rightly be viewed as curative. Some of the (b)(2)(A) sanctions, further, seem inapposite to failure to preserve information in the absence of a court order — for example, (iv) “staying further proceedings until the order is obeyed” and (vii) contempt.

Further questions were raised during the public comment period about the references in the published draft to “substantial prejudice” and “willful or in bad faith.” Many comments urged that

further definitions should be adopted. Particularly forceful concerns were raised about the use of the word “willful.” Depending on the context, “willful” has been defined by courts in many different ways. Under some definitions, willfulness could be found from an act intentionally done even though there was no thought about the effect on information that should be preserved for anticipated or pending litigation. A party, for example, might “willfully” trade in a smart phone without any thought about preserving the information stored in it. Nor did “bad faith” entirely escape criticism.

The published provision that allowed sanctions when the loss of information “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation” drew particular criticism. Many expressed concern that it risked undoing the attempt to limit “sanctions” to circumstances of substantial prejudice and either willfulness or bad faith. “[I]rreparably deprived” and “any meaningful opportunity to present or defend against the claims in the litigation” were said to lie in the eye of the beholder. A judge who is not prepared to find willfulness or bad faith might seize on these phrases to justify sanctions in circumstances not covered by what was intended to be a very narrow exception to the requirements of substantial prejudice and willfulness or bad faith.

Although the Rule 37(e) proposal authorizes a wider range of measures to cure demonstrated prejudice, it carefully cabins use of several very severe measures — presuming that the lost information was unfavorable to the party that lost it, giving the jury an instruction that it may or must presume that the information was unfavorable, dismissing the action, or entering a default judgment. These measures may be used only on a finding that the party lost the information with the intent to deprive another party of its use in the litigation. As specified in the revised Committee Note, the rule rejects the view of such cases as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that would permit adverse-inference instructions on the basis of negligence or gross negligence.

Finally, after much discussion, the Advisory Committee concluded that the list of “factors” specified in Rule 37(b)(2) of the published proposal was unnecessary and might cause confusion. Accordingly those rule provisions were removed, but Committee Note language retains a discussion of how several of those considerations might affect the application of the revised rule.

The Rule in Detail

Limiting the Rule to ESI

The Advisory Committee recommends that the rule be limited to ESI. That is the subject that launched this venture in the first place, and it clearly is the subject which most requires uniform guidance. Review of numerous cases led to the conclusion that the law of spoliation for non-ESI is well developed and long-standing, and should not be supplanted without good reason. There was little complaint about this body of law as applied to information other than ESI, and the Advisory

Committee concluded that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, such as hard-copy documents, at least in terms of the approaches set out in Rule 37(e). But repeated efforts have shown that it is very difficult to craft a rule that deals with failure to preserve tangible things. The classic case is *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), which upheld dismissal of the action after the plaintiff failed to preserve the allegedly defective airbag. The published proposal — which was not limited to ESI — sought to accommodate such cases by allowing “sanctions” if a party’s actions in failing to preserve information “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” As already noted, this provision drew many comments suggesting that it opened the door to avoiding the limits otherwise imposed on “sanctions.” Limiting the new rule to ESI avoids this complication.

In addition, there are some pertinent practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e), like the present Rule 37(e), should be limited to ESI.

The Advisory Committee recognizes that the dividing line between ESI and other evidence may in some instances be unclear. But it concludes that courts are well equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by this issue.

Reasonable steps to preserve

The revised rule applies if ESI “that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it.” The rule calls for reasonable steps, not perfection, in preserving ESI, and is thus consistent with other rules on related subjects. For example, Fed. R. Evid. 502(b)(2), dealing with inadvertent disclosure of material that is privileged or work-product material, focuses on whether “the holder of the privilege or protection took reasonable steps to prevent disclosure,” and Rule 502(b)(3) asks whether the privilege holder “promptly took reasonable steps to rectify the error.”

Revised Rule 37(e) adopts the same approach to preservation for use in litigation. As

explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that the party's sophistication with regard to litigation may bear on whether it should have realized what should be preserved.

Restoration or replacement of Lost ESI

If reasonable steps were not taken, and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits the court's powers under Rules 16 and 26 to order discovery to achieve this purpose. In particular, discovery regarding sources of ESI that might otherwise be regarded as inaccessible or allocation of expenses might be important. At the same time, however, the quest for lost information should take account of whether the lost information likely is only marginally relevant or duplicative of other information that remains available.

(e)(1)

Proposed Rule 37(e)(1) provides that the court may:

upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. Unlike the published preliminary draft, it adds a limit urged by many of the comments – that the measures be no greater than necessary to cure the prejudice. As the Note also makes clear, a court is not required to exhaust all possibilities of curing prejudice.

Proposed (e)(1) says that the court must find prejudice to order corrective measures, but it does not say which party bears the burden of proving prejudice. Many comments raised concerns about assigning such burdens, noting that it is often difficult for a party to prove it was prejudiced by the loss of information it has never seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

This proposed rule departs from the published proposal's approach of limiting all "sanctions" under Rule 37(b)(2)(A) to a showing of substantial prejudice and bad faith. It preserves the trial court's ability to use some measures included in Rule 37(b)(2)(A) to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established. *See* Rule 37(b)(2)(A)(i); (ii). The proposed rule does not attempt

to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three more general ways — measures under (e)(1) require a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures limited by (e)(2) unless it makes a finding that the party acted with the intent to deprive another party of the information's use in the litigation. Finally, because (e)(1) measures are not "sanctions," there should be no concerns about whether they raise professional responsibility issues.

(e)(2)

Proposed (e)(2) provides that the court may:

- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As noted above, some circuits permit such instructions upon a showing of negligence or gross negligence, while others require a showing of bad faith. Subdivision (e)(2) resolves the circuit split by permitting adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Advisory Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Advisory Committee's Discovery Subcommittee carefully analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion — when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Why else would the party have destroyed it? Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")(citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence or gross negligence adopt a different rationale — that the adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. *See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some logical appeal, the Advisory Committee has several concerns with this approach when applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the “cloud.” Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Advisory Committee to conclude that the circuit split, at least with respect to ESI, should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends the logic of the mandatory adverse-inference instruction to the even more severe measures of dismissal or default. The Advisory Committee thought it anomalous to allow dismissal or default in circumstances that do not justify the instruction.

A difficult drafting issue presented by (e)(2) arises from the multiplicity of instructions that may be available to guide a jury’s consideration of a failure to preserve ESI. Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at the time of trial. These issues are examined in the Committee Note.

Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. This is because the adverse inference permitted under this section can itself satisfy the prejudice requirement: if a court or jury infers the lost information was

unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss. An express prejudice requirement is also omitted because there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).

Factors in published Rule 37(e)(2)

The published proposal included a list of factors that it said the court should employ in determining whether a party should have retained information and whether it lost the information willfully or in bad faith. Proposed Rule 37(e)(2) was as follows:

- (2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:
- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
 - (B) the reasonableness of the party's efforts to preserve the information;
 - (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
 - (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
 - (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

This list of factors received much attention during the public comment period. Some saw the factors as providing useful guidance to parties trying to determine what to preserve, and to courts presented with motions under the rule. But many others raised substantial concerns about whether the list was incomplete and possibly misleading. Some factors received particular criticism. Factor (C), for example, raised concerns about whether some courts might read it as requiring compliance with even extremely unreasonable demands to preserve. Factor (E) was criticized on the ground that it offered no help to a party faced with a preservation decision before suit was filed, and also on the ground that it might promote motion practice once a case has commenced.

The arguments against lists of factors are familiar. The list may be mistaken as exclusive,

or the list may become a routine set of items to be checked off, approached without sufficient care. Or the enumerated factors themselves may be less important than other factors omitted from the examples, either when the rule is adopted or as the world changes — and changes in the world of ESI are notoriously rapid. Or a wisely chosen list of factors may be expressed poorly. Or confusion may arise from the proper use of factors that bear differently on different determinations. The reasonableness of efforts to preserve information, for example, may have scant bearing in determining whether the loss caused prejudice — at most, there is a common element in the apparent importance of the information. For reasons like these it is common experience to begin with rule drafts that list factors, then to demote the factors to discussion in a Committee Note, and perhaps to take the final step of expunging all references to suggested factors for decision.

The eventual decision of the Advisory Committee was to remove the factors from the rule. Substantial portions of the Committee Note discussion of the factors have been retained, particularly as they bear on the question whether information should have been retained, and whether reasonable steps to preserve were taken.

Acts of God

The published version attempted to address a concern raised by the Standing Committee — whether the rule would permit sanctions to be imposed for events outside the party’s control. The example given was the destruction of a hospital’s computer records by flooding from SuperStorm Sandy. The published draft met this problem by providing for “sanctions” only if “the party’s actions” caused the loss.

The same protection exists in the current recommendation. The revised rule authorizes the specified measures only when a party fails to “take reasonable steps to preserve” information that should be preserved in anticipation of litigation. As the Committee Note observes generally, such reasonable steps need not lead to perfect preservation. More specifically, the Note also acknowledges that a party cannot be held responsible for loss of information that occurs despite such steps. If the information is not in the party’s control, or other events beyond its control — such as a flood, failure of a “cloud” service, or a malign software attack — cause the loss of information, the rule does not authorize measures under either Rule 37(e)(1) or (e)(2).

Replacing Present Rule 37(e)

The published preliminary draft called for replacing present Rule 37(e) with the new rule. The invitation for public comment included the question whether the present rule should be preserved. There were some comments that favored retaining some of the present rule, but the great majority saw no need for retaining the current rule once the new rule is adopted. The Advisory Committee recommends replacing the current rule with the new rule.

The Advisory Committee concluded that retaining the present rule would cause confusion

in light of the new rule's text. For example, the present rule refers to "sanctions," while the new rule does not. The present rule talks in terms of "good faith," while the existing rule focuses on reasonable steps, prejudice, and the specific intent required in (e)(2). The present rule was designed to leave inherent power available for the loss of ESI, while the new rule displaces inherent power. The present rule includes a potentially open-ended exclusion of cases involving "exceptional circumstances," while the new rule does not. In light of these potential sources of confusion, and because the Advisory Committee believes that the proposed rule provides even more protection for parties who act reasonably than does the present rule, the Advisory Committee concluded that present Rule 37(e) should be replaced. Borrowing the language of the present rule, the Committee Note does state that the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information.

Conclusion and Gap Report

The public comment period was very helpful in presenting issues regarding Rule 37(e). The Discovery Subcommittee carefully considered the public comments during a series of meetings and conference calls that produced the proposed rule. The Advisory Committee is confident that the proposed rule strikes the right balance on this important subject. Public comments also confirmed that rulemaking in this area is genuinely needed. For the guidance of the Standing Committee, the Gap Report regarding changes since publication is presented below.

Gap Report

The revised rule is a modification of the published draft in several ways: (1) It applies only to electronically stored information; (2) It removes the provision in the published draft that authorized "sanctions" against a party that lacked the culpable state of mind called for in the rule if the loss of information caused "irreparable prejudice" to another party's ability to litigate; (3) It does not speak in terms of "sanctions" and no longer invokes the list of sanctions contained in Rule 37(b)(2)(A); (4) It places primary emphasis on measures to restore or replace lost electronically stored information; (5) On finding prejudice to a party due to loss of the information, it authorizes the court to order measures "no greater than necessary" to cure the prejudice; (6) It does not use the culpability standard "willful or bad faith", substituting the standard that the party "acted with the intent to deprive another party of the information's use in the litigation"; (7) Only when that culpability standard is met, it authorizes the court to presume that the lost information was unfavorable to the party that lost it, to instruct the jury it may so infer from the loss of the information, or to dismiss the action or enter a default judgment; (8) It no longer includes in the rule a list of factors for the court's consideration in applying the rule. Recognizing that these changes are substantial, the Civil Rules Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

PROPOSED RULE 37(e)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

(e) **Failure to Preserve Provide Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Committee Note

Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to

31 determine when certain measures should be used. The rule does not affect the validity of an
32 independent tort claim for spoliation if state law applies in a case and authorizes the claim.

33 The new rule applies only to electronically stored information, also the focus of the 2006
34 rule. It applies only when such information is lost. Because electronically stored information often
35 exists in multiple locations, loss from one source may often be harmless when substitute information
36 can be found elsewhere.

37 The new rule applies only if the lost information should have been preserved in the
38 anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many
39 court decisions hold that potential litigants have a duty to preserve relevant information when
40 litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not
41 attempt to create a new duty to preserve. The rule does not apply when information is lost before
42 a duty to preserve arises.

43 In applying the rule, a court may need to decide whether and when a duty to preserve arose.
44 Courts should consider the extent to which a party was on notice that litigation was likely and that
45 the information would be relevant. A variety of events may alert a party to the prospect of litigation.
46 Often these events provide only limited information about that prospective litigation, however, so
47 that the scope of information that should be preserved may remain uncertain. It is important not to
48 be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

49 Although the rule focuses on the common-law obligation to preserve in the anticipation or
50 conduct of litigation, courts may sometimes consider whether there was an independent requirement
51 that the lost information be preserved. Such requirements arise from many sources — statutes,
52 administrative regulations, an order in another case, or a party's own information-retention
53 protocols. The court should be sensitive, however, to the fact that such independent preservation
54 requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The
55 fact that a party had an independent obligation to preserve information does not necessarily mean
56 that it had such a duty with respect to the litigation, and the fact that the party failed to observe some
57 other preservation obligation does not itself prove that its efforts to preserve were not reasonable
58 with respect to a particular case.

59 The duty to preserve may in some instances be triggered or clarified by a court order in the
60 case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and
61 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once
62 litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly
63 seeking judicial guidance about the extent of reasonable preservation may be important.

64 The rule applies only if the information was lost because the party failed to take reasonable
65 steps to preserve the information. Due to the ever-increasing volume of electronically stored
66 information and the multitude of devices that generate such information, perfection in preserving

67 all relevant electronically stored information is often impossible. As under the current rule, the
68 routine, good-faith operation of an electronic information system would be a relevant factor for the
69 court to consider in evaluating whether a party failed to take reasonable steps to preserve lost
70 information, although the prospect of litigation may call for reasonable steps to preserve information
71 by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve
72 suffice; it does not call for perfection. The court should be sensitive to the party's sophistication
73 with regard to litigation in evaluating preservation efforts; some litigants, particularly individual
74 litigants, may be less familiar with preservation obligations than others who have considerable
75 experience in litigation.

76 Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss
77 of information occurs despite the party's reasonable steps to preserve. For example, the information
78 may not be in the party's control. Or information the party has preserved may be destroyed by
79 events outside the party's control — the computer room may be flooded, a “cloud” service may fail,
80 a malign software attack may disrupt a storage system, and so on. Courts may, however, need to
81 assess the extent to which a party knew of and protected against such risks.

82 Another factor in evaluating the reasonableness of preservation efforts is proportionality.
83 The court should be sensitive to party resources; aggressive preservation efforts can be extremely
84 costly, and parties (including governmental parties) may have limited staff and resources to devote
85 to those efforts. A party may act reasonably by choosing a less costly form of information
86 preservation, if it is substantially as effective as more costly forms. It is important that counsel
87 become familiar with their clients' information systems and digital data — including social media
88 — to address these issues. A party urging that preservation requests are disproportionate may need
89 to provide specifics about these matters in order to enable meaningful discussion of the appropriate
90 preservation regime.

91 When a party fails to take reasonable steps to preserve electronically stored information that
92 should have been preserved in the anticipation or conduct of litigation, and the information is lost
93 as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be
94 restored or replaced through additional discovery. Nothing in the rule limits the court's powers
95 under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding
96 discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B)
97 on allocation of expenses may be pertinent to solving such problems. If the information is restored
98 or replaced, no further measures should be taken. At the same time, it is important to emphasize that
99 efforts to restore or replace lost information through discovery should be proportional to the
100 apparent importance of the lost information to claims or defenses in the litigation. For example,
101 substantial measures should not be employed to restore or replace information that is marginally
102 relevant or duplicative.

103 **Subdivision (e)(1).** This subdivision applies only if information should have been preserved
104 in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the

105 information, information was lost as a result, and the information could not be restored or replaced
106 by additional discovery. In addition, a court may resort to (e)(1) measures only “upon finding
107 prejudice to another party from loss of the information.” An evaluation of prejudice from the loss
108 of information necessarily includes an evaluation of the information’s importance in the litigation.

109 The rule does not place a burden of proving or disproving prejudice on one party or the other.
110 Determining the content of lost information may be a difficult task in some cases, and placing the
111 burden of proving prejudice on the party that did not lose the information may be unfair. In other
112 situations, however, the content of the lost information may be fairly evident, the information may
113 appear to be unimportant, or the abundance of preserved information may appear sufficient to meet
114 the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be
115 reasonable in such situations. The rule leaves judges with discretion to determine how best to assess
116 prejudice in particular cases.

117 Once a finding of prejudice is made, the court is authorized to employ measures “no greater
118 than necessary to cure the prejudice.” The range of such measures is quite broad if they are
119 necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;
120 the severity of given measures must be calibrated in terms of their effect on the particular case. But
121 authority to order measures no greater than necessary to cure prejudice does not require the court
122 to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court’s
123 discretion.

124 In an appropriate case, it may be that serious measures are necessary to cure prejudice found
125 by the court, such as forbidding the party that failed to preserve information from putting on certain
126 evidence, permitting the parties to present evidence and argument to the jury regarding the loss of
127 information, or giving the jury instructions to assist in its evaluation of such evidence or argument,
128 other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure
129 that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted
130 under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s
131 use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking
132 pleadings related to, or precluding a party from offering any evidence in support of, the central or
133 only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific
134 item of evidence to offset prejudice caused by failure to preserve other evidence that might
135 contradict the excluded item of evidence.

136 **Subdivision (e)(2).** This subdivision authorizes courts to use specified and very severe
137 measures to address or deter failures to preserve electronically stored information, but only on
138 finding that the party that lost the information acted with the intent to deprive another party of the
139 information’s use in the litigation. It is designed to provide a uniform standard in federal court for
140 use of these serious measures when addressing failure to preserve electronically stored information.
141 It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d
142 Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or

143 gross negligence.

144 Adverse-inference instructions were developed on the premise that a party's intentional loss
145 or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the
146 evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent
147 or even grossly negligent behavior does not logically support that inference. Information lost
148 through negligence may have been favorable to either party, including the party that lost it, and
149 inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information
150 never would have. The better rule for the negligent or grossly negligent loss of electronically stored
151 information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit
152 the most severe measures to instances of intentional loss or destruction.

153 Similar reasons apply to limiting the court's authority to presume or infer that the lost
154 information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding
155 at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on
156 the loss of information in these circumstances, permitting them only when a court finds that the
157 information was lost with the intent to prevent its use in litigation.

158 Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or
159 infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction
160 that directs or permits the jury to infer from the loss of information that it was in fact unfavorable
161 to the party that lost it. The subdivision does not apply to jury instructions that do not involve such
162 an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties
163 to present evidence to the jury concerning the loss and likely relevance of information and
164 instructing the jury that it may consider that evidence, along with all the other evidence in the case,
165 in making its decision. These measures, which would not involve instructing a jury it may draw an
166 adverse inference from loss of information, would be available under subdivision (e)(1) if no greater
167 than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of
168 courts to give traditional missing evidence instructions based on a party's failure to present evidence
169 it has in its possession at the time of trial.

170 Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another
171 party of the information's use in the litigation. This finding may be made by the court when ruling
172 on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse
173 inference instruction at trial. If a court were to conclude that the intent finding should be made by
174 a jury, the court's instruction should make clear that the jury may infer from the loss of the
175 information that it was unfavorable to the party that lost it only if the jury first finds that the party
176 acted with the intent to deprive another party of the information's use in the litigation. If the jury
177 does not make this finding, it may not infer from the loss that the information was unfavorable to
178 the party that lost it.

179 Courts should exercise caution in using the measures specified in (e)(2). Finding an intent

180 to deprive another party of the lost information's use in the litigation does not require a court to
181 adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the
182 severe measures authorized by this subdivision should not be used when the information lost was
183 relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be
184 sufficient to redress the loss.

185 Subdivision (e)(2) does not include an express requirement that the court find prejudice to
186 the party deprived of the information. The adverse inference permitted under this subdivision can
187 itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable
188 to the party that lost it, the same inference suggests that the opposing party was prejudiced by the
189 loss. In addition, there may be rare cases where a court concludes that a party's conduct is so
190 reprehensible that serious measures should be imposed even in the absence of prejudice. In such
191 rare cases, however, the court must still find the intent specified in subdivision (e)(2).

APPENDIX
Published Rule 37(e) Amendment Proposal

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~(e) **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) Failure to Preserve Discoverable Information.

(1) Curative measures; sanctions. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the

28 request was clear and reasonable, and whether the person who made it and
29 the party consulted in good faith about the scope of preservation;

30 (D) the proportionality of the preservation efforts to any anticipated or ongoing
31 litigation; and

32 (E) whether the party timely sought the court's guidance on any unresolved
33 disputes about preserving discoverable information.

1 Committee Note

2 In 2006, Rule 37(e) was added to provide protection against sanctions for loss of
3 electronically stored information under certain limited circumstances, but preservation problems
4 have nonetheless increased. The Committee has been repeatedly informed of growing concern about
5 the increasing burden of preserving information for litigation, particularly with regard to
6 electronically stored information. Many litigants and prospective litigants have emphasized their
7 uncertainty about the obligation to preserve information, particularly before litigation has actually
8 begun. The remarkable growth in the amount of information that might be preserved has heightened
9 these concerns. Significant divergences among federal courts across the country have meant that
10 potential parties cannot determine what preservation standards they will have to satisfy to avoid
11 sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very
12 serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some
13 information later sought in discovery.

14 This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of
15 guidelines for federal courts, and applying them to all discoverable information, not just
16 electronically stored information. The amended rule is not limited, as is the current rule, to
17 information lost due to “the routine, good-faith operation of an electronic information system.” The
18 amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy
19 their preservation responsibilities may do so with confidence that they will not be subjected to
20 serious sanctions should information be lost despite those efforts. It does not provide “bright line”
21 preservation directives because bright lines seem unsuited to a set of problems that is intensely
22 context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh
23 in calibrating its response to the loss of information.

24 Amended Rule 37(e) supersedes the current rule because it provides protection for any
25 conduct that would be protected under the current rule. The current rule provides: “Absent
26 exceptional circumstances, a court may not impose sanctions under these rules on a party for failing
27 to provide electronically stored information lost as a result of the routine, good-faith operation of
28 an electronic information system.” The routine good faith operation of an electronic information
29 system should be respected under the amended rule. As under the current rule, the prospect of
30 litigation may call for altering that routine operation. And the prohibition of sanctions in the

31 amended rule means that any loss of data that would be insulated against sanctions under the current
32 rule would also be protected under the amended rule.

33 Amended Rule 37(e) applies to loss of discoverable information “that should have been
34 preserved in the anticipation or conduct of litigation.” This preservation obligation was not created
35 by Rule 37(e), but has been recognized by many court decisions. It may in some instances be
36 triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that
37 should be considered in determining, in the circumstances of a particular case, when a duty to
38 preserve arose and what information should have been preserved.

39 Except in very rare cases in which a party’s actions cause the loss of information that
40 irreparably deprives another party of any meaningful opportunity to present or defend against the
41 claims in the litigation, sanctions for loss of discoverable information may only be imposed on a
42 finding of willfulness or bad faith, combined with substantial prejudice.

43 The amended rule therefore forecloses reliance on inherent authority or state law to impose
44 litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does
45 not affect the validity of an independent tort claim for relief for spoliation if created by the
46 applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of
47 such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

48 An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their
49 discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court’s scheduling order may
50 address preservation. These amendments may prompt early attention to matters also addressed by
51 Rule 37(e).

52 **Subdivision (e)(1)(A).** When the court concludes that a party failed to preserve information
53 that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety
54 of measures that are not sanctions. One is to permit additional discovery that would not have been
55 allowed had the party preserved information as it should have. For example, discovery might be
56 ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not
57 reasonably accessible. More generally, the fact that a party has failed to preserve information may
58 justify discovery that otherwise would be precluded under the proportionality analysis of
59 Rule 26(b)(1) and (2)(C).

60 In addition to, or instead of, ordering further discovery, the court may order curative
61 measures, such as requiring the party that failed to preserve information to restore or obtain the lost
62 information, or to develop substitute information that the court would not have ordered the party to
63 create but for the failure to preserve. The court may also require the party that failed to preserve
64 information to pay another party’s reasonable expenses, including attorney fees, caused by the
65 failure to preserve. Such expenses might include, for example, discovery efforts caused by the
66 failure to preserve information. Additional curative measures might include permitting introduction

67 at trial of evidence about the loss of information or allowing argument to the jury about the possible
68 significance of lost information.

69 **Subdivision (e)(1)(B)(i).** This subdivision authorizes imposition of the sanctions listed in
70 Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was
71 a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform
72 standard in federal court for sanctions for failure to preserve. It rejects decisions that have
73 authorized the imposition of sanctions — as opposed to measures authorized by Rule 37(e)(1)(A)
74 — for negligence or gross negligence. It borrows the term “sanctions” from Rule 37(b)(2), and
75 does not attempt to prescribe whether such measures would be so regarded for other purposes, such
76 as an attorney's professional responsibility.

77 This subdivision protects a party that has made reasonable preservation decisions in light of
78 the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality.
79 Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss
80 of information may affect other decisions about discovery, such as those under Rule 26(b)(1),
81 (b)(2)(B), and (b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the
82 exceptional circumstances described in Rule 37(e)(2)(B)(ii) are shown.

83 The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should
84 have been preserved; if so, the court may impose sanctions only if it can make two further findings.
85 First, the court must find that the loss of information caused substantial prejudice in the litigation.
86 Because digital data often duplicate other data, substitute evidence is often available. Although it
87 is impossible to demonstrate with certainty what lost information would prove, the party seeking
88 sanctions must show that it has been substantially prejudiced by the loss. Among other things, the
89 court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if
90 these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when
91 the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)
92 sanctions in the expectation that the court will employ the least severe sanction needed to repair the
93 prejudice resulting from loss of the information.

94 Second, it must be established that the party that failed to preserve did so willfully or in bad
95 faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

96 **Subdivision (e)(1)(B)(ii).** This subdivision permits the court to impose sanctions in
97 narrowly limited circumstances without making a finding of either bad faith or willfulness. The
98 need to show bad faith or willfulness is excused only by finding an impact more severe than the
99 substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown
100 that a party failed to preserve discoverable information that should have been preserved. In addition,
101 it must be shown that the party's actions irreparably deprived a party of any meaningful opportunity
102 to present or defend against the claims in the litigation.

103 The first step under this subdivision is to examine carefully the apparent importance of the
104 lost information. Particularly with electronically stored information, alternative sources may often
105 exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A)
106 can reduce the adverse impact. If a party loses readily accessible electronically stored information,
107 for example, the court may direct the party to attempt to retrieve the information by alternative
108 means. If such measures are not possible or fail to restore important information, the court must
109 determine whether the loss has irreparably deprived a party of any meaningful opportunity to present
110 or defend against the claims in the litigation.

111 The “irreparably deprived” test is more demanding than the “substantial prejudice” that
112 permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
113 might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff’s
114 failure to preserve an automobile claimed to have defects that caused injury without affording the
115 defendant manufacturer an opportunity to inspect the damaged vehicle may be an example. Such
116 a situation led to affirmance of dismissal, as not an abuse of discretion, in *Silvestri v. General*
117 *Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically
118 important event. But even such losses may not irreparably deprive another party of any meaningful
119 opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the
120 evidence presented by the party who lost discoverable information that should have been preserved,
121 along with possible presentation of evidence and argument about the significance of the lost
122 information, should often afford a meaningful opportunity to litigate.

123 The requirement that a party be irreparably deprived of any meaningful opportunity to
124 present or defend against the claims in the litigation is further narrowed by looking to all the claims
125 in the litigation. Lost information may appear critical to litigating a particular claim or defense, but
126 sanctions should not be imposed — or should be limited to the affected claims or defenses — if
127 those claims or defenses are not central to the litigation.

128 A special situation arises when discoverable information is lost because of events outside
129 a party’s control. A party may take the steps that should have been taken to preserve the
130 information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious
131 computer attacks. Curative measures may be appropriate in such circumstances — this is
132 information that should have been preserved — but sanctions are not. The loss is not caused by “the
133 party’s actions” as required by (e)(1)(B).

134 **Subdivision (e)(2).** These factors guide the court when asked to adopt measures under
135 Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37(e)(1)(B). The
136 listing of factors is not exclusive; other considerations may bear on these decisions, such as whether
137 the information not retained reasonably appeared to be cumulative with materials that were retained.
138 With regard to all these matters, the court’s focus should be on the reasonableness of the parties’
139 conduct.

140 The first factor is the extent to which the party was on notice that litigation was likely and
141 that the information lost would be discoverable in that litigation. A variety of events may alert a
142 party to the prospect of litigation. But often these events provide only limited information about that
143 prospective litigation, so that the scope of discoverable information may remain uncertain.

144 The second factor focuses on what the party did to preserve information after the prospect
145 of litigation arose. The party's issuance of a litigation hold is often important on this point. But it
146 is only one consideration, and no specific feature of the litigation hold — for example, a written
147 rather than an oral hold notice — is dispositive. Instead, the scope and content of the party's overall
148 preservation efforts should be scrutinized. One focus would be on the extent to which a party should
149 appreciate that certain types of information might be discoverable in the litigation, and also what it
150 knew, or should have known, about the likelihood of losing information if it did not take steps to
151 preserve. The court should be sensitive to the party's sophistication with regard to litigation in
152 evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar
153 with preservation obligations than other litigants who have considerable experience in litigation.
154 Although the rule focuses on the common law obligation to preserve in the anticipation or conduct
155 of litigation, courts may sometimes consider whether there was an independent requirement that the
156 lost information be preserved. The court should be sensitive, however, to the fact that such
157 independent preservation requirements may be addressed to a wide variety of concerns unrelated
158 to the current litigation. The fact that some information was lost does not itself prove that the efforts
159 to preserve were not reasonable.

160 The third factor looks to whether the party received a request to preserve information.
161 Although such a request may bring home the need to preserve information, this factor is not meant
162 to compel compliance with all such demands. To the contrary, reasonableness and good faith may
163 not require any special preservation efforts despite the request. In addition, the proportionality
164 concern means that a party need not honor an unreasonably broad preservation demand, but instead
165 should make its own determination about what is appropriate preservation in light of what it knows
166 about the litigation. The request itself, or communication with the person who made the request,
167 may provide insights about what information should be preserved. One important matter may be
168 whether the person making the preservation request is willing to engage in good faith consultation
169 about the scope of the desired preservation.

170 The fourth factor emphasizes a central concern — proportionality. The focus should be on
171 the information needs of the litigation at hand. That may be only a single case, or multiple cases.
172 Rule 26(b)(1) is amended to make proportionality a central factor in determining the scope of
173 discovery. Rule 37(e)(2)(D) explains that this calculation should be made with regard to “any
174 anticipated or ongoing litigation.” Prospective litigants who call for preservation efforts by others
175 (the third factor) should keep those proportionality principles in mind.

176 Making a proportionality determination often depends in part on specifics about various
177 types of information involved, and the costs of various forms of preservation. The court should be

178 sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties
179 (including governmental parties) may have limited resources to devote to those efforts. A party may
180 act reasonably by choosing the least costly form of information preservation, if it is substantially as
181 effective as more costly forms. It is important that counsel become familiar with their clients'
182 information systems and digital data — including social media — to address these issues. A party
183 urging that preservation requests are disproportionate may need to provide specifics about these
184 matters in order to enable meaningful discussion of the appropriate preservation regime.

185 Finally, the fifth factor looks to whether the party alleged to have failed to preserve as
186 required sought guidance from the court if agreement could not be reached with the other parties.
187 Until litigation commences, reference to the court may not be possible. In any event, this is not
188 meant to encourage premature resort to the court; amendments to Rule 26(f)(3) direct the parties to
189 address preservation in their discovery plan, and amendments to Rule 16(b)(3) invite provisions on
190 this subject in the scheduling order. Ordinarily the parties' arrangements are to be preferred to those
191 imposed by the court. But if the parties cannot reach agreement, they should not forgo available
192 opportunities to obtain prompt resolution of the differences from the court.

SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION

The following summaries refer to the comments by the numbers assigned to them by the Administrative Office. The full comments should be available through Regulations.gov. The numbers there begin with USC-RULES-CV-2013-0002-, followed by the numbers that appear in these summaries. Since the final number, included below, is the only thing that's different, there seemed no reason to include the rest.

Note also that some commenters appear more than once. Some who submitted written comments also appeared at a hearing, and some submitted more than one written comment.

The review of comments after no. 804 did not attempt to include all those who commented, although every one of the 2345 comments received was reviewed. There were many comments that were very similar in both the pro-amendment and anti-amendment camp. Regarding comments after no. 804, this summary is limited to what seemed to be comments that differed from what's been heard before, and it does not list those who made those same points. It is easy to report that very many additional comments echoed both sets of comments already summarized repeatedly. (For example, it appears that two law firms submitted essentially identical letters from 15 to 20 lawyers each on the last day.) Perhaps, then, it is appropriate to begin with something mentioned in comment 1540, which quoted Rep. Morris Udall, who was a former boss of the submitting lawyer, and who tried to cut long-running hearings by saying "Everything has been said; just not everyone has said it."

The comments are arranged topically as follows

1. Overall
2. Rule 37(e)(1) -- Failure to preserve
3. Rule 37(e)(1) -- Curative measures
4. Rule 37(e)(1)(B)(i)
5. Rule 37(e)(1)(B)(ii)
6. Rule 37(e)(2)
7. Need to retain provisions of current Rule 37(e)
8. Limiting the rule to electronically stored information
9. Additional definition of "substantial prejudice"
10. Additional definition of "willfulness or bad faith"

Summary of Rule 37(e) Comments

1. Overall

Ronald J. Hedges (262): Does the proposed rule violate the Rules Enabling Act? In *Interfaith Comm. Org. v. Honeywell Int'l, Inc.*, No. 11-3813 (3d Cir. June 4, 2013), the Third Circuit considered whether Rule 68 might infringe on substantive rights provided by the fee-shifting provisions of the Resource Conservation and Recovery Act, but rejected that argument. The district court, however, had held that Rule 68 was incompatible with Congress' purpose in enacting RCRA that applying the rule to cases brought under the act would violate the Rules Enabling Act. "Does proposed Rule 37(e) violate the Rules Enabling Act? Would it simply govern the 'manner and means' by which a party's substantive right to a sanctions award is governed? Or would the rule alter the 'rules of decision' by which a court would adjudicate that right?" Would the requirement that courts find willfulness or bad faith vary a substantive right? Or would negligence still be sufficient for the imposition of serious sanctions? Does not the proposed rule set forth substantive standards for a court to apply -- at least some of which do not now exist?"

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The proposal has little or no deterrent value, which should be the purpose of a rule purporting to sanction unacceptable conduct by a party. The rule change would make it more difficult to obtain sanctions. This is moving in the wrong direction. "At a time when the plaintiffs' aviation bar needs liberalization of the discovery rules to deter and cure the problems being encountered in their technically complex cases, the Committee advances proposals which will make discovery of sophisticated corporate defendants more difficult and spawn new discovery avoidance tactics among defendants and their lawyers."

Lawyers for Civil Justice (267): A new preservation rule is urgently needed. Under current law, courts have created ad hoc litigation hold procedures, and parties struggle to define the line that should apply to the scope of preservation. As a result, they are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. This fear has fueled an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information. But the proposal lacks sufficiently clear preservation directives, and also includes sanctions standards that permit sanctions to be imposed based on an insufficient showing of culpability. Beyond that, we need a bright-line rule on the preservation trigger. The rule instead enshrines the vague "foreseeability" standard in the opening sentence. In its place, the Committee should adopt a bold, clear and reasonably balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps. Judicial decisions have transformed the traditional spoliation rule that was a brake on plaintiffs' conduct prior to suit into a new rule that places great affirmative burdens on defendants to preserve all potentially relevant material. Under the "reasonable anticipation" trigger standard, decisions must be made before receipt of a scope-defining complaint. Critics of this rule that use hypotheticals involving auto-delete do not make justifiable objections for a variety of reasons.

Washington Legal Foundation (285): WLF fully embraces the overarching objective of proposed 37(e), which is to replace the disparate treatment of preservation and sanctions with a single uniform standard. In particular, the rejection of the Second Circuit's ruling that mere negligence is sufficient to support sanctions (in *Residential Funding, Inc. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002)) is welcome. WLF believes these changes have the potential

Summary of Rule 37(e) Comments

to significantly curtail the amount of satellite litigation about spoliation allegations and also reduce the high costs of over-preservation.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts, but is concerned that the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." The absence of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of these terms by the courts. AHIMA suggests that Committee may wish to consider further clarification and definition of those terms.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. It stresses that preservation and spoliation issues are not only concerns for institutional defendants. "In the past, particularly in an asymmetrical case (such as a single employee discrimination action brought under Title VII), plaintiff's counsel might have paid only fleeting attention to his or her client's preservation obligation since it was presumed that the defendant employer had possession, custody or control of all the relevant ESI. That confidence may be misplaced, however, with the advent of social media. * * * Since the plaintiff controls when litigation commences, as well as the nature and scope of any claims asserted, a plaintiff's attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions." "[S]ome version of proposed Rule 37(e) may provide relief from the balkanized approach to the spoliation issue that now characterizes the litigation landscape, thereby bringing some predictability to this area of law."

Fred Slough (291): The proposed rule "provides an incentive to destroy records. The opposing party has too high a burden to be able to hold those who destroy evidence responsible. A jury should know that the violator has hidden potentially damaging evidence and the new rules make it more difficult for a Judge to impose such a sanction."

Philip Favro (298): (Includes two articles about the package of proposed changes) By ensuring that the sanctions analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach that may benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The proposed rule also addresses some of the lingering concerns of the plaintiffs' bar. For example, it specifically empowers the court to order additional discovery or other curative measures when a litigant has destroyed information it should have retained.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section wholeheartedly supports codifying the obligation to preserve information in anticipation of and during litigation. This measure should promote more consistent application of the standards for triggering and defining the scope of the duty to preserve. The Section also agrees that the appropriate scope of the information to be preserved is "discoverable information" as defined in proposed Rule 26(b)(1), or current Rule 26(b)(1) if that is retained without change.

Thomas Y. Allman (308): Generally speaking, the proposed rule should help to promote a uniform approach and foreclose the current practice of using inherent sanctioning power as an end run around existing Rule 37(e). But a number of aspects of the proposed rule raise concerns that need to be addressed.

Summary of Rule 37(e) Comments

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer has experience in mass tort cases involving federal MDL proceedings, and endorses all the comments submitted by LCJ, of which it is a member. It notes that the current system virtually guarantees costly overpreservation of evidence because no clear standards are given about when a party should "reasonably anticipate litigation." For example, in a group of class actions that were recently concluded Bayer preserved an estimated 17,388 GB of information over a period of four years. In response to plaintiffs' discovery requests, we produced 31.1 GB of that information (1.3 million pages). The ratio of information preserved to information produced was 559:1. We believe that the proposed 37(e) amendments would be an improvement, but that they do not go far enough.

Jonathan Smith (NAACP Legal Defense Fund) (310): The proposed changes would permit parties who have failed to preserve discoverable information to suffer minimal consequence, and could have a detrimental effect on civil rights litigation. They place an extremely heavy burden on parties seeking sanctions or adverse-inference instructions as a result of an opposing party's conduct during the discovery process.

Steven Banks (Legal Aid Society - New York City) (317): Instead of simply revising the current rule governing preservation of electronic discovery, the amendment creates a broadly applicable new rule that significantly curtails the trial court's discretion to sanction spoliation of any evidence, electronic or otherwise. This is a significant change in the federal rules, creating a standard for sanctions that would be very difficult for any party affected by the destruction of evidence to meet. Legal Aid opposes the proposed rule. In the Second Circuit, where we typically litigate, sanctions are more broadly available than would be true under the proposed rule. We agree with Judge Scheindlin's comments in Sekisui American Corp. v. Hart, 2013 WL 41163122 (S.D.N.Y., Aug. 15, 2013), that imposing sanctions only where evidence is destroyed willfully creates perverse incentives. In one recent case involving a prisoner who was beaten by another prisoner, employees of the City Department of Correction watched videos of the area where the assaults occurred but then deleted them. In another similar case, the City preserved only fragments of the video of the event. It turned out that the Department had essentially no video preservation policies, despite the obviously critical nature of surveillance videotape to the litigation. It is patently unfair for our clients to have to meet the very stringent threshold proposed by this new rule in order to permit the trial court to impose sanctions.

U.S. Chamber Institute for Legal Reform (328): The rewriting of Rule 37(e) is needed because the current rule's effectiveness has been called into question. Because companies fear that they will be sanctioned for loss of information, preservation costs have continued to mount under the current rule. Fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information, even though only an infinitesimal fraction ends up being used by the parties in litigation. The proposed new rule is an improvement over the current rule. A rule that gives the court the option of using curative measures is sensible. But the ILR believes that the rule should be improved by strengthening its protections against sanctions.

Bryan Spoon (329): The proposed changes benefit large corporations and add another barrier between a plaintiff and the materials that could prove or disprove the case. Spoliation is already a major issue, and these changes make it easier for corporations to destroy relevant document without appropriate sanctions.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): Preservation issues have taken

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on a life of their own. Corporations worry about preserving terabytes of e-discovery that may never be relevant to any of the claims or defenses at issue in any litigation. Many of the preserved documents serve no business purpose and are preserved solely due to fear of sanctions in light of the unsettled legal standard. Before the proliferation of e-discovery, practitioners were faced with the simpler question of what paper documents needed to be maintained. E-discovery creates a completely different dynamic. The volume is exponentially greater. There is a greater risk of inadvertent destruction. The FDCC therefore urges the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information.

Doug Lampe (343) (Ford Motor Co.): Ford supports revising Rule 37 to establish uniform preservation and sanctions guidelines across courts, and agrees that the revisions would at least somewhat reduce the burden of over-preservation.

Kim Stone (345) (Civil Justice Assoc. of Calif.): We support the proposed changes to Rule 37(e), which should help reduce unnecessary and expensive preservation of information. We agree with the comments of the Lawyers for Civil Justice and the Institute for Legal Reform.

Shanin Specter (344) (Kline & Specter): Our firm represents plaintiffs in catastrophic injury cases, particularly medical malpractice. We believe the proposed rule alters substantive law, and goes beyond practice. The adoption of this rule would preempt the application of the substantive law regulating spoliation of evidence of those states which have addressed the topic.

The Sedona Conference Working Group 1 (346): It is unclear whether the Committee's proposed changes to Rule 37(e) as currently drafted will have a substantial impact on the goal of reducing the burden and costs associated with overbroad preservation or setting forth a uniform national spoliation standard. We ask that the Committee carefully consider our alternative proposals, which we submitted to the Committee in October and December of 2012. We approve of the goal of replacing current Rule 37(e) with a rule that would establish a uniform national culpability and prejudice standard. But we have a number of concerns about the manner in which the current proposal is drafted.

Pennsylvania Bar Assoc. Fed. Practice Comm. (350): The Committee endorses the concept of a uniform approach to spoliation sanctions in federal courts. The proposal has a careful balance with respect to the imposition of an adverse inference. It lowers the degree of malfeasance required by the spoliating party as the prejudice to the opposing party increases, such that only ordinary negligence is required if the prejudice is extreme, bad faith or willful conduct is required for lesser prejudice, and no adverse inference sanctions is available without at least substantial prejudice to the opposing party.

Eric Hemmendinger (Shawe Rosenthal) (351): We support changing Rule 37 to limit motions for sanctions for failure to preserve. The current rule has given rise to discovery which is aimed not at obtaining evidence, but at identifying something arguably relevant which the employer failed to preserve, which then becomes the centerpiece of a spoliation claim. We support limiting such claims to situations in which the failure caused substantial prejudice and was willful. But we fear that the list of factors in the rule may cause trouble, and could encourage parties to seek discovery about those matters. We think that a party seeking such discovery should have to demonstrate substantial prejudice at the outset, before getting any discovery on this ground.

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Kenneth D. Peters & John T. Wagener (353): The proposed rule is comprehensive and demonstrates an intent to tie sanctions for failure to preserve discoverable evidence to conduct that is "willful" or "in bad faith" and causes "substantial prejudice." These changes may help to mitigate a litigant's ESI burden, which often results in over preservation. But proposed (B)(ii) is likely to generate substantial motion practice as the courts struggle to define exactly what it means. It should be deleted.

Advisory Comm. on Civil Litigation, E.D.N.Y. (355): We do not support this amendment at this time. We agree that, ideally, there should be a uniform national rule governing the consequences of failure to preserve information. But in view of the rapid and continuing evolution of electronic discovery, we do not believe the time is ripe to promulgate such a rule. The different federal courts diverge about the proper standards for determining the consequences of failure to preserve discoverable information, and the Supreme Court has not yet spoken on the issue. Promulgation of a uniform rule should await further experience and further development of the law in this area.

Richard McCormack (356): It is extremely important that these changes be made in order to ensure fairness to all sides in the litigation. The change should establish a much-needed uniform national standard that would lessen the cost of over-preservation and additional litigation over allegations of spoliation. But I think that (B)(ii) should be removed as the courts are likely to use it to avoid the primary rule. In addition, the Committee should make it clear that sanctions are available only when the party has acted willfully and in bad faith. The list of factors in proposed 37(e)(2) should be removed. Finally, the rule should prescribe a clear, bright-line standard on when the affirmative duty to preserve information is triggered. The best one would be commencement of litigation.

Dusti Harvey (358) (AAJ Nursing Home Litigation Group): The wholesale revamping of Rule 37(e) represents both a broad shifting of the burden in determining whether a discovery violation is subject to court sanction as well as a narrowing of a court's ability to impose sanctions in the first place. The current rule requires the party failing to provide electronic discovery to demonstrate that its conduct was in good faith. The proposed changes appear to limit a court's ability to sanction a party for failing to produce discoverable material generally (not merely electronic discovery). The changes would require the aggrieved party to convince the court of numerous factors, some quite intangible, before sanctions could be imposed. Discovery violations by corporate defendants have become commonplace in all types of litigation. But most acts or omissions giving rise to the destruction, loss, or withholding of discovery would likely not be sanctionable under the proposed rule.

Edward Hawkins (362): Eliminating the adverse inference instruction by changing Rule 37(e) will serve only to encourage rule-breaking plaintiffs and defendants to withhold evidence. The sting of the adverse inference instruction helps to keep both the plaintiff and the defendant forthcoming with discovery.

John M. Gallagher (379): The proposed change to Rule 37(e) purports to insulate a party from sanctions for failure to provide ESI if it has been lost as a result of routine, good faith operation of an electronic storage system. But once one party sends to the other party a "litigation hold" letter, the world of "routine" has been lost in the rearview mirror.

Richard Malad (376): I strongly oppose this rule change. We represent plaintiffs who

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confront defendants with a substantial advantage at the outset. The various rule changes will only serve to limit discovery these plaintiffs need. The Rule 37(e) change will place limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous state specifically permit it. The rule change also allows the court to consider "proportionality" of the preservation efforts, likely as an appeal to defendants who do not want to preserve large amounts of information.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We applaud the effort to develop a national standard for spoliation sanctions and confine the most serious sanctions to a narrower set of situations. But we think that "willful" is the wrong term to use in (B)(i) and that (B)(ii) should be removed entirely from the amended rule.

Alan Morrison (383): I support the back-end approach of focusing on the consequences of failing to preserve, rather than attempting to establish front-end preservation requirements (assuming that would be permissible in a rule). I also agree that curative measures, as opposed to sanctions, are a better option.

Glen Pilie (Adams & Reese) (385): We support the adoption of amended Rule 37(e) and agree with the LCJ comments regarding the need for a clear rule regarding the scope of ESI preservation. We offer an example of a recent case in which our client was the defendant and suffered sanctions due to its failure to preserve temporary internet files that might have shown that its employees accessed the plaintiff's secure website to order forklift parts. The case is *NACCO Materials Handling Group v. The Lilly Company*, 278 F.R.D. 395 (W.D. Tenn. 2011). Plaintiff was a billion dollar global forklift manufacturer, and it claimed defendant, a small family-owned forklift dealership, had engaged in improper use of access to plaintiff's site. But it did not sue for four months after discovering the alleged access to its website. After suit was filed, defendant issued a litigation hold to key personnel in the parts department, which seemed to be involved. It did not instruct every employee in the company to preserve ESI and did not retain an ESI expert. Instead of an outside expert, it relied on its in-house IT director (who split his duties between that job and serving as a trainer for forklift repair). Defendant did not immediately cease its ordinary retention practices and establish protocols with regard to backup files, and employees were not instructed to disable "auto-delete" functions on web browsers or in temporary internet files. The magistrate judge imposed sanctions for failing to protect this information even though there was no evidence that any relevant information was lost. Moreover, defendant had a pending 12(b)(6) motion at the time. Defendant decided, however, to settle while an appeal of the magistrate judge's ruling was pending before the district judge, largely due to the harshness of the looming sanctions and the potential disruption they could cause to this small business if not reversed.

International Assoc. of Defense Counsel White Paper (390): The proposed rule holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation about allegations of spoliation. It establishes a national standard that would eliminate the court's ability to impose sanctions under "inherent authority" or state law. The amendment should provide practitioners with added security when advising clients on discovery issues.

Hon. James C. Francis IV (395): The proposed rule would radically alter the standards for remedying spoliation. In the process, it would curtail the ability of innocent parties to obtain relief when they are prejudiced by the destruction of information potentially relevant to

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litigation. But the rule does not solve the problems it purports to address. Instead, by focusing on the state of mind of the spoliator it introduces additional uncertainty and arbitrariness. Most importantly, it would undermine public perception of the fairness of our justice system. I urge the committee to withdraw the proposed rule or modify it substantially. There is no evidence that courts have imposed disproportionately serious sanctions. To the contrary, default, dismissal, and the imposition of an adverse inference instruction have generally been ordered only in response to the most egregious conduct by a party. Even if the rule were to produce uniformity in federal court, any entity that operates nationally would confront the risk of the most rigorous state court sanctions rules (citing cases from state courts). Moreover, the concept of willfulness varies depending on the context in which it appears (citing cases). A rule that provided more precision and certainty about the preservation obligation itself might hold promise, but this rule does not try to do that. Moreover, overpreservation is not caused solely by the prospect or actuality of litigation; regulatory and other preservation obligations exist. And lawyers do not think like criminals, adjusting their behavior based on the penalty for violating an obligation rather than the obligation itself. Yet the rule leaves that obligation unchanged. The rule might also prevent courts from using narrowly tailored preclusion orders to address the loss of specific information. Focusing on intent invites arbitrariness, because it is one of the most difficult things one can ask a court to resolve, and it would also tend to favor unsophisticated plaintiffs as compared with savvy business defendants. The Advisory Committee has not addressed, much less rebutted, the principle underlying Residential Funding -- that the party responsible for the loss of evidence, not the innocent party, should be responsible for the consequences that result from loss of information. Making sanctions unavailable unless the party deprived of the evidence can demonstrate bad intent of the spoliator would make the judicial system look unjust. A better proposal might look like the following:

(e) Failure to Preserve Discoverable Information

(1) Curative measures. If a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation, the court may impose a remedy no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith.

(2) Factors to be considered in fashioning a remedy. The court should consider all relevant factors in determining the appropriate remedy where a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it an the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservations to any anticipated or ongoing litigation; and

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(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Steven J. Twist (396): This rule is a much-needed reform. The fear of spoliation sanctions is a major driver of litigation cost. The fear is created by the lack of a nationwide standard that prohibits sanctions for loss of information unless it was in bad faith.

Hon. Shira Scheindlin (398): This rule does not provide a clear standard for preservation, as many urged the Committee to do. It does propose a national standard for imposing sanctions. At the moment, the circuits are in disarray, and I agree that a single national standard for the federal courts would be desirable although such a standard will not bring true national uniformity as the fifty state courts may adopt different standards. The idea of curative measures is good, but the rule is unclear and seems to be too restrictive. In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court addressed an instruction to the jury that it had the power to find that if a party had control over information but failed to preserve it the jury could infer that the lost information was unfavorable to that party. The court said this was not a sanction and that neither the court nor the jury was required to make such a finding. So it sounds like a "curative measure" under the proposed rule, but how many judges would think of a jury instruction as a curative measure? In sum, this proposal will create new problems without solving old ones. Magistrate Judge Francis has proposed a different rule. I agree with his proposal and all of his comments.

Eduarde Miller (Boehringer Ingelheim, USA, Inc.) (399): The proposed rule would appropriately prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." Such a standard is necessary and long overdue. There is no doubt about the need to create a uniform national standard aimed at avoiding costly over-preservation and ancillary litigation over allegations of spoliation. But proposed (B)(ii) is unnecessary and could eviscerate the entire rule by allowing courts to impose sanctions without finding willfulness or bad faith. And the conjunctive should be "and" in (B)(i). Also, the factors in (e)(2) should be removed because they are not relevant to the principal point in the proposed rule and there is a risk that they could be converted into mandates for certain conduct. Finally, it would be better to add a clear, bright-line standard for preservation to the rule.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): The proposed changes only encourage stonewalling and hiding the ball, both of which regularly occur already in product liability litigation. We already know that the failure to produce information by defendants often causes substantial prejudice. But making plaintiffs prove that imposes an unfair burden on them.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The proposed amendment is a step in the wrong direction. Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. But the changes will set the bar for obtaining sanctions so high that they will never be met.

Mark S. Stewart (Ballard Spahr) (412): Currently there is a diversity of judicial views on preservation and sanctions across the country. This diversity means that companies that operate in multiple jurisdictions have to err on the side of over-preservation, which drives up discovery costs. The uniform standard contemplated by the proposed amendment will allow companies to formulate a single strategy geared toward complying with that national standard. A uniform

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federal standard will probably also impact state practice. These developments would benefit plaintiffs as well. Before the use of social media was widespread, plaintiffs' counsel generally did not have much reason to pay attention to the possibility of being sanctioned. Today, the increasing importance of social media in cases brought by individuals changes that calculus. The cost of preservation sanctions motions may soon be visited more evenly on plaintiffs and defendants. The 2010 FJC study demonstrated that spoliation motions are infrequently granted, but that they generally double the time it takes to resolve a case, and that it is 27 times more likely that the case will proceed to trial. Limiting sanctions to intentional misconduct will reduce this expensive and time-consuming motion practice and facilitate efficient case disposition that will ultimately benefit all litigants.

Mark Kundla (416): The proposed rule appropriately limits sanctions to situations in which the party's conduct is "willful" or in "bad faith" and causes "substantial prejudice." These changes will help to mitigate a litigant's ESI burden, which often results in excessive costs of document retention.

Harlan Prater (418): The amended rule would establish a much-needed uniform national standard that would curtail costly over-preservation. But the use of the term "willful" as part of the standard is problematical because some courts define it in a way that would make sanctions too easy to obtain. I think that the standard should be "willful and bad faith."

William Adams (419): The proposed rule would alleviate the threat of sanctions for minor or unintentional failures to preserve every piece of potentially relevant evidence.

Daniel Edelman (420): This change, like all the proposed changes, would have a disproportionate impact on a plaintiff's already-limited ability to obtain relevant discovery from evasive corporate defendants. The cumulative effect of these changes would devastate our clients's ability to pursue their legal claims in what is already a David v. Goliath situation.

Dave Stevens (428): I'm not a lawyer, but I favor these changes. I own a small campground in Ohio, and find that I spend about as much time trying to minimize the threat of litigation as I do trying to win more customers. I favor the limit on penalizing businesses for discarding information to cases involving bad faith. The cost of litigation has caused us to eliminate diving boards and the rope swing, and I'm not going to install a zip line due to liability worries.

Ryan Furguson (433): The new sanctions provision is a positive step, which should prevent sanctions being imposed on a party without consideration of the impact of the loss of evidence on the case. The costs of storing and later reviewing this material put undue pressure on the parties to settle without regard to the merits.

Donald Bunnin (Allergan) (436): We favor the amendment because we believe it will clarify litigants' obligations and ease some of their burdens. In one product liability trial, we preserved and collected approximately 10 million documents. But only four thousand needed to be produced to plaintiff. Yet the costs of preserving the data exceeded \$275,000. We would support changing the rule to say willful "and" bad faith.

James Cocke (444): I support the amendments. We are a medium sized company that finds that current discovery avenues are so broad that if we were to truly attempt to comply with

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all of the discovery demanded of us we would have to shut down our operation and spend all of our time addressing ESI and the endless monster that modern computers and their progeny have created.

Stephen Aronson (446): I agree with Sen. Kyl that creating a national standard against discarding information that would hamper litigation is beneficial.

Robert D. Curran (448): Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. In any case involving a car crash that ends up in federal court, the parties anticipate litigation. Indeed, we frequently encounter work product objections to discovery that are premised on the anticipation of litigation. But critical evidence, such as security videos, black box data, automobiles themselves, devices involved in the accident, and the like are often destroyed or lost. The proposed change to Rule 37(e) is a step in the wrong direction because it sets the bar for sanctions so high that it will never be met.

Vickie Turner (450): We agree with LCJ and commend this proposal. We also agree that the standard should be "willfulness and bad faith" and that (B)(ii) should be removed. We also think that there should be a clear standard on when the duty to preserve arises.

David Hill (452): I agree with Sen. Kyl that there should be a clear national standard that says companies can be punished for discarding information only if done in bad faith.

John Brown (454): I support a clear national standard that would allow companies to be punished if they discard information in order to hide something or hamper litigation or if done in any other bad faith. But discarding as part of a records retention system it should not be punished.

Michael Scott (455): E-Discovery has posed new and difficult problems regarding evidence retention. I urge the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. I think that commencement of litigation should be the standard. I think that (B)(ii) should be removed because it would "swallow the rule." I also think that in (B)(i) the standard should be "willful and bad faith." I urge the deletion of the factors in 37(e)(2). If they are not deleted, they should be put into the Note.

Niels Murphy (456): The proposal to adopt a rule establishing a national standard holds great promise to curtail costly ancillary litigation about allegations of spoliation. But (B)(ii) could "swallow the rule" and should be removed. There also should be a clear, bright-line standard for the trigger. The "anticipation of litigation" standard in the proposed rule is not sufficient, and a "commencement of litigation standard" would be better.

Andrew Knight (458): I generally support new 37(e). Presently spoliation becomes the focus of the litigation in many cases rather than the merits of the case. I think the "willful or bad faith" standard is troubling because many courts consider a company's establishment of routing auto-delete mechanisms to be "willful." I think that the standard should be "willful and bad faith." I also believe that (B)(ii) should be removed from the rule so as to avoid confusion.

Stuart Delery (U.S. Dep't of Justice) (459): It is important that the Committee keep in mind that this rule will govern not only complex commercial litigation but also all other types of cases. Litigants with less sophistication, such as pro se litigants, do not have access to technical

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personnel to advise them on computer-based concerns.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

George Schulman (L.A. Country Bar Assoc. Antitrust & Unfair Bus. Prac. Section) (462): Our experience in modern litigation is that the amount of electronic information is exploding exponentially. A case involving a singular event, such as a filed contract, can generate thousands of emails among the parties. Matching up electronic production for all of the parties almost always reveals missing emails, whether they are missing because of lack of preservation or just a bad search for evidence requires additional rounds of discovery and often leads nowhere. Thus, while we appreciate the Committee's work in establishing a national standard and exempting mere negligence from severe sanctions, we note that efforts to uncover what is missing and why will surely run into the timing and discovery limits proposed elsewhere in the report.

Janet Poletto (463): We view the proposed amendment as an improvement over the existing situation. It appropriately limits sanctions to situations where a party's conduct is "willful" or "in bad faith" and causes "substantial prejudice." These changes will help mitigate a litigant's ESI burden, which often results in excessive costs of document retention and management for fear of sanctions.

Lisa Kaufman (Texas Civil Justice League) (466): TCJL strongly supports the proposed language for 37(e) requiring a showing of willful or bad faith conduct causing substantial prejudice before sanctions may be imposed. This change will reduce the risk that routine data maintenance will expose a litigant to sanctions simply for performing its day-to-day business operations in a cost-effective and reasonable manner.

Michael Freeman (Director, Tort Litigation, Walgreen Co.) (467): I favor the changes, but think 37(e) should go further. The word "and" should be substituted for the word "or" in (B)(i) on the culpability standard, and (B)(ii) should be deleted.

Kenneth Wittnauer (VP & Gen. Counsel, Britax Child Safety, Inc.) (483): These changes are helpful in providing certainty regarding preservation obligations. But I join others in saying they do not go far enough and urge that the word "and" be used instead of "or" in (B)(i) and that (B)(ii) be removed from the rule.

Peter Mancuso (Nassau County Bar Ass'n) (487): We support the proposed amendments to 37(e) and welcome the general approach of dealing with the failure to preserve ESI in a less onerous and fairer manner. In particular, we support the effort to incorporate directly into the rules an obligation to preserve information in anticipation of litigation. Rather than relying on inherent power, codifying the principle makes sense. We also agree that the correct focus should be on "discoverable information." We agree that sanctions (rather than curative measures) should be imposed only upon a showing of substantial prejudice and willfulness or bad faith.

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We disagree with those who have argued that this change will encourage careless or sloppy preservation efforts. We do not believe counsel or their clients will act in such a manner simply because a finding that (B)(i) is not satisfied might enable them to avoid sanctions.

Robert Buchbinder (488): The obligation to preserve evidence and the consequences of noncompliance have, under the current rules, resulted in meritless spoliation arguments that often derail litigation. The proposed changes to 37(e) are most helpful in providing certainty to my clients regarding their preservation obligations.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. Regarding (B)(ii), there was concern that the language used is vague and risks swallowing the rule. Because the sanctions turn on the importance of the information rather than culpability, very severe sanctions could result from essentially innocent conduct. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

James Edwards (496): Litigation today is inefficient, costly, and uncertain. One reason for these problems is uncertainty about preservation. We lack clear and consistent guidelines for preservation of information, and in many cases parties must settle claims due to the high costs rather than on the merits. Proposed Rule 37(e), along with amended Rule 26(b), should address the burdens of both over-preservation and overbroad discovery.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations) (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Martin Stern (501): I support the proposed amendment to Rule 37(e). But I think that it should be changed in two ways. First, "or" in (B)(i) should be changed to "and," and second, (B)(ii) should be eliminated altogether. Several also urge adoption of clear, bright-line standards

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for preservation decisions. Many other comments repeated this support and voiced these two recommendations for change, including those from Andy Osterbrock (Dow Corning Corp.) (514); Joel Neckers (524); Christian Bataille (578); Chet Roberts (579); Jamie Bryan (621); Vincent LaMonaca (on behalf of SVC, Inc) (640); Kenneth Waterway & Kelsey Black (652); L. Neal Ellis, Jr. (665); Tony Hullender (BlueCross BlueShield of Tennessee) (667); Lawrence D. Wade (668); Rex Darrell Berry (669); Scott Barbour (672); Lawrence L. Connelli (675); Lindy H. Scoffield (678), James T. Anwyl (679) and Leigh A. Stepp (680) (the last three letters are identical and come from the partners in Anwyl, Scoffield & Stepp, LLP); Debra L. Stegall (686); Richard Chesney (687), Gregory Bwower (690), Henry D. Nelkin (691), Michael Jenks (692), Lynn H. DeLisa (697), Rudolph Petruzzi (764) (the previous six comments are all from lawyers in the same law firm and endorse the amendments in general and 37(e) in particular); Cheryll L. Corigliano (694); Joyce G. Bigelow (696); Jeffrey Rubin (703); Mark Lavery (726); William Pokorny (731); Lee Mickus (Colorado Civil Justice League (755); Daniel Kuntz (MCU Resources Group, Inc.) (761); Michael I. Thompson (792); Michael Murphy (797); Jennifer B. Johnson (802).

Patrick Malone (503): This amendment is unnecessary. Moreover, the opportunity to obtain an adverse inference jury charge is an important incentive to keep parties honest in their discovery obligations. This rule change would reward wrongdoing. This comment resembles many other comments, both in its objections to the 37(e) proposals, but also in enumerating objections to the proposed changes to Rule 4, Rule 26, Rule 30, Rule 31, Rule 33, and Rule 36. Similar comments were received from many others, including: James Ragan (528); Victor Bergman (537); A. Laurie Koller (538); Justin Kahn (542); David Rash (545); Chris Nidel (547); Kevin Hannon (548); George Wise (549); Gregory Smith (551); Daniel Ryan (552); William Smith (553); John Lowe (557); Margaret Simonian (561); Teresa McClain (562); James E. Girards (563); Nicole Kruegel (570); Clark Newhall (577); James Howard (583); Christopher Bouslog (584); Tom Carse (586); E. Craig Daue (590); David Rudwall (591); Geoffrey Waggoner (592); John McCraw (595); Kenneth Miller (596); Michael Blanchard (597); Mark Gould (598); Herbert Ogden (608); Scott Loarned (611); Lars Lundeen (614); Marcia Murdoch (616); Shane Hudson (620); Thomas Bixby (627); Ian Crawford (628); James Swift (633); Todd Schlossberg (644); Craig Miller (650); John Baryllick (651); Thomas Yost (653); Brad Prochaska (658); Peter Ehrhardt (661); Alexander Blewett (685); Benjamin Graybill (704); Craig Wilkerson (718); Emily Joselson (on behalf of Langrock Sperry Woll) (730); Scott Smith (732); Karen Roby (734); Anonymous Anonymous (745); Sam U (746); Lisa Riggs (752); Mark Mandell (799).

Lawyers for Civil Justice (540) (supplementary comment): We strongly support the effort in Rule 37(e) to provide a uniform and predictable national standard that allows parties with potentially discoverable information to use their best judgment to manage their preservation efforts. And we still think that "willful" should be eliminated in (B)(i), and that the (B)(ii) exception should be eliminated. We also favor adding relevance and prejudice to the list of factors in 37(e)(2).

Glenn Hamer (Arizona Chamber of Commerce) (576): "By permitting [sanctions] only where willful conduct was carried out, the Committee's recommended changes to Rule 37(e) allow companies some certainty as they balance protecting themselves from litigation with addressing the needs of the market they serve. We urge the committee to further strengthen this protection by limiting spoliation sanctions only where conduct was committed in 'bad faith.'"

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Bradford A. Berenson (General Electric Co.) (599): GE's preservation challenges are enormous. It has over 300,000 employees world-wide, plus another 100,000 contractors who work closely with its employees. Approximately 35,000 employees leave the company or transfer jobs each year. GE operates in over 3,400 locations in 160 countries. In confronting preservation challenges, GE is faced with approximately 4,770 terabytes of email alone. Each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, and then ensure that the hold is honored. Enterprise-wide, this is a herculean task. The present "gotcha" game some plaintiffs adopt forces GE to engage in tremendous over-preservation. But those costs are overshadowed by the greater costs that arise when discovery actually occurs in litigation. "As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review, a task that typically requires a trained professional to examine each document that might be producible." (The comment offers three examples of situations in which GE incurred huge costs that bore no reasonable relation to the litigation stakes.) GE is particularly struck that the quality of justice in other countries seems relatively comparable with that in the U.S., while the cost of litigation in those countries is much, much lower. "[T]he disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that were participants in the global litigation market have a chance to opt out of the U.S. system, they often do."

Federal Magistrate Judges' Ass'n (615): The FMJA endorses the revision of Rule 37(e). "We believe the drafters have struck a balanced approach by requiring courts initially to look to possible remedies and weighing culpability in imposing sanctions."

Florida Justice Reform Institute (634): We strongly support the basic concept behind the proposed changes to Rule 37(e). A national standard is beneficial to promote the rapid development of a robust body of case law and to promote certainty and efficiency. But we think that (B)(i) should be limited to bad faith and the (B)(ii) should be removed from the rule. In addition, we favor adding a materiality factor to proposed 37(e)(2).

Cal Burnton (642): I favor the change to bring back a sense of professionalism and search for justice, which has been disappearing for our profession. With all the documents and electronic data existing wherever paper and data reside, one can never say that "all documents" have been produced. Yet the "sanctions" game will be played for no reason other than to put pressure on the other side, on the misguided view that if you hurt the other guy, you must be helping your own clients. But the rule should be changed in (B)(i) to require both bad faith and willfulness.

Hon. Lois Bloom (E.D.N.Y.): Along with the proposed changes to Rule 26, 30, and 33, the change to Rule 37(e) will cause more disputes and increase cost and delay. These amendments will only create new problems instead of curing existing ones.

Dana Bieber (Liability Reform Coalition of Washington): We support proposed 37(e), which we believe holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation.

Richard Valle (656): I am against the proposed changes. "As for the proposed revisions concerning Rule 37(e), I have a current case where it has taken almost a year to obtain all of the different versions of my client's medical records and bills. The court just ordered a forensic

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examination of Defendant's computer system. I don't believe we would be learning these things under the proposed revisions to the rules."

Noah Purcell (Solicitor Gen. State of Washington, on behalf of Washington State Attorney General's Office) (677): We enthusiastically agree with the proposed amendment to Rule 37(e). The absence of express proportionality limits in the current rules has the effect of significantly inflating the costs, complexities, and burdens of litigation by incentivizing over-preservation and over-broad discovery. We also favor the idea courts should prefer using curative measures to imposing sanctions.

Michael E. Klein (Altria Client Services) (684): I am manager of discovery support for all Altria and Philip Morris USA litigation. We have repeated experience producing huge amounts of information and finding that virtually none of it actually surfaces in the litigation. In answer to the Committee questions during hearings about whether the Rule 37(e) amendments would really result in measurable relief for businesses, we can report that the answer for us is "yes." The immediate benefit would be a significant reduction in the amount of information subject to preservation in our product liability litigation. So "the proposed Rule 37(e) amendments will provide millions of dollars of relief annually." We think that the rule should not be limited to ESI, that (B)(ii) should be eliminated, that 37(e) should not be retained, that the rule should define "substantial prejudice", and that (B)(i) should not authorize serious sanctions based on an unmoored concept of "willfulness."

Kenneth Suria (689): This is a welcome change because it offers protection for inadvertent and unintentional misplacing of discoverable material.

James Heavner (The Hartford Financial Serv. Group) (748): The Hartford spends millions of dollars every year preserving and producing documents, and supports this effort to provide a clearer and more reasonable standard for assessing this effort. But we think that looking to the Sedona Conference's emphasis on whether efforts to preserve were made in good faith is more promising. We also think that the rule should be emphasize whether alternative sources exist for the information.

Paul D. Weiner (704): My firm is the largest management-side law firm in the world. I spend full time on E-Discovery and have a team working for me. I want to "underscore the crushing eDiscovery burdens facing employers in today's digital world." Consistency across circuits is critical and is missing. One thing that is a bane is the frequency of overly broad cut-and-paste preservation demands, which are served in a knee-jerk fashion. I think that the mandates of Rule 26(g) should apply to such demands, and that lawyers be directed to make sure they are proportional. There is a dire need for rule amendments.

Wendy Butler Curtis (Orrick) (864): We favor requiring a finding of bad faith before sanctions may be imposed, partly on the theory that this standard will reduce gamesmanship and unjustified sanctions motions. To validate this assertion, we examined sanctions rulings from four circuits -- the 2d, the 8th, the 10th, and the 11th Circuits. Collecting all sanctions orders and opinions from those circuits gave us a pool of 119 cases. We then grouped cases into two categories, those where a finding of bad faith was required and those in which it was not. We hypothesized that a higher proportion of motions would be granted where the more demanding standard applied because the higher standard would deter groundless motions. Of the 119 cases involved, 32 used the bad faith standard and the other 87 used a lesser standard. Under the bad

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faith standard, 62% of the cases resulted in sanctions, while under the lesser standard the success rate was 45%. We believe these data show that the higher standard reduces the likelihood of groundless motions.

Philadelphia Bar Ass'n (995): The association endorses proposed 37(e).

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We agree that there is a need to revise Rule 37(e) to address issues of data preservation, spoliation and the availability and generally support the approach adopted in the proposed rule. We also believe that the factors identified in 37(e)(2) are relevant and appropriate in assessing the reasonableness of a party's efforts to preserve information for litigation. Nonetheless, we have reservations regarding some provisions and believe that further study and revised drafting is necessary before a final rule is promulgated. We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost.

Seth R. Lesser (1102): The proposed changes reflect changes that may be outdated in some areas of law. In our cases, so far as electronic discovery is concerned, the last few years have evidenced a sea change in the reduction of the expense and time spent on ESI discovery. The increased sophistication of both in-house and hired electronic discovery consultants is notable. At the same time, there are also far more efficient advanced search and review programs. As a result, we are rarely seeing companies having to spend substantial resources in our wage and hour cases to address legacy systems that are not compatible with more advanced programs. This has been a dramatic and marked change.

Robert Kohn (Federal Bar Ass'n) (1109): We support proposed 37(e). By making clear the relevant standards, the proposal simplifies the job of litigating and deciding a spoliation sanctions motion. This may also lead to more compromises to resolve spoliation issues by agreement rather than seeking court intervention.

John Vail (1118): The zeal of the Committee to address the concerns of outsized entities is well illustrated by proposed Rule 37(e), which has received insufficient comment. The goal of the Committee is to address preservation obligations that arise, as it acknowledges, primarily as a matter of substantive state common law. This federal procedural fix to a concern about state substantive law is beyond the ken of the Committee.

David Howard (Microsoft) (1222): The proposed amendment to 37(e) will help reduce the costs of over-preservation. Microsoft preserves data from every custodian at times, even though the lawyers working on the matter know there is a de minimis chance that the vast majority of the employees will ever be relevant to the litigation. If the rule is implemented, Microsoft will engage in this type of over-preservation much less often, because we will know that we can, in good faith, locate and instruct only those employees who are most likely to have relevant information without facing the tactical threat of a spoliation motion. At the same time, there is very little risk that the new rule will lead to insufficient preservation. It is in Microsoft's

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best interests to locate the key actors and place them under a litigation hold.

ARMA International (1263): ARMA is comprised of more than 27,000 professionals in the field of records and information management. It is the leading international organization dedicated to information governance. It maintains and designs information governance programs. Its governance programs are affected by judge-made preservation standards. The amendments to Rule 37(e) will therefore directly affect what ARMA does. It generally supports the proposed amendments insofar as they create a single, national standard for evaluating sanctions for spoliation. It does not profess expertise in managing discovery in litigation and does not express an opinion about the best way to prevent spoliation. But it can report that preservation or litigation holds are the largest exceptions to a records manager's maxim to retain document and information for only as long as it has business value or is statutorily required. Simplifying this standard should therefore produce information management benefits.

ARMA disagrees with those commenters who have argued that this standardization is illusory because the Federal Rules do not bind state courts. Not only do many state courts explicitly look to the Federal Rules, but the underlying premise is flawed; establishing a minimum federal standard will matter. It also agrees with the aim to raise the culpability standard above mere negligence. Because of the Second Circuit's Residential Funding decision many organizations have had to manage their preservation behavior according to this broad standard. This has been one of the causes of massive over-preservation. With the potentially devastating effect of spoliation sanctions hanging over their heads, organizations make preservation decisions out of fear as to how they will be second guessed after the fact. Magistrate Judge Francis pointed out that 9% of organizations surveyed by ARMA said that they did not have a records retention policy and 21% did not have policies that covered electronically stored information. But that disregards the fact that about 70% do have such policies, and these organizations are nevertheless over-preserving because they have reasonable policies but must deviate from them to avoid the risks of sanctions. So the reality is that the current low culpability standard does have a practical effect on how organizations manage their data. The specter of sanctions disrupts generally accepted data disposition principles because the cost to an organization of being accused of spoliation is vastly more significant than the large costs of over-preservation. From the perspective of the information governance professional, the uncertainty of the negligence standard drives an over-abundance of caution which not only makes the whole process more expensive, but prevents the deletion of irrelevant data.

George Wailes (1292): The proposed rule is unclear about what standard of conduct it is imposing when it refers to "willfulness." Does it intend to protect parties that ignore their obligations to preserve evidence? That seems to be true if it is rejecting the Residential Funding and Sekisui decisions, which say that intentional destruction does not require malice. Doing so will create pressure on law-abiding bodes to be less zealous in protecting the integrity of the fact-finding process, and would cut against the recently-amended ABA Model Rule 1.1, that says lawyers should keep abreast of technological developments. The rule also fails to say anything about the most important new development -- technology-assisted review of electronically stored information. This technology makes good on the hope of many that the daunting volumes of material can be tamed by technology, but it is not mentioned in connection with Rule 37(e).

P. David Lopez (EEOC) (1353): The EEOC has issued regulations requiring retention of various records. Compliance with these regulations is critical to EEOC's ability to investigate charges of discrimination. It agrees on the need for a preservation rule, and would favor a rule

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like the Category 2 rule presented at the Advisory Committee's April 2011 meeting. If a sanctions-only rule is not adopted, something like that should be reconsidered. It provides a useful standard regarding the scope of preservation but avoids the complications of the Category 1 rule. The rule actually proposed says in the Note that reasonable behavior should not be punished. But by definition negligent conduct is not reasonable. Therefore EEOC believes that the rule should permit remedial actions beyond the curative measures referred to in proposed 37(e)(1)(A) when relevant evidence is lost through negligence, and particularly if it is lost due to gross negligence.

Evan Stolove (Fannie Mae) (1360): The current version of Rule 37(e) has proven to be a confusing and difficult standard to apply, and has been rarely used. It also does not take into account the intent of the party that has lost ESI and whether there has been prejudice as a result even though those factors have often been important to judges making sanctions decisions. In that gap in the rules, there has been a proliferation of cases on spoliation that provide no uniform basis upon which to assess a party's preservation efforts. The proposed rule is intended to provide a uniform, national approach to spoliation sanctions. Fannie Mae supports the proposed changes. But it would favor changing proposed (e)(1)(B)(i) to say "willful and bad faith." It also thinks that proposed (e)(1)(B)(ii) should be removed from the rule. It has too many terms that are undefined, and the "irreparably deprived" criterion will probably be heavily litigated if adopted.

Jonathan Marcus (CFTC) (1366): Proposed 37(e) should provide much-needed national uniformity for the preservation of information, especially ESI. Courts across the country have reached different conclusions for many years on the subject of preservation, and that cacophony makes it difficult for an agency like CFTC because it litigates in all federal courts across the nation. The Second Circuit's negligence standard in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), is different from the Eighth Circuit standard in *Stevenson v. Union Pacific. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004), which requires intentional destruction to trigger sanctions. The Note to proposed 37(e)(1)(B)(i) rejects *Residential Funding* and the rule provides uniform guidance on this difficult issue which varies from circuit to circuit. It is crucial for a governmental agency to be able to make consistent agency-wide preservation decisions. We support the proposed rule because it makes this possible.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA is the largest membership association in the world that represents the accounting profession. It supports the recommendation of a national, rules-based federal standard for considering sanctions when parties fail to preserve discoverable information. Overhaul of Rule 37(e) is necessary to address the growing phenomenon of over-preservation. This practice is exacerbated by the different standards courts around the country have employed in imposing spoliation sanctions. Parties now use spoliation motions as a strategic tool to drive up the costs of litigation, and many entities have responded by developing preservation policies based on fear of outlier results. The AICPA strongly supports the Committee's efforts to combat these serious problems, and regards proposed 37(e) as a significant step toward reducing the costly practice of over-preservation. There is a pressing need for a uniform, national standard.

Peter Oesterling (Nationwide Mut. Ins. Co.) (1457): "Nationwide disagrees with the proposed changes to rule 37(e). These proposed changes not only do not advance the Committee's stated goal of establishing a uniform, national standard of preservation, these proposed changes would actually undermine that goal." The reliance on findings that a party's

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actions were "willful or in bad faith" and that they caused "substantial prejudice" in the litigation would not close the door to imposition of sanctions is a broad array of circumstances. In particular, the term "willful" is vague, ambiguous and susceptible to multiple interpretations. The factors in proposed 37(e)(2) do not provide guidance. "Given the uncertainty with all three of these terms, parties like Nationwide will likely preserve greater amounts of data and information in order to avoid potential sanctions." For similar reasons, Nationwide opposes deletion of the protections of current 37(e). Nationwide urges that the sanctions rule be confined to situations in which sanctions may be imposed only on proof a party acted with the specific intent to deprive its opponent of information relevant to a claim or defense. In addition, the "no culpability" provision in 37(e)(1)(B)(ii) should be withdrawn.

Julie Kane (Amer. Ass'n Justice) (1467): Proposed 37(e) would impose an extremely large burden on the party seeking sanctions. Substantial prejudice will be next to impossible to establish. The defense bar's proposal that the standard be "willful and bad faith" would make this worse. "It must be noted that the parties advocating for a narrow standard for sanctions are the same parties that usually possess the most relevant information in civil litigation." Moreover, the "national" standard won't really be national because every jurisdiction has its own set of laws and rules that require varying levels of preservation.

Thomas R. Kelly (Pfizer) (1491): "Pfizer does not expect the proposed amendments to have an immediate or dramatic effect on how and when the company preserves documents. But, under the proposed amendment, we believe Pfizer will gradually be able to lessen the burden with respect to its preservation efforts. Under the proposed rules, we believe Pfizer will be able to take a more practical and proportional approach to preservation, an approach which takes into account the facts and circumstances of each case. These may not be watershed changes, but they will be important and we hope will ultimately mean that company resources can go toward discovery of new medicines, rather than the cost of discovery for civil litigation."

Mark E. Harrington (Guidance Software) (1519): Guidance has deep concerns about this proposed rule. It proposes a radically altered framework regarding discovery sanctions that would severely constrain the ability of the trial judge to exercise sound discretion on a case-by-case basis. It places a burden on the innocent party to prove substantial prejudice and willful or bad faith conduct. Willfulness and bad faith are difficult to establish when the litigant does not have access to the lost evidence. In the Second Circuit, this showing would not be required under Residential Funding. Moreover, it would be extremely rare that the innocent party could show that the loss of information "irreparably deprived" it of any meaningful opportunity to prove its case.

Michael Lowry (1522): "In my Nevada practice, many of my cases now focus not upon the merits but instead litigate whether a spoliation instruction is warranted. 'Spoliation motions are now routinely filed. Trial courts are increasingly being asked to delineate the scope of a party's duty to preserve evidence.' *Glover v. Smith's Food & Drug Ctrs., Inc.* 2013 WL 5437096 (D. Nev. Sept. 26, 2013). Why? A spoliation instruction dramatically changes the case. I presented a webinar for USLAW in October, 2013, concerning spoliation. In preparing for the webinar I surveyed colleagues, and eventually the participants of the webinar, as to whether anyone had ever tried a case when a spoliation instruction would be issued. I could not find one. I instead received a history of cases that settled, rather than going to verdict, only because of a spoliation instruction. This anecdotal experience is why spoliation motions have become a predominant factor in my practice."

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Andre Mura (Center for Constitutional Litigation) (1535): The entities complaining about the burdens of production fail to distinguish between what they preserve solely for litigation purposes and preservation for other reasons. The fact that they preserve far more than they produce is not a problem that will be solved by proposed 37(e). The proposed rule and the problem of over-production are like two ships passing in the night. Parties with a lot of ESI preserve a lot of that information for a variety of purposes, including for litigation. But instead of giving rules of preservation that these parties requested, the Committee has proposed a rule that allows parties to evade sanctions for their behavior unless the innocent party can prove things that are hard to prove. At best, the proposed rule is an experiment. At least a rule limited to ESI will not overturn the rulings of federal courts across the country in cases involving spoliation of other types of evidence. Adopting a bad faith standard is too strict. It is akin to a mens rea requirement in criminal law, but would be more challenging with a corporate party. We think that the "curative measures" provision should be amended to allow a permissive jury instruction that allows the jury to determine whether evidence was lost, and whether that loss was willful or in bad faith.

John P. Relman (1547): By displacing inherent authority, the proposed rule intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to discipline misconduct by parties appearing before them. The rule may also undermine substantive federal regulations. For example, the EEOC has promulgated regulations requiring employers to preserve certain personnel documents, and various circuits recognize that violation of those regulations may give rise to an inference of spoliation and corresponding remedial measures.

Lawrence Kahn (City of New York Law Dep't, joined by cities of Chicago and Houston and International Municipal Lawyers Assoc.) (1554): The Note's description of the increasing burden of preserving information is absolutely the cities' experience. Harsh spoliation sanctions are incentives to "gotcha" satellite disputes which disproportionately distract from the merits of cases. These problems force cities to expend scarce resources solely to avoid these irresponsible side disputes. The problems encourage over-preservation and unnecessary litigation holds, often followed by over-collection, over-identification of potential custodians, and over-designations of the types of ESI to include even the most remotely relevant. To guard against this activity, the cities propose that bad faith be required to support sanctions. It is also critical to highlight the importance of proportionality to preservation decisions, including those made before litigation is filed.

Jonathan Redgrave (1608): I concur in the concern of the Federal Magistrate Judges' Association and think that the proposed rule should be revised to read: "If a party does not provide information requested in discovery because the party failed to preserve discoverable information that should have been preserved . . ." In addition, I think that proposed Rule 37(e)(1)(A) should require a predicate finding that there was a duty to preserve, and that there should be a finding of prejudice as well. I also agree that "willful" is problematical in (B)(i). Based on further reflection, he also thinks that the rule should be expanded to include a 37(e)(2), (3) and (4) to clarify the meaning of bad faith and substantial prejudice, and to preserve the provisions of current 37(e).

Patrick Oot (Electronic Discovery Institute) (1680): (He also serves as Senior Special Counsel to the Office of the General Counsel of the SEC.) The amendments provide litigants with much-needed tools to alleviate risk and mitigate significant cost. I predict that the growth

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in "junk data" will continue to burden producing parties as evidentiary scope creeps across emerging technology. Limitations on scope and emphasis on proportionality are therefore critical. Failure to implement such limitations will have broad cost consequences. Technology is not keeping pace with the growth in volume of data, so that the right place for emphasis among attorneys should be reasonableness of search and collection, not improved tools. Accordingly, the rules must protect reasonable decisions. The submission includes an adaptation from an October, 2013, presentation entitled "At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need a New Rule 37(e)."

J. Barton LeBlanc (AAJ) (1732): This proposed rule would disincentivize defendants from preserving critical evidence. Therefore, the rule should be limited to ESI if it is adopted. Better yet, the current rule should not be changed.

Robert Owen (1957): Since the adoption of the Federal Rules in 1938, the biggest changes in American civil litigation have flowed from the digital revolution. The explosion of digital information in the last 20 years means that there is an urgent need for rule reform now. Building on the ancient duty not to destroy known evidence, courts have recently created an entirely different duty -- to take affirmative steps to preserve potential evidence. The Committee's proposal does not tackle several disturbing aspects of this development, but its rule has the potential -- with some editing -- to address the problem of inconsistency and have a small effect on the expense of preservation. The Second Circuit's reliance on negligence as sufficient to support sanctions has skewed preservation practices everywhere, and this should be put right. Particularly given the complexity and variety of sources of ESI, this negligence standard is increasingly unfair. Therefore, "willful" should be removed from the rule as a standard for sanctions, and (B)(ii) should also be removed. In addition, the factors list should be removed. They do not provide definitive answers and leave out some important considerations.

William Butterfield (2034): It is too soon to be making further changes to the rules. The proponents of change started their campaign before the ink was dry on the 2006 amendments. The studies on which they relied were ill conceived, and relied often on unscientific surveys of biased sample populations. In addition to these general reactions to the package, I support efforts to achieve uniformity regarding conduct giving rise to sanctions and provide guidance to avoid imposition of sanctions. I think that the separation between remedial measures and sanctions is sensible, and that avoiding the stigma of calling a minor remedy a "sanction" is desirable. I would therefore revise proposed 37(e)(1)(A) to say "permit non-sanction-based curative measures, such as additional discovery, ordering the party to pay reasonable expenses . . ." I also think that a showing of information loss should not be a condition for the curative measures. Additional discovery, in particular, may often be needed to determine whether curative measures are in order, and if so which ones. The Committee Note should make clear that other rules, particularly Rules 16 and 26, are available to respond to these concerns.

Kirk T. Hartley (2057): I urge the committee to recruit expert economic and scientific advisors about data management. This could cut through the clutter of partisan papers on the economics of data storage and searching through data. It would also be a partial antidote to the reality that the incredible pace of scientific change means that many of yesterday's computer problems have been solved, and that costs continue to plummet. In my view (having done this sort of work for courts under court appointment), the Committee should make decisions on e-discovery only with the benefit of neutral, expert advice about the future and costs. I note also that spoliation of evidence is a tort in most states, but proposed 37(e) seems to set substantive

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standards. Moreover, the criteria set seem to have much less salience to toxic tort litigation (my area of experience) than to breach of contract litigation. For example, in my field old insurance policies are often the focus of litigation. Will Rule 37 permit insurers to discard the information about those old policies? An insurer might go to federal court seeking a declaratory judgment that Rule 37(e) permitted it to discard such old information, realizing that the rule is more favorable than state law on the subject.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases. We also think that the "least severe sanction" provision should be in the rule, not the Note.

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. It generally supports the amendments in their present form, believing that it will be useful in weighing what constitutes "reasonableness" under Rule 37(e)(2). We believe that, although adopting a nationally uniform rule is desirable, true success in reducing the cost and complexity of litigation will come primarily from technological changes in the corporate office environment, coupled with greater education of the bench and bar on how ESI may be managed appropriately. The growth, and growing importance, of "big data" provide evidence of this technological shift. Arguments about whether "over-preservation" will be reduced by the new rule seem to us to miss what is clearly the essential message, that legal holds in the near future will necessarily involve orders of magnitude of information larger than the levels reached in 2014. Attention to information governance necessarily incorporates greater concern with respect to the life cycle of records and developing defensible deletion policies. Although the use of sophisticated technologies will not by themselves fully conquer the challenges of expanding data, these tools give lawyers and parties much greater ability to manage their data sets in ways that hold out the potential to drive down e-discovery costs.

David R. Cohen (2174): I disagree with Judges Francis and Schiendlin and believe that these rule changes will reduce over-preservation, and I know that my views are shared by many companies that frequently have to make preservation decisions. Faced with severe consequences, the default response may be to try to comply with the most extreme preservation rules that have been adopted by any judges. Although the concerns about the term "willful or in bad faith" are legitimate, they are not a valid reason for desisting in the effort to generate national standards. So far as objections about the "burden" of showing prejudice or bad faith are concerned, I do not think it is necessary for the rule to try to allocate burdens. Judges are accustomed to making many kinds of decisions where burdens of proof are not pre-assigned. Judges should have the freedom to make these determinations based on the circumstances of the individual case, with neither side having a pre-determined handicap.

Ariana Tadler (2173): I oppose proposed 37(e), which I regard as the most complex and challenging of the amendment proposals. Preservation has long been a difficult feature of e-discovery; in the efforts leading up to the 2006 amendments it was considered but ultimately considered too thorny and set aside. It is not surprising that it was extraordinarily difficult to

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develop the current proposal. As late as April 2013, the Committee was still considering alternative versions, and wordsmithing continued until publication. Since the proposal was published, the commentary has featured a vigorous debate about the most fundamental issues, such as the difference between curative measures and sanctions, culpability standards and the bearer of the burden on these questions.

This controversy is mirrored in the experience of Sedona Conference Working Group 1 -- which exists for the very purpose of forging consensus on discovery issues. It could not reach consensus on an acceptable rule governing sanctions. Although the Steering Committee (not the full Working Group) did ultimately submit a proposed rule founded on "good faith" (rather than "bad faith") that process was also extremely difficult and the end result was a proposal that did not reflect a unanimous agreement. The disclaiming footnote was added to the proposal and its significance should be readily apparent. The division about these topics has been deeper and darker than any I have seen on a proposed rule change regarding discovery. That alone should lead the Advisory Committee to reconsider this proposal.

If the costs of preservation are too high, that is not due to a fault in the rules. Prof. Hubbard's study yielded no strong evidence on costs of preservation to support the idea that adopting this rule will produce major savings. Education and information governance -- not rulemaking -- will be the key to controlling preservation costs. And there is finally a real movement afoot on this front. The Sedona Conference is actively working in this area, and information governance was the hottest topic at Legal Tech in New York in Feb., 2014. If empirical evidence in the future shows that there is a problem that a new rule would solve, that would justify adopting a new rule. We are not there yet. But if the Committee decides to proceed, I urge that it give serious consideration to the alternative draft submitted by Judge Francis, with a new public comment period to follow.

Prof. William Hubbard (U. Chicago) (2201): (Prof. Hubbard submitted with his comments a 50-page report on his survey of preservation costs at corporations he studied. This study was commissioned by the Civil Justice Reform Group in Spring, 2011. (That group is an organization formed and directed by general counsel of Fortune 100 companies concerned about America's justice system.) Prof. Hubbard's cover letter clarifies his testimony at the Dallas hearing that the adoption of proposed 37(e) will produce "a modest change from the status quo and should have modest effects." But because the costs of preservation are very high for a number of companies, those effects (say a 3% reduction) would still produce considerable savings (for some companies, over \$1 million per year). In addition, it is important to note that this study focused only on preservation activity related to impending litigation or governmental investigations, not to retention activity required by various rules or statutes applicable to companies in various fields. There is also an 11-page Summary of Findings. A review of the full findings, or at least the Summary of Findings, is superior to a summary here, but at least some points may usefully be made:

- (1) A total of 128 companies responded to the survey. The companies ranged in size from those with fewer than 1,000 employees (31 companies -- 24%) to those with more than 100,000 employees (18 companies -- 16%). Roughly the same number of the remaining companies had between 1,000 and 10,000 and 10,000 and 100,000 employees. Federal cases are a major concern for companies of all sizes; for the largest companies, government investigations are also a particular concern.

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(2) Interviews were conducted with representatives of 13 of these companies, and in those interviews respondents often reported that preservation costs "have become an important factor in whether to litigate or settle."

(3) Preservation problems are most frequent with email and hard drives, but the rating of problems is relatively similar for each of 8 types of preservation mentioned in the survey.

(4) Smaller companies are less likely to have specialized resources to deal with preservation, in part because they are less likely to have in-house expertise. For large companies, fixed (non-case-specific) costs of preservation are high. But for all companies case-specific costs are significant.

(5) A small proportion of cases account for a very large share of the preservation costs. In most litigation matters, preservation scope is not broad. Of 390 matters on which data were available from a sample company, fewer than 20 custodians were subject to a hold in 240 of those matters (60%), while more than 475 employees were subject to a hold in about 15 of the 390 matters (about 4%). See Figure 6, p. 40 of report. With regard to the six companies for which data is available, 5% of the matters account for over half of all litigation hold notices.

(6) The amount of information preserved greatly exceeds the amount collected and processed for litigation. In one company (Figure 8 in the report), more than 5,000 custodians were subject to preservation, but fewer than 10% of those custodians' preservation was actually subject to collection, and a slightly smaller number had their data processed.

(7) Reducing the amount of preservation will have little or no negative impact on the availability of information needed in litigation.

The Executive Summary concludes: "The costs imposed by the uncertainty created by the current environment of conflicting legal precedents is a repeated refrain from companies in this Survey. By addressing the standards for sanctions for failure to preserve, the proposed amendments to Rule 37 focus on an issue of expressed need. A benefit of the proposed amendments is a likely modest but meaningful reduction in preservation costs. Greater stability and less uncertainty in the law of preservation will have its most direct effect on the phenomenon of 'overpreservation.'"

David E. Hutchinson (2205): The focus on "proportionality" underscores a nagging disconnect between the rules and practice that has worsened in recent years and will continue to do so unless it is directly addressed. The greatest factor affecting civil discovery in recent years has been the development of legal technologies. There has been a global paradigm shift in the technologies used to create and store information. One 2013 estimate was that the volume of data is growing at a rate of approximately 33% per year. Because technologies continue to develop at an exponential rate, any "proportionality" requirement for discovery needs to include consideration of the process and technologies underlying preservation and production of electronically stored information. Between 1986 and 2007, the total storage capacity for digital data grew about 100-fold. But the 2007 figures already appeared quaint in 2014, and the ESI landscape will likely continue to develop rapidly and somewhat unpredictably. Focusing on preservation sanctions, the substantial growth in sanctions decisions since 2006 suggests that the

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2006 amendments were not sufficient to deal with these issues. But the focus on "proportionality" is limited in its effectiveness because it fails to give due weight to the impact of developing technologies. Proportionality should therefore include consideration of the technologies used and/or available, because they essentially dictate the reasonableness and burdens associated with e-discovery.

David J. Piell (2208): The e-discovery crisis is largely an invented crisis. While it is true that e-discovery costs money, it costs less and provides far more comprehensive information than when armies of associates spent months in warehouses searching through mountains of physical documents. For companies that do not have their ESI organized, forcing them to organize it for litigation purposes leaves them with better access for business purposes. The rules regarding discovery should not be modified to accommodate entities that cannot keep their records in a reasonably ordered and accessible manner. Similarly, the movement to reject Residential Funding is misguided; why should sanctions not be imposed against a party that loses information due to its own negligence?

David Beck (former member of Standing Committee) & Alistair Dawson (2212): The adoption of a consistent standard for issuance of sanctions creates predictability and encourages compliance. We therefore strongly support the proposal to clarify the standard for issuance of sanctions. Despite the implementation of "best practices," data can still be lost unintentionally, but such losses should not be sanctionable. But for sanctions bad faith should be the guiding standard.

Karl A. Schieneman (ReviewLess) (2237): "I do not believe the proposed amendments do enough to encourage the use of more technology to solve e-discovery and specifically they do not promote transparency and motivate litigants to share how technology is being used to improve e-discovery and reduce e-discovery burdens." I have developed a career of creative use of technology to solve discovery problems, including service as a special master in e-discovery cases. I have found that lawyers are not embracing technology to solve what is a technology-driven problem. This situation is due both to unfamiliarity with these technological issues and to the fact that current case law and rules do not promote or foster transparency, leading to expensive motions as parties on the receiving end try to understand what they will be receiving from productions using predictive coding. I think the solution is for the rules committee to encourage the use and experimentation with technology from its pulpit, at least in the Note. The goal should be to reduce the barriers to sharing information between parties created by 80 years of case law that do not require a sharing of information because it would be impractical to have parties second guess each other about production of individual documents. Those sorts of issues are sharply reduced by technology-assisted review. I should emphasize that I am not advocating any particular type of technology (including predictive coding), but only pointing out that technology used properly can result in less ESI being reviewed and produced.

Washington D.C. Hearing

David R. Cohen (Reed Smith): The rule change is absolutely necessary. Sanctions motions are used as tactical devices. The stakes are too high. You can't afford to be wrong about preserving things.

Jonathan Redgrave (Redgrave LLP): Current Rule 37(e) has failed. The replacement has promise, but I have drafting issues. (I will submit detailed comments later.) The Committee

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should move forward with these rules. We can't wait forever for the ever-elusive empirical data to develop.

Thomas Allman: I endorse proposed 37(e), and agree it should be used to replace the current rule. My reason is that it cabins inherent power. As Judge Sutton said in *U.S. v. Aleo*, 681 F.3d 290, 310, that is important; when the rules address something judges should not attempt to escape the limits of the rules by falling back on "inherent power." The current lack of uniformity is an affront to the legal system, and the goal of restoring it is worth the candle. The rule will incentivize reasonable conduct.

Anna Benvenuti Hoffman: We are a small civil rights firm, with a focus on police misconduct. We routinely face difficulty obtaining needed information from defendants. This rule change would encourage stonewalling. An adverse inference is not a heavy sanction. She thinks that the rule change should be rejected entirely. If that does not happen, it should at least be limited to electronically stored information. Overall these amendments send a signal that there is too much discovery. Some judges are hostile to our claims. There is no reason to bolster the arsenal of defendants.

Dan Troy (GlaxoSmithKline): Preservation imposes great waste on his client. Something like 57% of our email is preserved for possible use in litigation. We have about 203 terabytes preserved. That's more than 20 times the entire collection of the Library of Congress. And the amount we have to preserve is rapidly increasing; since 2010 it has gone up a lot. We need a uniform national standard, and we also need a reasonable standard.

Robert Levy (Exxon): Exxon has 5200 people (including former employees) on litigation holds right now. This is a major problem. We have to evaluate all this material on our E-Discovery platforms. Assuming each of these people has to spend ten minutes per day to comply with this extra duty (a reasonable prediction) that means about 327,000 hours per year are used up dealing with litigation holds. This extraordinary effort is necessary because judges evaluate our performance only by hindsight. As a consequence, preservation is a big part of our design of our information systems. Preservation concerns affect our ability to make changes in those systems. Something that would deal with the conflicts among the circuits would be helpful to us. Under the present circumstances, it is very difficult to make a semi-confident decision about how to handle preservation issues. If the standard is negligence, how can I ever feel safe? That's why some people feel they must preserve everything. True, this set of problems is a result of improvements in technology, and any rule will be somewhat imprecise. But a rule could significantly improve on the current corrosive uncertainty.

Lily Claffee (U.S. Chamber of Commerce): Preservation exacts a heavy psychic toll on U.S. business and American global competitiveness. These burdens don't just affect mega-corporations, and may be even more significant (and potentially crippling) for small firms. It would be even better for the rule to go farther and address specifics on trigger, scope, and duration of preservation obligations. "I can drive a truck through relevance" under the current rule. It would be better to say "material and relevant." Without those additional specifics, I would be tempted to continue to overpreserve.

Jennifer I. Klar (Relman, Dane & Colfax): This rule change would produce bad results and also change substantive law. It would impede the search for truth. Indeed, the D.C. Circuit has held that there is a need in employment discrimination cases for adverse inferences where

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information is lost. A negligence/gross negligence standard is sufficient protection for defendants. Anything more provides too much protection. So this is a substantive change, not a procedural change. It also raises grave fairness issues. Defendants have documents, and even now the plaintiff must prove negligence in connection with destruction to obtain any relief. To require proof of something more creates a perverse incentive. At least, limit the rule to electronically stored information and don't apply it to paper documents. Those are critical to employment discrimination cases. The cost claims made by big corporations do not provide a ground for this change. Residential Funding gives them sufficient protection.

Malini Moorthy (Pfizer, Inc.) (testimony & no. 327): She is head of the Civil Litigation Group E-Discovery team. Pfizer supports the proposed changes to Rule 37(e). The current situation confronts companies like this one with vastly disparate obligations to preserve. The need for action can be illustrated by an example involving Pfizer. In litigation about hormone therapy, a court ordered the company to preserve 1.2 million backup tapes. That order remained in effect for a long time. These tapes had about 100 gigs per tape, resulting in preservation of a total of about 100 petabytes of data. This preservation cost an estimated \$40 million over the six years the order was in effect. But the company never had to use a single one of the backup tapes. It produced a total of 2.5 million documents to the plaintiffs (25 million pages). Only 400 of those documents were used in the litigation, mainly 100 of them produced early in the case and before the huge bills began running up. The shift in the culpability standard in the rule would help avoid this sort of thing, as would the emphasis on proportionality.

Phoenix hearing

Robert Owen: Rule 37(e) is a "tremendous step in the right direction." But it is vital that the rule be tightly written. There must be no wiggle room. Some judges will try to bend the rule. One S.D.N.Y. judge has already construed "willful" very broadly. A particular benefit of adopting the rule would be to prevent courts from relying on inherent authority. The goal should be to (a) establish a single national standard, and (b) make clear that it is higher than the negligence standard that the Second Circuit adopted in Residential Funding. Preservation has become much more complicated than it was in 2002 when Residential Funding was decided, particularly with the advent of multiple portable devices. It's almost impossible to train employees to avoid mistakes or keep everything.

Timothy Pratt: He was general counsel of Boston Scientific, and came to appreciate the litigation costs such an entity must bear. It is certainly not possible to eliminate all costs, but the scale of costs preservation can impose is extremely wasteful. For some years, Boston Scientific had \$5 million in costs to outside vendors for preservation. Since 2005, Boston Scientific had preserved about 107 terabytes of information, most of that in the last three years (as the volume of information escalated). "Everyone knows there's huge over-preservation and over-production."

David Howard (Microsoft): Microsoft has updated the report it offered during the Dallas mini-conference. In an average case, it now finds that the breakdown of number of pages preserved as opposed to the number used at trial is huge -- only 1 in 1,000 of the pages produced is used at trial, and only a very small percentage of those preserved is even produced:

Preserved -- 59,285,000 pages
Collected and processed -- 10,544,000 pages

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Reviewed -- 350,000 pages
Produced -- 87,500 pages
Used at trial -- 88 pages

Microsoft is forced to over preserve by the current rules, which do not clearly define the duty to preserve. It has spent \$600 million to preserve and to manage discovery, including vendor costs. On being asked, witness is uncertain how Microsoft could identify the 88 pages used at trial in the case example above, or the 87,500 produced, before litigation is filed. But the burden is mounting. In 2013, Microsoft found that it was preserving 1.3 million pages per custodian, a 400% increase by this measure since 2010. Proposed 37(e) will help deal with this problem. We have to keep information to prove our side of the case, but the current attitudes towards, and uncertainties about, preservation mean that we must preserve much, much more. This does not really benefit our opponents, but it does really benefit our opponents in terms of availability of needed evidence.

Paul Weiner (Littler, Mendelson): There are recurrent gotcha tactics that exploit the "crushing" burdens of E-Discovery. Plaintiff lawyers rely on overbroad cut-and-paste preservation demands. He would add "preservation" explicitly to Rule 26(b)(2)(C) to address this sort of problem. Rule 37(e) is a good start in dealing with these problems. If it achieves consistency across circuits, it will be a very good thing. The addition of proportionality is a bedrock concern. It would be good also to incorporate a Rule 26(g) undertaking with regard to preservation demands. He has written about the preservation obligations of plaintiffs, and sees that new 37(e) could provide them with benefits also. One way to do so would be the reference to "sophistication" in the Committee Note.

Thomas Howard: Proposed 37(e) will solve real problems. The theme should be to make sure that the rules continue to be predictable. That can minimize motion practice. Note that in products cases (which he handles) most of the defendant's documents offered at trial are offered by the defendant.

Stephen Twist: Preservation and discovery costs amount to more than what his company pays the plaintiff on the merits for cases in which plaintiffs are successful. The leading factor in managing litigation is cost, not the merits of the claims involved. But he is not certain how much he would save if 37(e) were adopted, and intends to submit that information later.

Jill McIntyre: Adoption of 37(e) will enable companies to preserve less without denying adversaries access to any important information.

John Rosenthal: The burdens of preservation are real. Last year, Winston & Strawn lawyers spent 100,000 hours on preservation. He strongly supports the package. Corporations must overpreserve. Proposed 37(e) will provide predictability. But further refinements would be desirable. He co-chaired the Sedona drafting group, and favors its approach. But he does not think that changes that would require re-publication and delay the amendment process a year or two are important enough to justify that delay.

Dallas Hearing

Matthew Cairns: (He is a former officer of DRI, but two officers of DRI will be testifying for the organization later in the hearing.) In his practice, he finds himself representing

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municipalities, and finds that they cannot afford the sort of rigors that E-Discovery can impose. One example is a case involving a town that had only one computer, located in the town hall. But to be suitably careful, he concluded it was necessary to impose a hold also on the computers of 10 volunteers, even though their computers included all their personal information. (These volunteers were sued in their individual capacities.) Prof. Hubbard will provide empirical evidence about this topic, but the point is that these burdens are real. Opponents of change use hypotheticals; proponents of change use real life data and examples. Nonetheless, he cannot say that adopting the proposed rule would actually have resulted in doing things differently in the case described.

Rebecca Kourlis: Broad research supports the conclusion that the current system is unduly burdensome for both sides and that it invites gamesmanship. (Almost) all agree that increased judicial management is a good thing. But it cannot be said that there are compelling data on any of the topics addressed by the amendment package. More data might be helpful, but more data are not likely to answer all questions. IAALS believes that the proposed changes are moving in the right direction.

John W. Griffin: It is true that there are myriad standards for preservation. But in essence everybody knows the rule -- if evidence is important it should be preserved, or at least it should not be destroyed. The new rule would seem to accept loss of evidence due to a party's negligence. That should not be accepted, for if it is the system will break down. The courts will suffer if parties that "lose" evidence are "blessed by the courts" despite these failures. Regarding one case he litigated against the government on whether a diabetic could be in the FBI, he was able to prove his case only after getting the medical records of all the current officers in the country and demonstrating how many of them were allowed to serve despite seemingly serious health problems.

Mark P. Chalos: All agree that having a national standard is laudable. We represent plaintiffs, and with corporate defendants we don't see "one document" missing, but rather "big gaps in data." Our concern is that this rule change would make it almost impossible to obtain sanctions to demonstrate the culpability required by the amended rule. The heightened standard of showing that something that was lost is essential to the case is also problematic. Making inadvertence an safe harbor in fact will have broad implications. The burden should be on the spoliator to prove "no harm, no foul."

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) G.E. operates in 160 countries and is involved in thousands of civil cases. The burden of preservation can be immense. To illustrate, GE has a Microsoft Outlook Exchange email system with 450,000 mailboxes distributed across 141 servers in 8 locations around the world. Each month, about 550 million emails are sent through those servers, but generally not stored on them. These realities impose great burdens on GE when it tries to comply with its preservation obligations. Focusing on email alone, GE faces a potential universe of 4,770 terabytes of email alone, located in hundreds of thousands of devices around the world. GE's lawyers have to define some sort of litigation hold appropriate to a case, and then send notices and reminders. Enterprise-wide, this is a herculean task. Often we cannot anticipate the twists and turns of litigation, and our efforts will be measured years later using 20/20 hindsight. That retrospective evaluation of preservation will happen in an adversarial atmosphere frequently leading to "gotcha" tactics. Altogether, this situation has led GE to engage in what must be tremendous

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over-preservation. Ultimately, very little of the material preserved is actually produced (in those instances where litigation in fact ensues), and very little of what is produced is actually used in the litigation. Since GE operates world-wide, this experience causes it to contrast the U.S. litigation burdens it faces with its experience in other countries. Simply put, there is no comparison; the U.S. system is in a league all its own. The breadth of discovery and the uncertainty of preservation obligations contribute to this wasteful behavior. GE therefore supports the change to Rule 37(e) to provide a nationally uniform standard and limit sanctions to cases involving bad faith destruction of evidence. It also thinks that the word "willful" should be removed and the "no fault" (B)(ii) provision should be removed. GE is also concerned about the "curative measures" provision because it could become the avenue through which judges would reintroduce sanctions under a different heading.

Michael Harrington (Eli Lilly & Co.): Since 2008, he has found that the total litigation spend on discovery has increased 60%; for preservation in particular, the cost may approach \$40 million for his company. Rule 37(e) is an improvement, although imperfect. It is not clear, however, that adopting the proposed rule will actually change his company's preservation practices, at least at first. He would look to the factors in 37(e)(2) in making decisions; they would provide guidance, although he does not like all of them as they are presently articulated.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. "We have a wonderful system, but nobody can afford it." Details are provided in Don Bivens' letter of Feb. 3 (no. 673 -- to be summarized separately). Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

Gregory C. Cook: The costs to litigate have gone up, particularly due to E-Discovery. We should have a uniform national standard, and curtail ancillary litigation. Before the advent of ESI, there was no need to tell people that they did not to keep their post-it notes, but with ESI everything might be preserved. (B)(i) should say "willful and bad faith," and (B)(ii) should be removed.

Thomas P. Kelly (Pfizer): The amount of ESI is staggering. For example, Pfizer has about 300 active legal holds involving about 80,000 people. It has 5 billion emails in legacy archives, a number that grows by a billion a year. It also has 250,000 boxes of documents, totalling about 750 million pages of material. It has to engage in preservation of these dimensions because there is no consistent standard on what it has to do. As things are now, we have to keep everything. If proposed 37(e) were adopted Pfizer would not have to preserve as much; standards would develop to guide it.

David Warner (Shell): He is the manager of global litigation information management for Shell. Technology is changing, and opportunity for unintentional mistakes is much greater than it was when Residential Funding was decided. The rules have not kept up with the changes in technology. The current rules are too broad; we have to keep millions of documents on permanent hold. Eventually only 1% of these are actually produced. The constraints mean that he has to stand in the way of Shell technological innovation designed to improve company operations. But technology will not provide solutions to these problems. No search tools exist to search different systems, and systems proliferate and evolve. On one matter, the cost of Shell

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of maintaining information on a hold was \$20 million to \$80 million. What it needs is something that narrows the scope of preservation.

Stephen Puiszis: Favors removing "willful" from (B)(i), which would correspond to the standard for sanctions in the 7th Circuit. He is also unnerved by the idea of curative measures, which involve no element of prejudice or harm. On (e)(2), he would take out Factor C on demands to preserve.

Megan Jones (COSAL): She is a member of Sedona. ESI has only been with us for about ten years. Although it has been a challenge to deal with "the tidal wave of electronic discovery," we should recognize how rapidly things can and do change. What technology created technology can manage. Her organization is focused on enforcing the antitrust laws, and it is concerned that under the proposal emails will be deleted with no recourse for those trying to prove anti-competitive practices. She supports Judge Francis's example for Rule 37(e). How could a plaintiff prove substantial prejudice? For example, suppose an employee testifies that "from time to time he talked to a competitor about pricing." Without emails to prove the details, how can she demonstrate that she has lost critical evidence?

Prof. William H.J. Hubbard (U.Chi.Law School): He has performed an empirical study and provided with his testimony the Summary of Findings of that study: It looked to a sample of 126 companies, including companies of all sizes and in a broad range of industries. Over 79% reported a "great extent" or "moderate extent" of preservation burdens. Companies report "overpreserving" to protect against serious uncertainty under current law. Rules amendments that clarify and define the standards for sanctions should reduce the phenomenon of overpreservation. Because only a small proportion that preserved information is ever used, reducing overpreservation would likely not have any negative impact on the production and use of data in litigation. The final report will not be ready until Feb., 2015. In testimony, Prof. Hubbard stressed three points: (1) Preservation is not a problem only for big companies; (2) A small fraction of matters generate high costs -- 0.5% of the matters generated 60% of the costs; and (3) Most preserved data is never collected or reviewed. Asked whether adoption of 37(e) would make a change in preservation activities, he said that one could expect a small but meaningful reduction in preservation as a result. At the same time, concerns about detrimental effects of adopting the rule seemed nil to him. Asked about whether much of what's preserved is kept not due to potential litigation but because of other preservation requirements, such as regulatory requirements, he said that the survey did not distinguish between these two types of preservation. Most of what is preserved today will be preserved even if the rule is adopted. Core records will be preserved; we are talking about data and the margins. For example, federal requirements may mandate keeping some kinds of email exchanges.

John Sullivan: There are entire law firms dedicated solely to preservation. These amendments will improve the situation, but (B)(i) should say "willful and bad faith."

Lee A. Mickus: Uniform standards are needed, and "willful" should not be used. There is confusion about what that word means.

Gilbert S. Keteltas: He co-chairs his firm's e-discovery team. He often sees 100 custodians under a hold, and a terabyte or more of information preserved.

David Rosen: Proposed 37(e) is a path for protecting corporate interests. Highlighting

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proportionality is not desirable. Although it is true that preservation can be costly, it should be remembered that plaintiffs bear real costs for preservation also.

Stuart Ollanik: He wrote "Full Disclosure" (1994) and joined in comments submitted by Paul Bland. It is important to remember that there is usually a substantial asymmetry of assets between individual plaintiffs and corporate defendants. He challenges the notion that defense discovery costs are a result of overbroad preservation or production efforts. Instead, those costs result from defense efforts to avoid discovery -- defendants litigate very vigorously to keep from turning over evidence. It seems that they now treat that activity of theirs that raises costs and a reason to curtail discovery and preservation. Proposed 37(e) will eliminate disincentives to keep needed information. He agrees with the comments of Judges Francis and Scheindlin.

Conor Crowley: He is Chair of one Sedona Conference Working Group. The bifurcation of curative measures and sanctions does not achieve the goal of a uniform national standard. See Sedona's October, 2012, submission to the Advisory Committee. It would be better for the rule to require that the party act in good faith than to focus on whether it acted in bad faith. If bad faith is the focus, it should be defined as acting with a specific intent to deprive the opposing party of evidence. In addition, "substantial prejudice" should be defined as materially burdening a party in proving its case. (B)(ii) is too broad in suing the "meaningful opportunity" criterion. The list of sanctions should be made more extensive, and the rule should itself direct that the least severe sanction be used. Factor C should be removed from (e)(2). Factor (B) could be interpreted too narrowly. In addition, (e)(2) should be expanded to include another factor -- whether the party destroyed information known to be relevant. He does not favor republishing, and thinks that these changes can be made without republication.

Daniel Regard: He is the CEO of iDiscovery Solutions. He is appearing as a technologist, not to take sides. From that perspective, "willful or bad faith" seems ambiguous. All automatic systems are intentionally set up by somebody. There are myriad such "automatic" activities. Data movement is really copying and deleting of data. Data changes move data and eventually lead to deletion of some. Use of cloud computing means that the cloud provider may be the one specifying or regulating such things; this may result in much less ability for control by the person subject to the duty to preserve. And these challenges are likely to increase. One can forecast 26 billion devices on the internet by 2020. The amount of location and time information all these devices will generate will be enormous, even by contrast to the already enormous amount of big data presently. But it is not reasonable to expect technology to solve all these problems. For one thing, the demand for solutions is simply not comparable to the demand behind the creation of new devices and development of new functions for devices. He recommends moving forward with the amendments.

John D. Martin: He is the manager of an e-discovery practice with 30 professionals. He generally supports the package. But his clients find themselves in "preservation paralysis." In one case, the client preserved about a half million backup tapes at a cost of \$1 million per year (\$2 per tape?). He supports amending 37(e), but worries about "willful" being too uncertain. As things now stand, there is little real incentive for plaintiffs to tailor their discovery requests. One suggestion is addition of the word "the" before "litigation" to make it clear that this is not about whether certain materials should have been preserved for some litigation, however remote from the present one, but whether they should have been preserved for this case. But he acknowledges that this line should not exclude attention to preservation for the first case involving an allegedly defective product when the current suit is the 50th case.

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Ashish Prasad: He is CEO of Discovery Services, LLC. The big ticket over the past five years has been the impact of TAR on e-discovery costs. His prediction is that it will lead to a "small reduction" in review costs, but that other developments will offset this effect. Most lawyers are not comfortable with having only machines look at documents and will insist that lawyers do so. One reason is to identify trade secrets and the like. So the real savings will probably be something like 25%. At the same time, there will be large increases in data volume, so improved methods may largely be a way to stay in place and not fall farther behind.

Ariana Tadler: She represents plaintiffs. She is concerned about an escalation of motions practice under amended 37(e), and also about the challenge of proving substantial prejudice. The current problems were not caused by the rules, but by the behavior of lawyers. The solution is cooperation, not 37(e). How will this rule really stop over-preservation? She supports a rule like Judge Francis's proposal. Sedona really struggled to reach consensus on these issues; they are very difficult. And now Prof. Hubbard reports that there won't be much effect even in terms of what the corporate litigants want.

Jennifer Henry: Amended 37(e) would be an important change to provide guidance for preservation. It would assist litigants. The State of the law is in flux, and parties live in fear of the consequences of failure to preserve. An example is an airline client that has five full-time employees who manage preservation only, not review of materials for production. This leads to massive over-preservation. She would remove "willful" from (B)(i) and add a bad faith requirement to (B)(ii).

David Kessler: He is Chair of the e-discovery practice at Norton Rose Fulbright. He is a huge proponent of using TAR. But it should not be written into the rules. But the requirement of specific objections under Rule 34 will not help so long as plaintiffs are still making overbroad requests.

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2. Rule 37(e)(1) -- Failure to preserve

Eli Nelson (284): This provision sets out an ambiguous standard for proof. Who determines whether information should have been preserved? What is the context of such a determination -- a priori or ex post? What test is applicable? I suggest changing the rule to say "which the party knew or should have known needed preservation." This would clarify that the standard is reasonableness.

Washington Legal Foundation (285): The rule should articulate a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information. Much of the wasteful cost of discovery stems directly from the ever-increasing burden of over-preservation, which is largely a result of guesswork resulting from fear of sanctions. The current "anticipation of litigation" standard is largely unworkable and impractical because these decisions must be made before litigation begins, and without the benefit of the scope of discovery provided by the pleadings. Moreover, before suit is filed there is no judge able to resolve discovery disputes or preservation issues. The rule should adopt a decisive and clear-cut "commencement of litigation" standard, triggered by the filing of a complaint. This rule would set uniform expectations while preserving a party's ability to prove or defend a case.

Lynne Thomas Gordon (287) (American Health Information Management Assoc.): Although AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information, the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." Provisions of the proposed amendments are still subject to considerable interpretation, thereby bringing into question whether these amendments will achieve the goal of uniformity. For example, the lack of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of those terms by the courts.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges that the rule adopt a "commencement of the litigation" trigger for determining when preservation obligations are imposed. The proposal would required preservation "in anticipation" of litigation. This trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming.

Andrew B. Downs (359): Often the prospect of litigation is foreseen far earlier well down the corporate organizational structure than at the level where the individuals with the training, background, and authority to initiate litigation holds are located. The "anticipation of litigation" standard is subjective and fails to recognize the fundamental traits of human nature -- humans are slow to recognize they may have erred, they react slowly to unforeseen events, and do not like to deliver bad news to superiors. For these reasons, I urge you to replace the "anticipation of litigation" standard with a two part either/or standard under which the duty to preserve begins when notice of the suit is received, or when the party receives a written request from the other party to preserve relevant information.

International Assoc. of Defense Counsel White Paper (390): The rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard requires preservation decisions to be made prior to the receipt of a scope-defining

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complaint. Litigants need a clearer roadmap in this area. The IADC recommends that the rule adopt a clear "commencement of litigation" trigger.

William Luckett (415): There should be a defined point in time when a duty is imposed on a party to preserve information. Perhaps it is when a notice of claim letter is received and the claim is defined with relative certainty, or perhaps it should be the date of service or other notice of commencement of litigation. Whatever the "marker" ends up being, it should be clearly stated.

Harlan Prater (418): Though I generally support the amendment, I am concerned with the adoption of the "anticipation of litigation" standard. The new rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. One would be a "commencement of litigation" standard balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary.

Federal Magistrate Judges' Ass'n (615): We note a possible ambiguity in Rule 37(e)(1), which refers to the failure "to preserve discoverable information that should have been preserved in anticipation or conduct of litigation." The predicate of any sanction must be that the information was not only discoverable but actually sought in discovery. Failing to preserve information in the abstract should not result in any sanction. It is the failure to produce information sought in discovery because of the failure to preserve it that justifies sanctions. We recommend inserting qualifying language in the rule to make this meaning clear:

If a party does not produce information sought in discovery because the party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may . . .

New York County Lawyers' Ass'n (2072): We agree with the Rules Committee that it is wise not to set "bright line" rules regarding preservation. They are inappropriate in this fact-specific area. The idea of a broader rule encompassing a duty to preserve was considered during the drafting of the 2006 amendments, but it was recognized then that drafting such a rule would be too difficult. But we would like to see clarification on what "anticipation" means. Does it mean that a duty to preserve is triggered when a party "reasonably anticipates litigation" or when a party believes "litigation is imminent"? The rule should make this clear.

Phoenix hearing

Timothy Pratt (Federation of Defense Counsel): What we need is a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. We think that it would be best to adopt a "commencement of litigation" trigger for that obligation. The "anticipation of litigation" test is uncertain and forces parties to make preservation decisions before they know whether a lawsuit is even coming. Such a rule is bound to lead to differing standards in different courts. The "commencement of litigation" standard is desperately needed.

William Butterfield: There should be a clear separation between a curative measure and a sanction. One way to do that would be to refer in the rule to a "non-sanction-based curative measure."

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3. Rule 37(e)(1) -- Curative measures

John K. Rabiej (272): The proposed amendments helpfully carve out "curative measures" from what have been sanctions, but in so doing they fail to retain a showing of prejudice as a prerequisite for use of such measures. Because curative measures may have consequences comparable to the severest sanctions, a showing of prejudice should be required. Accordingly, the Committee Note should be amended along the following lines: "Although a party need not make a showing that the opposing party is culpable in losing discoverable information, the party should typically make a showing of the actual degree of prejudice resulting from the lost information before a curative measure is imposed." Examples of serious curative measures include a directive to restore backup tapes, or permitting introduction of evidence at trial concerning the loss of information, along with attorney argument about that subject. Most judges will have the good sense to require a showing of prejudice before employing such measures, but history has taught that outlier decisions can have profound impact on ESI discovery jurisprudence, and that they are rarely subject to appellate review. Unfortunately, the Committee Note as presently written says that the court may impose a curative measure to restore lost ESI even though it would otherwise be precluded under the proportionality test of Rule 26(b)(2)(C). Meanwhile, proposed 37(e)(1)(B)(i) requires "substantial prejudice," and (B)(ii) requires a higher degree of prejudice. Altogether, this may invite arguments that no prejudice at all is required for imposition of curative measures. An early example of judicious consideration of prejudice is *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90 (D. Colo. 1996), which notes that prejudice is important along with culpability when making sanctions decisions. Typically, the courts have recognized prejudice in later decisions (noting a number of recent decisions). In *Gates Rubber*, plaintiff argued that because terminating sanctions were not involved no showing of prejudice was necessary. It would be best to guard against such arguments in the future; this may seem a small point but an ounce of prevention may be warranted here.

Washington Legal Foundation (285): The proposed rule authorizes imposition of "curative measures" without a showing of willfulness, bad faith or substantial prejudice. Presumably the party needs only to establish that lost information was relevant. But curative measures may sometimes have consequences every bit as severe as sanctions, at least some meaningful threshold should be satisfied before curative measures are authorized. A minimal showing of substantial prejudice should be required in the rule before curative measures are imposed. Unless such substantial prejudice can be shown, no curative measures should be necessary.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. "The Advisory Committee's proposal has the salutary effect of re-focusing attention on the 'remedial' aspects of a spoliation motion."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section applauds the Committee's attempt to bring order out of the chaos of differing standards for remedial measures for spoliation. It agrees that there should be a showing of substantial prejudice and willfulness or bad faith to impose sanctions.

Thomas Y. Allman (308): The distinction between "sanctions" and "curative measures" is quite murky and will allow a district court to avoid the ban in (B)(i) on all but the harshest

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sanctions simply by invoking the "curative measures" provision. This suggests that curative measures will become the primary remedy, rather than "sanctions," and that adverse inferences will fall into the former rather than the latter. The Sedona Conference, in comparison, defined the full spectrum of "sanctions" without differentiation, but separately acknowledged the role of case management and remedial orders as necessary to "effectuate discovery or trial preparation."

The Sedona Conference Working Group 1 (346): We have a number of concerns about the curative measures provisions. First, we believe that the Committee Note should be clarified to avoid any misunderstanding of this provision to suggest that courts would be limited in their authority to utilize similar measures to manage their cases, such as ensuring compliance with their orders. More basically, however, we believe that "curative measures" should not be treated separately from "sanctions" under Rule 37(e). Instead, the rule should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies ("sanctions") for failures to preserve relevant information, and that it should emphasize that where a party has acted in good faith in its preservation efforts, such sanctions should only be imposed in exceptional circumstances. The rule could undermine the Committee's goals by permitting "curative measures" without a showing of either exceptional circumstances or of prejudice and culpability. In practice, there is often no difference between the ultimate effect of many "sanctions" and "curative measures." Moreover, courts have characterized serious sanctions, such as a permissive adverse inference jury instruction, as remedial rather than as a "sanction." See *Mali v. Fed'l Ins. Co.*, 720 F.3d 387, 393 (2d Cir. 2013). Interpreted in this way, the "curative measures" provision would undermine the goal of reducing overpreservation. As detailed below, Sedona's October, 2012, proposal would forbid imposition of sanctions "if the party acted in good faith." This approach (with an "exceptional circumstances" exception) should be adopted for sanctions for failure to preserve evidence. When courts use such remedial or case management orders under another rule, neither prejudice to the requesting party nor culpability need be shown. Accordingly, the Sedona submission in Exhibit A says that "Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation." But "curative" sanctions potentially affect parties and counsel long after the case in which those sanctions are issued. For example, *pro hac vice* applications sometimes require counsel to report whether they have ever been sanctioned.

John Beisner (382): I enthusiastically endorse the portion of the proposal that authorizes courts to order curative measures. Under the current rule, the only option for a court faced with a party's loss of information is to sanction that party. But the goal of the rule should not be punishment, and giving the courts the option of ordering curative measures is logically.

Alan Morrison (383): Curative measures are a better option than sanctions.

Hon. James C. Francis IV (395): The differentiation between curative measures and sanctions in the proposed rule is a positive contribution. Particularly because there are professional repercussions for lawyers subjected to sanctions, this is a positive development. But the proposed rule puts the boundary in the wrong place. Each of the so-called "sanctions," including case-ending orders, may be curative if it is necessary to rectify the substantial loss of evidence.

Hon. Shira Scheindlin (398): In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court indicated that a permissive adverse inference instruction is akin to a curative measure,

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making a finding of culpable intent unnecessary. But how many judges would so regard a jury instruction?

David Kessler (407): There should be a requirement that a finding of negligence is included in the curative measures provision. That would make it clear that the adverse inference sanction is just that -- a sanction -- and not a "curative measure." In general I support the bifurcation of curative measures and sanctions. But I am concerned that it may not be clear that the listing of curative measures does not seek to limit a court's authority to use similar measures to manage its cases. I agree with Sedona that the Note should clarify this point. I also agree with Sedona that an adverse inference is, in all forms, a punitive sanction. It is very difficult to recover from, and too often case-dispositive. Since discoverable information will almost always get lost (to some extent), it should be absolutely clear that adverse inferences are not available unless the findings required for sanctions are made. Curative measures should not be case-altering (or career-altering). Therefore, courts should be prohibited from using curative measures to correct a failure to preserve discoverable information where the party has acted reasonably or where the requesting party cannot establish some prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The changes to 37(e)(1)(A) say that permitting additional discovery is a "sanction." It seems to us that this means plaintiff can only get further discovery on proving spoliation. But discovery should be available without proving spoliation. The rule then says that the court can also "order curative measures." But the only curative measure that will deter spoliation is to strike defenses. The only other curative measure that comes to mind is an adverse jury instruction.

Robert D. Curran (448): The changes to 37(e)(1)(A) propose "sanctions" for failure to preserve. But the first proposed sanction is to "permit additional discovery." Thus, it would seem that the plaintiff has the burden to uncover the spoliation and then is granted only the right to pursue more discovery, a right which should have been accorded anyway. The second sanction is to order curative measures, but the only one that will deter spoliation is to strike defenses. It is unclear what "curative measures" exist other than striking defenses or providing a jury instruction regarding a rebuttable presumption as to what information would have shown. The third sanction is to shift attorney fees, but those fees will usually not amount to much.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully

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that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost. We think the Note should list examples of measures that might be considered curative measures and make clear that this listing does not preclude other remedial measures that the court may devise in view of the facts of a particular case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): I question the assumption that "curative measures" are somehow significantly less harmful and dangerous than "sanctions." The potential for a personal-interest conflict with a client under Rule 1.7 of the Model Rules of Professional Conduct is the same with either type of negative result. And the negative impact on the client is also the same. Practically speaking, there is no principled distinction between the concepts of "curative measures" and "sanctions" under proposed 37(e). So having the curative measure provision will promote motion practice because there is no culpability standard for those outcomes. So at least a meaningful threshold of harm or culpability should be required before these are available.

P. David Lopez (EEOC) (1353): Many measures that are not "adverse inference instructions" should be permitted in the absence of a finding of bad faith or willfulness. Such measures can range from comment by the court regarding a party's loss of information with no suggestion as to which party the information would have favored, to an instruction that if the court determines that the party with control over the information was at fault in the loss of the information it may, but is not required to, infer that the information was unfavorable to that party. EEOC believes a new rule should give the courts maximum flexibility in addressing the loss of information whatever the degree of fault that caused the loss. EEOC also believes that it will be appropriate in some cases to permit attorney comment to the jury about the loss of information even though the court has not commented or instructed on the matter. So long as the evidence would permit a jury to conclude that it was lost due to the fault of a party. EEOC therefore believes the Note should be augmented with something like the following: "Attorney comment to the jury on the loss or destruction of relevant information generally should be permitted when there is sufficient evidence in the record for a reasonable juror to accept the attorney's contentions regarding the reason the information is missing and any inferences the attorney suggests that the jury draw from the loss or destruction of the information."

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA applauds the emphasis on curative measures. This new authority to "adopt a variety of measures that are not sanctions" represents a common-sense principle that preservation rules should be concerned primarily with fairness in litigation, not with punishing parties for inadvertent spoliation. The rule's emphasis on whether loss of discoverable information was caused by "the party's actions" is also an important clarification to make clear that potential parties need not fear sanctions when they acted in good faith but outside factors resulted in loss of information. The rule should make clear that the measures specified in proposed 37(e)(1)(B)(i), including the adverse inference instruction, are not curative measures. Some courts say that adverse-inference instructions are remedial, and litigants might urge courts to employ them in this guise.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ urges that the rule, if adopted, should allow courts to use some adverse inference jury instructions as curative measures and not sanctions. There are different types of instructions that range from strict mandatory instructions to permissive instructions. Permissive instructions leave the jury with authority to determine

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whether relevant facts are missing, and if so whether that information would have been helpful to the party who was innocent in its loss. Such an instruction can level the evidentiary playing field. There should be room to separate the severe adverse inference instructions from less severe ones.

J. Barton LeBlanc (AAJ) (1732): The Committee's proposal blurs the distinction between sanctions and curative measures and thereby inadvertently preempts state common law in diversity cases. The current rule is limited to sanctions "under these rules." That phrase clearly excludes duties under state law and places a breach of that duty to the court, which is within the Enabling Act. But the amended rule does not include that phrase, and it proposes to include a breach of duty to a litigant, even though that is usually a matter of state common law. Many states have found that the failure to preserve evidence is a violation of a duty owed to the litigant and that a curative measure is an adverse inference jury instruction. The use of adverse inference jury instructions as a curative measure is distinct from sanctions and requires no additional standards that must be met. The Judicial Conference should not be in the business of protecting large corporations from having to preserve evidence, particularly when the impact would be to preempt state law.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases.

John Rosenthal (2146): The bifurcation between "sanctions" and "curative measures" should be abandoned. Permitting "curative measures" with no showing of culpability will weaken the rule, as will the absence of prejudice from the requisites for "curative measures." The distinction is basically false, and unsupported by decades of case law. There is often no practical difference between "sanctions" and "curative measures." Moreover, in the overwhelming majority of cases courts granting what they seemed to regard as "sanctions" were doing what the Committee seems to think is using "curative measures." Permissive adverse inference instructions are an example. *Mali v. Fed'l Ins. Co.*, 720 F.3d 387, 395 (2d Cir. 2013), said that such an instruction "is not a sanction" but rather "an explanation of the jury's fact-finding powers." Compare *Arch Ins. Co. v. Boran-NuTone LLC*, 509 Fed. Appx. 453, 459 (6th Cir. 2012), saying that a permissive adverse inference instruction is a sanction and recognizing that it is "dressed in the authority of the court, giving it more weight than if merely argued by counsel." The rule proposal is also bereft of a standard or guidance as to when and under what circumstances to grant such measures, likely producing years of litigation about what the rule means.

David R. Cohen (2174): Several of those submitting comments question whether any limitations on sanctions is necessary. Some do not seem aware of the devastating impact that any sanctions can have, whether severe or merely intended to be curative, on the reputation of companies and their counsel. One of the great benefits of the proposed amendments to Rule 37(e) is that they retain the ability to allow curative measures in non-egregious circumstances without the stigma of the "sanctions" label. For a company, the reputational impact of having been sanctioned may be far worse than the monetary cost involved. It can have negative impacts for years to come. For counsel, the result may be loss of a job or the ability to practice law. For

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example, when I seek admission pro hac vice, one of the invariable questions is whether I have ever been sanctioned by any court in any jurisdiction. If I had to answer "yes," that could disqualify me from many representations.

Washington D.C. Hearing

Jeanna M. Littrell (FedEx Express): As an LCJ member, FedEx urges attention to the comment from John Rabiej about including a prejudice requirement in relation to "curative measures," which can be very serious consequences.

David Cohen: The Committee was wise to leave in remedial measures so that parties can still get additional discovery if they need it, even sometimes with attorney fees as well. We used to call those things "sanctions," but we're no longer placing that bad label on them because you don't have to be guilty of bad conduct for these to be used.

Jonathan Redgrave (Redgrave LLP): The curative measures provision is not tethered to any notion of culpability, which is unfortunate. Supports John Rabiej's suggestion regarding need for showing of prejudice.

Robert Levy (Exxon): We agree with John Rabiej on the need to emphasize prejudice as a prerequisite for "curative measures." Those can be very significant.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) GE is concerned about the introduction of "curative measures." This could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation and, if unwarranted, be equally unfair. Moreover, the absence of any prejudice requirement in (e)(1)(A) means that the curative measures could provide a means to evade the substantial prejudice requirement in (b)(i), creating, in effect, a no-fault, no-prejudice loophole in the rule. That would produce a step backwards in most jurisdictions from the current situation. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions.

Lee A. Mickus: He generally represents auto companies. He favors dropping (B)(ii). On the other hand, he has no problem with missing evidence instructions.

Brian Sanford: He is a plaintiff lawyer. In his opinion, adverse inference instructions are curative measures and the rule should so recognize.

Summary of Rule 37(e) Comments

4. Rule 37(e)(1)(B)(i)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The burdens on an injured party are so high as to render this "sanctions" provision essentially meaningless. First, it must show that the offending party failed to preserve discoverable information. Then it must establish that it should have preserved that information in anticipation of litigation. Then it must show that due to the loss of this information it has suffered "substantial prejudice." Even if it proves these things, the party must also prove that the failure to preserve was either "willful" or done in "bad faith." These are "both impossibly high (and subjective) standards that tend to be very difficult to establish without the proverbial 'smoking gun' to establish scienter."

Lawyers for Civil Justice (267): The conjunction should be changed from "or" to "and" so that the rule says sanctions may be imposed only on a finding that the failure to preserve was "willful and in bad faith." Permitting a "willful" failure to preserve as sufficient could include any deliberate conduct. This is confirmed by Judge Scheindlin's decision in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013), which applies the following standard: "The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently." Under this standard, establishing a standard auto-delete function could be characterized as "willful." The standard should make clear that sanctions are allowed only on a finding that the failure to preserve resulted from a desire to suppress the truth. Alternatively, the rule could define "willful" to include scienter or knowledge.

Daniel B. Garrie (281): The proposed amendment does not adequately deal with how the moving party proves the need for the missing information. As Judge Scheindlin eloquently said in Sekisui American Corp. v. Hart, 2013 WL 4116322: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it would allow parties who have destroyed evidence to profit from that destruction." Now counsel must advise their clients that destroying evidence is risky, as the burden is on the destroying party to prove good faith. If the burden shifts to the innocent party to show prejudice or harm, companies will not be as fearful of deleting evidence. Imagine a corporation who stumbles upon very harmful evidence, but destroys it knowing that the opposing party could never prove the value of its contents. The amended rule inadvertently protects the bad actor. If the rule is amended, "spoliation will run rampant."

Eli Nelson (284): There are currently differing interpretations of the threshold for sanctions, and this rule change will make it harder to order sanctions. Without the teeth of sanctions, there is no credible disincentive for those tempted to act badly. Document preservation is not something on the radar for many lawyers. Sanctions provide an excellent vehicle for promoting ethical behavior by lawyers, and the fact they can be ordered in the judge's discretion provides a desirable prod to lawyers. But requiring a finding of willfulness or bad faith will make it easy to defeat sanctions. With this change, it may become appropriate for counsel to advise their clients to roll the dice, or to remain ignorant of their preservation obligations. If they are "merely negligent" in that regard, the clients will actually improve their chances of winning on the merits. In particular, this strategy will assist them in winning the war of attrition. "Discovery about discovery" will become necessary to vindicate the rights of the victims of such conduct. At a minimum, "gross negligence" or "recklessness" should be added

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to willfulness and bad faith as a sufficient finding. This would make litigants pay more attention to the preservation obligations than they have so far.

Washington Legal Foundation (285): WLF believes that the use of the disjunctive is highly problematic. Conduct that is merely willful does not necessarily spring from a desire to suppress the truth, so "willfulness" alone should not suffice to establish the requisite scienter for imposition of sanctions. Some judges will not hesitate to impose sanctions if the rule can plausibly be read to permit them. See Sekisui Am. Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly even if without intent to [breach the duty to preserve it], or negligently."). Finding culpability under such circumstances would undermine the goals of this amendment. It would be better to require that the court find that the loss of information was "willful and in bad faith" before sanctions can be imposed.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA is concerned that the proposed amendments shift the burden to prove the need for missing information to the missing party. As Judge Scheindlin noted in Sekisui American Corp. v. Hart: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators."

National Center for Youth Law (292): This amendment would reject case law that holds negligence to be sufficient culpability to support sanctions. It essentially requires the innocent party to prove that it has been substantially prejudiced by the loss of relevant information, even where the party destroyed information willfully or in bad faith. "Not only does such a change incentivize negligence (as long as it's not 'willful or in bad faith') but it creates an almost insurmountable burden on the plaintiff."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party that acted willfully or in bad faith to spoliator relevant material. Concerns have been raised regarding whether the proposed rule is inconsistent with the goals of sanctions, including deterrence and shifting risks to parties destroying evidence. For precisely such reasons, many courts have applied a presumption of prejudice where a party has willfully destroyed evidence. Burdening parties with the necessity of proving the relevance of information that no longer exists presents obvious problems. Finding alternative sources may often be possible, but often it is not.

Thomas Y. Allman (308): Under (B)(i), a potential producing party will be immune from sanctions even if discoverable information is lost through negligent or grossly negligent conduct, and even if the conduct is deemed "willful" it is still protected unless there is proof that "substantial prejudice" has resulted. A safe harbor of that nature is essential to create predictability, particularly for potential parties implementing preservation obligations prior to suit. But the ambiguity of the word "willful" significantly weakens that effect. It may be described to include anything that is "intentional." Similarly, the requirement that prejudice be shown could be compromised by courts that conclude the "willfulness" implies substantial prejudice. Beyond that, (B)(i) risks being undermined by (B)(ii), which makes sanctions available outside the tangible property realm in the absence of culpability. It would also be desirable to make it clear in the Note that the Committee has rejected *Residential Funding*.

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Kaspar Stofflemayr (Bayer Corp.) (309): Granting authority to impose sanctions for loss of information that is "willful" though not in bad faith is not sufficient protection. And the non-exclusive list of factors in proposed 37(e)(2) confuses rather than clarifies the matter. Parties who are concerned to avoid sanctions at all costs will continue to overpreserve evidence unless the Rules delineate a clear line between a bad faith failure to preserve evidence and less culpable failures. We endorse LCJ's proposal to replace "or" with "and" in (B)(i).

Jonathan Smith (NAACP Legal Defense Fund) (310): Moving parties will often be unable to demonstrate the degree of harm suffered since they will not fully know what the lost information would have revealed. As Judge Scheindlin recently said (Sekisui American Corp. v. Hart, 2013 WL 4116322), this shift "incentivizes bad behavior on the part of would-be spoliators." This does not mean that the moving party should be exempt from having to establish prejudice in order for sanctions to be imposed; those results should occur only in cases in which real harm has occurred. But the proposed amendment places a burden on the moving party that is too heavy. Civil rights plaintiffs, in particular, must often obtain their evidence from the defendants. LDF suggests that the rule be changed so that if the court concludes that the spoliating party has acted culpably (even in only a negligent manner) it bears the burden of demonstrating that the lost information is not relevant to any of the claims being asserted by the other party.

John F. Murphy (Shook, Hardy & Bacon) (314): Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring "substantial prejudice" and actions that were "willful or in bad faith." The present divergence in standards has created confusion, particularly for institutional clients such as corporations, businesses or governments. To enhance the revisions, the Committee should consider changing the standard from "willful or in bad faith" to "willful and in bad faith" to prevent the bad faith element from fading away or disappearing altogether. Doing so would be a reasonable extension to the Committee's work on the rule to ensure that those who make reasonable efforts to preserve information not suffer sanctions.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the culpability standard should require proof of both willfulness and bad faith. Allowing sanctions for conduct that is willful but not in bad faith undermines a core purpose of the proposed amendment -- to punish intentionally harmful conduct only. Pursuant to the articulated standard, Pfizer could be sanctioned for loss of material pursuant to an existing document retention policy, even if the policy had been implemented in good faith. Because willfulness does not require bad faith, the current wording of the amended rule appears inconsistent with the intention of the Committee.

U.S. Chamber Institute for Legal Reform (328): The ILR believes that the standard should be willful and in bad faith. At least one judge has interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind. See Sekisui A. Corp. v. Hart, 2013 WL 4116322 at *4 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that the use of the word "or" in this subsection would authorize sanctions for willful conduct. That could include deliberate conduct that was void of any evidence of bad faith. One often cited willful act is the use of a standard auto-delete function. The use of such a function could be willful, but not

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in bad faith. FDCC recommends that the Committee consider substituting "and" for "or" to make clear that the conduct must be both willful and in bad faith.

The Sedona Conference Working Group 1 (346): Sedona believes that "willful" should be removed from the culpability standard and that "bad faith" should be replaced with "did not act in good faith" for the goal of uniformity. The specific Sedona proposal (submitted to the Committee in October, 2012 and included in Appendix A to this submission) provides as follows:

Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

This determination should be made with reference to a number of elements:

In determining whether a party acted in good faith in its preservation efforts * * *, a court must consider whether the party:

- (A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;
- (B) intentionally destroyed information relevant to the claims or defenses;
- (C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;
- (D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and
- (E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

The Sedona proposal then directs that the court "must select the least severe sanction necessary to redress the failure to preserve" and provides the following enumeration of possible sanctions:

- (A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;
- (B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;
- (C) staying further proceedings until the order is obeyed;
- (D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;
- (E) directing that the matters embraced in the order or other designated facts be taken

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- as established for purposes of the action as the prevailing party claims;
- (F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
 - (G) striking pleadings in whole or in part;
 - (H) dismissing the action or proceeding in whole or in part;
 - (I) rendering a default judgment against the non-movant; or
 - (J) treating the failure as a contempt of court, if there has been a violation of a previous order.

Andrew B. Downs (359): The rule should say that sanctions are unavailable unless the loss was "willful *and* in bad faith," not willful *or* in bad faith. Conduct can often be willful without there being any intent to cause the resulting harm, or even when the actor could not reasonably foresee the resulting harm. Conduct which is willful and in bad faith should not be tolerated. Good faith conduct that is "willful" in a strict meaning of the term should not be sanctionable.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We think that "willful" is the wrong term to use if the intention is only to authorize sanctions against one who acted with intent to spoliator. Some courts define "willful" as synonymous with volitional action, but no connotation of bad faith. We think that willful either should be deleted from the proposal, or the disjunctive "or" should be replaced with "and."

John Stark (381): Limiting sanctions to willfulness and bad faith combined with substantial prejudice in the litigation is a wise standard to keep litigation from devolving into a game of document management. Willfulness or bad faith should be defined as intent to destroy evidence to prevent a party from prevailing in litigation. The problem with leaving "willfulness" undefined is that it may be deemed to mean a simply intent to dispose of information. The exception where there is no willfulness or bad faith -- "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" -- provides a reasonable escape valve for a truly catastrophic situation caused by the destroying party's actions.

John Beisner (382): I applaud the proposal requiring a party to demonstrate "substantial prejudice" to support a sanctions request. This will limit the parties' ability to exploit spoliation traps. But the culpability standard should focus on whether the party's actions were "willful and in bad faith." Some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind (citing Sekisui). But sanctions should be authorized only when a party has engaged in intentionally culpable conduct -- knowingly destroying evidence that it knows should have been preserved. With ESI, it may be impossible to keep all information on a given subject. Sanctions for spoliation should be available only when the party knew it had a duty to retain the information.

Alan Morrison (383): I think that one aspect of the sanctions provision should be clarified. It does not appear to authorize the court to impose attorney's fees as a sanction.

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Sanctions under Rule 37(e) are limited to those listed in Rule 37(b)(2), but most lawyers would regard attorneys' fees as not included. But Rule 37(b)(2)(C) does allow attorney's fees. It is unclear, however, whether (C) is included. I would add "and (C)" after "Rule 37(b)(2)(A)" on line 22 unless the Committee wants to exclude attorney's fees. I find the standard -- "willful or in bad faith" -- uncertain because there is no definition of those terms. Of the two, bad faith is less problematic; presumably it means something more than lack of effort or sloppiness, but the focus on the party's subjective intent is problematic, particularly when it is an organization with many individuals having potential responsibility for retaining records. Instead, objective tests like recklessness or gross negligence are clearer and should be sufficient, particularly since the level of sanctions can make the punishment proportionate to the level of misconduct. Willful is more of a problem; as Judge Posner has written willful is "a classic weasel word. Sometimes it means with wrongful intent but often it just means with knowledge of something or other." Unless some clear guidance can be provided, I would leave it out and rely solely on an objective standard such as recklessness or gross negligence.

International Assoc. of Defense Counsel White Paper (390): The use of "willful" is problematic because some courts define willfulness as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. The problem could be solved by substituting "and" for "or" in (B)(i).

Steven J. Twist (296): The word "willful" should be removed, making it clear that the test is "bad faith." Some courts interpret "willful" to mean simply intentional, and if that word remains in the rule it will remain impossible for companies to make reasonable decisions about preservation. Moreover, several circuits have higher standards, so adopting the published standard would lower the standard in those circuits.

Hon. Shira Scheindlin (398): Substantial prejudice is an open-ended concept that will be interpreted differently by each judge facing the question. It is a subjective determination. Worse yet, "willful" must mean something other than "bad faith" given that the latter term is preceded by "or." What, then, does it mean? My research shows that it varies depending on the context in which it is used. I would not like to see this problem cured by eliminating "willful" and leaving only "bad faith." That sets the bar too high. Such a rule would encourage sloppiness and disregard for the duty to preserve. If the Committee wishes to keep the focus on state of mind, then I would urge that the language include "gross negligence," "reckless," or "bad faith" rather than "willful" or "bad faith." I am very concerned about the burden of proof with regard to "substantial prejudice." It is unreasonable to require the victim to prove not only culpable state of mind but also to prove prejudice when it cannot know the value of the information that it does not have. The better approach would be to presume that the lost information was important if the culpable conduct was done with a sufficiently egregious state of mind. The presumption can be rebutted by the spoliating party. That is the fair approach.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): We already know that the failure to produce information by defendants often causes substantial prejudice. But having to show that failure to preserve was willful or in bad faith imposes an extraordinary burden on a claimant seeking to obtain curative measures or sanctions against a party that destroyed evidence. Defendants will simply claim that their "retention" policies made the evidence unavailable. Then they get a "pass" and no sanctions will ensue. But the cost of keeping information in this electronic age is de minimis. Moreover, locating relevant materials is easy also. "Instead of

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manually sorting for weeks through what can often be tens of thousands of pages, or in many of my cases millions of pages, now we do an electronic search in moments to find relevant information to assist in prosecuting or defending a claim. * * * No matter what is claimed about the cost of preserving and producing information electronically, anyone can see that it is far cheaper to handle than on paper."

John Kouris (Defense Research Institute) (404): DRI believes that the use of the disjunctive in this proposal ("willful or in bad faith") is highly problematic. Some courts (see *Sekisui*) define "willful" as intentional or deliberate conduct without any showing of a culpable state of mind, such as by establishing a standard auto-delete function. We think "or" should be changed to "and."

David Kessler (407): The word "willful" should be stricken. In addition, the rule should be amended to require the court to use the least intrusive curative measure or sanction to remedy the failure to preserve.

Michael Reed (on behalf of members of the ABA Standing Committee on Federal Judicial Improvements) (409): We believe that the language is problematic. The term "willful" is hopelessly ambiguous. We believe that the threshold standard for the award of sanctions instead should be a demonstration of gross negligence or recklessness by the movant. We also believe that it's unfair to place an initial burden on the moving party on a spoliation motion to prove prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This amendment practically imposes a scienter requirement that will rarely if ever be met. This will cause the plaintiff to engage in massive discovery to prove scienter.

Mark S. Stewart (Ballard Spahr) (412): The rule should be changed to say there must be a finding that the loss of information was "willful and in bad faith." Without that change, some courts may find the willfulness component satisfied because a party had purposefully acted in a way that caused data to be lost without intending to prejudice a litigant. In *Sekisui*, for example, plaintiff deleted computer files to free server space six months before sending a notice of claim. Despite finding that plaintiff acted without a "malevolent purpose," the court found that the intentional destruction of evidence after the duty to preserve attached amounted to willful destruction. The language of the proposed rule should be revised to avoid this sort of result.

William Adams (419): The rule should say willful "and" bad faith.

Ryan Ferguson (433): The rule should say willful "and" bad faith. Merely requiring that the conduct was willful leaves open the possibility that parties will be sanctioned for following what would otherwise be legitimate document retention policies.

Robert D. Curran (448): The requirements for getting sanctions under this provision impose impossible conditions. There is practically a scienter requirement, which will never be met. And it would require plaintiff to engage in massive discovery to prove scienter.

Thomas Wilkinson (461) (with copy of article from Penn. Bar Ass'n Fed. Prac. Comm. Newsletter): Judge Scheindlin's point about the dubious nature of putting the burden on the party seeking sanctions to prove substantial prejudice is persuasive; it is well-established that the

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burden should lie with the party best able to provide information about the question at issue. But her further charge that the amendment creates perverse incentives and encourages sloppy behavior is not so persuasive. Although the amendment would limit the court's ability to issue sanctions, it also encourages the court to order curative measures. The court could, for example, direct a party to restore lost information or to develop substitute information or permit the introduction of evidence at trial about the loss of information or allow argument to the jury about the possible significance of that lost information. These adverse consequences serve to encourage litigants to engage in reasonable and diligent document and data preservation practices.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

Gwen D'Souza (Maryland Employment Lawyers Assoc.) (660): Currently, negligent destruction of evidence will support an adverse instruction allowing the jury to infer the defendant's bad faith and possible retaliatory or discriminatory animus. We oppose the change in (B)(i) requiring the plaintiff to prove wrongful intent in the destruction of evidence before proving wrongful intent in the underlying employment is too onerous. Placing on the plaintiff the additional and new burden of proving harm is also unwarranted. And these pro-defendant changes are unlikely to produce savings for defendant. It is unclear how it can really save money spent on preservation just because the rule is amended this way.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We strongly oppose including "willful" as an alternative to "bad faith." We attach in our Appendix a compilation of citations to varying interpretation of the word "willful" in the various circuits. We also think that any standard less demanding than "bad faith" would be wrong for the serious consequences Rule 37(e) addresses. If the term "willful" really means the same thing as "bad faith," we don't need it, and if it means something else, we do not want it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): The Committee does not explain why it has decided to treat an "adverse inference jury instruction" as a "sanction" under Rule 37(e)(1)(B) rather than as a "curative measure" under Rule 37(e)(1)(A). Certainly many of the courts that have approved this remedy have viewed it as a necessary corrective to address the particularly discovery failure at issue. If it is a permissible "curative measure" to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of that evidence. See *Mali v. Federal Ins. Co.*, 720 F.3d 387, 391-94 (2d Cir. 2013) (explaining that an adverse inference instruction may be appropriate to explain trial testimony even where it is not a sanction). It may be that the adverse inference instruction must be addressed separately from other curative measures. But we think that requiring a high showing of culpability before it can be used sets the bar too high. We also think

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that the Committee should explain why it is rejecting the Second Circuit's Residential Funding decision. Requiring a finding of bad faith or willfulness before an adverse inference instruction can be given swings too far the other way even though it is a legitimate concern that negligent behavior could cause this result.

We suggest that the rule be amended to treat the adverse inference instruction separately, and to require a showing of gross negligence or recklessness, plus substantial prejudice, before it can be employed. In addition, we think that the rule should be revised to permit sanctions if the party's "actions or omissions" caused prejudice. We are also uncertain whether the rules process can preclude district courts from imposing sanctions under other sources of authority, particularly when they are authorized by state law in diversity cases. One member of the Committee (Julia Brickell) dissented from this point, urging that a willfulness or bad faith standard should be used for adverse inference instructions because they influence a jury's determination of the merits of a case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Using the term "reckless" in the rule, either to define "willful" or to support an inference of bad faith, should be avoided. It is critical to define "willful" if it is to be used in the rule to avoid possible incorporation of common law meanings of the word. As the Supreme Court has recognized, "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007). The word "willful" should be removed from the proposed rule. If it is retained, it should be defined as the Sedona Conference has recommended -- "acting with the specific intent to deprive the opposing party of material evidence relevant to the claims or defenses." Keeping the term will mean that the standard for sanctions will be lowered in the circuits that now require bad faith. And using "reckless" instead is not a good solution. The critical point is that only bad faith supports the adverse inference that the lost evidence was harmful to the party that lost it. As the Supreme Court also recognized in *Safeco*, the term "recklessness" is not self-defining. See 551 U.S. at 68. Moreover, recklessness is a quasi-negligence standard.

ARMA International (1263): "Willfulness" is a risky standard if it includes discarding information pursuant to a responsible preservation policy. Such discard of information is consistent with established records management standards. The heart of information governance is the concept that documents have a life cycle, and that means they are intentionally destroyed or discarded when that cycle ends. This is good information governance, and is the part of the rule proposal our members are struggling with the most. The contradictions for information governance professionals would become worse if companies could be sanctioned for spoliation for intentionally deleting data after they have followed, in good faith, a disposition protocol that included reasonable due diligence.

Jonathan Marcus (CFTC) (1366): Courts define "willfulness" in myriad ways across the country and in various contexts. Sometimes a finding of gross negligence is said to suffice. For example, in *U.S. v. Krizek*, 111 F.3d 934, 941-42 (D.C.Cir. 1997), the court said that "reckless disregard lies on a continuum between gross negligence and intentional harm." In the context of a False Claims Act case, the court regarded reckless disregard as an extension of gross negligence. In *Phillips v. U.S.*, 73 F.3d 939, 943 (9th Cir. 1996), the Ninth Circuit upheld an instruction for recklessness that the lower court had borrowed from an earlier definition of gross negligence in a case in which the government had to prove willfulness under 26 U.S.C. § 6672. "Like Euclid's axiom that 'things equal to the same thing are equal to each other,' courts could

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find that reckless conduct equals both willful and grossly negligent conduct." Accordingly, if "willful" and "bad faith" are retained in the rule the Note should define them.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA urges adoption of a simple bad faith standard. "Willfulness" could be interpreted to mean mere deliberateness, without any specific intent to destroy information relevant to litigation. Courts could conclude that even activity protected under current Rule 37(e) -- "information lost as the result of the routine, good-faith operation of an electronic-information system" -- describes "willful" conduct in that the system itself was adopted pursuant to an intentional business decision.

Anna Benvenuti Hoffman (1918): "An adverse inference is not a very powerful sanction -- it merely permits the jury to find that evidence that defendants should have kept, but cannot produce, may have been helpful to plaintiffs. But it does provide some incentive for defendants to look for and produce files. With this change, that would be gone, and it would be essentially impossible to meet the threshold required for sanctions."

New York County Lawyers' Ass'n (2072): We are concerned that the rule does not allow a court to sanction an unsuccessful bad faith attempt to destroy crucial information because that can't be said to have caused substantial prejudice. Even where egregious actions did not result in prejudice, we think that the court should have discretion at least to impose monetary penalties.

Washington D.C. Hearing

Jeana Littrell (FedEx Express): If courts interpret "willful" to include settings on an auto-delete function, that might mean we would have to stop using auto-delete on all our systems, or at least all subject to a litigation hold. That would be very costly, and would strain the limits of existing technology for finding responsive ESI.

David R. Cohen (Reed Smith): The present formulation of creates a risk because some courts interpret "willful" very broadly. It would be better to say "willful and in bad faith."

Jonathan Redgrave (Redgrave LLP): Using both "bad faith" and "willful" will lead to disputes. He favors using "bad faith" and defining it. Also, the rule should say that the least severe sanction should be employed; saying that only in the Note is not enough.

Thomas Allman: It is good to reject Residential Funding. But some recent decisions have defined "willfulness" too broadly. It may be that a good definition of willfulness in the Note will be an antidote to that risk. It is important to make very clear that the old Second Circuit view is not to be followed under the new rule.

Peter Strand (Shook, Hardy & Bacon): We think it would be much better to say "willful and bad faith." "Folks don't destroy documents."

Dan Troy (GlaxoSmithKline): We favor having the rule say willfulness and bad faith.

Alexander Dahl (Brownstein Hyatt Farber Schreck): The current formulation that treats "willful" action as sufficient to justify sanctions is too elastic. For example, see Judge Scheindlin's decision in Sekisui, where she defines willfulness in a very broad manner. True, she

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also expresses opposition to this committee's current proposal in that decision, but the point is that some judges will regard the current proposal as authorizing sanctions in a broad swath of cases. In short, so long as decisions like the Sekisui ruling scare the people who have to make preservation decisions, the rule change will not achieve its purpose of reducing the huge burden and cost now resulting from divergent approaches to preservation. The rule should say that bad faith is required, and that it requires a showing of a decision based on consciousness of a weak case or awareness that evidence helpful to the other side would be destroyed.

Jennifer Klar: Negligence or gross negligence would be more appropriate standards than what the Committee has proposed. That would protect parties that have acted reasonably. Under the willfulness or bad faith standard, the destruction of evidence will go unchecked, creating an incentive to destroy evidence. Moreover, including adverse inference instructions with sanctions is wrong because that is a remedial measure, not a sanction. The D.C. Circuit has proclaimed that such measures are "fundamentally remedial."

Michael C. Rakower (N.Y. St. Bar Ass'n): We recommend including a definition of willfulness. It should stress intentional action. It also should focus on a party's "actions or omissions", not just on actions. Omissions may more often be the reason these problems arise.

Phoenix hearing

Robert Owen: Retaining "willful" as sufficient will dilute the rule. One judge in the S.D.N.Y. has already indicated a very broad interpretation of that word. It would be best to substitute "and" for "or" in the rule -- "willful and in bad faith."

William Butterfield: The requirement that a party seeking sanctions prove that the loss of information caused "substantial prejudice" is a large burden. For this reason, the rule should provide that the alleged spoliator should have the burden of proving that there was no substantial prejudice. That would matter only if the court were persuaded that the necessary level of culpability were established. In those cases, given that the alleged spoliator has more knowledge of its own information than the other side, it makes sense to place the initial burden on that party to show that there has been no significant prejudice. "Willful" is also a "problematic" standard in the rule. The Committee Note should provide examples of bad faith. One would be failure to take any steps to preserve, allowing the auto-delete function to destroy evidence.

Stephen Twist: The word "willful" should be removed.

Jill McIntyre: The "substantial prejudice" standard will be helpful to companies. Usually they don't delve into the data to determine what to preserve; no company will make a detailed evaluation of the data at the preservation stage, unless litigation is imminent. So rather than do that, it will avoid risks by overpreserving. Although reducing preservation does not save much money all by itself, it does reduce costs later on for collecting, processing, and producing. Asked how the "substantial prejudice" standard assists companies in making such decisions, witness answers that it shows that it's o.k. to risk loss of some information.

John Rosenthal: The distinction between sanctions and curative measures is illusory and should be abandoned. One illustration of this illusiveness is that "permissive" adverse inference instructions are sometimes regarded as curative measures presently by judges. On the other hand, some case law calls things we seem to regard as curative measures "sanctions." Yet our

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draft would allow "curative measures" to be imposed without a showing of either prejudice or culpability. If curative measures are left in, a prejudice requirement should be added.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) Regarding the standard for allowing sanctions should clearly make them unavailable for anything like negligence. Therefore, he would be concerned about adopting a "reckless disregard" standard. The Sedona standard is better.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

John H. Martin: Texas has a lot of jurisprudence on what "willful" means. If you use that word, you should define it.

Neva Lusk: (B)(i) should say "willful and bad faith." Otherwise any intentional action could result in sanctions. There are a lot of mom and pop operations that do intentional actions that should not suffice to support sanctions. Does not like "reckless disregard" as a standard either. Instead, one should use a totality of the circumstances standard. Asked whether a party that simply decided not to comply with preservation obligations because of the cost of doing so could be sanctioned if it was indifferent to, but not aware of, what was lost, answered that this conduct would not indicate a specific intent to deprive another party of relevant evidence.

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5. Rule 37(e)(1)(B)(ii)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): This proposal is even more troubling than (B)(i). "First of all, the phrase 'irreparably deprived' is past tense and, therefore, suggests that an injured party proceeded with the litigation of its case and was, as a result of the offending party's conduct, not able to pursue its claims during the course of the litigation. But if an injured party has to wait until it has failed on its claims at trial as a result of vital evidence being destroyed then none of the sanctions provided for under Rule 37 will matter." And what does the term "irreparably" add to "deprived"? That seems to establish some higher standard that an injured party must meet to show its entitlement to relief. Finally, the use of the word "present" raises concerns among those who have the burden of proof. "[A]n injured party may be deprived of vital evidence necessary to *prove* its claim by the wrongful conduct of a defendant, but still have a scintilla of evidence sufficient to *present* its claim to a jury."

Lawyers for Civil Justice (267): This provision should be stricken. There is no need to include this provision since ample measures exist to handle the rare kind of case in which this problem can arise. Removing the provision would not weaken existing spoliation law. The Silvestri case, for example, could have been handled the same way it was handled under this rule without (B)(ii) because the court could have deemed plaintiff's conduct to be willful or in bad faith. It was surely prejudicial. Moreover, under the proposed rule remedial or curative measures would have permitted the court to preclude plaintiff's experts from testifying or allowed defendant's attorney to comment at the trial. Other cases confirm that this provision is not needed to justify needed sanctions results. But including this provision will likely result in an increase in motions seeking harsh sanctions. Indeed, this provision provides "a tort-based spoliation recovery" that is beyond the authority of the Rules Enabling Act, for "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from 'a court's inherent power to control the judicial process'" (quoting *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009)). Moreover, the "irreparably deprived" phrase is too amorphous, and results would tend to differ from judge to judge. In addition, "including the (B)(ii) exception in the new rule will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the 'irreparably deprived' language."

Washington Legal Foundation (285): (B)(ii) creates a risk that it will essentially swallow the rule by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. Although the Committee evidently intends that the "irreparably deprived" language will be applied narrowly, litigants claim "irreparable harm" as a matter of course in sanctions battles, and experience suggests that judges and litigants alike will some come to view the expression as a convenient way to circumvent primary operation of the rule. Absent willful or bad faith conduct, there should be no authority to impose sanctions on an innocent or merely negligent party. (B)(ii) should be removed from the proposed rule.

Alex Jennings (294): I think that (B)(ii) should be retained even if 37(e) is limited to electronically stored information. Although limiting the rule to ESI might lessen the effect felt if this part is removed from the rule, it still provides a narrow exception when sanctions are allowed even in the absence of willfulness or bad faith. This narrow exception has been used by courts. Due to the exceptional circumstances that are necessary for relying on this provision, such as tangible evidence, limiting the rule to ESI is not enough. The flexibility of (B)(ii) can be

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incredibly necessary.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section supports authority to impose sanctions without regard to culpability when a party's actions have "irreparably deprived a party of any meaningful opportunity to present or defend against claims." Were this provision not included, the Section would be concerned that an adverse-inference jury instruction or a direction establishing matters or facts could not be imposed when the spoliated information is central to the action but the spoliator was merely grossly negligent or reckless. The standard in (B)(ii) is sufficiently high that it likely will be only the rare case in which sanctions may be imposed when the spoliator does not act willfully or in bad faith.

Thomas Y. Allman (308): The (B)(ii) provision should be dropped. In its place, the phrase "absent exceptional circumstances" should be added to the rule to avoid overruling *Silvestri* and similar cases. The Committee Note could then explain that this exception is designed to help avoid courts using it inappropriately to impose liability without fault. If the Committee is not prepared to remove (B)(ii), it should consider limiting it to "documents and ESI."

Malini Moorthy (Pfizer) (no. 327): This provision creates a risk that courts will not narrowly apply what is meant to be limited to very exceptional cases. Plaintiffs routinely assert that they have been "irreparably deprived" of critical information.

U.S. Chamber Institute for Legal Reform (328): ILR urges that this section be deleted altogether. Allowing sanctions without a finding of wilfulness and bad faith would exacerbate the problem if spoliation "mini-litigations." It would also be unfair because an adverse inference instruction produces all but a declaration of victory for the side that obtains the instruction against the other side.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that this provision could swallow the rule by enabling judges to impose sanctions without any finding of willfulness or bad faith. It urges removal of the provision.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): I was asked whether my suggestion to add "absent extraordinary circumstances" to the beginning of (B)(i) and drop (B)(ii) would lead to greater uncertainty because it would be open ended. That would make the alternative a truly rare exception, not an equivalent alternative as in the current draft.

Doug Lampe (343) (Ford Motor Co.): Ford is concerned that retaining (B)(ii) would eviscerate much of the clarity sought by the Committee. All advocates for sanctions claim they have suffered "irreparable deprivation." All that "irreparable" means is that the information sought is gone, and "deprivation" only means that the loss of the information is regrettable and unfortunate. Ford urges that a bad intent component be included in any rule governing the imposition of sanctions. If that is not done, Ford urges that (B)(ii) be changed to make it clear that the claim or defense must be so restricted by the absence of information that the court would be required to dismiss the claim or defense were there no relief under (B)(ii).

The Sedona Conference Working Group 1 (346): Sedona believes that if the "Absent exceptional circumstances" approach it has recommended is adopted (b)(ii) would not be

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necessary. We think that the wording of the Advisory Committee's proposal would be susceptible to inconsistent interpretations because the term "meaningful" is inherently subjective. The "absent exceptional circumstances" approach provides the court with appropriate flexibility to address situations where the loss of evidence has deprived a party of the ability to pursue or defend against the claims. If the Committee proceeds with (B)(ii), we believe it should be rewritten to focus on whether the party has been "irreparably deprived of the ability to present or defend against the claims in the litigation." This language seems to us much less susceptible to inconsistent interpretations than the Committee's "any meaningful opportunity" language.

Kenneth D. Peters & John T. Wagener (353): This provision should be deleted. It will generate motion practice as the courts struggle to determine what it means.

Andrew B. Downs (359): This provision is an invitation to sanctions motions. The irreparable loss of evidence should not convert otherwise unsanctionable acts or omissions into sanctionable ones. If there is an "irreparable deprivation" exception, lawyers will use it, but not as the Advisory Committee contemplates. It takes but one published decision expanding the scope of this provision to encourage yet more sanctions motions and more litigation of collateral issues.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We are concerned that courts may overread (B)(ii) because it applies to any loss of information that "irreparably deprives a party of any ability to present or defend the action." The rule should make clear that sanctions are permitted in the absence of culpability only where the adverse party cannot, as a result, submit any evidence in support or defense of the claim. It may be best that this provision be eliminated, but at least it should be explicitly cabined.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that sanctions for loss of evidence should be limited to cases of bad faith. To create a lesser standard of culpability for loss of evidence that causes catastrophic prejudice would encourage counsel who cannot show that the loss of evidence was due to bad faith to claim that the impact of the loss satisfies the standard of no "meaningful opportunity" to prosecute or defend. This in turn would require opposing counsel to argue that the party seeking sanctions could nonetheless prevail -- in effect arguing the other side's case.

John Beisner (382): (B)(ii) should be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation claims as a litigation tactic and impose significant costs on American companies by encouraging them to store every last byte of information.

Alan Morrison (383): I believe the use of the word "any" on line 30 of the proposal places too heavy a burden on the party seeking sanctions. I would substitute "a" for "any," to lessen the burden and produce a fairer balance. In line 32, the use of "all claims" seems to mean that the deprivation must affect all claims; should it not be "any" claim. Beyond that, why not use "claim or defense," as used in Rule 26(b)(1) and several other places in the rules. Thus, the provision could read "irreparably deprived a party of a meaningful opportunity to litigate a claim or defense in the action."

International Assoc. of Defense Counsel White Paper (390): (B)(ii) could be problematic and allow courts to impose sanctions absent any willfulness or bad faith. It is likely that some

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courts would use the exception to avoid the primary rule. The IADC recommends that the exception be removed from the proposed rule.

Steven J. Twist (396): (B)(ii) should be removed from the rule. It is likely some courts would use the exception to avoid the primary rule.

John Kouris (Defense Research Institute) (404): This provision could swallow the rule and defeat the basic goal of the amendment to constrain use of sanctions for failure to preserve. It is likely that some courts would simply use this provision to sidestep the requirements of (B)(i).

David Kessler (407): This provision should be removed. It makes the responding party the insurer of its opponents' ability to sue.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This provision at least offers the possibility (compared to (B)(i)) of having some teeth. But we ask, at what point this decision is to be made? Is it only at the end of the trial? If it is toward the beginning of the litigation, it would be almost impossible for plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to present or defend against the claims in the litigation? This would require massive evidentiary hearings and certainly will be almost impossible to determine at the beginning of the process.

Mark S. Stewart (Ballard Spahr) (412): This provision may paradoxically undermine the amendment's purpose. The exception should theoretically apply only rarely, but courts may use it to avoid the rule. Requiring intentional conduct to justify sanctions is necessary to achieve the amendment's goals. We think that this provision should be removed.

William Lockett (415): This provision should be removed. There is plenty of strength in the rule as written when there is any indication of willfulness or bad faith with respect to failure to preserve evidence.

Thomas Kirby (435): This provision is seriously ambiguous and should be clarified. The language "any meaningful opportunity to present or defend against the claims in the litigation" could be read in several different ways. It could mean that severe sanctions are proper if any one meaningful opportunity to present or defend any one claim is foreclosed, even if other equally meaningful opportunities or defenses remain. Or it could mean that sanctions are proper only if every meaningful opportunity has been foreclosed. I suggest that the rule be rewritten to say "one or more meaningful opportunities to present or defend against one or more claims in the litigation" or "all meaningful opportunities to present or defend all [or at least one of the] claim[s] in the litigation."

Robert D. Curran (448): At what point is the determination called for by (B)(ii) to be made? Is this only at the end of the trial? If it is toward the beginning of the process, it would be almost impossible for the plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to litigate. This would require massive evidentiary hearings. And no party would be willing to admit, much less try to prove, that it cannot prove its case.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit

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litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): There were multiple suggestions on how to address the concerns of the (B)(ii) exception to the requirement to prove culpability. A significant number of participants urged that (B)(ii) should be removed entirely, and that the Committee Note should state that 37(e) does not overrule the Silvestri line of cases. Others raised the issue that the Committee Notes themselves are not approved by the Supreme Court, making this a less-than-ideal way to address these concerns. One participant endorsed an idea proposed by Thomas Allman that would delineate between documents, ESI, and tangible things. This provision could be removed, it was suggested, if new 37(e) were applied only to ESI and documents, but not to tangible things.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We support the proposition that, in that rarest of cases where a party's non-bad faith conduct destroys evidence such as to make it impossible for the other party to litigate, extreme sanctions might be appropriate. We do not agree with the suggestion -- implicit in a question the Committee asked -- that such unintentional catastrophic destruction cannot happen to ESI. It can, and the rule should apply to all manner of information.

Philadelphia Bar Ass'n (995): While dropping (B)(ii) might make sense if the rule were limited to ESI, we think that it serves a purpose to provide relief in a case involving a catastrophic harm to a party's ability to litigate that cannot be remedied by any curative measure. We understand that such a finding is limited to extremely rare circumstances and that the harm must be the result of a party's actions, not to an Act of God or of some third party.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We strongly support retaining this provision. There may well be circumstances where the consequences of the loss of electronically stored information could be so severe as to warrant the imposition of sanctions even in the absence of willfulness or bad faith.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA believes that this provision should be eliminated. Allowing sanctions without any culpability would undermine the goal of proposed 37(e). Because the focus is on the value of the information to a potential opposing party, which is not within an organization's control, there is no stopping point under this standard short of "keep everything." Moreover, the sanctions specified, particularly the adverse inference instruction, should depend on whether there has been litigant misconduct.

New York County Lawyers' Ass'n (2072): We think that this provision should be retained. The Note makes it clear that this will apply only in exceedingly rare cases, and even then only when the loss was a result of "the party's actions." It is important to retain judicial authority to use sanctions in such extreme circumstances. Moreover, in such a catastrophic loss of information it seems at least unlikely that negligence would be the explanation. Some in the

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legal community claim that this provision will lead to a spate of motions, if those motions are made courts will sensibly use curative measures in most instances, for most cases do not involve such exceptional losses of information. It does not seem likely to us that this provision will "swallow the rule," for the Note makes it clear that this is only for the truly extraordinary case.

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): The focus should be on the importance of the lost information to the action; materiality is key.

Thomas Allman: Drop (B)(ii) from the rule. The better solution is to preface the rule with "Absent exceptional circumstances, . . ." That will take care of any exceptional case that might fall within (B)(ii).

Alexander Dahl (Brownstein Hyatt Farber Schreck): This provision creates a risk that judges seeking a ground for imposing sanctions but unable to fit within (B)(i) will distend (B)(ii) into something much broader than what the Committee has in mind. The provision is unnecessary. Problems of the sort addressed can be solved by curative measures.

Michael Rakower (N.Y. St. Bar Ass'n): We support the Committee's formulation of sanctionable conduct, but recommend that willfulness be defined. We propose that it be either intentional conduct or conduct that's sufficiently reckless so as to enable someone to foresee a high likelihood of harm. Our report is more precise on the formulation of this preferred standard. We also think it is important to add "or omissions" after "actions."

Phoenix hearing

Robert Owen: This provision should be eliminated. It will produce adverse results and dilute the goals of the rule rather than solve a real problem.

Timothy Pratt (Federation of Defense Counsel): This provision should be eliminated.

Thomas Howard: This provision should be limited to tangible things. That is where the problem exists -- loss of the instrumentality of injury. ESI is simply different.

Robert Hunter: Imposing sanctions for nonculpable loss of evidence is wrong. This sort of thing can happen often. For his company, employees servicing units often remove, discard, or alter units as part of servicing. Even if they ask "Have there been any problems?" they may not find out about something that comes up long afterwards.

Stephen Twist: (B)(ii) should be removed.

John Rosenthal: This provision should be eliminated. It deals with a mythical situation and will cause myriad problems.

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6. Rule 37(e)(2)

Lawyers for Civil Justice (267): The factors in Rule 37(e)(2) do not belong in the rule. Originally (at the time of the Dallas mini-conference in September 2011) the Subcommittee was considering "bright line" rules to specify clear preservation standards and bring certainty to this area. In particular, specificity on the "trigger" would have been welcome. The Subcommittee abandoned this approach, however, leaving it to the courts to determine whether information should have been preserved. But the list of factors is incomplete and potentially misleading. There is no relative ranking of the importance of the various factors. Although some emphasize attention to whether a party behaved reasonably, there is little discussion of the impact of the absence of reasonableness. If these provisions are included in the rule, there is a significant risk that they will spur ancillary discovery. Courts may "cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the rule." For example, the Note states that the prospect of litigation may call for altering routine operations and says that issuing a litigation hold is often important. "It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate." See *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409 (S.D.N.Y. 2009). The specific factors compound the uncertainty:

Factor A does not define with any precision the circumstances that constitute notice that litigation is likely or that information would be discoverable.

Factor B calls for evaluating the reasonableness of preservation efforts, but reasonableness is an inherently vague standard and the fact some information was lost does not mean reasonable efforts were not employed.

Factor C regarding good-faith exchanges about preservation could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.

Factor D regarding proportionality does not spell out presumptive categories of data which need not be preserved absent prior notice. Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands.

Factor E may be useful in some cases, but requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to provide guidance.

Washington Legal Foundation (285): The list of factors is not particularly helpful. None of these "reasonableness" factors sheds any relevant light on the central question -- whether the failure to preserve material was willful or in bad faith, resulting in substantial prejudice. Because it is an incomplete catalog of considerations, it risks being misinterpreted as mandates whose violation would justify the imposition of sanctions irrespective of the culpability and prejudice requirements. WLF urges the Committee to eliminate these factors from the rule altogether. At the most, they could be mentioned in the Note.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): (This is an article from the Federal Courts Law Review concerning the proposed amendments.) Preservation issues are best addressed by the parties as early as possible and from a reasonable, good faith perspective.

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Counsel should not send pro forma preservation letters with overbroad demands, and the recipient of a preservation demand should view the request as an opportunity to open a dialogue on the scope of any preservation obligation, rather than an affront to be ignored. "Conferring with opposing counsel does not place the responding party at a tactical disadvantage, particularly if the recipient has already concluded that the preservation demand letter was sufficient to trigger a litigation hold."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): Although the Section strongly endorses the concept of describing with particularity these and other such factors in the text of the rule, we are concerned that the language and the factors do not clearly express the Advisory Committee's intent. We think that the factors include everything in current Rule 37(e) and that it should accordingly not be retained if the new provision is adopted. But the introductory language saying that the factors bear on whether discoverable information that should have been retained has been lost singles out willfulness and bad faith as topics without considering the extent to which these factors also bear on whether an action was negligent or grossly negligent, which could affect what is an appropriate corrective measure under proposed 37(e)(1)(A). In addition, although the Committee Note says that the Committee has an "expectation" that only the least severe sanction necessary in the circumstances will be used, there is nothing in the rule that says so. The Section thinks that the introductory material should be revised as follows: "The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information, including"

Thomas Y. Allman (308): The Committee rejected the inclusion of a detailed rule on preservation in favor of the "factors" listed in proposed 37(e)(2). But there is a dark side to the choice to merely hint at what the Committee might see as desirable by listing idiosyncratic "factors." The factors listed identify only selected aspects of the mix of issues involved and do not provide the type of practice commentaries issued by more nimble entities such as the Sedona Conference. The Committee seems to assume that the factors will ensure that if a potential party makes reasonable preservation planning decisions it will not be branded a "spoliator." But the rule does not allow a party to safely rely on its ex ante assessment of proportionality in designing the scope of an initial preservation effort, even in the absence of access to the opposing parties or to a court. There is also a serious risk that courts will unfairly or inadvertently turn the encouragement of reasonable conduct on its head by determining that the protection from sanctions will be forfeited in the absence of following the advice in the Committee Note. For example, the Note unequivocally advocates the interruption of routine operations and touts the use of litigation holds, implicitly endorsing their use regardless of the circumstances. Courts have so used statements in the Committee Note to the 2006 amendments. The factors listed in Rule 37(e)(2) do not belong in the Civil Rules and should, at most, only be described in the Committee Notes as a checklist of possible issues to consider. But if the current formulation is retained, the Committee should make it clear that sanctions may be imposed only upon proof of heightened culpability and substantial prejudice. In addition, the Note should clarify that the diminished scope of discovery under amended Rule 26(b)(1) due to proportionality concerns is equally applicable to the scope of preservation under proposed 37(e).

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer strongly urges the adoption of a clearly defined and easily identifiable triggering event, such as the commencement of litigation, that would initiate a defendant's obligation to take affirmative steps to preserve information. The ill-defined "reasonable anticipation of litigation" standard under current law is too vague to provide

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useful direction to a party who wishes to avoid the risk of sanctions while still limiting preservation and costs to what the law requires. An example illustrates the problems under the present rule: In late 2012, an attorney sent the company a letter attaching a federal court complaint he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. It also rejected the demands, but so far as it knows no lawsuit has been filed. Meanwhile, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information. Current law gives scant guidance on when the company should no longer "anticipate litigation."

U.S. Chamber Institute for Legal Reform (328): This provision should be deleted from the rule. None of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitute reasonable conduct in the preservation context.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges deletion of this section of the proposed rule. The factors do not assist in determining whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice. If the Committee does not delete the factors, FDCC suggests that they be included in the Committee Note rather than the text of the rule itself. Including the factors in the rule suggests that they are mandatory considerations.

The Sedona Conference Working Group 1 (346): Sedona has proposed a set of factors to use in determining whether a party acted in good faith, its preferred standard for sanctions. It believes that its factors are superior to some identified in the Committee's draft. In particular, it believes that receipt of a "preservation letter" should not be mentioned. The existence of a preservation duty really has little to do with such letters; the duty can arise without any such demand, and demands are often made when there is really no duty. This factor may result in gamesmanship. We agree that the reasonableness of the party's preservation efforts should matter, but are concerned that the Committee's language is too narrow and might be read as limited to whether sufficient efforts were made to preserve the specific information that was lost. Instead, the focus should be on the "overall reasonableness" of the party's preservation efforts.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): Regarding proposed 37(e)(2)(D), we note that it does not say what factors inform proportionality in this context. The Committee Note suggests that courts should consider the same factors that inform the proportionality inquiry under new Rule 26(b)(1), and we expect that most courts will do so. But we think the text of the rule should explicitly refer to the Rule 26(b)(1) factors that courts should consider.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): In Rule 37(e)(2)(E), we propose changing "the party" in the first line to "any party." There may be circumstances in which it would be reasonable for the requesting party to seek the court's guidance on the responding party's obligation to preserve evidence. In addition, we think that the invitation in the Committee Note (see pp. 45-46) for consideration of a party's lack of sophistication in evidence-preservation practices would encourage lack of diligence or, worse, sharp practices by parties insincerely profess to be "unsophisticated."

John Beisner (382): I think these factors should be deleted from the proposed rule. None

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of them relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Instead, they emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Reasonableness is a highly elastic standard, and using it will only foster greater uncertainty over whether a party may or may not delete information. There is also the risk that some courts will view failure to satisfy any one of these factors as sufficient to justify sanctions in a case where the loss of information was not the result of the party's willfulness or bad faith.

Alan Morrison (383): I worry about the focus in factor (A) on whether the information would be "discoverable." Particularly if the change to Rule 26(b)(1) invoking proportionality is adopted, that determination may be quite difficult to make. It also seems to me that requiring this sort of inquiry is ill-advised, and to create incentives for parties to destroy evidence, or allow it to be lost, on the ground that they had a reason to think it would not "discoverable under Rule 26(b)(1)." Similarly, paragraph (D) makes proportionality to "any anticipated or ongoing litigation" pertinent. Is that the same as the proportionality idea now introduced into 26(b)(1)? Does it include all the factors in 26(b)(2)(C)(iii) or 26(b)(1)?

International Assoc. of Defense Counsel White Paper (390): Although (e)(2) is illuminating and potentially helpful, it provides too tempting an opportunity for trial courts of varying judicial temperaments to bend the rule to achieve their own objectives instead of providing a bright line rule for litigants to understand and follow with confidence. The IADC recommends that the list of factors be eliminated, or at most included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts.

Hon. James C. Francis IV (395): Perhaps the most beneficial aspect of the proposed rule is the non-exclusive list of factors that courts are directed to use in assessing a party's conduct. Proposed (e)(2) makes clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect. Further, the factors properly encourage the parties to engage with one another with respect to preservation and to bring disputes that cannot be resolved informally to the court for resolution.

Hon. Shira Scheindlin (398): These factors reveal little or nothing about willfulness or bad faith. Rather, they are factors that assess the reasonableness of the conduct. This creates a disconnect. If the standard for the imposition of sanctions included negligence or gross negligence the factors would make sense. But as the rule is written now they are not helpful.

John Kouris (Defense Research Institute) (404): This list of factors is not helpful and should be deleted or, at most, included in the Committee Note rather than the rule text. What the rule should do is articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. The current, ill-defined boundaries of discovery drive over-preservation. The "anticipation of litigation" standard in particular causes real difficulties.

Stuart Delery (U.S. Dep't of Justice) (459): The Department strongly supports including the concept of proportionality, as is included in the current factors. Disputes about the proper scope of ESI discovery or recovery efforts often involve exponentially greater cost than comparable disputes involving paper documents. Too often the accusations of lost information,

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and expensive and time-consuming efforts to address or prepare for accusations, or to recover long-discarded emails, outweigh the value of the case. We recommend that the Note clarify that the scope of discovery a party anticipates should be consistent with the scope of Rule 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information" because some will claim a disconnect between the scope of information covered by this new rule and the scope of information that is otherwise available in discovery. We also think that factor (A) on foreseeability should be modified. The Department has confronted situations in which a party repeatedly "loses" data while claiming ignorance of its preservation obligations. We think that "was on notice" might not capture this situation, and that the rule should allow the court to take account of prior instances of the same or similar conduct by the party. We therefore propose that (A) be revised as follows:

- (A) the extent to which the party reasonably should have known ~~was on notice~~ that litigation was likely and that the information would be discoverable;

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): A few expressed support for the factors in (e)(2), but most supported revising them. A significant number favored substantially revising (e)(2) to remove the "laundry list," leaving the analysis flexible to be tailored for specific cases. One participant expressed the concern that the factors include many items that occur after the fact, which could result in gamesmanship. Factors (A) and (B) garnered the most support, and several argued that the rule should be limited to those alone. One participant also suggested collapsing the introductory language. Other factors drew criticism. (E) was said to be confusing and unhelpful, based on the ambiguity of the word "timely." The same thing was argued with respect to "proportional" in factor (D). Others argued that the list of factors should be made explicitly non-exhaustive.

Charles Ragan (494): With respect to the factors listed in (e)(2), I suggest that less would be more, and that the factors should be limited to:

- (A) the extent to which the party was on notice that litigation was reasonably likely and that the information would be relevant; and
- (B) the reasonableness of the party's efforts to preserve the information.

I think that proposed factors (C) through (E) are subsumed within the first two. I suggest adding "reasonably" to (A) to conform to the majority rule in case law for triggering legal hold obligations. I suggest the substitution of "relevant" for "discoverable" because the scope of relevance is elastic -- it can contract or expand, as claims are modified. In particular, there may be information the discoverability of which is not apparent when notice occurs that litigation is reasonably likely. A party should not be subject to sanctions if it secured the core information at the outset, but did not foresee the final configuration of the claims, and that information that is ultimately "discoverable" in regard to added claims but has been lost in the interim might lead to sanctions.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations) (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the

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information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that including the factors in the rule is a bad idea. It will encourage courts to place too much weight on the enumerated "checklist" elements while ignoring others, and might even erode the essential point that the imposition of extreme sanctions depends on a finding of actual bad faith. Beyond that, we unanimously and particularly object to Factor (C), for it portends sanctions for not "consulting" in response to a request to preserve information. The factor seems to assume that such consultation is always required. This factor should be eliminated even if the factors list is retained. We are also uncomfortable with Factor (E), for it seems to presume that it is the duty of the recipient of the request to go into court to have its decision what information to preserve confirmed.

James Heavner (The Hartford Financial Serv. Group) (748): This list is unnecessary and risk creating uncertainty in application if retained in the body of the rule. Several of the factors listed yield answers that do not contribute to the underlying issues.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We believe the factors in proposed 37(e)(2) are relevant and appropriate to be considered in assessing the reasonableness of a party's efforts to preserve information for use in litigation. This is one of the reasons we think the rule should apply to all types of information, not only electronically stored information. Those factors should be used for assessing preservations with regard to other types of evidence also.

Robert Kohn (Federal Bar Ass'n) (1109): By providing that whether a party timely sought the court's guidance on any unresolved disputes about preserving discoverable information, the amendment may lead to earlier and more economical case management to resolve preservation issues. More generally, the standards in the rule simplify the job of litigating and deciding a spoliation motion, and may lead to more compromises about these topics, thereby obviating applications to the court.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Including pre-suit consultation among the parties is tantamount to implicitly imposing a pre-suit obligation to meet and confer. That is unwarranted. My experience is that pre-suit letters demand that everything be preserved but the kitchen sink, and that nothing is gained by trying to negotiate the issues. But if there are to be factors, the Committee should considering adding a party's good faith in attempting to preserve information, the relevance and materiality of the information and the degree of prejudice or harm suffered because it was lost.

Denise Taylor (Assoc. of So. Cal. Defense Counsel) (1463): Making the adversary's efforts to communicate its preservation expectations part of the calculus for what is reasonable under the circumstances fosters cooperation, and may require it. "Adding a consideration of the proportionality of the preservation efforts to any anticipated or ongoing litigation is another helpful guideline, and it is in line with rule 26(b)(1). This reflects not only the wisdom of

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ensuring that litigation resources are not wasted, but also demonstrates the comprehensiveness and uniformity of the proposed rule amendments." Including attention to whether the court's guidance was sought will helpfully encourage parties to seek guidance from judges.

Gregory Cook (1464): (Supplementing testimony and responding further to questions raised during the hearing at which he testified.) I favor eliminating the factors. Judge Grimm asked what factors I would include and indicated a concern about a rule without any guidance. My main concern is that the failure to comply with these factors would be construed to mean bad faith. The factors emphasize reasonableness, which is a markedly less rigorous standard than bad faith. One solution might be to make the factors apply only to curative measures and not to sanctions. I am also concerned that the factors mix together pre-suit and post-suit matters. I also believe that "anticipation . . . of litigation" is uncertain for class actions. Finally, the factors refer to proportionality of the preservation efforts but not of the request to preserve.

William Butterfield (2034): I applaud the Committee's attempt to provide guidance on the factors used to assess whether a party's conduct was willful or in bad faith. But many have assailed proposed factor (C), which focuses on whether there was a preservation demand. I think that factor should remain in the rule. Those who complain about mentioning such communications also complain that they don't know what to preserve. This is inconsistent. These same objectors stress that they regard such letters as often overbroad, but the rule gives weight to the demands only if they are "clear and reasonable" and only if negotiations were conducted in "good faith about the scope of preservation."

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. We think that the Note on published factors (B) and (D) (regarding the reasonableness of efforts to preserve and proportionality) would benefit from further commentary that acknowledges the exponentially accumulating growth in the amount of data that institutional actors possess and control. There is a "generic acknowledgement" in the introductory Note material, but we favor greater emphasis with a link to these factors. The larger the corporate or organizational entity, the greater the difficulties faced in terms of its ability to manage data. This reality is a factor that should enter into any calculus of what constitutes "reasonableness." A Note could also mention advanced technologies that may be employed as an aid in preservation efforts (such as the use of email archiving with autocategorization). Thus, the Note on B might be augmented with something like: "Additional considerations might include the volume and complexity of the information subject to a preservation requirement, as well as the familiarity of the party with and its ability to employ advanced technologies in the aid of preservation."

David R. Cohen (2174): I think the factors should be retained. Judge Scheindlin is right that they seem to make more sense in a determination of negligence or recklessness than of bad faith, but I also believe that some courts may still find this non-exclusive list helpful when determining whether a party failed to preserve information that should have been preserved. Indeed, Judge Francis correctly notes that the salutary benefits of listing those factors include "making clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect."

David E. Hutchinson (2205): Factor (B) has a glaring problem because the rule does not provide any reference point for which technologies and/or management processes are relevant,

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emerging, or obsolete. And the amendment seems to place the onus on the court to make an informed decisions on these issues. But "proportionality" decisions need to be contextualized in the broader ESI landscape. Discovery rules and decisions are limited in their ability to guide when they are premised on a particular state of technological development. E-discovery under the current rules is problematic because the rules are tacked onto rules written for hard copy discovery. I therefore urge that the "proportionality" consideration include the following: "whether the discovery or preservation at issue involves a reasonably tailored protocol based on the available technologies for data management and the volume of data covered."

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): These factors should not be in the rule. Put this type of material in the Committee Note. On the other hand, the notion that the court must limit itself to the least severe sanction, now only in the Note, should be put into the rule itself.

Thomas Allman: Consider dropping (e)(2) from the rule. The provision is trying to do too much. The goal should be to write a good Committee Note. I am not happy with the factors beyond reasonableness and proportionality. Even if they do foster uniformity they are troubling.

Michael C. Rakower (N.Y. St. Bar Ass'n): The directive that the court use the least severe sanction should be in the rule, not just the Note.

Phoenix hearing

Robert Owen: Factor (C) is troublesome. It seems to invite blanket overbroad preservation demands. Particularly in the pre-litigation setting these are formless demands and provide no content from which the recipient can determine what really needs to be preserved.

Timothy Pratt (Federation of Defense Counsel): The "factors to be considered" should be eliminated from the rule. The discussion should be limited to the Note.

Paul Weiner (Littler, Mendelson): Factor (C) should include a 26(g) feature, making lawyers certify that their preservation demands are justified and not designed to impose costs on the other side.

Thomas Howard: The (e)(2) factors should be removed from the rule. Perhaps discussion should be included in the Note. The concern is that they will be applied uniformly and in a wooden manner. It might be said that consistency on application of the factors is to be avoided.

John Rosenthal: The factors should be revised along the lines recommended by Sedona. For one thing, any judicial "remedy" for loss of information should be proportional to the loss. For another, the rule should say that the court must use the least severe sanction.

Dallas Hearing

Michael Harrington (Eli Lilly & Co.): He is uncertain whether the adoption of proposed 37(e) would produce immediate or dramatic changes in his company's preservation practices. But he would look to the factors spelled out in the rule for guidance. So he likes the idea of

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having factors, although he is not entirely happy with all the factors that are in the proposed rule now.

William T. Hangley (ABA Section of Litigation leadership): As a general matter, the idea of having factors is useful and the factors included are useful. But factor C is not helpful. It seems to presume that failure to respond to such a demand is likely to produce trouble. But some demands are not worth answering, so the mere fact of not responding should not support negative actions. He also does not like Factor E. It does not take account of the fact that often these demands are delivered to nonparties or before litigation commences.

Gregory C. Cook: He does not favor the factors. Particularly with class-action litigation, Factor A presents great difficulties before suit is filed. Case law could develop to provide guidance in the way that the factors attempt to provide guidance. But if the list is retained, it will be regarded as an exclusive list, and rigidify the analysis.

Karl Moor (Southern Company): His company is a utility. The factors don't provide much guidance. You have to imagine the largest scope of plaintiff's claim. The proportionality test would help. But I have to help them build their case by informing them about our systems. So even though reasonableness and proportionality factors would help there would still be large burdens.

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7. Need to retain provisions of current Rule 37(e)

Lawyers for Civil Justice (267): Because proposed Rule 37(e) covers all of the conduct that the current rule does, LCJ believe that it is unnecessary to retain the current 37(e) language in the proposed rule.

Alex Jennings (294): I think existing 37(e) should be abrogated and completely replaced. The new rule appears to cover all situations in which the current rule would apply. Including the old rule might only serve to confuse lawyers as to when each part might apply, assuming it could be parsed. Additionally, the rule has been invoked only rarely, as the Committee notes. I think that is because it needs to be refined. If the original rule is retained, it might simply encourage courts to continue awarding sanctions for behavior that they deem to be exceptionable, sanctionable under other rules, or not result from good-faith operation.

Thomas Y. Allman (303) I was originally a proponent of targeted amendments to current Rule 37(e). But I have come to believe that the proposed rule is a superior formulation to support a "fresh start" on a meaningful national rule. It comprehensively occupies the spoliation sanction field to the exclusion of inherent sanctioning power. This provides a significant advantage over the current rule. As noted by Judge Sutton in *U.S. v. Aleo*, 681 F.3d 290, 310 (6th Cir. 2012), "a judge may not use inherent power to end-run a cabined power."

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that current Rule 37(e) need not be retained.

U.S. Chamber Institute for Legal Reform (328): If the Committee makes the changes proposed by the ILR to the proposed new rule, there is no need to retain current 37(e).

Doug Lampe (343) (Ford Motor Co.): Ford believes that there is no reason to retain the current provisions of Rule 37(e).

The Sedona Conference Working Group 1 (346): We believe that existing Rule 37(e) need not be retained if the amended rule adopts a good faith standard, as we have urged. But if the Committee retains the provision authorizing imposition of "curative measures" without regard to culpability or prejudice, we believe that the provisions of current 37(e) should be included lest the protection it currently provides be lost.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): It would be important to retain the current 37(e) provisions if proposed (B)(ii) is adopted. The current rule precludes the imposition of sanctions for the loss of ESI due to the routine, good faith operation of an electronic information system. Otherwise, parties who claim they have lost "any meaningful opportunity" to prosecute or defend a case as the result of the ordinary, good faith operation of an electronic information system will seek sanctions. If proposed (B)(ii) is not adopted, and if the standard for (B)(i) sanctions is limited to bad faith, there would seem to be no need for current 37(e).

David Kessler (407): The current rule should not be retained. As detailed by the Committee, the current rule has not been effective.

Mark S. Stewart (Ballard Spahr) (412): In practice, Rule 37(e) has not been widely

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applied and has done little to stem the tide of discovery sanctions that arise out of the failure to preserve data. It applies only in a very limited situation -- "good faith operation of an electronic information system" -- which has proven to be a nebulous and confusing standard for courts to apply. The rule does not take into account either the intent of the party or whether the loss prejudiced the receiving party.

Vickie Turner (450): We see no reason to retain current Rule 37(e). We agree that the amended rule is sufficient, and the proposed Committee Note clearly explains the robustness of the amended rule.

Stuart Delery (U.S. Dep't of Justice) (459): The Department does not support the proposed removal of current 37(e). Many Executive Branch agencies strongly believe that the current rule should remain and is a necessary protection. Unlike hard-copy documents, electronically stored documents can be generated in almost unlimited quantities and can eventually impose significant burdens in storage and maintenance. Essentially, the removal of 37(e) will suggest that discovery sanctions may be available simply as a result of the typical -- and economically necessary -- routine deletion of old electronic content. Such a revision seems to fail to accord with the realities of modern business and electronic communications. Although the revised rule seems to accommodate some of these concerns, it still leaves an important gap by allowing for sanctions in (B)(ii). Since a governmental entity will be unable to predict the full slate of future claims that may arise against it, this carve-out will work to undermine the safe harbor recognized in the remainder of the rule. Even though the Committee has made it clear that it intends (B)(ii) to be used only rarely, litigation about whether the exception to the required proof of willfulness or bad faith will undoubtedly arise in a much wider set of matters. The amended rule does not expressly provide a safe harbor for routine operation of a computer system. Although the case law is sparse on current 37(e), it is relied on when creating a document retention policy and has been used in litigation in negotiating resolution of discovery issues. Many of the Executive Branch agencies we have consulted do not support the removal of current 37(e). At a minimum, the Department suggests the following modification to (B)(ii):

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. Subsection (ii) does not apply to electronically stored information that is lost as a result of the routine, good faith operation of electronic information system before the anticipation or conduct of litigation.

Charles Ragan (494): I see no good reason to retain current 37(e). It was initial described as a "safe harbor," but barely served as a shallow cove.

Edwin Lowther, Jr. (629): Retaining the current provisions of 37(e) is unnecessary because the proposed rule covers all the conduct that the current rule covers.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that maintaining this provision would serve the salutary purpose of making clear that automated elimination of information is not sanctionable when it is not a product of bad faith. By the same token, the excision of the existing provision might lead some courts, somewhere, to conclude that the existing law is no longer the law.

Wendy Butler Curtis (Orrick) (864): The current rule should be retained because it provides important clarity that loss of information "as a result of the routine, good faith operation

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of an electronic information system" will not result in sanctions. That is a crucial point for honest litigants.

Philadelphia Bar Ass'n (995): We see no advantage to retaining the current rule, particularly since it actually runs counter to the more detailed and elaborate analysis under proposed 37(e)(1)(B)(i) and (ii). Retaining the current language would only serve to undermine the analytical processes at work in either of the sections and present a potential unintended "safe harbor" for parties seeking to avoid the type of diligent preservation efforts required under both sections.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no need to retain current 37(e). As the Advisory Committee has noted, it is invoked only rarely. The reason it has not been invoked is that it really does not address or answer the key questions. It is well settled at this point that a party faced with litigation cannot simply allow the continued operation of an electronic information system to result in the loss of relevant electronically stored information, but must impose a litigation hold. Current Rule 37(e) provides no guidance on when such steps must be taken, how broad they should be, etc. The proposed rule provides at least a framework for evaluating the reasonableness of the decisions a party has made in answering those questions, and therefore is a useful step forward.

P. David Lopez (EEOC) (1353): EEOC believes that current 37(e) should not be retained.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): If the changes AICPA recommends are made in the rule, there would no need to retain the current provisions. If those changes are not made, retaining something in the rule that makes clear that loss of information due to the routine good-faith operation of an electronic-information system is not sanctionable is a good idea. Although the Note saying that nothing protected by the current rule should be subject to sanctions under the amended rule, the various interpretations of "willfulness" in court opinions raise concerns.

New York County Lawyers' Ass'n (2072): It would be a mistake to retain current 37(e) as it would run counter to the analysis under the revised rule. Retaining the current rule would perpetuate the practice of "defensive preservation" and lead to continued spoliation/sanction battles. As Judge Scheindlin has said, the current rule "is the flip side of a safe harbor. It says if you don't put in a litigation hold when you should, there's going to be no excuse if you lose information. That's how I read 37(e). It says you are only excused if this was lost as a result of a routine, good-faith effort to destroy records." Panel Discussions, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 Fordham L. Rev. 1, 30-31 (2009).

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8. Limiting rule to electronically stored information

Lawyers for Civil Justice (267): The rule should apply to all types of discoverable information. A single standard is vastly superior to having two separate standards. For one thing, distinguishing between ESI and physical evidence is likely to become more complicated in the future.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information (not just electronically stored information).

Alex Jennings (294): The rule should continue to be limited to electronically stored information. The rules are still struggling to catch up with the volume of material that companies and individuals store electronically, which is the main reason the sanctions issue is a preoccupation for lawyers. Until we find a way to store everything forever in a way that doesn't completely overload the discovery system as well as the storage system, I think that this proposed rule uses a fair standard for ESI. There are other mechanisms already in the rule that allow for proper handling of sanctions in relation to other material. Rule 37(e) does not need to be expanded in this way to give judges another way to assign sanctions with regard to non-electronic materials.

Jonathan Smith (NAACP Legal Defense Fund) (310): LDF recommends that, if it is adopted, new Rule 37(e) be limited to electronically stored information. There are unique costs and challenges associated with that information, particularly as to preservation and spoliation, justify continuing to limit 37(e) (as currently limited) to electronically stored information. Given that these amendments to 37(e) are substantial, it may be best first to limit their effect to electronically stored information.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the rule should not be limited to loss of electronically stored information, but should apply to all discoverable information.

U.S. Chamber Institute for Legal Reform (328): The rule should not be limited to electronically stored information. Having separate rules for electronically stored information and other evidence will create confusion for litigants. Because the proposed rule sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): Along with dropping (B)(ii), it would be desirable to focus the rule on discoverable "information." As defined in Rule 34(a), that includes (A) any designated documents or electronically stored information, and (B) any designated tangible things. But it might suffice if (B)(ii) were limited to the latter -- excluding not only electronically stored information but also documents. In his ongoing study of current spoliation cases, fully 90 to 95% deal only with documents and electronically stored information, not tangible things. This would greatly assist in pre-litigation efforts, and minimize over-preservation.

Doug Lampe (343) (Ford Motor Co.): Ford does not see a principled basis for distinguishing among different types of discoverable evidence based on the manner in which it is stored. A single standard applicable to all evidence would encourage consistency from courts in

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addressing motions for sanctions and provide better guidance to parties.

The Sedona Conference Working Group 1 (346): We do not believe that the rule should be limited to electronically stored information. The issues arise equally with preservation of hard copy documents and other tangible things. Many litigated matters involved significant quantities of hard copy documents, and their preservation should be treated consistently. Moreover, future technologies might involve storage we would not consider "electronic."

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): The rule should not be so limited. ESI may be the biggest issue in discovery today, but the destruction or loss of documents and tangible things is just as important as the destruction or loss of ESI. Limiting the rule to loss of ESI would suggest that there can be different standards for the imposition of sanctions for the loss of other sorts of evidence, leading to divergent rulings from court to court on issues such as whether sanctions can be imposed if the loss of physical evidence is due to negligence. A uniform rule would promote certainty and reduce the likelihood of unproductive satellite litigation.

David Kessler (407): The rule should not be limited to electronically stored information. Not only is a single standard easier to follow and enforce than multiple standards, but there is no principled reason to differentiate between the spoliation of electronic and paper documents.

Vickie Turner (450): We do not think the rule should be limited to electronically stored information. A uniform standard applicable to all evidence would be best. The distinction is murky at best and should not be introduced into the rule.

Stuart Delery (U.S. Dep't of Justice) (459): If a spoliation rule is promulgated, it should apply equally to electronic documents, paper, and tangible things. The Note should make the scope of application clear. There is a risk that divergent, complicated, and confusing spoliation case law will develop if the rule does not apply equally to all potential evidence. Cases almost always include a mixture of electronic information and documents/objects in other forms. The rules should not provide that a party who diligently saves its email on the one hand, but shreds key hard-copy notes on the other to be treated differently depending on the form of the information lost.

Federal Magistrate Judges' Ass'n (615): The FMJA believes that the rule should not be limited to loss of ESI, but should extend to all discoverable information. Different standards for failure to preserve ESI and failure to preserve other discoverable information would almost certainly generate substantial motion practice about the practical differences between ESI and other discoverable information.

Edwin Lowther, Jr. (629): The rule should adopt one clear standard applicable to all types of discoverable information.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): The rule should not be limited to ESI. The obligations to preserve ESI and other information should not be different. This will become more true as the line between ESI and other documents blurs and transforms.

James Heavner (The Hartford Financial Serv. Group) (748): A unitary standard is the

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most appropriate architecture for the rules going forward. We see no distinction between paper and electronic documents when it comes to defining core preservation obligations. And applying the rule to all preservation would make for more efficient judicial policing.

Philadelphia Bar Ass'n (995): The impetus for the proposed changes to the rules is clearly electronically stored information, but there is a virtue to applying uniform standards to all spoliation issues. Although existing case law is likely adequate to deal with most non-ESI spoliation issues, the factors delineated in proposed Rule 37(e)(2) should prove helpful in assessing the reasonableness or fault surrounding the preservation of all discoverable material. In addition, although dropping proposed 37(e)(1)(B)(ii) might make sense if the rule were limited to ESI, we think that, on balance, the interests in uniformity justify wider application of the rule.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no reason why the principles set out in the proposed rule are not equally applicable to any issue regarding failure to preserve evidence.

P. David Lopez (EEOC) (1353): EEOC believes that the rule should cover all discoverable information.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): There would be no benefit to limiting proposed 37(e) to ESI. Although the costs of preservation may be greater with respect to electronic data, there is no reason to think that these harms are unique to that context. Furthermore, the rule's displacement of inherent authority should not be confined to ESI.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ is opposed to this rule. But if the Committee nevertheless goes forward, AAJ strongly believes that it should not expand the rule to all discoverable information but instead limit the rule to ESI. ESI is the source of the problems the Committee has focused upon, and should be the focus of the rule also.

Washington D.C. Hearing

Thomas Allman: One way to deal with the problem presented by the current inclusion of (B)(ii) is to limit the rule so that cases like Silvestri are excluded from it. But distinguishing between "electronically stored information" and "documents" is unlikely to work. Perhaps a better way would be to exclude "tangible things." Those are treated as a separate category in Rule 34, and seem to be distinct in the sense that they are likely to be the sorts of things that might be so central as to justify sanctions in the absence of willfulness or bad faith.

Phoenix hearing

Thomas Howard: The rule should not be limited to ESI.

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9. Additional definition of "substantial prejudice"

Lawyers for Civil Justice (267): Yes. The standard should be that the information is material to claims and defenses. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y.) at *4 FN 48.

Alex Jennings (294): I think a further definition would be helpful. The Committee even observes that prejudice in this part of the rule need not be as cataclysmic as the prejudice that would justify sanctions under other parts of the rule. A definition might look like: "substantial prejudice -- such that it results in the party being unable to present its case successfully, prevents it from substantiating its claim, or results in unfair dismissal of its claim"

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section sees no reason to define "substantial prejudice" any further. It will always be context specific. The report cites a number of examples of judicial handling of this issue.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that an additional definition of "substantial prejudice" is important.

U.S. Chamber Institute for Legal Reform (328): Yes a definition would help ensure a national uniform standard. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. For example, one court says the standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the claim] or defense." Sekisui Am. Corp., 2013 WL 4116322, at *4. But "substantial prejudice" should be defined as a more stringent standard, that the loss of information is somehow material to a party's claims or defenses.

Doug Lampe (343) (Ford Motor Co.): Courts would benefit from additional guidance regarding this term. The courts should be reminded that meeting this factor requires demonstration of a direct and meaningful impairment of a party's ability to advance a claim or defense.

The Sedona Conference Working Group 1 (346): We support the Committee effort to require that a party seeking sanctions show that it has been seriously prejudiced in its ability to prove its case. But we believe that the rule should make clear that sanctions are allowed only if the party was materially hindered in presenting or defending against the claims in the case. For that reason, the rule should specify that a party is not substantially prejudiced where the lost relevant information has not materially prevented a party from presenting or defending against the claims. We also believe it is important that the rule state that the sanctions motion must be timely, a requirement that is currently absent from the proposed rule.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We do not believe that any further definition is necessary. Judges routinely exercise their discretion to decide issues of prejudice. Prejudice may arise in myriad factual scenarios, and a rule defining what constitutes prejudice might inadvertently exclude situations in which true prejudice exists that do not strictly fall within the definition. The availability of alternative sources of the information and the importance of the lost information are rather obvious factors to be considered in assessing

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prejudice, and incorporating them in the rule appears superfluous.

David Kessler (407): Yes, there should be such a definition, though this conclusion is tied in with how the Committee addresses "willfulness or bad faith" in (B)(i). Although "substantial prejudice" is not easy to define, there are some things it is not. It must be more than just prejudice, which means that it must be more than merely relevant, even if it was supportive of the requesting party's case. Thus, the standard used in *Sekisui* ("a reasonable trier of fact could find that [the lost evidence] would support [the] claim or defense") is too low. Substantial prejudice should mean that the requesting party is materially impaired in prosecuting its claims or defenses due to the destruction of the evidence, because no other similar evidence of a similar kind and character is available.

Vickie Turner (450): We favor adding a definition, and propose that "substantial prejudice" "equates to significant harm to a party's ability to advance a material claim or defense."

Stuart Delery (U.S. Dep't of Justice) (459): We believe there should be an additional definition in the rule. We proposed a new 37(e)(3) as follows:

- (3) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:
 - (A) The availability of reliable alternative sources of the lost or destroyed information;
 - (B) the materiality of the lost information to the claims or defenses in the case.

This proposed rule language is consistent with the Committee's intent to have reasonableness incorporated into a court's preservation analysis. This language provides the appropriate and explicit framework for the court's analysis, and provides parties with clear guidance on what elements of prejudice must exist before they consider filing a motion for sanctions. This language also helps the court focus on the actual harm to the requesting party.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "substantial prejudice."

Edwin Lowther, Jr. (629): The rule should provide a definition to clarify when substantial prejudice exists, and it should be tied to materiality of the information to claims and defenses in the case.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We do not believe that an additional definition is necessary. Judges will consider all factors relevant to the circumstances. Enumerating factors risks overemphasizing the listed factors and devaluing legitimate factors that do not happen to be included in the list.

James Heavner (The Hartford Financial Serv. Group) (748): We support including an additional definition, and think a focus on materiality to claims and defenses is warranted.

Philadelphia Bar Ass'n (995): An additional definition of this phrase does not, in the

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unanimous view of the Association, appear necessary. The variety of factual backgrounds in cases does not seem to allow for such a definition. The requirement of willful or bad faith conduct, coupled with the five factors set forth in proposed 37(e)(2), while not exclusive, seem to provide helpful measures for determining the gravity of the arguably sanctionable conduct. The extent of harm to a litigant's case can only be assessed in the context of the particular claim or defenses allegedly impaired by the fact-specific degree of preservation failure and its causes. Like Justice Stewart's definition of pornography, the court will know it when it sees it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

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10. Additional definition of "willfulness or bad faith"

Lawyers for Civil Justice (267): The standard in proposed 37(e)(1)(B)(i) could define "willful" to require scienter or knowledge. See, e.g., *Micron Tech, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests); *Vadusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his willful conduct resulted in its loss or destruction"); *Goodman v. Praxair Serv., Inc.*, 632 F.Supp.2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction). In short, willfulness should be defined to include an element of malice. Doing so would make it clear that sanctions are limited to acts executed in bad faith.

Alex Jennings (294): I don't think any additional definition of willfulness or bad faith is required. Courts are familiar with these concepts and the application of them. An additional definition could lead to situations in which they are applying criteria they are not acquainted with.

Thomas Y. Allman (308): The term "willful" would benefit from clarification. The rule could specify the necessity of showing that the conduct was undertaken for the purpose of hiding adverse information or a similar formulation showing purposeful conduct. Connecticut has already done so. Two other viable options are (1) delete the "willfulness" category entirely, or (2) insert "and" for "or" and require that both elements ("willfulness" and "bad faith") be proven.

Malini Moorthy (Pfizer) (327): Pfizer believes that the standard should require a finding that the loss of information was willful and in bad faith. If that is not done, it believes that an additional definition of willfulness would be helpful.

U.S. Chamber Institute for Legal Reform (328): Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith, such as pursuant to a routine document preservation system. Sanctions should be allowed only when the party acted knowing that it had a duty to retain the information.

Doug Lampe (343) (Ford Motor Co.): Willfulness, standing alone, should not be a sufficient basis for imposing sanctions. If the Committee nevertheless retains it in the disjunctive, it should be clarified that it means purposeful intent to preclude the availability for use in litigation. Millions of documents are destroyed "willfully" every day, but it is only pertinent to the discovery process if the documents were willfully destroyed in apprehension of litigation.

The Sedona Conference Working Group 1 (346): Sedona recommends that the rule should speak in terms of whether the party "did not act in good faith" rather than relying on either willfulness or bad faith. Using "willful or bad faith" risks having courts impose sanctions for negligent or grossly negligent conduct. Additionally, emphasizing good faith would prompt development of a set of factors that incentivize good behavior. But if the Committee is not willing to make this change, we encourage that it clarify that its culpability standard requires a finding that the alleged spoliating party acted with "specific intent" to deprive the opposing party

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of material evidence relevant to the claims or defenses. We have rejected the false distinction between curative measures and sanctions. Our standard should apply to all measures adopted to respond to failure to preserve.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that the only standard of culpability for the imposition of sanctions should be bad faith, which should be defined to mean "taken with the intent to destroy or delete potentially relevant evidence or in a reckless disregard of the consequences of the party's actions." As a suggestion, we propose that "willful" be deleted but that after "bad faith" the following be added: "that is, were taken with intent to destroy or delete potentially relevant evidence or in reckless disregard of the consequences of the party's actions." This change would accomplish three things: (1) it would eliminate the terribly ambiguous concept of "willfulness"; (2) it would provide a uniform standard that should be easily understood by lawyers, judges, litigants, and witnesses; and (3) it would make clear that the sanctions provided are not to be imposed on a showing of negligence. It is the same as the standard advanced by the Leadership of the ABA Section of Litigation in a letter dated March 13, 2013, to Judge Campbell.

David Kessler (407): Yes, this is the single most important thing the Committee could do to improve the amendment. The standard should be that loss of information is "willful" if it is "the intentional destruction of evidence for the purpose of depriving an opponent or the Court of the evidence." This standard runs closest to the purpose of sanctions and goes furthest in preventing preservation and spoliation being used as weapons in discovery.

Vickie Turner (450): We recommend that both willfulness and bad faith be required. Defining both terms will be necessary to provide clarity. We suggest defining "willful" and "bad faith" to include an element of intent to preclude availability of evidence for use in litigation, as well as knowledge of wrongdoing. The definition should say that only obstructionist efforts plainly meant to gain an unfair advantage in litigation are sanctionable.

Stuart Delery (U.S. Dep't of Justice) (459): We agree with others who have urged clarification for (B)(i). We suggest that "willful" and "bad faith" be defined to require purposeful, harmful intent. One way to do that would be to change the rule to "willful and in bad faith." Spoliation sanctions should not be issued if a party did not take purposeful, intentional action to destroy information. Parties will nevertheless take care to preserve information absent the threat of sanctions because curative measures can also be burdensome, costly, and affect case strategy. Other preservation obligations may also exist, and parties have their own needs to preserve evidence to use to prove their own cases. In addition, the rule should encourage good information management practices in their normal IT operations.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "willfulness or bad faith."

Edwin Lowther, Jr. (629): The rule should include some language making it clear that good faith but intentional acts are not cause for spoliation. "Willful" should be defined to include an element of scienter.

Philadelphia Bar Ass'n (995): We do not recommend an additional definition for "willfulness." It clearly imports intentional conduct and is explicit in its meaning. We do, however, perceive some ambiguity in the term as used in relation to potentially sanctionable

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behavior. If a party intentionally disposes of ESI in the ordinary course of business, is that "willful" conduct under the rule, or must the party act for the purpose of preventing discovery? This could be clarified in the Note. We do not recommend a specific definition of "bad faith," given the wide variety of contexts to which the rule might apply. We do, however, think that the Note could refer to the types of sanctionable conduct contemplated so as to provide guidance.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that the term "willful" should be deleted. But we believe that courts have substantial experience interpreting the concept of bad faith, and that a further definition is not needed.

James Heavner (The Hartford Financial Serv. Group) (748): We believe the conjunction should be "and," not "or." This would relieve uncertainty about the meaning of "willful."

Phoenix hearing

Robert Owen: The definition should be the one offered by Sedona -- an intent to deprive the adverse party of evidence.

Timothy Pratt: Willful should be defined. He favors the Sedona definition. It's not clear that "willful and bad faith" is different from just saying "bad faith."

David Howard (Microsoft): We favor the Sedona definition of willful.

Thomas Howard: Willfulness should be defined. He favors the Sedona definition.

Robert Hunter: The rule should define willfulness as destroying information with knowledge that it will impact a claim.