COHEN MILSTEIN

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

Re: *Comments on the Proposed Amendments to the Federal Rules of Civil Procedure*

Dear Members of the Advisory Committee:

I appreciate the opportunity to share the comments below and to testify at the upcoming November 7, 2013 hearing regarding proposed amendments to the Federal Rules of Civil Procedure. My comments are focused on the proposed changes to discovery procedures, and are informed by my over thirty years of experience representing victims of discrimination and other unlawful employment practices, including my service as class counsel in over fifty civil rights and employment class and collective actions. For the past 16 years, I have served as the head of the Civil Rights and Employment practice group at Cohen Milstein Sellers & Toll, PLLC; prior to that, I served as Director of the Employment Discrimination Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs for over 15 years. I have also taught as an Adjunct Professor at Georgetown University Law Center and the Washington College of Law at American University. My comments are my own, and not necessarily those of my firm.

I. Summary of Comments

As a practicing attorney routinely immersed in lengthy, complex litigation, I share the Committee's interest in reducing discovery-related delay and cost in civil litigation while ensuring parties retain full and fair access to the evidence needed to vindicate their claims and defenses. But based on my litigation experience, I do not believe that most of the proposed amendments—in particular, those pertaining to Rules 26(b)(1), 26(c), 30, 31, 33, and 36—would have the intended effect of reducing discovery-related costs and delays. To the contrary, by unsettling 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 to discovery requests, I anticipate that the proposed amendments would lead to more time-consuming and costly discovery disputes and collateral litigation—at least in complex cases, for which discovery costs are highest.

Further, I fear that the proposed amendments, particularly those tightening the numerical limits on depositions, interrogatories, and requests for admissions, as well as endorsing discovery cost-shifting, would have the unintended effect of preventing plaintiffs from obtaining the evidence needed to prove and properly value their claims. This is risk is particularly acute in civil rights cases, which are typically are fact intensive and require significant discovery. Frequently, moreover, there is a severe information asymmetry with the defendant controlling access to most of the relevant evidence, creating the need for robust discovery to vindicate and value the claims effectively.

More fundamentally, the proposed changes to the Rules are divorced from a critical issue contributing to high discovery costs: the need for more early and active judicial case management. There is a broad consensus that greater court involvement is critical to early identification of key contested issues and corresponding streamlining of discovery, as well as to reducing discovery disputes and collateral litigation. Further, following discussion of this issue at the 2010 Duke Conference, initiatives and pilot projects have been developed to explore procedures for more effectively streamlining discovery through better, more targeted early disclosure requirements and more active judicial case management focused on early identification of, and discovery on, issues essential to evaluating and resolving the case. Rather than pushing forward now with new one-size-fits-all discovery limitations for which there is no demonstrated need and no consensus of support, I respectfully submit that the Committee should await analysis of the pilot projects and focus reform on procedures to promote more effective case management and early disclosure of key information.

II. Identifying the Problem Behind Excessive Discovery Costs

The longstanding debate over the appropriate scope of discovery, and whether presumptive limits permit too much or too little of it, remains intractable and breaks down along predictable lines, with corporate defendants regularly urging further restrictions and representatives of plaintiffs seeking broader access to discovery. The Committee, however, should not pick sides in this debate by altering the presumptive limits on discovery without strong empirical basis for such changes. Further, the Committee need not wade into this debate now because the focus on uniform limits of discovery is largely beside the point the Committee seeks to address: excessive and disproportionate discovery costs and delays.

Most excesses in discovery cost and delay do not stem from the quantity of requests or depositions allowed by the Rules. Indeed, there is little indication that parties are inefficiently running up the amount of discovery they take simply because they can do so consistent with the Rules. For example, the Federal Judicial Center's major 2009 study of the discovery rules

revealed that, despite the current presumptive ten deposition limit, parties take far fewer depositions in most cases; excluding cases without any depositions, the median number of depositions per side was only 2 to 3.[1] This is unsurprising, as discovery is costly for the requesting party as well as for the responding party. Thus in my experience, parties and their attorneys conduct their own cost-benefit analysis prior to requesting a deposition or other discovery, and only proceed when they believe the value of the discovery is likely to outweigh the costs. Additionally, FJC researchers found that litigation costs under the current rules are driven largely by three factors: monetary stakes, factual complexity, and contentiousness among the parties.[2] The first two factors are consistent with a properly functioning discovery system, where discovery costs are proportionate to the factual needs and stakes of the litigation. Only the third factor, contentiousness, is likely to introduce excessive, disproportionate discovery costs and delays, associated with costly and time-consuming discovery disputes. Indeed, in the context of electronic discovery, each reported type of dispute was associated with a 10 percent increase in costs;[3] such collateral costs do not advance fact-finding and are the type of unproductive, excessive costs that detract from the efficient functioning of civil litigation.

Rather than stemming from presumptive discovery allowances that are "too expansive," the more pressing sources of *excessive* discovery costs and delays are twofold: First, the current discovery process permits parties to seek discovery of everything they might possibly need upfront through a one-size-fits-all, use-it-or-lose-it process. At the same time, one or both parties may seek to avoid or delay for tactical reasons production of certain witnesses, documents, or information to the extent permitted by the Rules. This process can be inefficient as it provides no assurance that evidence pivotal to valuing the parties' claims and defenses will be adduced before the balance of discovery is conducted. As a result, broader discovery may be conducted, and more attendant motions filed, than might be necessary if the parties were directed initially to focus their discovery on issues critical to the valuation of the claims and defenses. Amendments to the rules have thus far not been effective in expediting the process of disclosing the information needed for the parties to assess meaningfully the value of the case. Thus, as Professor Charles Silver explained following amendments to the Rules in 2000, "procedural reforms have not reduced [litigation] costs" because the costs "reflect the need to figure out how much claims are worth" and to negotiate resolution.[4] Senior researchers from the FJC recently

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[1] Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, at 10 (Federal Judicial Center, 2009).

[2] Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J 765, 782-84 (2010) [hereinafter "Lee & Willging, *Defining the Problem of Cost*"].

[3] *Id*. at 785-86.

[4] Charles Silver, *Does Civil Justice Cost Too Much?*, 80 Tex. L. Rev. 2073, 2074 (2002).

surveyed studies of litigation costs and rule reform and echoed Professor Silver's conclusion, finding that the ongoing project of amending the Rules "may have failed to reduce costs because it does not address the actual drivers of cost."[5]

Second, left largely alone in an adversarial context in which each party pursues its own interests zealously, parties are often unable to agree on the sequencing of discovery or ways to narrow and focus discovery on those issues that could create an early opportunity for resolution. Rather, parties often find themselves locked in discovery disputes that generate lengthy and costly collateral litigation. Active and early involvement of the court in structuring the discovery process can minimize the need for motion practice and direct discovery to those areas that are most critical for both sides to be able to assess the case.

III. The Solution: Early and Active Judicial Case Management and Focusing First on Discovery Most Critical to the Evaluation of the Case

Faced with an intractable debate over appropriate discovery limits, a third way exists that would serve the interests of both sides, address the problems identified above, and better serve the Committee's goal of making discovery faster, more efficient, and better aligned with the needs of each case. Rather than focusing on one-size-fits-all quantitative discovery limits, the more effective approach is to design processes to involve the court early and actively in case management and identification of critical contested issues, and to encourage phased discovery to address on an expedited basis the facts most critical to evaluating and valuing the case. By focusing both the parties and the court on what discovery is most critical to assessing the case early on, this approach would allow parties to more quickly and efficiently obtain the information needed to allow for meaningful settlement negotiations. The court's engagement and direction could also significantly reduce costly and protracted motion practice.

A consensus has emerged to support this approach. Indeed, as noted in the Advisory Committee's report on the proposed amendments, the need to improve "early and active judicial case management" was one of three main themes stressed by participants in the 2010 Duke Conference, alongside proportionality in discovery and cooperation among lawyers.[6] Similarly, the American College of Trial Lawyers Task Force on Discovery and Civil Justice ("Task

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[5] Lee & Willging, *Defining the Problem of Cost*, at 783.

[6] Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, p. 260 (August 2013) [hereinafter "Proposed Amendments"]. *See also* Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 Kansas L. Rev. 877, 890 (2013), *available at* http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v61/03-Kourlis_Final.pdf ("One of the most broadly endorsed themes that arose out of the research and Duke Conference was the need for increased active case management by a single judge.").

Force") and the Institute for the Advancement of the American Legal System ("IAALS") have jointly studied the concerns regarding discovery and potential changes to the rules, and concluded that a primary problem is that the "rules structure does not always lead to early identification of the contested issued to be litigated," leading to unfocused discovery, and urged courts to take an early and active role in managing cases and discovery to help control costs.[7] As IAALS observed, "there is a loud cry for active judicial case management throughout the whole process—from the start of litigation to the end of the case—to ensure a more efficient and less costly process."[8]

The proposed amendments include some minor changes intended to facilitate more effective case management, but while the proposals represent steps in the right direction, they seem unlikely to have significant impact. For example, the proposed amendment to Rule 16(b)(1)(B) to make clear that scheduling conferences, if conducted at all, should be conducted by telephone, in person, or other real-time means and not by mail, is unobjectionable. But it seems unlikely that there is a current problem with too many scheduling conferences being conducted by mail. Rather, the real problems are 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. Similarly, I applaud the effort to encourage scheduling orders that require parties to request a judicial conference prior to moving for a discovery order, but would use stronger language than that in the proposed amendment to Rule 16(b)(3), which merely *permits* scheduling orders to require such practice. Although the Committee is understandably reluctant to impose a universal mandate requiring such practice at this stage, greater effect could be achieved by making the practice of requiring pre-motion conferences the *default* process, which the court can reject in particular cases, rather than simply one that is permitted.

More generally, I agree with the Committee's point that adoption of new, universal mandates regarding judicial case management is likely premature pending further study of effective practices. Fortunately, following the Duke Conference, the judiciary has been actively engaged in collecting information about how to better manage cases pre-trial and to structure early discovery efficiently for particular types of cases that comprise a large portion of the federal docket. This includes several pilot projects assessing protocols for management of particular types of cases that often entail substantial discovery, including employment cases

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[7] Am. Coll. Of Trial Lawyers & IAALS, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, at 2 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

[8] Kourlis & Kauffman, *supra* n.6, at 890.

alleging adverse actions[9] and complex civil litigation.[10] The complex litigation pilot in particular is designed to assess the impact of more active early case management procedures and containment of discovery disputes. Several state court systems are also engaged in pilot projects focused on many of the same goals.[11] According to IAALS, most of the federal and state pilot projects prompted by the Duke Conference and currently underway will begin producing meaningful data later this year or in 2014.[12]

Additionally, some judges have adopted similar approaches of their own creation through standing discovery orders, providing further sources for consideration and study. *See, e.g.,* Discovery Order (Judge Grimm, D. Md.) (providing for phased discovery, with initial phase focused "on the facts most important to resolving the case, whether by trial, settlement or dispositive motion").[13] Such orders can anticipate the possibility of negotiated resolution following an initial, more targeted phase of discovery. If a resolution is not achieved after an initial round of focused discovery, a subsequent phase of broader discovery should be available to ensure that the parties are able to fully investigate and develop their case. Issues such as the admissibility of an expert, the viability of an economic model, or the level of significance of statistical measures, for example, may be pivotal to valuation of the litigation and, therefore,

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[9] Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

[10] Pilot Project Regarding Case Management Techniques in Complex Civil Cases in the Southern District of New York, *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf. The pilot was extended in November 2012 to run for an additional eighteen months through September 30, 2014. *See* http://iaals.du.edu/library/publications/sdny-pilot-project-regarding-case-management-techniques-for-complex-civil-c. Among other things, the pilot provides for an early and comprehensive initial pretrial conference, at which parties recommend limitations on fact and expert discovery, and substantially limits and expedites discovery motion practice.

[11] Information and links to the state pilot projects are available from IAALS at http://iaals.du.edu/initiatives/rule-one-initiative/implementation.

[12] Kourlis & Kauffman, *supra* n.6, at 883.

[13] A copy of Judge Grimm's discovery order is available at http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf. I highlight Judge Grimm's discovery order as one example of a protocol for staging discovery to focus on the most critical facts first. My reference to the order is not intended to suggest agreement with all aspects of the order, including the presumptive numerical discovery limitations and the suggestion that costs should presumptively be shifted to the requesting party during the second phase of discovery.

warrant the parties' undivided and early attention in discovery. Courts supervising this process, of course, must ensure that an initial stage of discovery permits the parties meaningful access to discovery needed to address these pivotal factual and related legal issues.

In short, the most effective means of addressing excessive discovery costs and delays is through active, engaged case management that focuses the court and the parties on discovery of the facts most critical to assessing the case early on and creating opportunity to explore resolution of the litigation. The Committee should therefore await analysis of the pilot projects and, to the extent it concludes some action now is warranted, the Committee's focus should be directed at creating more effective case management procedures, including provision for early disclosure of key evidence, rather than simply adjusting numerical discovery limits.

IV. A Move Towards More Active Judicial Case Management Need Not Create Additional Burden on the Courts

I am sensitive that this proposal to encourage or require more and earlier involvement by courts in case management may appear to impose additional burdens on already over-extended courts. But the proposed approach can achieve offsetting time savings for courts in at least two ways. First, by investing a relatively small amount of additional time early in a case to hold a case management conference and work with the parties on a scheduling order that provides for early critical discovery on issues pivotal to resolving the case, courts may benefit from the more expedient resolution of the case, with less motion practice and more abbreviated litigation.

Second, pairing greater initial judicial involvement in the development of the scheduling order with changes to the process for resolving discovery disputes could substantially reduce the amount of time judges must spend resolving such disputes. In my experience, it is not unusual for attorneys to file multiple, summary-judgment length briefs on relatively discrete and straightforward discovery issues over the course of a case. In some of my longer running cases, the court has been presented dozens of discovery motions with accompanying memoranda, oppositions, replies, and sometimes sur-replies. However, most discovery disputes regard matters of judicial discretion, and a judge who is already familiar with a case and the discovery plan can often resolve such disputes in the course of a short telephonic hearing with counsel for the parties, sparing the judge and clerks time otherwise spent reviewing lengthy briefings and drafting full written orders. Thus, I urge taking the proposed amendment to Rule 16(b)(3) a step farther, setting a default requirement that parties must request a short hearing with the court prior to filing any discovery motions. Further, even if some disputes are not resolved through a hearing, judges may reduce time they must devote to discovery matters in other ways, such as by limiting parties to page-limited letter briefs on discovery motions. In short, although more active early case management may require more time from judges upfront in a case, this early investment of time, paired with methods of streamlining subsequent discovery dispute resolution, is likely to achieve greater time savings over the life of the case.

V. The One-Size-Fits-All Proposed Limitations on Discovery Will be Counter-Productive for Complex Litigation and for Employment Litigation

One-size-fits-all discovery limitations are inherently problematic, as they will necessarily fail to reflect the appropriate amount of discovery for each case. The amount of discovery reasonably needed varies substantially from case to case, and even from party to party within a given case depending on the factual complexity, the burden framework, and access to information outside of the formal discovery channels. In class and collective action employment cases, for example, plaintiffs often need substantial discovery, typically including depositions of managers at different levels in the corporate decision-making structure and with responsibility over different geographic regions and corporate policies, as well as of technical employees who can explain the functioning and meaning of relevant data sources, such as employee timekeeping and payroll software and databases. 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. And as my firm usually advances discovery costs on behalf of our clients and our compensation typically is contingent on case outcome, we are careful to only conduct discovery that we truly believe is important to developing information that will advance the resolution of the case. Even in non-class employment cases, employees typically need far more discovery than does the employer, as the employer has access to and control over all of its records, communications, and other employees outside of the discovery process and typically needs little additional information from the plaintiff employee. In contrast, the employee is typically unable to obtain evidence through informal processes, and generally cannot obtain statements from other employees due to restrictions on contacting adverse parties as well as practical barriers stemming from employees' fear that volunteering information to help a case against their employer will hurt their own employment prospects. Thus, at least in the context of employment and civil rights litigation, the Committee's suggestion that the presumptive number of depositions should be reduced "to decrease the cost of civil litigation, making it more accessible for average citizens" is a goal unlikely to be realized, as it is these "average citizens" in disputes with their employers that are more likely to have their claims impeded by tighter one-size-fits-all limits on discovery.

Additionally, tightening the presumptive limits is unlikely to have the desired effect of increasing efficiency. As a theoretical matter, one-size-fits-all presumptive limitations on discovery may cause two types of inefficiencies: First, presumptive limits that are *too high* for a factually-simple case may encourage parties to take more discovery than is needed. Second, presumptive limits that are *too low* for a more factually-complex case may encourage parties to use broader requests—in lieu of a higher number of more tailored requests—to obtain the discovery needed without obtaining leave to exceed the limit. Further, presumptive limits that are too low for complex cases may increase collateral disputes over whether discovery in excess of the presumptive limits should be allowed. Such disputes are particularly likely when parties' needs for discovery in excess of the limits are unequal, as the party with less to gain through discovery may argue against allowance of any discovery in excess of the presumptive limits.

Shifting the presumptive limits downward, as proposed by the Committee, would help address the first potential inefficiency of parties taking excess discovery in more factually simple cases simply because they can, but at the expense of increasing inefficiency in more factually complex cases. Further, as discussed above, the data studied by the FJC do not indicate that this first *potential* source of inefficiency has *in fact* created inefficiency under the current Rules. Rather, the evidence indicates that most parties in most cases limit their discovery proportionately to the factual needs and stakes of their cases, and take far fewer depositions than are presumptively permitted. Thus there is limited upside to reducing the presumptive limits. At the same time, there is substantial downside, as lowering the limits for complex cases may generate more discovery disputes and overbroad requests. The Advisory Committee Report discounts this concern, as it assumes when parties seek more discovery, "the parties can be expected to agree, and should manage to agree, in most of those cases."[14] But that assumption is inconsistent with my litigation experience. Particularly where information access is asymmetrical, the party that does not need as much discovery will be unlikely to consent to requests for discovery in excess of presumptive limits, as it can obtain both cost savings and a strategic advantage from the lower limits. Therefore, where the parties' access to information relevant to the litigation is asymmetrical, the chances diminish considerably that they will agree on discovery beyond any presumptive limits that exist.

Again, rather than focusing on uniform discovery limits, the better approach is to set case-specific limitations through a scheduling order, preferably after the parties have engaged in some initial disclosures and conferred with the court regarding the key areas of dispute and the corresponding discovery needs. In such circumstances, the scheduling order could provide a discovery framework tailored to the particular needs of the particular litigation while leaving available additional discovery upon a showing of good cause. This would minimize later disputes and the need for motions for additional discovery beyond one-size-fits-all presumptive limits. To the extent the Committee concludes that some presumptive limits should be provided in the Rules to serve as guideposts, such guideposts should recognize the substantial differences in discovery needs between different categories of cases. Thus, should the Rules be amended to provide lower presumptive numerical limitations on depositions, interrogatories, and requests for admission in most cases, provision should be made for higher presumptive limits in complex cases and other categories of litigation with greater discovery needs.[15] At minimum, the Rules should provide expressly that higher limits should be readily permitted in such types of cases and should be determined as part of the case management process. This approach would both

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[14] Proposed Amendments at 268.

[15] Categorizing cases for different discovery tracks is not novel; indeed, some local rules require such tracking. For example, both the Northern District of Georgia and Southern District of Florida assign cases to expedited, standard, and complex tracks that provide different presumptive limits on the duration of the discovery period. *See* N.D. Ga. L.R. 16.2, 26.2, and App'x F; S.D. Fl. L.R. 16.1(a).

provide more meaningful guidance than the current and proposed "one-size-fits-all" presumptive limitations and would reduce side-litigation over additional discovery requests in the categories of cases for which more discovery is most often needed.

For the above reasons, I respectfully urge the Committee to re-examine the proposed rules that prescribe one-size-fits-all limits governing the amounts of discovery permitted and, if it retains such rules, to make explicit that distinctions should be made in the amounts of discovery presumptively permitted based on case type and complexity, and the extent to which the litigation turns on facts not readily available to one or more parties.[16]

VI. Cost-Shifting is Unnecessary for Discovery Requests that are Proportional, and is Undesirable Because it Encourages Inefficiency Among Producing Parties and Risks Denying Discovery to Parties of Limited Means

While cost-shifting may be appropriate in limited circumstances,[17] it is unwarranted and inefficient in most, and could have the effect of denying discovery altogether in civil rights and employment cases where plaintiffs have limited resources to bear such costs. Existing law empowers courts to permit discovery cost-sharing in limited circumstances. More explicit endorsement of cost-shifting, as the proposed language in Rule 26(c) would achieve, is not necessary. And, if any such language is added, the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources.[18]

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[16] In the event the Committee feels compelled to retain one-size-fits-all numerical limitations on discovery, those limitations may be structured to create additional incentives for their efficient use. For example, rather than prescribe an established number of depositions, all of equal length, the rule should impose a limitation on the total time allotted for all depositions permitted each party. Some depositions require less time than others. Prescribing a uniform length for depositions creates no incentive for efficiency, other than a modest cost-savings. Setting an overall limit on the time allotted for all depositions, however, permits each party to allocate time among depositions as the need may require and creates incentives for parties to be efficient in their examination of witnesses.

[17] For example, in a commercial dispute between parties with comparable resources, cost-sharing may be appropriate if a party seeks discovery for which there is limited value and substantial cost to produce.

[18] Additionally, to the extent Rule 26(c)(1)(B) is amended to recognize the court's authority to issue a protective order "specifying terms . . . including . . . the allocation of expenses" for the discovery sought, I concur with the comment submitted by the New York State Bar Association Commercial and Federal Litigation Section urging the Advisory Committee, at a minimum, to make clear that the proposed rule only applies to expenses, which do not include attorneys' fees. By adding such language, the Advisory Committee should confirm that it does not intend to alter

First, cost-shifting is unnecessary to deter excessive discovery requests because discovery imposes costs on the requesting party as well as the responding party. Preparing for and conducting depositions, reviewing and analyzing responses to interrogatories and processing, hosting and reviewing documents produced require significant time and expense for the discovering party. In discovery of Electronically Stored Information ("ESI"), where the pressure for cost-sharing seems greatest, the requesting party must devote substantial attorney time, as well as data storage and reviewing software costs, to the project of receiving, reviewing, storing, and organizing produced data. Indeed, in a recent FJC study, in cases in which plaintiffs requested ESI, though did not produce ESI, plaintiffs' costs were 37% higher than for plaintiffs in cases without ESI.[19] Parties requesting ESI have ample economic incentive, therefore, to tailor their requests as narrowly as possible to avoid being buried by a largely irrelevant production. As requesting parties already have substantial incentive to tailor their discovery requests so that they are proportional to the needs of the case, shifting more of the responder's costs to the requesting party is unnecessary to deter unreasonable requests or to ensure requesting parties have sufficient "skin in the game."

Second, the prevailing practice of allocating costs to the party best able to control them is efficient. The costs associated with responding to discovery can vary substantially depending on a party's practices and choices; for example, the FJC study found that there was significant variation in the costs of producing ESI, and concluded that "factors internal to the company and its information systems, not the Federal Rules, are responsible for some of these costs" of production.[20] Where parties control the information subject to discovery, whether it be ESI or paper records, ensuring that each party bears its own costs of production ordinarily creates incentives to maintain and produce the records in a cost-effective manner. The converse is also true. A rule endorsing the regular or more frequent shifting of costs from one party to another during discovery, particularly if based on assessments of proportionality and high costs of production, reduces incentives for parties to maintain records in readily-accessible formats and employ efficient search strategies.

Third and finally, I ask the Committee to be mindful that particularly in civil rights and employment cases, a significant asymmetry often exists in the parties' resources and their access to evidence without formal discovery. In such circumstances, shifting the cost of discovery may

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the American Rule on attorneys' fees or to authorize courts to shift attorneys' fees incurred in connection with discovery, such as fees for time incurred reviewing documents. Retaining the system in which parties typically bear their own discovery expenses, at least until the merits of the matter are adjudicated, properly allocates the costs of discovery to the party best able to control them.

[19] Lee & Willging, *Defining the Problem of Cost*, at 784-85.

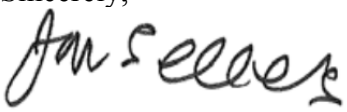
[20] *Id*. at 785.

cause a party to forgo much-needed discovery altogether, compromising the proof needed to vindicate the underlying rights.

Courts already possess ample means to permit cost sharing where the circumstances may warrant it and to protect parties from discovery where its cost and burdensomeness is grossly disproportionate to its foreseeable value. Coupled with the parties' own economic incentives to pursue discovery prudently, the processes currently in place are sufficient to protect against excessive costs of discovery. Instead of introducing more cost-shifting into the discovery process, the courts can curb the length and cost of litigation more effectively by earlier and more active involvement in staging and focusing discovery on those matters likely to be most pivotal in the parties' valuation of the case claims and defenses.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,



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