



INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



UNIVERSITY *of*  
DENVER

January 30, 2014

*Submitted electronically via Regulations.gov*

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

Dear Committee:

On December 5, 2013, IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—hosted a Forum for Understanding and Comment on the Federal Rules Amendments in Denver, Colorado. The Forum brought together a group of approximately forty lawyers, academics, and judges from around the country, with diverse practices and viewpoints, from both sides of the “v.” The Forum provided an opportunity for comment on the proposed federal rules amendments for those with expertise and experience in the federal civil litigation process, but who may not have regularly participated in the federal rule-making and comment process.

The attached report provides additional background regarding the Forum and a summary of the discussion. We hope that the Forum and this summary provide a meaningful contribution to the ongoing conversation.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Love Kourlis". The signature is written in a cursive, flowing style.

Rebecca Love Kourlis  
Executive Director, IAALS



*IAALS' Report on*  
A FORUM FOR UNDERSTANDING  
AND COMMENT ON THE  
FEDERAL RULES AMENDMENTS

On December 5, 2013, IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—hosted a Forum for Understanding and Comment on the Federal Rules Amendments in Denver, Colorado. The Forum brought together a group of approximately forty lawyers, academics, and judges from around the country, with diverse practices and viewpoints, from both sides of the “v.” The Forum provided an opportunity for comment on the proposed federal rules amendments for those with expertise and experience in the federal civil litigation process, but who may not have regularly participated in the federal rule-making and comment process. The following report provides additional background and summarizes the discussion.

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IAALS is a national, independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

IAALS has taken a leadership role in finding solutions to problems within the civil justice system, by doing important research on the operation of the civil justice process and by generating practical, implementable recommendations. Since we began our work in 2006 we have come a long way, with meaningful research and recommendations that have informed



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change at the state and federal level. This work falls under our *Rule One Initiative*, which serves to advance empirically informed models for court processes and procedures that provide greater accessibility, efficiency, and accountability in the civil justice system. Because balance is so important to this work, we continually strive for input from all sides.

In May of 2010, the Judicial Conference Advisory Committee on Civil Rules convened a Conference on Civil Litigation at Duke Law School to bring together state and federal judges, practitioners, and academics to discuss the current status of the civil justice system and propose solutions to identified problems. Before the conference, participants—including IAALS—submitted empirical data, papers, and proposals in support of improving civil litigation in America. While discovery was identified as a contributing factor to the cost and delay in the current system, there was also support for early, active judicial case management and a call for rule provisions addressing preservation and sanctions issues.

Following the conference, the Advisory Committee formed a Duke Conference Subcommittee to explore the central themes that emerged from the conference. The Subcommittee developed a set of proposed amendments to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The Advisory Committee has organized the proposals into three related groups: discovery rule changes aimed at achieving proportionality in discovery, case management rule changes aimed at earlier and more effective judicial involvement, and revisions to Rule 1 aimed at advancing cooperation. In addition, the Discovery Subcommittee of the Advisory Committee on Civil Rules has focused on rules proposals to address preservation and sanctions issues, which has culminated in proposed revisions to Rule 37(e).

## METHODOLOGY

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IAALS extended invitations to the Forum to a select group of lawyers, academics, and judges from around the country with the goal of bringing together a diverse group to discuss the proposed federal rules amendments and identify areas of agreement and disagreement. Approximately forty participants attended the Forum at the Hotel Teatro in Denver, Colorado on December 5, 2013. Participants are listed in the attached Appendix A, along with a short summary of their backgrounds. For those participants who wanted to reference the proposed amendments in advance, IAALS provide a copy of the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and published in August, 2013.

The Forum was an open format meeting, facilitated by Rebecca Love Kourlis, former Colorado Supreme Court Justice and IAALS' Executive Director. Following an initial welcome, the participants each introduced themselves and provided a short summary of their background.

Judge Lee Rosenthal, of the U.S. District Court for the Southern District of Texas, Houston Division, summarized the history and background of the current proposed amendments to set the stage for the discussion, and gave a short introduction to the discussion of each proposed amendment summarizing the changes. IAALS provided redline and clean copies of the proposed amendments for the participants. Justice Kourlis facilitated discussion of the proposed amendments, walking through each of the amendments as grouped by the Advisory Committee. In order to keep the discussion balanced, Justice Kourlis alternated eliciting comments between participants with different viewpoints.

Following the meeting, IAALS compiled the comments into the following summary. Judge Rosenthal, Daniel Girard, and Jonathan Redgrave, all participants at and contributors to the Forum, reviewed drafts.

## DISCUSSION

The discussion began with the proposed rules on discovery reforms, proceeded to case management, then preservation, and ended with the proposed amendments to Rule 1. In general, the main areas of disagreement surfaced during the discussion of the proposed amendments to the scope of discovery under Rule 26(b)(1), while there was broad support for the proposed case management amendments. The discussion provided a greater understanding of the experiences and concerns behind the various viewpoints. It also led to several recommendations for possible changes to the proposed amendments that garnered support from the group. In the end, the participants valued the level of consensus, as well as the insights and understanding they gained into the different perspectives of other participants.

## DISCOVERY REFORMS

### **Rule 26(b)(1): Proportionality by Adopting Rule 26(b)(2)(c)(iii) Cost-Benefit Analysis**

The participants had the greatest interest in, and range of views regarding, the proposed amendments to Rule 26(b)(1), particularly the proposal to add a statement to the definition of the scope of discovery that discovery is to be “proportional to the needs of the case, considering the [factors previously listed in Rule 26(b)(2)(C)(iii)].”

Many of the plaintiffs’ attorneys felt that the addition of the word “proportionality” and the relocation of the factors from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1) together would change the rule beyond merely moving language from one section to another. Several participants felt that including proportionality in the same sentence as relevance changes what is discoverable from what is relevant to what is *both* proportional and relevant. These participants felt that this would significantly and detrimentally restrict discovery. One participant raised the concern that too much emphasis will be placed on numbers and money, rather than other important values or

interests the litigation may serve. One plaintiffs' attorney pointed out that the word "proportionality" itself "rubs the plaintiffs' bar the wrong way" and creates clear discomfort on the part of plaintiffs' attorneys, in part because it has never appeared in the civil rules and may be read to go beyond the existing factors that are in the rule. One attorney referred to it as creating a subjective "you know it when you see it" standard, creating a great concern about how individual judges will "see it" in specific cases. Plaintiffs' attorneys explained that their concerns over importing or adding such judicial discretion into deciding discovery disputes are heightened by the difficulty of determining what is proportional early in a case, before discovery. It is precisely this discovery that plaintiffs' attorneys need to develop further knowledge about the extent and nature of the claim, the injury, and the damages. The stakes of the litigation may not be known or appreciated. Plaintiffs' lawyers expressed concern regarding removal of the "reasonably calculated" language as well, seeing this as a further restriction on the scope of discovery.

In addition, many of the plaintiffs' attorneys expressed the concern that the proposed amendment to Rule 26(b)(1) would shift the burden to the requesting party to prove that something is both proportional *and* relevant, rather than having the burden on the party resisting discovery. These attorneys were particularly concerned that it is often harder for plaintiffs to show that discovery requests are proportional than it is for objecting defendants to show they are not. The defendants usually have greater information and knowledge about the nature, location, and types of requested information than the plaintiffs, particularly early in the litigation. The plaintiffs' attorneys expressed the view that these changes are not neutral and could have enormous implications for certain types of cases, including civil rights cases.<sup>1</sup> Plaintiffs' attorneys also raised the concern that they will routinely get an objection that the requested discovery is not proportional, which will result in further discovery disputes and less efficiency, rather than more.

Most of the defense attorneys supported including "proportionality" and the factors from Rule 26(b)(2)(C)(iii) in Rule 26(b)(1) because the change highlights the need for proportionality in discovery. The defense attorneys suggested that moving the factors from Rule 26(b)(2)(C)(iii) into the 26(b)(1) scope of discovery will refocus the court and the parties on the need to determine how the requested discovery relates to the issues, claims, and defenses—and on how important or useful the discovery is likely to be in proving them. One defense attorney noted that "far too often, so much information is demanded without any focus on how that is going to help advance the claims. To the extent the changes bring the court into the process of determining how much information should be discovered, this is a good thing."

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<sup>1</sup> One participant from Colorado who does both plaintiff and defense work shared anecdotal evidence from the Colorado Civil Access Pilot Project, which requires that "[a]t all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case." See CHIEF JUSTICE DIRECTIVE 11-02: ADOPTING PILOT RULES FOR CERTAIN DISTRICT COURT CIVIL CASES, Pilot Project Rule 1.3 (amended June 2013), *available at* [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/CJD%2011-02amendedappendixes12-12-11.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amendedappendixes12-12-11.pdf). While there was a big concern going in that parties would not get the discovery they need, the attorney shared that, based on anecdotal reports thus far, the project has not had the feared effect of limiting either parties' ability to get the discovery they need.

Other defense attorneys talked about the benefits of moving away from boilerplate discovery requests, and from discovery sought for tactical benefit, toward discovery targeted to what the parties actually need in a specific case. This is in significant part because of the advent and proliferation of electronically stored information (“ESI”), but defense attorneys also pointed out that the problems are not just with ESI. A number of defense attorneys suggested that the proposed change does not change the fundamental structure and burdens involved in discovery. Several noted that Rule 26(g) already places an affirmative obligation of proportionality on requesting parties and that existing Rule 26(b)(2)(C) requires courts to the proportionality factors. These attorneys argued that the proposed change, while valuable, is not a fundamental sea-change for discovery.

Regarding removal of the “reasonably calculated language,” defense attorneys noted that while the standard has always been “relevance,” the “reasonably calculated” language tended to overshadow the rule and distort the scope of relevancy. These lawyers supported the rule change as reaffirming the existing scope of discovery, which is and should be relevance.

A judge referred to the amendment as a “stop and think rule” that will not change how judges rule, but could affect how attorneys approach discovery. This judge saw the changes as beneficial because they would encourage and increase judicial involvement in discovery. One other judge interpreted the change as a signal that the court should take more control over discovery. That judge suggested that the proposed amendment does not qualify relevance but adds another factor for the court to consider when determining the scope of discovery. The judge generally supported such changes as bringing the judge in at the beginning when there is an opportunity to make informed and effective decisions on discovery, including on proportionality. One judge commented that, for those judges who are actively managing discovery, this would not change the equation at all. For the judges who are not active enough now in balancing proportionality, the rule will bring the judges into the discussion earlier.

#### *Areas of Consensus and Ideas for Improvement*

There was consensus that engaged judges are better judges. Both plaintiff and defense attorneys stated that increased judicial engagement is a good thing, and when judges actively manage a case, that changes how the attorneys approach the case—for the better. Unfortunately, there was also agreement that active judicial engagement was the exception. The discussion then centered around how changing the rules could get judges more involved and what can be done when they are not. Finally, there was agreement that the person with access to or control over the requested discovery will generally be the one with the most information about the extent to which the discovery is burdensome.

There were some suggestions for changes that would address some (although not all) of the concerns. Collectively, there was consensus around the idea that there should be a set of factors that judges use to determine the appropriate amount of discovery in each case. Some

participants, including both plaintiff and defense attorneys, expressed support for deleting the word “proportionality” and substituting “consistent with the needs of the case” or some other language that would implicate some of the same factors but in a more flexible manner. This proposal would amend Rule 26(b)(1) to read, “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and *consistent with the needs of the case*, considering . . . .” If not removed entirely, plaintiffs’ attorneys would like to see the word “proportionality” separated from the relevance analysis.

A significant majority, including attorneys on both sides of the “v,” agreed that the amount in controversy in a litigation may be given too much weight in determining what is proportional, particularly given the fact that it is the first listed factor. One suggestion, which garnered broad support, was to move the “amount in controversy” factor lower in the list of factors; another well-supported suggestion was to delete the “amount in controversy” factor altogether. Some participants also suggested that if “amount in controversy” were removed entirely, the “parties’ resources” factor should also be removed.

A broader proposal was to tie the proportionality analysis to the stage of discovery. One idea was to begin with discovery needed for settlement and have additional discovery as needed to get ready for summary judgment motions or trial. Another participant suggested tying discovery to motions for summary judgment and responses. The concept of staging discovery to make the process more targeted and therefore proportional appeared to have support from several participants, whether explicitly provided for in the rule language or simply encouraged by existing or amended rule language.

### **Rule 26(c): Allocation of Expenses**

The proposed amendment to Rule 26(c) would add language that explicitly recognizes a court’s authority to issue a protective order that includes the allocation of expenses. The participants generally divided in reaction to this proposal along traditional plaintiff and defense lines.

One participant raised the concern that adding this language suggests that shifting costs to the requesting party is a preferred outcome. The concern was that the language will be interpreted as supporting cost shifting, particularly when read with the Committee Note. Several plaintiffs’ attorneys urged that shifting costs to the requesting party will severely limit the ability of cases to go forward. These attorneys stated that judges know they have the discretion to shift costs and do not need this reminder. One participant suggested that if this proposed change goes forward, the language suggested by the New York State Bar Association should be included in the Committee Notes to make clear that there is no intent to alter the American Rule on attorneys’

fees and that such fees would not be included in cost allocation.<sup>2</sup> Plaintiffs' attorneys also stated that they would like to see language providing that cost allocation remains the exception.

On the other side, some defense attorneys expressed the view that the proposed change does not go far enough and that greater emphasis on allocating discovery costs is needed. Those participants suggested that rather than always requiring the party responding to discovery to bear discovery costs, the party requesting the information should be required to consider whether the expense of obtaining the requested discovery is worth it. Attorneys seldom talk about how much requested discovery will cost to produce and whether those costs make sense for a particular case. Those supporting the proposed amendment believe that such conversations are important and should occur more often. Hence, some participants expressed the hope that the amendment will encourage conversations about the value of specific requested discovery and whether it was worth it to the requester, which they viewed as a positive development. One participant referenced the Committee Note, which does not say "should," underscoring that the point of the amendment is, indeed, to facilitate conversation about whether specific requested discovery is in fact necessary or justified in the particular case.

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

The proposed amendments to Rules 30, 31, 33, and 36 would change the presumptive duration of depositions and the numbers of some forms of discovery, including depositions, interrogatories, and requests for admission.

There was no support among the participants for decreasing the numerical limits on depositions. There was also no support for decreasing the hourly limits for depositions. There was general agreement on both sides of the "v" that there is not a problem with the current limits. Some participants pointed out that depositions are a very useful discovery tool, and it may be less efficient, not more, to decrease the limits. One participant pointed out that a lower limit may ultimately reduce the costs of litigation, but there was a clear consensus to leave the presumptive limits as they are.

Participants likewise recognized the usefulness of interrogatories, and there was consensus that the number of interrogatories provided by the rules is not a general problem. Instead, interrogatories, like depositions, serve as a useful tool in gaining information to narrow and tailor electronic discovery.

There was more discussion surrounding the proposed amendments to include a presumptive limit on the number of requests for admissions. There were some who argued they are abused. Some defense attorneys suggested the proposed limit of 25 is a good presumption, urging that adding a presumptive limit, subject to court modification, would help to curb such abuse.

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<sup>2</sup> See NEW YORK STATE BAR ASSOCIATION COMMERCIAL AND FEDERAL LITIGATION SECTION, REPORT ON PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84 AND APPENDIX OF FORMS 29 (Oct. 2, 2013).

On the other hand, multiple plaintiffs' attorneys noted that requests for admission are very effective discovery tools, sometimes in larger numbers than 25. Plaintiffs' attorneys expressed the concern that imposing even a presumptive limit could introduce another dispute that would require a motion and a court decision, adding to inefficiency, cost, and delay, and impairing the parties' ability to prepare their cases effectively. Several plaintiffs' attorneys stated that requests for admission streamline cases and that more than 25 requests are often necessary. Although there was some support for no limits, if there is to be a limit, the consensus among the plaintiffs' attorneys seemed to be that 50 would be appropriate.

### **Rule 34: Objections and Responses**

The proposed amendments to Rule 34 would impose additional requirements on responses and objections to requests for production, including amending Rule 34(b)(2)(C) to require that a response must state "the grounds for objecting to the request with specificity" and that an "objection must state whether any responsive materials are being withheld on the basis of that objection." There was general agreement in support of the proposed changes. One participant expressed concern about the proposed wording of the amendments and suggested that the language be softened to say "may be withheld." Another participant raised a concern that expecting that the production be "completed no later than the time for inspection stated in the request" was unrealistic, particularly for ESI. It was noted in response that the proposal contemplates that production may not always occur at the time stated in the request.

## CASE MANAGEMENT

There was broad support for early intervention on the part of district court and magistrate judges and for rule provisions that encourage timely judicial management and engagement. Both plaintiff and defense attorneys agreed that lawyers and parties are more cooperative when the judges are involved from the beginning of a case. There was also broad support on both sides of the "v" for the proposed case management amendments themselves. Some suggested moving forward with the less divisive case management amendments to see if they resulted in increased judicial supervision that would avoid the need to make "proportionality" an explicit part of the scope of discovery. There was not, however, collective support for such deferral.

The case management piece was put into helpful perspective by one participant who summarized the joint work by IAALS and the ACTL in this area. This work has culminated in a report entitled *Working Smarter Not Harder: How Excellent Judges Manage Cases*, which summarizes the interviews of approximately thirty state and federal judges from around the country who were identified as excellent case managers.<sup>3</sup> The judges interviewed as part of that study consistently and enthusiastically endorsed the practices that are the focus of the proposed amendments, including in-person status conferences and requiring a conference before discovery motions are

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<sup>3</sup> AM. COLL. OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., *WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES* (2014), <http://iaals.du.edu/workingsmarter>.

filed. The judges found that these case management practices, and the judicial engagement they produced, resulted in issues being presented and resolved much more quickly and efficiently—saving both time and money.

### **Rule 4(m) and Rule 16(b)(2): Time for Service and Time for Scheduling Order**

The proposed amendments to Rule 4(m) and Rule 16(b)(2) shorten the time limits at the beginning of the case, with the intent of eliminating delay and engaging the court earlier in the case. There were a few comments from the plaintiffs’ attorneys regarding potential issues with the shortened time frames. One participant noted that the short time frame for service may pose a problem if parties are trying to identify the defendant and the statute of limitations is close to expiring. Others raised a concern about the interplay between the shortened time for service and the time needed for service by waiver under Rule 4. The current rule allows enough time to request a waiver by mail and, if service is not completed, to effect service. On a shorter schedule, plaintiffs may be forced to skip requesting a waiver, which will make the process less efficient. Others mentioned that there are good reasons to leave the rule as is, and no good reasons to change it.

### **Rule 16(b): Actual Conference**

There was overall support for the proposed change to Rule 16(b) removing the reference to conferences “by telephone, mail, or other means.” There was consensus that in-person conferences are more effective and have a positive impact on the litigation for all parties. One participant asked whether the rule could be made even more forceful by requiring an in-person conference. One judge agreed, suggesting that the initial pretrial conference could be “presumed to be in person unless good cause shown.” This led to a discussion of the extent to which rules should prescribe in detail how individual judges manage their dockets and cases, as opposed to providing a set of management tools and guidance on using them. There was also useful discussion about how technology can offer creative and less expensive ways to achieve the same results as in-person conferences for cases in which attorneys and judges may be scattered around the country.

### **Rule 16(b)(3): Conference before Discovery Motion and Additional Subjects**

Similarly, there was broad support for the case management reforms under Rule 16(b)(3), particularly for having parties appear (at least by telephone) on relatively short notice for a pre-motion conference to address discovery disputes. There was support from both sides of the “v” for requiring a pre-motion conference with the court before filing a formal motion to compel discovery or to seek protection from discovery. Both plaintiff and defense attorneys referred to examples of this practice from around the country, noting variations that include parties submitting a one- or two- page letter summarizing the items to be covered prior to the conference. The attorneys reported positive experiences with such pre-motion conferences, noting that this approach results in the parties addressing disputed issues promptly, obtaining

early and active judicial involvement, and receiving prompt resolution of disputes from the court (or at least significant narrowing of issues). Again, some thought the rules did not go far enough, and suggested that such a practice could be used for dispositive motions as well, including Rule 56 motions.

### **Rule 26(d): Early Rule 34 Requests**

Although not a topic that garnered much comment, there was support for early service of Rule 34 document requests. This is another area where some suggested that the rules could go even further by extending this approach to other forms of discovery besides production requests. A suggestion was made to change Rule 26(d)(2) to “Early *Discovery* Requests” rather than limiting it to “Early *Rule 34* Requests.”

## PRESERVATION

### **Rule 37(e): Preservation**

Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. There was recognition that both plaintiffs and defendants have “skin in the game” when it comes to preservation. A number of participants saw a need for the proposed rule but felt that the language needs some revision.

Several of the concerns with the proposed amendments to Rule 37(e) focused on proposed Rule 37(e)(1)(B)(ii). This section intended to address circumstances such as in *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001). The proposed rule would permit sanctions without a showing of willfulness or bad faith where a party’s actions “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” Participants expressed concerns that the language was vague and presents the risk of swallowing the rest of the rule and becoming the sole focus. One participant expressed the concern that the consequence of missing information is tied to the importance of what is lost, and not to the party’s conduct. As a result, the sanctions could be very severe even if the conduct involved a low level of culpability.

Some expressed concern about including curative measures in the sanctions rule, but overall the participants were supportive of this approach. One general counsel noted that including curative measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. For example, a curative measure could recognize the ability to replace a missing email with one that is found in another location that provides the same or similar information, allowing any actual harm caused by the omission to be cured. Several participating judges also expressed support for curative measures, as they provide the court with more flexibility to deal with preservation issues.

There was some concern on the plaintiffs' side that the rule does not adequately address cases in the middle range of culpability and harm, where the case does not justify imposing severe sanctions, but curative measures are not adequate to cure the missing information. Judges in the room felt that the rules provide enough flexible tools to allow creativity and common sense in crafting solutions for such cases. Others noted that they like the shift in focus to bad faith because a high bar for spoliation sanctions is important to preventing cases from becoming about sanctions rather than merits. Several participants raised concerns about including the word "or" between "willful or bad faith," given that behavior can be willful without any bad intent to destroy or alter evidence. There was also concern expressed about what "substantial prejudice" means and whether there could be further definition provided, given the severe consequences that can be imposed.

#### *Areas of Consensus and Ideas for Improvement*

There were multiple suggestions on how to address the concerns with the "B(ii) exception." A significant number of participants stated that the B(ii) exception should be removed entirely, and that the Committee Note should state that Rule 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 the concern. One participant, crediting a previously filed comment,<sup>4</sup> suggested that the delineation between documents, electronically stored information, and tangible things be carried over from Rule 34. In such a scenario, Rule 37(e) could be made applicable solely to documents and electronically stored information, and the B(ii) exception removed altogether.

A few expressed support for the factors under proposed Rule 37(e)(2), finding them helpful in terms of providing a roadmap or warning for the parties. That said, most of the comments were in support of revising Rule 37(e)(2). A significant number favored substantially revising Rule 37(e)(2) to remove the "laundry list" of factors, leaving the analysis flexible, to be tailored to 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 both garnered the most support, and several agreed that the rule could be limited to these two factors alone. One participant also suggested collapsing the introductory language. The remaining factors received various criticisms. For example, it was suggested that factor E is confusing and unhelpful, based on the ambiguity of the word "timely." The same thing was argued with respect to "proportional" in factor D. Others urged that any list of factors should be made explicitly non-exhaustive.

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<sup>4</sup> See THOMAS Y. ALLMAN, PUBLIC COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE CONCERNING PROPOSED RULE 37(E) 7 (Oct. 24, 2013).

## COOPERATION

### **Rule 1: Cooperation**

There was a mixed response with regard to the proposed additional language to Rule 1. A slim majority favored the proposed amendment. Supporters noted their hope that the additional language could help lead to a culture change in favor of cooperation. The supporters additionally favored including “attorneys” to make it explicit that the mandate applies to attorneys as well as to the parties.

The opponents to the change separated along two lines. The first group did not oppose the concept, but rather suggested that Rule 1 contains iconic language, which should be left alone. The second group pointed out the importance of zealous advocacy and the limited practical effect that would come from this language change, as well as the potential for use of the language as a tactical weapon that could increase objections and motions in discovery.

## CONCLUSION

The participants came to the discussion sharing an expertise in federal practice and a dedication to improving the civil justice system. The comments above reflect that, while views differ in some areas regarding the proposed amendments, there are also many areas of consensus.

The proposed amendments to Rule 26(b)(1) garnered the most comment and debate, while the case management amendments received the most support. The discussion resulted in many suggested “tweaks” to the current proposals that could address some of the concerns raised at the Forum. Several suggestions had widespread support, such as moving “amount in controversy” in Rule 26(b)(1) lower in the list of factors for consideration, or removing it from the list entirely. There was also a clear consensus that the proposed deposition time and number limit amendments are not necessary or desirable. In other areas, no consensus emerged. Even in these areas, however, the Forum was successful in providing an opportunity to exchange views, explore the complexities of the issues, identify possibilities for continued progress toward broader agreement, and to offer possible solutions. We hope that the Forum and this summary provide a meaningful contribution to the ongoing conversation.

## APPENDIX A: FORUM PARTICIPANTS

### **Jennie Lee Anderson, *Andrus Anderson LLP***

Jennie Lee Anderson, of San Francisco, California, has extensive experience representing plaintiffs in a variety of class action and complex litigation cases. Her current practice focuses on representing individuals and classes in employment, personal injury, product liability, consumer protection, and antitrust cases.

### **Dennis Cameron, *WPX Energy***

Dennis Cameron, of Tulsa, Oklahoma, has over 20 years of legal experience and currently serves as Deputy General Counsel for WPX Energy. His practice with GableGotwals consists primarily of complex litigation involving energy interests including the defense of class actions.

### **Logan Cornett, *IAALS***

Logan Cornett, of Denver, Colorado, is a Social Science Research Assistant at IAALS and has worked on all of IAALS' initiatives, with particular focus on the *Rule One Initiative*. She helps to design evaluative measures, as well as to collect and analyze data, for IAALS' empirical research studies.

### **Chief Judge Janice Davidson (ret.), *IAALS***

Chief Judge Janice Davidson, of Denver, Colorado, served on the Colorado Court of Appeals for twenty-five years, and was Chief Judge of that Court since 2003, before she retired from the bench in 2013. She joined IAALS in January 2014 as Senior Advisor. She has served on multiple rules committees in Colorado and served as a member of the Committee that developed the Colorado Civil Access Pilot Project.

### **Michael C. Dell'Angelo, *Berger & Montague, P.C.***

Michael Dell'Angelo, of Philadelphia, Pennsylvania, litigates complex cases, primarily for plaintiffs, throughout the country. He has recently handled a variety of "bet the company" cases around the country ranging from complex commercial disputes to securities litigation to antitrust matters.

### **Gilbert A. Dickinson, *Dickinson, Prud'Homme, Adams & Ingram, LLP***

Gilbert Dickinson, of Denver, Colorado, practices in the area of medical malpractice defense and general insurance defense. He is an active member of the American Board of Trial Advocates and has been actively involved in Colorado and nationally in helping to develop and promote access to the civil justice system through procedural reform and expedited discovery and trial practices.

**Kathryn Dickson, *Dickson Geesman LLP***

Kathryn Dickson, of Oakland, California, represents individuals in employment discrimination, harassment, wrongful termination, and whistleblower actions, although she has also had notable success in several high-profile class action cases. She is committed to representing the entire spectrum of employees from entry-level workers to top-level executives.

**R. Stanton Dodge, *DISH Network LLC***

Stanton Dodge, of Englewood, Colorado, serves as Executive Vice President, General Counsel and Secretary of DISH Network Corporation, a Fortune 200 satellite TV provider with more than 14 million subscribers nationwide. He is responsible for all legal and government affairs for DISH and its subsidiaries.

**Herbert Eisenberg, *Eisenberg & Schnell, LLP***

Herbert Eisenberg, of New York, New York, has a practice devoted to representation of employees in all aspects of employment law with a focus on individual and class litigation involving employment discrimination, equal pay, sexual harassment, and employment contracts. He has arbitrated securities industry employment disputes, litigated employee benefit claims under ERISA, fraud claims in the employment context and has handled both public and private sector union-side collective bargaining matters.

**Carolyn Frantz, *Bartlit Beck Herman Palenchar & Scott LLP***

Carolyn Frantz, of Denver, Colorado, has a practice focused on legal strategy, critical motions, and appellate issues in complex and multidistrict litigation. Before joining Bartlit Beck in 2005, she was a professor at the University of Chicago Law School and clerked for Justice Sandra Day O'Connor of the United States Supreme Court and Judge David S. Tatel of the United States Court of Appeals for the District of Columbia.

**Joseph D. Garrison, *Garrison, Levin-Epstein, Richardson, Fitzgerald & Pirrotti, P.C.***

Joseph Garrison, of New Haven, Connecticut, is a prominent employment lawyer whose practice draws upon his vast experience as a trial lawyer and negotiator, and combines the representation of individuals in litigation with an expanding focus on mediation and arbitration. He served for three years as President of the National Employment Lawyers Association (NELA) and for fifteen years on NELA's Executive Board. He now serves as NELA's representative to the federal Advisory Committee on Civil Rules.

**Corina D. Gerety, IAALS**

Corina Gerety, of Denver, Colorado, directs long-term research and evaluation projects as IAALS's Director of Research. Her work involves legal and empirical research, analysis, and writing, as well as research-related collaboration and presentation. She conducts research for all IAALS initiatives on an as-needed basis.

**Daniel C. Girard, *Girard Gibbs LLP***

Daniel Girard, of San Francisco, California, specializes in class actions and complex business litigation. He has successfully represented plaintiffs in cases involving shareholder rights, securities, antitrust, consumer, telecommunications, and civil rights laws. He served for two terms on the federal Advisory Committee on Civil Rules.

**Margaret A. Harris, *Butler & Harris***

Margaret Harris, of Houston, Texas, concentrates her law practice on representing individuals in employment disputes, including first amendment retaliation, sexual harassment, and disability, age, race, and gender discrimination matters. She is a member of the College of Labor & Employment Lawyers and a member and former officer and board member of NELA.

**Professor Melissa Hart, *University of Colorado Law School***

Professor Melissa Hart, of Boulder, Colorado, devotes her teaching and scholarship to employment discrimination, civil procedure, and constitutional law. She has been teaching at the University of Colorado Law School since 2000 and has been the Director of the Byron R. White Center for the Study of American Constitutional Law since 2010.

**Richard P. Holme, *Davis Graham & Stubbs LLP***

Richard Holme, of Denver, Colorado, has tried almost 70 jury trials, including those while he was a Deputy District Attorney in Denver (1969-71), numerous trials to courts, and several arbitrations. He has litigated and tried major contract actions, employment and discrimination issues, condemnation suits, and patent, intellectual property, trade secrets, product liability, securities fraud, and natural resources cases. He has also handled a number of major constitutional cases.

**Richard Hood, *Hood, P.C.***

Richard Hood, of Denver, Colorado, practices in the areas of pharmaceutical and medical device litigation with an emphasis on electronic discovery and data transfer matters. He serves as co-lead counsel of the Plaintiffs' Steering Committee in Multi-District Litigation No. 2087 – In re Hydroxycut and in the In re Crestor California JCCP.

**Christy D. Jones, *Butler Snow***

Christy Jones, of Richmond, Mississippi, is a member of the Pharmaceutical, Medical Device and Healthcare Industry Team at Butler Snow. She focuses her practice on drug and medical device, product liability law, and mass torts. During her over 30 years of trial experience, she has served as national trial counsel representing various corporations and has tried cases throughout the United States, in many instances serving as lead counsel in bellwether trials.

**Brittany K.T. Kauffman, *IAALS***

Brittany Kauffman, of Denver, Colorado, is the Director of the *Rule One Initiative* at IAALS, where she provides legal and empirical research and analysis, facilitates collaboration among stakeholders, assists in developing and disseminating recommendations, and undertakes national outreach and advocacy to further the goals of promoting greater accessibility, efficiency and accountability in the civil justice system.

**Gregory J. Kerwin, *Gibson Dunn***

Gregory Kerwin, of Denver, Colorado, handles complex commercial disputes in trial and appellate courts with emphasis on securities, antitrust, and business tort and contract disputes. He has served as lead or second-chair in approximately 20 jury trials, bench trials, and arbitrations, and has argued and briefed many cases in the Colorado appellate courts, Tenth Circuit, and Ninth Circuit. He has also represented clients in trial courts in 20 other states.

**Justice Rebecca Love Kourlis (ret.), *IAALS***

Rebecca Love Kourlis, of Denver, Colorado, served on the Colorado Supreme Court until January, 2006, when she resigned to establish IAALS, where she is Executive Director. In this capacity, she has become an outspoken advocate of judicial reform and is considered an expert on the challenges and opportunities facing our courts in the 21<sup>st</sup> Century.

**Suzanne Lambdin, *Lambdin & Chaney, LLP***

Suzanne Lambdin, of Denver, Colorado, handles primarily first and third party insurance bad faith litigation and insurance coverage, but she also litigates wrongful death, professional malpractice (primarily dental), products liability, premises liability, class actions, automobile accidents, and other commercial and tort liability cases. She has tried dozens of cases to verdict and also maintains a successful appellate practice with over two dozen reported opinions.

**Jonathan J. Margolis, *Rodgers, Powers & Schwartz LLP***

Jonathan Margolis, of Boston, Massachusetts, concentrates his practice in the area of employment law, representing plaintiffs. He has a reputation for taking on large corporations and public employers. He is an active member of the NELA, is part of its Federal Rules Task Force, and has presented at several of its national conventions.

**Ellen J. Messing, *Messing, Rudavsky & Weliky, P.C.***

Ellen Messing, of Boston, Massachusetts, represents employees in labor and employment litigation, including wrongful termination, discrimination, contract, sexual harassment, and public employee matters. She is past national secretary of NELA, former cochair of the Boston Bar Association committee on professional ethics, and a former chair of the Massachusetts chapter of NELA, among other positions.

**Lee Mickus, *Snell & Wilmer***

Lee Mickus, of Denver, Colorado, concentrates his practice on the defense of manufacturers during the discovery, trial, and appeal stages of product liability lawsuits, as well as the coordination of pattern litigation. He has handled cases involving a wide variety of products, including automobiles, pharmaceuticals, medical devices, industrial machinery, and recreational equipment. His practice also addresses allegations asserted against financial planners in their interactions with investors.

**Robert N. Miller, *Perkins Coie***

Robert Miller, of Denver, Colorado, has over 45 years of experience in complex commercial litigation and white collar crime. As the former United States Attorney for the District of Colorado, and as a former Colorado District Attorney, he has extensive experience in representing companies, board members, officers and individuals in connection with investigations by federal and state prosecutors. He also routinely conducts internal investigations and advises companies on compliance programs.

**John E. Moye, *Moye White***

John Moye, of Denver, Colorado, counsels clients in all facets of business law—from corporate structure, strategy, and operations to mergers, expansions, and recapitalizations. He frequently advises clients and participants, including buyers, sellers, investors, boards, and committees in various acquisition transactions, divestitures, IPOs, and all types of business-related contracts.

**Andre M. Mura, *Center for Constitutional Litigation***

Andre Mura, of Washington, D.C., has handled complex litigation and dispositive motions in state trial and federal district courts. His litigation experience includes civil rights, constitutional, consumer, products liability, class action, Section 1983, and federal preemption law. He has briefed and argued cases in numerous state supreme courts, and has experience authoring briefs filed in the U.S. Supreme court, at both the petition and merits stages.

**Gretchen M. Nelson, *Kreindler & Kreindler LLP***

Gretchen Nelson, of Los Angeles, California, handles class actions in the securities, antitrust, and consumer areas, business litigation and wrongful death and personal injury lawsuits, arising out of aviation and maritime accidents. Prior to joining Kreindler & Kreindler, she devoted her practice to the litigation of complex class action cases, involving securities, antitrust, employment and consumer claims as well as other litigation on behalf of individuals and small businesses.

**Gordon W. Netzorg, *Sherman & Howard***

Gordon Netzorg, of Denver, Colorado, focuses on complex commercial litigation, with an emphasis on corporate and partnership disputes, securities and fraud litigation, natural resources, and class actions. He also arbitrates and mediates commercial cases. He is a member of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and was Co-Chair of the Colorado Business Pilot Project Committee.

**Charles R. Ragan, *Ragan Law Firm***

Charles Ragan operates from bases in the Twin Cities and the San Francisco Bay Area. He has counseled Fortune 100 companies and emerging companies on the efficient resolution of complex commercial disputes. Most recently, he has focused his practice on the management of electronic information in complex business organizations and is an original participant in Working Group 1 of The Sedona Conference®.

**Jonathan M. Redgrave, *Redgrave LLP***

Jonathan Redgrave, of Washington, D.C., has extensive experience in all areas of complex litigation in both state and federal courts and focuses his practice in the area of informational law, which includes electronic discovery, records and information management, and data protection and privacy issues. He served as Editor-in-Chief of “The Sedona Principles®” and serves on the Advisory Board of The Sedona Conference®.

**Judge Lee H. Rosenthal, *U.S. District Court for the Southern District of Texas, Houston Division***

Judge Lee Rosenthal, of Houston, Texas, was appointed a United States District Court Judge for the Southern District of Texas, Houston Division, in 1992. Before then, she tried civil cases and handled appeals in the state and federal courts. She served as a member, then chair, of the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure.

**Stephanie Lindquist Scoville, *Senior Assistant Attorney General, Colorado***

Stephanie Lindquist Scoville, of Denver, Colorado, focuses on complex litigation and related appeals in both state and federal courts. Recent representative cases include a Second Amendment challenge to recent gun control laws and a constitutional challenge to TABOR. She also litigates employment matters on behalf of Colorado's state agencies and universities.

**Magistrate Judge Craig B. Shaffer, *U.S. District Court for the District of Colorado***

Craig Shaffer, of Denver, Colorado has been a United States Magistrate Judge for the District of Colorado since January 2001. He previously served as a Navy judge advocate, a senior trial attorney with the United States Department of Justice, and in private practice as a partner in two different Denver law firms. He is a frequent presenter at conferences and seminars dealing with electronic discovery.

**Norman E. Siegel, *Stueve Siegel Hanson LLP***

Norm Siegel, of Kansas City, Missouri, concentrates on complex business and multi-party litigation on a contingency basis. He has successfully tried to verdict a wide range of cases including obtaining several multi-million dollar jury verdicts. He is a frequent speaker on issues related to complex litigation management, discovery, and pre-trial procedures.

**Judge Jeffrey Sutton, *U.S. Court of Appeals for the Sixth Circuit***

Judge Jeffrey Sutton, of Columbus, Ohio, has served on the U.S. Court of Appeals for the Sixth Circuit since 2003. Before his appointment, he practiced appellate law and constitutional and commercial litigation. He served as State Solicitor of Ohio, where he oversaw appellate litigation on behalf of the Ohio Attorney General and participated in complex litigation on her behalf at the trial level. He currently serves as the chair of the Judicial Conference Committee on Rules of Practice and Procedure.

**Beth E. Terrell, *Terrell Marshall Dadt & Willie PLLC***

Beth Terrell, of Seattle, Washington, focuses on complex litigation, including the prosecution of consumer fraud, defective product, and wage and hour class actions. She has been co-lead counsel on many multi-state and nationwide class actions against Fortune 100 and 500 companies. She also represents individuals with employment and personal injury claims and has successfully tried cases in state and federal court.

**James P. Ulwick, *Kramon & Graham PA***

James Ulwick, of Baltimore, Maryland, has tried many cases in state and federal courts, including: banking, criminal defense, class actions, contracts, personal injury, legal and medical malpractice, RICO, construction, equal employment, real estate, securities, toxic tort, and other cases. Prior to his joining Kramon & Graham, he served as a federal prosecutor, an Assistant United States Attorney for the District of New Jersey, and an Assistant United States for the District of Maryland.

**Chief Judge Kathryn H. Vratil, *U.S. District Court for the District of Kansas***

Chief Judge Kathryn Vratil, of Kansas City, Kansas, has served as a District Court Judge for the District of Kansas since 1992. Chief Judge Vratil became the district's Chief Judge in January 2008. Her legal experience includes 14 years of private practice where she specialized in commercial and business litigation. She also served as Municipal Judge for the City of Prairie Village, Kansas.

**Kenneth A. Wexler, *Wexler Wallace LLP***

Kenneth Wexler, of Chicago, Illinois, devotes his practice to complex litigation, with particular emphasis on healthcare fraud, antitrust, investment fraud, unfair business practices, and whistleblower suits. His focus is on obtaining recoveries for victims seeking fundamental fairness through the judicial process. He also teaches complex litigation at Loyola University of Chicago School of Law.

**Joy Allen Woller, *Lewis Roca Rothgerber***

Joy Woller, of Denver, Colorado, represents individuals, corporations, and government entities in complex commercial litigation in both federal and state court. She has experience in a wide range of substantive areas, including contract disputes, employment matters, intellectual property issues and litigation arising from insurance insolvencies. As the Firm's eDiscovery and Litigation Support Partner, she assists the Firm's commercial litigation group in addressing complex electronic discovery issues.