



LAWYERS FOR CIVIL JUSTICE

SUPPLEMENTARY PUBLIC COMMENT to the ADVISORY COMMITTEE ON CIVIL RULES

AN IMPERATIVE TO ACT: THE PUBLIC COMMENTS DEMONSTRATE THE NEED TO REFORM THE DISCOVERY RULES TO ACHIEVE A MEANINGFUL REDUCTION IN THE COSTS AND BURDENS OF DISCOVERY

February 3, 2014

“[C]ivil justice in the United States [has] become reduced to a series of [“gotchas”] where cases can be just as much about finding and exploiting the other side’s errors during pretrial phases as it is about finding what truthfully happened and therefore finding justice....It’s tragic that the United States justice system, which has contributed so much to making this the greatest nation on the planet, is cited as a reason not to come here to do business....People and their businesses should be coming here because of the great justice system. They should be here because of it, not citing it as a reason to stay away.”

-- Frank Steeves, General Counsel, Emerson Electric Company, in testimony to the Federal Advisory Committee on Civil Rules¹

I. Introduction and Summary

Lawyers for Civil Justice (“LCJ”)² respectfully submits this Supplementary Public Comment³ to the Advisory Committee on Civil Rules (“Advisory Committee” or “Committee”) concerning the

¹ Transcript of Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 302-303 (Nov. 7, 2013) *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>.

² Lawyers for Civil Justice (“LCJ”) is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming the federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

³ LCJ filed a public comment August 30, 2013, which is available here: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267>.

Proposed Amendments to the Federal Rules of Civil Procedure (“proposed amendments”). In doing so, LCJ commends the Advisory Committee for its success during the public comment period in providing a fair, open and thoughtful process.

Substantial evidence now before the Committee shows that American businesses – large, medium and small – are preserving and producing staggering amounts of information that have no bearing on the merits of their cases. Here are a few highlights:

- Allergan, Inc. collected 1,025,000 documents in a patent case where it was a plaintiff and produced 391,000 to defendants, of which only 146 ended up as exhibits – in other words, 0.08 percent of collected documents and 0.2 percent of produced documents were used in trial.⁴
- Altec, Inc. spent twice as much on discovery as it did to pay claims in 2012.⁵
- Services Group of America spent \$1 million on discovery in three cases during the last two years where legal costs exceeded the amount in controversy.⁶
- Bayer Corporation recently produced 2.1 million pages in a case that went to trial for eight weeks, and only 0.04 percent of that information was used at trial.⁷
- At Boston Scientific Corporation, roughly one-half of all employees are subject to litigation holds, and \$32 million has been paid to an outside discovery vendor since 2005.⁸
- Exxon Mobil Corporation has 5,200 employees subject to litigation holds, and estimates that navigating those holds requires an average of 10 minutes per day per employee, for a total of 867 hours a day or 327,000 hours a year in lost productivity. An overwhelming amount of that wasted time is for no purpose whatsoever, since only 3.8 percent of preserved data is ever produced, and only 16 percent of what’s produced is processed.⁹

⁴ Letter from William N. Scarff, Jr., Vice President, Associate General Counsel, and Chief Litigation Counsel at Allergan, Inc. & Donald P. Bunnin, Senior Litigation Counsel at Allergan, Inc. to Advisory Committee on Civil Rules, et al. (Jan. 22, 2014) (Re: Public Comment of Allergan, Inc. Concerning the Proposed Amendments to the Federal Rules of Civil Procedure) *available at* <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0436>.

⁵ *See*, Testimony of Rob Hunter, General Counsel of Altec, Inc., Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 201 (Jan. 9, 2014) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

⁶ Testimony of Steven J. Twist, Vice President and General Counsel, Services Group of America, Inc., Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 245-246 (Jan. 9, 2014) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

⁷ Testimony of Kaspar Stoffelmayer, Vice President and General Counsel, Bayer Corporation, Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 91-92 (Jan. 9, 2014) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

⁸ Testimony of Timothy A. Pratt, President, Federation of Defense and Corporate Counsel and Executive Vice President, Chief Administrative Officer, General Counsel and Corporate Secretary, Boston Scientific Corporation, Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 28 (Jan. 9, 2014) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

⁹ Testimony of Robert L. Levy, Counsel – Civil Justice Reform and Law Technology, Exxon Mobil Corporation, Transcript of Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil

- GlaxoSmithKline’s U.S. outside litigation costs have been 50 times higher than its non-U.S. outside litigation costs during the last 10 years, and its preservation burden has increased 316 percent in the last two years. While 45 percent of its U.S. employees are subject to a litigation hold, the same is true for only 12.4 percent of its employees outside the U.S..¹⁰
- Microsoft Corporation has spent \$600 million on discovery over the last decade – and that’s only for outside counsel, not in-house lawyers. In 2013, the company preserved an average of 1.3 million pages per custodian, but on average, only one page out of every 670,000 is used in litigation.¹¹
- Pfizer, Inc. was required to spend \$40 million to preserve 1.2 million back-up tapes for eight years – but never had to retrieve a single document from those tapes.¹²

This evidence demonstrates that the current discovery rules are slowing – and in many cases, preventing – the ability of parties to reach the merits of their disputes. It further supports the Committee’s imperative to act.

II. Proportionality and the Scope of Discovery

A. Rule 26(b)(1): Adding Proportionality Would Not Shift Any “Burden”

The principle of proportionality is widely acknowledged as an important consideration in all phases of modern discovery. It has long been present in Rule 26(b) and is cross-referenced in Rule 26(b)(1) with the statement that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”¹³

Unfortunately, despite its long-standing presence in the Federal Rules of Civil Procedure, proportionality is infrequently and insufficiently enforced and has thus far failed adequately to address the problem of excessive discovery, as it had been expected to do.¹⁴ The Advisory

Procedure Judicial Conference Advisory Committee on Civil Rules at 158-164 (Nov. 7, 2013) *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>.

¹⁰ Testimony of Dan Troy, Senior Vice President and General Counsel, GlaxoSmithKline, Transcript of Proceedings, In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 123-128 (Nov. 7, 2013) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>.

¹¹ Testimony of David M. Howard, Microsoft Corporation, Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 80-81, 85 (Jan. 9, 2014) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

¹² See Letter from Malini Moorthy, Vice President & Assistant General Counsel, Pfizer, Inc., to Advisory Committee on Civil Rules, et al. (Nov. 5, 2013) (Re: Public Comment of Pfizer, Inc. Concerning the Proposed Amendments to the Federal Rules of Civil Procedure) *available at*

<http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0327>.

¹³ A parallel provision in Rule 26(g)(1)(B)(iii) places responsibility on an attorney signing discovery requests, responses or objections to certify that those filings are “neither unreasonable nor unduly burdensome or expensive” taking into account the proportionality factors.

¹⁴ Memorandum from Honorable David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure to Honorable Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure 136 (Dec. 5, 2012) (Re: Report of the Civil Rules Advisory Committee) *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2012.pdf> (“In 1983 the underlying concept

Committee has appropriately proposed to move the core principle of proportionality from Rule 26(b)(2)(C)(iii), which addresses limitations on discovery, into Rule 26(b)(1), which defines the scope of discovery in general. This substantive amendment to the scope of discovery will help to ensure the early consideration and appropriate application of proportionality in discovery (by both the parties and the courts). It would not, however, as some have argued, change the burden of establishing proportionality.

The argument that relocating the principle of proportionality would place a new burden on requesting parties reflects a misunderstanding both about the current state of the law with regard to the burden of proof in motions to compel and about the principle of proportionality more generally. Regarding the current state of the law, it is widely acknowledged that where a party moving to compel disclosure “has satisfied the court that the information sought meets the relevance requirements,”¹⁵—a low “burden” that is easily met—then “[t]he burden of establishing that the proportionality or good faith requirements have not been met *should be placed on the party who opposes the discovery.*”¹⁶

There is no reason to believe nor evidence to suggest that the proposed amendment would alter the “burden” in any regard. Moreover, regardless of who technically bears the “burden” to establish proportionality, both requesting and responding parties will have a substantial interest in presenting their best arguments, effectively equalizing the “burden.”¹⁷ For example, the “burden or expense of the proposed discovery,” could not possibly be assessed absent some proffer by the resisting party. Likewise, a requesting party is in the best position to show the “importance of the discovery in resolving the issues.” Thus, regardless of who technically bears the burden of establishing proportionality (or a lack thereof), the responsibility to provide the courts with sufficient information upon which to base its decision will continue to fall upon both parties.

Rule 26(g) specifically makes clear that the burden of ensuring proportionality in discovery falls upon all parties. Rule 26(g)(1)(B)(iii) requires both requesting and responding parties to certify

of proportionality was adopted in Rule 26(b)(2) and also Rule 26(g), with the expectation that the new cost-benefit calculus would solve most problems of excessive discovery. That expectation has not been realized.”)

¹⁵ 7 Moore’s Federal Practice § 37.22 (Matthew Bender 3d Ed.).

¹⁶ *Id.* (emphasis added); see also, *Fort Worth Employees’ Retirement Fund v. J.P. Morgan Chase & Co.*, ---F. Supp. 2d---, 2013 WL 6628963, at *2 (S.D.N.Y. Dec. 16, 2013) (citing *Vidal v. Metro-North Commuter Railroad Co.*, No. 3:12 CV 248, 2013 WL 1310504, at *1 (D. Conn. Mar. 28, 2013) (“Rather, [a] party resisting discovery has the burden of showing ‘specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive, ... submitting affidavits or offering evidence revealing the nature of the burden.”); *Patrick v. Teays Valley Trustees, LLC*, ---F.R.D.---, 2013 WL 6524656, at *5 (N.D. W.Va. Dec. 12, 2013) (citing *Herbalife Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 05-CV-41, 2006 U.S. Dist. LEXIS 68744, at *1, *17 (N.D. W. Va. Sept. 21, 2006) (“If a party believes that a discovery request exceeds the broad scope of allowable discovery, it may object, but ‘the party resisting discovery has the burden of clarifying, explaining and supporting its objections.’”); *Oakes v. Halvorsen Marine, Ltd.*, 179 F.R.D. 281 (C.D. Cal. 1998) (citing *Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 135 F.R.D. 101, 104 (D.N.J. 1990) (“The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.”)).

¹⁷ See Testimony of John Beisner, Partner, Skadden, Arps, Slate Meagher & Flom LLP, Transcript of the Proceedings, In the Matter of: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 64-66 (Jan. 9, 2014) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.

that any request, response, or objection is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.” The proposed amendments would not change Rule 26(g) and its attendant obligations – just as they will not change the principle of proportionality itself. Thus, the “burden” of ensuring proportionality would *remain with both parties*, as it has for many years.

Ironically, many witnesses who oppose including proportionality in the scope of discovery have demonstrated not only the merits of the concept but also that lawyers are adept at explaining why some cases need more discovery than others. The Committee has heard several thoughtful discussions of “the needs of the case,” which is exactly what the proposed amendments are meant to encourage. Yet some opponents talk about “proportionality” as if it meant the opposite: “one size fits all.” On the contrary, “proportionality” means discovery tailored to the needs of each case, enabling parties to get the evidence they need more quickly while avoiding wasteful over-preservation and over-production that imposes costs and burden on the entire legal system without any commensurate benefit.

Separate from the question of who bears the “burden” of establishing proportionality, the proposed amendments to Rule 26(b)(1) (or any other rule for that matter) should not be undermined by hypothetical bad behavior. If litigants routinely act unethically, that is a matter for the rules of ethics, not for the scope of discovery. Successful discovery has always depended upon the good faith participation of all parties and counsel. The rise of electronic discovery has not changed that, despite the challenges of volume and cost in this information age. Because the proposed amendments to Rule 26(b)(1) seek only to address and alleviate these challenges—*which can fall upon plaintiffs and defendants alike*—cynical arguments that the proposed changes will cause more obstreperous behavior should not undermine the opportunity for much-needed reform.

B. Rule 26(c) Should Include Preservation

Currently, Rule 26(c) (“Protective Orders”) explicitly applies only to limiting the “disclosure or discovery” of discoverable information. However, as the Committee implicitly acknowledges by adding proportionality as a factor for assessing preservation conduct in Proposed Rule 37(e)(2), there is an intimate linkage between preservation and discovery. Accordingly, we urge the inclusion of authority to limit excessive and burdensome preservation demands. While some courts have already taken the initiative to enter such orders, confusion may exist regarding both the availability of, and the mechanism for, seeking preservation protection, which may in turn result in unnecessary and costly over-preservation in many cases. Rule 26(c) should be amended to provide clarity.

III. Preservation and Sanctions: Proposed Rule 37(e)

We strongly support the effort in Proposed Rule 37(e) to provide a uniform and predictable national standard that allows parties with potentially discoverable information to use their best judgment, based on reasonableness and proportionality, to manage their preservation efforts without fearing serious sanctions for inadvertent data loss. However, there are four barriers to achieving the full potential of the Rule.

A. Eliminating – Or Limiting – the (B)(ii) Exception

Although LCJ remains convinced that the risks of including proposed subsection 37(e)(1)(B)(ii) (“the (B)(ii) exception”) vastly exceed any potential benefit, we nevertheless respect the Committee’s commitment to finding the right balance to avoid “overturning” decisions such as the Fourth Circuit’s opinion in *Silvestri v. General Motors*,¹⁸ where the prejudice resulting from loss of tangible evidence rendered it impossible for the product manufacturer to defend the defect claim in that action.

The first issue is whether Rule 37(e) should apply broadly to all types of evidence given that the *Silvestri*-type cases are much more likely to arise in disputes involving physical evidence, which Rule 34 describes as “tangible” evidence in contradistinction to “ESI” and “documents.” We agree that Proposed Rule 37(e) should generally apply to all types of discoverable information,¹⁹ but continue to be concerned that, unless eliminated or cabined, the (B)(ii) exception will be employed much more often than the Committee anticipates, jeopardizing any benefit of the rule. For this reason, we offer a compromise solution to this dilemma: preserve Rule 37(e)’s broad applicability to all kinds of evidence, but limit the application of the (B)(ii) exception to tangible things. The (B)(ii) exception would read like this (our insertion is underlined):

(ii) in the case of tangible things, irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

We acknowledge that this is not a perfect solution. However, it would preserve the principle for its most viable usage²⁰ while reducing the risk of causing great mischief.

B. Defining or Eliminating “Willful” Are Alternatives to Changing the “or” to “and”

Proposed Rule 37(e) currently requires – in Subsection (B)(i) – that substantial prejudice and conduct that is “willful or in bad faith” must be shown before sanctions are authorized. However, the proposed rule will not succeed in altering the fear-driven preservation behavior that is responsible for a significant portion of discovery costs and burdens unless the inherent ambiguity in the use of “willful” is fixed. As demonstrated by the *Sekisui* decision in August 2013, merely intentional conduct, without any showing of culpable intent, may qualify as sufficiently “willful” in some jurisdictions:

“The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.”²¹

¹⁸ *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

¹⁹ See LAWYERS FOR CIVIL JUSTICE, REDUCING THE COSTS AND BURDENS OF MODERN DISCOVERY: WHY THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE ARE URGENTLY NEEDED (WITH A FEW IMPORTANT IMPROVEMENTS) 16 (Aug. 30, 2013) [hereinafter “LCJ Public Comment”], available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267>.

²⁰ Even the circuit court in *Silvestri* acknowledged the “peculiar circumstances” of the case. 271 F.3d 583, 595 (4th Cir. 2001).

This definition of “willful” as simply “knowingly” will survive if Proposed Rule 37(e) remains as drafted, forcing parties to “save everything” rather than use their best judgment. *Residential Funding* will stand. Large ESI holders will suffer increasing burdens of ridiculous over-preservation, and America’s small- and medium-sized businesses that do not have the luxury of in-house eDiscovery counsel will continue to be damaged and puzzled by sanctions for their good faith decisions. Substituting the conjunctive “and” for the disjunctive “or” in the proposed rule would make clear that an intentional act carried out in the absence of bad faith is not a sufficient basis for sanctions.²² This would be the best remedy. However, if the Committee intends to retain the phrase, then we support the following definition of “willful”: “acting with specific intent to deprive the opposing party of material evidence relevant to the claims or defenses.”²³ This definition would empower decision makers to employ their best judgment. As an alternative, we would also support deleting “willful” and leaving the threshold standard as “bad faith,” which (although it presents some ambiguity) has been almost uniformly interpreted to incorporate specific intent.

C. Prerequisites for Curative Measures

Although LCJ supports a distinction between curative measures and sanctions in Proposed Rule 37(e), we urge the Committee to add two clarifications. First, the rule should require a preliminary showing of prejudice as a prerequisite for curative measures to respond to the fact that the measures are a non-punitive alternative to sanctions. After all, the point of a “curative” measure is to cure something, not simply to punish. Courts should not use this power if it does not restore in some way what has been lost, and neither should they punish a loss of data that has no impact on the case – including cumulative or duplicative information.

Second, the Committee should make clear in the Rule, not just the Note, that courts should employ the least severe remedy that will suffice to repair the case when choosing among possible measures and sanctions.

D. The List of Factors Should Include Relevance and Prejudice

LCJ has previously urged the Committee to remove the list of factors from Proposed Rule 37(e), or to move them into the Note, because they are incomplete, ambiguous and potentially misleading.²⁴ However, if the Committee intends to keep the factors, then we recommend adding an assessment of the relevance of the lost information and the prejudice caused by its loss. These elements are key because, in their absence, the factors’ focus on reasonability and proportionality could allow courts to follow practices developed under *Residential Funding* to survive.

²¹ *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 503(S.D.N.Y. 2013).

²² See LCJ Public Comment, *supra* note 19, at 7-9.

²³ This is similar to the suggestion made by The Sedona Conference®. See Letter from The Sedona Conference® Steering Committee of Working Group 1 to the Committee on Rules of Practice and Procedure, at 13 (November 26, 2013) (Re: Response by The Sedona Conference® Working Group 1 Steering Committee to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013)) *available at*: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0346>.

²⁴ See LCJ Public Comment, *supra* note 19, at 10-13.

IV. Endorsing the Purpose of the Numerical Limits Revisions: Rules 30, 31, 33 and 36

Opponents of the Committee’s proposals have been particularly critical of modest changes to the presumptive limits on the use of discovery devices such as oral or written depositions. The critics generally do not understand the Committee’s purpose for proposing the reforms, which is unimpeachable. As the Committee explained:

The fear that lowering the threshold will raise judicial resistance [to approve increases in specific cases] seems ill-founded. Courts are willing now to grant leave to take more than 10 depositions per side in actions that warrant a greater number. The argument that they will become reluctant to grant leave to take more than 5, or more than 10, is not persuasive.²⁵

The Committee’s presumptive limits proposals are well thought-out, and they will promote early discussion about efficient discovery. They will not prevent requestors from obtaining the information they need to prosecute or defend the claims. The specific presumptive limits proposed should be helpful in achieving the goals of discovery reform in conjunction with the broader rule proposals. We support their adoption as proposed.

V. Proposed Rule 34(b)(2)(C) Will Increase Discovery Burdens and Ancillary Litigation Without Producing Any Benefit

The well-intended proposal to add a requirement to Rule 34(b)(2)(C) for an objecting party to “state whether any responsive materials are being withheld on the basis of that objection”²⁶ is problematic. The confusion that the Committee seeks to end – uncertainty over whether information is being withheld when a party states several objections but still produces information – is typically cured through cooperation at the “meet and confer” or thereafter (and courts may be enlisted informally or through motion practice when necessary). The root cause is often a failure to object with specificity, as currently required by the Rules.²⁷ If a party objects to only part of a document request, the rules require it to state specifically which portions are objectionable and otherwise to produce documents related to the non-objectionable part of the request.²⁸ The requesting party also has a duty to propound specific demands.²⁹ Requiring all

²⁵ Memorandum from Honorable David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure to Honorable Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure 14 (May 8, 2013) (Re: Report of the Advisory Committee on Civil Rules) *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

²⁶ Proposed FED. R. CIV. P. 34(b)(2)(C).

²⁷ FED. R. CIV. P. 34(b)(2)(C) (“*Objections*. An objection to part of a request must specify the part and permit inspection of the rest.”).

²⁸ *See Pro Fit Mgmt., Inc. v. First Lady of Am. Franchise Corp.*, 2011 U.S. Dist. LEXIS 19151, * 28-29 (D. Kan. Feb. 25, 2011) (“[a]lthough Defendant is permitted to object to part of a document request, Defendant’s response fails to specify exactly what part of the document requests is being objected to, which is required by *Fed. R. Civ. P. 34(b)(2)(C)*.”).

²⁹ *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649-650 (10th Cir. 2008) (internal citations omitted) (“[u]nder our rules, parties to civil litigation are given broad discovery privileges. But with those privileges come certain modest obligations, one of which is the duty to state discovery requests with ‘reasonable particularity.’ All-encompassing demands... take little account of that responsibility. Though what qualifies as ‘reasonabl[y] particular’ surely depends at least in part on the circumstances of each case, a discovery request should be sufficiently definite and

parties to identify whether any documents are withheld in response to *every* objection does not solve the problem that the Committee is attempting to address. Rather, it unnecessarily places added burden on all parties and the court.

We respectfully urge the Committee not to adopt this proposed amendment since the current rules and procedures available provide the information or means to obtain the information needed.

VI. Conclusion

A wide variety of American businesses – large, medium and small – have responded to the Committee’s call for public comment with substantial evidence further supporting the imperative to act on discovery reform. The current rules are allowing a runaway epidemic of discovery burdens and over-preservation that are distracting – and in many cases preventing – parties from reaching the merits of their disputes. The Committee’s proposals will provide meaningful help. Moving proportionality into the scope of discovery would bring down the costs of discovery by reducing the need to produce information that has no bearing on the claims – without changing any legal “burden” or anyone’s access to what they need for the case. Meanwhile, Proposed Rule 37(e) will improve the current epidemic of vast over-preservation (so long as it is modified as described above). The Committee is on the cusp of achieving what many before have attempted but ultimately fallen short of accomplishing. We strongly urge the Committee to move forward with a bold and serious final proposal to address the enormous challenge that the information age is posing to the U.S. civil justice system.

limited in scope that it can be said ‘to apprise a person of ordinary intelligence what documents are required and [to enable] the court . . . to ascertain whether the requested documents have been produced.’”).