**Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure**

**Submitted February 5, 2014**

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

To the Committee on Rules of Practice and Procedure:

We write to urge this Committee to reject the proposed amendments that redefine the scope of discovery, lower presumptive limits on discovery devices, and eliminate Rule 84 and the pleading forms. The undersigned are law professors who teach and write in the area of federal civil procedure. Each of us also litigated in the federal courts prior to entering the academy, and remain actively involved in professional practice.

In our judgment, two key issues bear close consideration by the Committee as it considers how to proceed: (1) What problem does the Committee seek to solve? (2) On balance, how likely is it that the proposed amendments will improve the status quo? As in 1993 and 2000, the Committee is focused on addressing a perceived problem of excessive discovery costs. In supporting the current proposed amendments, the Committee recognizes that empirical data show no widespread problem, but nevertheless hopes that new across-the-board limits on discovery will lessen discovery costs in the small number of complex, contentious, high stakes cases where costs are high. The Committee is correct about the data: most critically, the Federal Judicial Center's ("FJC") 2009 closed-case study shows that in almost all cases discovery costs are modest and proportionate to stakes. As in 1993[1] and in 2000,[2] evidence of system-wide, cost-multiplying abuse does not exist, and the proposed amendments are not designed to address the small subset of problematic cases that appear to be driving the Rule changes. We anticipate that,

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[1] Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1411-43 (1994) (strongly criticizing the "soft social science" opinion evidence used by the rulemakers behind the 1993 reforms, while noting that the findings of the methodologically sound empirical studies did not support the reforms).

[2] James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (evaluating the RAND corporation study of the 1993 reforms, which found that under that set of rules lawyer work hours on discovery were 0 for 38% of general civil cases, and low for the majority of cases.); see also *id*. at 640 (table 2.10 shows that while discovery costs grow with size and complexity of case, the proportion of total costs they represent does not dramatically increase; the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively); Thomas E. Willging, Donna Stienstra, John Shepard, and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531-32 (1998) (finding that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%).

as with past Rule changes, untargeted amendments will fail to eliminate complaints about the small segment of high-cost litigation that elicits headlines about litigation gone wild; instead they will create unnecessary barriers to relief in meritorious cases, waste judicial resources, and drive up the cost of civil justice. The amendments are unnecessary, unwarranted, and counterproductive.

In our view, those who support major change to the Federal Rules are responsible for demonstrating that proposed amendments will, on balance, make the overall system fairer and more efficient. Perceptively, Judge Lee Rosenthal has noted that "[s]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens."[3] Even assuming that a small subset of cases presents a problem that should be solved, the proposed amendments will do little, if anything, to decrease costs in these cases. As the two authors of the FJC's 2009 empirical study commented:

> Instead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues. . . . Otherwise, we may simply find ourselves considering an endless litany of complaints about a problem that cannot be pinned down empirically and that never seems to improve regardless of what steps are taken.[4]

Our concern is not just that the proposed amendments will be ineffectual. Our greater worry is that they will increase costs to litigants and the court system in those average cases that operate smoothly under the current rules. In our view, the amendments are likely to spawn confusion and create incentives for wasteful discovery disputes. Even more troubling, by increasing costs and decreasing information flow, the proposed amendments are likely to undermine meaningful access to the courts and to impede enforcement of federal- and state-recognized substantive rights.

We begin by discussing the relevant data regarding costs of discovery. We then turn to the proposed amendments regarding Rule 26, the proposed restricted uses of various discovery devices in Rules 30, 31, 33 and 36 and, finally, the proposed elimination of the Forms and Rule 84.

## I. Relevant Data Regarding Costs of Discovery

### A. Most Cases Involve Minimal or No Discovery

Before considering each of the proposals in more detail below, it is important to begin with a discussion of the best available empirical evidence. Thanks to research conducted by the

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[3] Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228 (2010).

[4] Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010).

ablest of researchers, what we know is that discovery costs are not disproportionate in the vast majority of cases.[5] We will focus on one of the most recent and comprehensive studies that, as it turns out, was undertaken by the Federal Judicial Center at the behest of this Committee.[6]

In late 2008, this Committee asked the FJC to look closely at discovery costs in civil cases and to report its findings to the May 2010 conference on civil litigation at Duke University Law School. To do so, the researchers were very careful to frame their research to find cases that involved as much discovery as possible. Thus, they systematically excluded from their study any cases in which discovery was unlikely to take place. The researchers also eliminated any case that was terminated less than 60 days after it had been filed. What was left, then, was a study that likely over-represented how much discovery takes place in a typical civil case in federal court. The result is acknowledged to be a careful and exhaustive study.

The FJC analyzed thousands of closed civil cases, revealing that the median cost of litigation, including attorneys' fees was $20,000 for defendants and $15,000 for plaintiffs. These figures came as a surprise to many, particularly those proponents of reform who had long assumed that litigation costs routinely careen out of control in federal civil cases. Just as significant—and perhaps just as surprising to many observers—were the FJC's findings with regard to the overall percentage of total litigation costs attributable to discovery. Discovery costs were reported by plaintiffs' lawyers to account, at the median, for only 20% of the total litigation costs; the median figure reported by defendants' lawyers was 27%. Standing alone, these findings undercut the conventional wisdom, repeated in headlines and sound bites, that discovery costs are far-and-away the most significant part of total litigation costs in federal cases. And linked to these findings was, perhaps, the most important finding of all. At the median, the reported costs of discovery, including attorney's fees, amounted to just 1.6% of stakes of the case for plaintiffs and only 3.3% of the case's value for defendants. This means, of course, that in half of all civil cases, the costs of discovery amounted to even less than 1.6% of the case's value for plaintiffs and less than 3.3% of its value for defendants.

It is hard to overstate the importance of these data regarding discovery costs relative to stakes. The real concern with discovery costs, after all, is not that they are too high in some absolute sense. Given how widely case values vary, one cannot compare discovery costs in a $100,000 case with those incurred in a case worth $10 million or more. The real worry is discovery costs that are disproportionate to a case's value—a point that surely needs no further defending here in light of the Committee's own recognition of the critical role that proportionality plays in evaluating discovery. But the data fail to demonstrate that disproportionality is a systemic problem.

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[5] For a helpful recent summary of the available empirical evidence, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088-89 (2012).

[6] Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf. *See also* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010) [hereafter "Defining the Problem"].

### B. The Minority of Cases in Which Discovery Costs Are High Will Not Be Affected by the Proposed Amendments

While there is a persistent feeling in some quarters that litigation costs are high, and that discovery costs are the biggest driver of that cost, the actual problem to be attacked is not well defined. Without more clarity about the nature or causes of the problem, untargeted changes are unlikely to succeed.

As noted above, the FJC's study found little problem in the average case. It also identified characteristics that are associated with high litigation costs. The most significant is the amount of money at stake in the litigation, with factual complexity also highly correlated with more expense.[7] Law firm economics also have an important impact on litigation costs. When other variables are controlled for, law firm size alone more than doubles the costs, and hourly billing also tends to make costs higher.[8] These findings are consistent with the results of earlier empirical studies.

Complex, high-stakes cases may be riddled with high discovery costs. Whether these costs are unjustifiably high has not been demonstrated. What is clear is that these are the cases least likely to be affected by very low presumptive limits on discovery devices or by enhanced focus on the proportionality rules. Many of the factors associated with high discovery costs will not be sensitive to changes in the procedural rules. Some disputes will always have very high stakes, making expenditures on those disputes rational. Some disputes will always be factually complex, requiring time and effort to ascertain and share relevant facts in a way that allows the parties to adequately price claims and bargain toward settlement. Some parties will always hire large law firms that bill by the hour at very high rates.

As the FJC's own researchers have noted, previous changes in the discovery rules "may have failed to reduce costs because [they did] not address the actual drivers of cost. Perhaps the procedural reforms have not reduced the purportedly high costs of litigation because those costs have a source other than the Federal Rules themselves."[9] Problems that arise outside the procedure rules cannot be eliminated through rule changes.

In summary, the data establish that there is *not* a widespread problem with discovery costs and that the traits most strongly associated with increased costs are not sensitive to procedure rules. Neither conclusion supports a major package of rule amendments, particularly when those amendments may increase costs in other ways.

## II. Rule 26: Proposed Amendments Re-Defining the Scope of Discovery

Three of the proposed amendments would change the way Rule 26 defines the scope of discovery: eliminating the trial judge's discretion to allow discovery relevant to the "subject matter" of the action; eliminating the well-established "reasonably calculated to lead to the

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[7] Lee & Willging, Defining the Problem, *supra* note 6, at 783.
[8] *Id*. at 784.
[9] *Id*. at 783.

discovery of admissible evidence" language; and inserting proportionality limits into the very definition of matter within the scope of discovery. All three proposals reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable, making the amendments unnecessary. Vague complaints that the proportionality rules are underutilized hardly establish that judges are balancing improperly or are unaware of the need to do so. Yet implicit criticism of the way trial judges are managing cases and ruling on discovery issues animates the proposed rule changes, many of which claim to make little or no change in the substance of Rule 26. This is no substitute for a coherent explanation of the need for change or why the proposed changes are the appropriate tool to fix the perceived problem.

### A. Rule 26(b)(1): Elimination of a district judge's discretion to order discovery relevant to the "subject matter" of the action

The Committee's current proposal to amend Rule 26(b)(1) eliminates the power of courts to grant—upon a showing of good cause—access to discovery relevant to the subject matter of the action. This proposed change is without basis, would narrow judicial discretion, and make it more—not less—difficult to carry out reasonable case management. Moreover, these changes would unduly narrow the scope of discovery and lead to additional and complex discovery disputes, while giving courts minimal guidance for resolving them.

Some historical background about Rule 26 can inform this discussion. For the first six decades of the Federal Rules of Civil Procedure, parties were permitted to seek and obtain discovery that was relevant to the "subject matter" of the action.[10] The 2000 Amendments altered this formulation, permitting discovery relevant to the "claims or defenses" in the action, with broader "subject matter" discovery available only upon a showing of good cause. Giving district judges the power to broaden discovery was recognized as necessary to ensure flexibility and encourage judicial involvement in discovery management. The Committee also recognized that defining which information is relevant to subject matter but not to claims or defenses could be difficult.[11] Accordingly, the Committee thought it important to maintain the possibility of court involvement to "permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested."[12]

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[10] In 1978, the Committee considered a proposal nearly identical to the current one, but ultimately rejected it for reasons that resonate today. The Committee reasoned that deleting the term "subject matter" would simply invite litigation over its distinction from "claims or defenses." Moreover, although the Committee was aware of no evidence that discovery abuse was caused by the broad term "subject matter," it also was doubtful "that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 627-28 (1978).

[11] Commentary to Rule Changes, Court Rules, 192 F.R.D. 340, 389 (2000) ("The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.").

[12] *Id.*

The Committee's current proposal gives little consideration to the principles that guided its decision fourteen years ago. The explanation for eliminating the discretionary power of the court is inadequate, based centrally on the conclusory assertion that "[p]roportional discovery relevant to any party's claim or defense suffices."[13] The Committee has offered no substantive reason for moving away from the discretion currently afforded the parties and the court to shape discovery according to "reasonable needs of the action."[14] We urge this Committee to reject this kind of unsupported assertion. Had there been a pattern of judicial abuse of the discretion afforded them by the current Rule 26(b)(1), one would expect that it would be evident in the case law. However, the decisions applying this aspect of Rule 26(b)(1) suggest that courts have exercised their discretion sparingly and appropriately.[15] Perhaps the Committee has a different understanding of how courts have exercised discretion under Rule 26(b)(1) but, if so, the basis for that alternative view has not been shown. Nothing suggests that the authority to allow such discovery—upon a showing of good cause—plays any role in the "worrisome number of cases" where "excessive discovery" is thought to occur.[16]

Not only is the existing evidence insufficient to justify making this change to Rule 26(b)(1), but we believe that the Committee underestimates the potential disruption the proposed rule would have on litigation. For instance, the proposed Advisory Committee Notes state that "[i]f discovery of information relevant to the claims and defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate."[17] But this is precisely the opposite of what the 2000 Committee believed would be

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[13] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 297 (Aug. 2013) [hereafter "Preliminary Draft of Proposed Amendments"].

[14] 192 F.R.D. at 389.

[15] Of the reported district court cases we reviewed interpreting the "good cause" standard, none suggests unreasonable decisionmaking. See, e.g., Jones v. McMahon, 2007 WL 2027910 *15 (N.D.N.Y. July 11, 2007) (finding good cause to permit a limited deposition regarding matter relevant to the subject matter of the action, but denying request in large part because of lack of good cause showing); Rus, Inc. v. Bay Indus., Inc., No. 01 Civ. 6133, 2003 WL 174075, * 14 (S.D.N.Y. Apr. 1, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not make "any showing of need"); RLS Assoc., LLC v. United Bank of Kuwait, PLC, No. 01 Civ. 1290, 2003 WL 1563330, *8 (S.D.N.Y. March 26, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not show that "production would serve the reasonable needs of the action"); Johnson Matthey, Inc. v. Research Corp. et al., No. 01 Civ. 8115, 2002 WL 31235717, *2 (S.D.N.Y. Oct. 3, 2002) (finding no good cause for disclosure of documents relevant to subject matter, but not to claims or defenses); Hill v. Motel 6, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (good cause not shown for broad discovery of personnel files in disparate treatment case, where discovery would relate to disparate impact, but finding good cause for the disclosure of specified employees' personnel files); Cobell v. Norton, 226 F.R.D. 67 (D.D.C. 2005) (rejecting request for discovery beyond the scope of plaintiff's statutory claim in a suit seeking an accounting of Indian trust funds. Discovery related more generally to asset management was not permissible as it was beyond the scope of plaintiffs' statutory claim); Jenkins v. Campbell, 200 F.R.D. 498 (M.D. Ga. 2001) (breach of contract plaintiff was entitled to discovery only on those claims remaining after the entry of partial summary judgment against him, although court retained authority to revise partial summary judgment order at any time prior to the entry of final judgment).

[16] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[17] *Id.* at 255-56.

achieved by limiting discovery to claims and defenses asserted in the pleadings.[18] It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims. Thus the elimination of "subject matter" discovery eliminates a tool necessary to address the problem of information asymmetry that is so common when an individual or small business faces a large entity in litigation. If Rule 26(b)(1) were amended to prevent judges from ordering discovery relevant to the "subject matter" of the action, the ability to balance this informational asymmetry would be more severely limited. For example, a plaintiff who has a valid § 1983 claim against a municipal official would be hard-pressed to seek discovery relevant to a potential *Monell* claim against the municipality, absent the power of a court to grant access to material relevant to the subject matter of the action. And the plaintiff with a valid claim against the municipality may have little additional opportunity to develop information necessary to support her claim. Finally and relatedly, we have great concerns that the uncertainties that will follow from this amendment will create incentives for parties resisting discovery to file more motions to litigate relevance, increasing discovery costs and forcing judges to spend time ruling on a new group of motions. We have seen how past changes to Rule 11 increased satellite litigation pertaining to sanctions rather than improving the efficiency or fairness of the civil justice system.

In sum, the Committee has articulated no specific benefit that will outweigh the costs of altering the current framework of Rule 26(b)(1). The existing text requires an affirmative showing of good cause to justify discovery that is relevant to the "subject matter involved in the action" but not to "any party's claim or defense." Even when good cause is shown, such discovery is subject to the limits already articulated in Rule 26(b)(2)(C), and may be limited by a protective order under Rule 26(c). No adequate explanation has been offered for why these existing protections are insufficient to ameliorate any negative consequences of permitting occasional discovery regarding the subject matter of the litigation. There is no basis for believing that the proposed amendment would, on balance, produce more good than harm, and so we urge the Committee not to adopt this proposed change to Rule 26(b)(1).

### B. Rule 26(b)(1): Admissibility and Relevance

As the Committee recognizes, it has long been the case that discovery is permitted even as to information that—standing alone—would not be admissible at trial.[19] Yet the Committee's current proposal to amend Rule 26(b)(1) would eliminate an important sentence that has guided courts for decades: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[20] Again the Committee's proposed amendment does not target a documented problem and runs the risk of creating wasteful satellite litigation.

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[18] 192 F.R.D. at 389 ("The rule change . . . signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

[19] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 266.

[20] In its place, the proposal would add a sentence that omits the phrase "reasonably calculated to lead to the discovery of admissible evidence." *See id.* at 289-90 ("Information within this scope of discovery need not be admissible in evidence to be discoverable.").

The Committee explains that this change is not meant to modify the definition of "relevance," but rather to prevent improper use of the "reasonably calculated" language to allow discovery into information that is not, in fact, relevant.[21] As an initial matter, these concerns appear to be based on nothing more than anecdotal impressions.[22] There is no empirical evidence that this language has had the effect hypothesized by the Committee. The current Rule already makes clear that the "reasonably calculated" language applies only to "*[r]elevant* information"; that was the point of the 2000 amendment.[23]

Even if viewed in isolation, however, the phrase "reasonably calculated to lead to the discovery of admissible evidence" cannot permit discovery beyond what is otherwise authorized by Rule 26(b)(1). Under the Federal Rules of Evidence, evidence is only admissible if it *is* relevant.[24] The need to obtain information that is "reasonably calculated" to lead to the discovery of admissible, relevant evidence is especially crucial in the context of pretrial discovery. As the Committee recognized in 2000:

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.[25]

The "reasonably calculated" language does not give parties carte blanche, of course. All discovery is subject to the limits articulated in Rule 26(b)(2)(C), and may be limited by a Rule 26(c) protective order.

To delete the "reasonably calculated" language, by contrast, will send courts and litigants a misguided and fundamentally incorrect message: that there is some category of information that *is* "reasonably calculated to lead to the discovery of admissible evidence" but is *not* relevant to the claims or defenses and, therefore, wholly outside of the permissible scope of discovery. This will almost certainly be perceived as narrowing the definition of relevance and mandating a

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[21] *Id*. at 266 (expressing concern that the "reasonably calculated" language is being improperly invoked "as though it defines the scope of discovery" and as setting "a broad standard for appropriate discovery").

[22] Minutes of the April 2013 Meeting make reference to a survey that revealed "hundreds if not thousands of cases that explore" the language "reasonably calculated to lead to the discovery of admissible evidence," with "many" of these cases suggesting that courts thought this phrase "defines the scope of discovery." Committee on Rules of Practice and Procedure Agenda Book, June 3-4, 2013, at 147 (draft minutes of April 2013 Advisory Committee meeting). There is no indication that any analysis of the cases was made to determine whether they permitted discovery that would not be considered "relevant" under the current or proposed Rule.

[23] 192 F.R.D. at 390 ("Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.").

[24] *See* FED. R. EVID. 402 ("Relevant evidence is admissible …. Irrelevant evidence is not admissible.").

[25] 192 F.R.D. at 389.

more restrictive approach to discovery that is wholly unjustified. This proposal is a particular cause for concern because it affects the meaning of a word—"relevant"—that has been called by a leading treatise in the field as "[p]erhaps the single most important word in Rule 26(b)(1)."[26] At a minimum, the proposed change will invite wasteful satellite litigation over the amendment's purpose and effect—an unintended outcome that would undermine the goal of reducing unnecessary costs and delay.

### C. Rule 26(b)(1) & (b)(2)(C): Proposal to incorporate the "proportionality" factors into the "scope of discovery"

We also oppose the proposal to move the cost-benefit considerations that are currently set forth in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). There is a serious risk that the amendment will be misread to impose a more restrictive discovery standard across the board, contrary to the Committee's intent and without any empirical justification for a more restrictive approach. There is also a danger that the rewritten rule would be misinterpreted to place the burden on the discovering party, in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability. This would improperly shift the responsibility to show burdensomeness from the party resisting discovery to the party seeking discovery, which in turn will encourage a higher degree of litigation over the scope of discovery and increase costs both for litigants and the court system. Moreover, the rule change does not explain how the cost-benefit analysis is to be undertaken or shown, and we are concerned that the requirement will create perverse incentives for the hiring of experts, the holding of additional court conferences, and the over-litigation of discovery requests.

We recognize that the Committee has not expressed the view that the cost-benefit considerations that now appear in Rule 26(b)(2)(C)(iii) should be re-balanced to make discovery harder to obtain. Rather, the proposed Committee Note states that the proposal will merely "move" Rule 26(b)(2)(C)(iii)'s already "familiar" considerations to Rule 26(b)(1).[27] During public hearings on these proposals, Committee members emphasized repeatedly that this change will not alter the burdens that currently exist.[28]

The Committee appears to believe that the cost-benefit provisions are underutilized and that they will acquire greater attention, use, and citation if relocated to an earlier portion of Rule 26. The Committee provides no evidence that lawyers and judges are unaware of the provision's current existence. It seems far more likely that the standards for proportionality are infrequently cited because—as the empirical evidence suggests—discovery is usually proportional and appropriate. Rule 26 is already crystal clear about a party's obligation to respect Rule 26(b)(2)(C)(iii)'s considerations when making discovery requests, a party's ability to object to discovery requests that it believes are excessive in light of Rule 26(b)(2)(C)(iii)'s considerations, and the court's obligation to limit discovery requests that run afoul of Rule 26(b)(2)(C)(iii)'s

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[26] CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, 8 FEDERAL PRACTICE & PROCEDURE § 2008.

[27] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[28] See Transcript of Nov. 7, 2013 Hearing [hereinafter "Nov. 7 Hearing"], at 32, 139-40, 154-56, 180-81.

considerations. Although the proposed Committee Note states that moving these considerations to Rule 26(b)(1) will require parties to observe them "without court order,"[29] that obligation already exists under Rule 26(g).[30]

Relatedly, the Committee asserts that these cost-benefit considerations are "not invoked often enough to dampen excessive discovery demands."[31] But this assertion also lacks empirical support. If the lawyers who expressed concerns about "excessive discovery" in response to the survey questions are the same ones who are "not invok[ing] Rule 26(b)(2)(C) often enough,"[32] then it is their advocacy on behalf of their clients—not Rule 26—that requires improvement. It seems especially improbable that the cases about which the Committee is most concerned—"those that are complex, involve high stakes, and generate contentious adversary behavior"[33]—are the same ones in which parties are not "invok[ing]" cost-benefit considerations often enough. More likely, lawyers complaining about excessive discovery are fully aware of Rule 26(b)(2)(C)(iii)'s considerations, but they are not uniformly successful in limiting discovery requests that *they* view as excessive.[34]

Admittedly, judges may sometimes make mistakes in concluding that a particular discovery request should not be limited pursuant to Rule 26(b)(2)(C)(iii)—just as they may sometimes make mistakes in concluding that a particular discovery request *should* be limited pursuant to Rule 26(b)(2)(C)(iii). But there is no empirical support for the idea that transplanting the same considerations one subsection earlier in Rule 26(b) will improve the discovery process. It is difficult to believe that judges and attorneys regularly fail to read past Rule 26(b)(1) and that, even when they make it that far, they deliberately ignore its explicit reference to "the limitations imposed by Rule 26(b)(2)(C)."

It would also be unwise for the Committee to proceed with this proposal on the view that, because it makes no substantive change to the discovery standard, the amendment at least would do no harm. In fact, the amendment could have serious, unfortunate consequences. The puzzling justification for the proposal is precisely why so many who have commented on it perceive it to make the overall discovery standard more restrictive than it currently is. For there is no other logical purpose for making the proposed change: judges would be hard-pressed to imagine that the goal is simply to remind them of the existence of a provision within Rule 26 that is already

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[29] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[30] Fed. R. Civ. P. 26(g)(1) ("By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, [any] discovery request . . . is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and . . . neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."). *See also* Nov. 7 Hearing, at 139, 154, 172-73 (discussing Rule 26(g)).

[31] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[32] *Id.*

[33] *Id*.

[34] *Cf.* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 361 (2013) ("[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.").

known and employed. Because the Committee's proffered explanation for the transition is so difficult to comprehend, there is a real danger that judges will mistakenly infer that the Committee must have intended a more restrictive discovery standard, or at least one that places greater burdens on the requesting party. This would be a perverse result; but it is a quite predictable one, and one that can and should be avoided.

Accordingly, the Committee should leave Rule 26(b)(2)(C)(iii)'s cost-benefit factors where they currently reside. If there is concern that litigants are failing to realize that those considerations must be "observed without court order,"[35] then an alternative would be to suggest discussion of these factors at the preliminary discovery conference already contemplated under Rule 26(f).

## III. Restricted Use of Discovery Devices: Rules 30, 31, 33 & 36 and Lower Presumptive Limits

The Committee defends proposed limits to the presumptive number of discovery devices each party can use as a way to reduce cost and increase efficiency. However, like the Committee's proposed amendments to Rule 26, they are insufficiently supported by relevant empirical evidence, and they will likely spawn more discovery disputes and undermine the Rule's goal of achieving just outcomes in individual cases. The most problematic proposal in the current package of reforms is the change from a presumptive limit of ten depositions per party to a presumptive limit of five. In certain types of cases, depositions are the most important discovery device that parties use. Thus, especially as to this discovery device, limiting access should be justified only if there is a strong basis to believe that this reform is needed and that desired benefits will follow.

It is helpful to begin this discussion by exploring the reasons that the Committee has offered thus far in support of imposing stricter presumptive discovery limits. As for the proposed limits on the presumptive numbers of interrogatories (reducing the number from 25 to 15) and requests for admission (limiting them to 25, except for requests to admit the genuineness of documents), the Committee does not purport to provide any empirical justification.[36] As for the proposal to reduce the presumptive limit on depositions, the Committee relies almost entirely on a single finding from a memorandum prepared for the Committee's April 2013 meeting by Emery Lee of the FJC. Specifically, the Committee notes that in a survey of lawyers, 40-45% said the costs of discovery become disproportionate to the value of the case when the number of depositions exceeds five.[37]

It is a mistake to rely on this single point of datum to support the proposed reduction in the presumptive number of depositions allowed during discovery. As the Committee recognizes, these data do not establish a causal relationship between disproportionate costs and more than

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[35] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[36] *See id.* at 268-69.

[37] *Id.* at 267.

five depositions.[38] Lee himself cautioned the Committee against drawing conclusions about the merits of reducing the presumptive limit as a way of reducing unnecessary discovery costs, in large part because his 2013 memorandum analyzed data from a broader FJC study that was not focused on the precise relationship between depositions and costs. As Lee said, "the proportionality question [in the 2009 survey] asked about the costs of discovery in general and not about deposition costs."[39] Thus, attorneys who reported that discovery costs were excessive "may have responded based on the cost of other types of discovery, even in deposition cases."[40] Moreover, even if one could extrapolate from the general perceptions of discovery reported in the 2009 survey to the specific costs imposed by depositions, "the relationship between the number of depositions and attorney perceptions of the proportionality of discovery is not necessarily causal in nature. Instead, it is possible that one or more antecedent variables underlie the relationship between these two variables."[41]

To understand why the data relied upon by the Committee do not support the proposed change, it is necessary to understand the precise information that would help to evaluate the question whether changing the presumptive limits on depositions will meaningfully reduce excessive discovery costs. Given that there already is a presumptive limit of 10 depositions, the relevant question is whether there is a correlation between disproportionate discovery costs and cases in which there are between 6 and 10 depositions. The data reported by Lee in his 2013 memorandum do not provide this information, however. They only suggest that, in cases that exceeded 5 depositions, attorneys were more likely to report that discovery costs were "too much" in comparison to their client's stake in the case. Notably, in every category, more than half of respondents perceived discovery costs to be "just right" regardless of the amount of depositions.[42] More importantly, assuming that perceptions of costs are reliable indicators of actual costs, the data do not distinguish perceptions of costs in cases depending on whether depositions exceeded 10 or were between 6 and 10. Thus, it is quite possible that the perceptions of high costs are concentrated in those cases in which depositions exceeded 10, a concern that already is accounted for in the existing rule.

The more fundamental flaw in the Committee's reliance on the lawyer-survey finding is that by focusing only on a single finding from the cited memorandum the Committee overlooks the real lessons to be learned from the available empirical evidence. That evidence shows, as noted above, that in the vast majority of cases discovery costs are not disproportionate to the value of the case. As far as depositions are concerned, only about half of lawyers (roughly 55%) reported one or more depositions of non-expert witnesses. To repeat: about 45%, or nearly half of all lawyers, reported that not a single deposition had been taken by anyone in their case. The FJC then asked just those lawyers who had been involved in a case in which at least one deposition of a non-expert witness was taken to report what the total number of depositions had been in their case. It turns out that among the bare majority of cases in which any deposition at

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[38] *Id*. (noting that "a causal relationship cannot be established").
[39] Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 131.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 132.

all was taken, the mean number of depositions by plaintiffs was just under 4 (the median was 3); and the mean number of non-expert depositions by defendants was just under 3 (median was 2). Expert depositions were an infrequent occurrence as well. Fewer than 1 in 7 lawyers responding to the survey reported that one or more expert witness depositions were taken by any party. That is, approximately 85% of both plaintiff and defense lawyers reported no expert depositions were taken at all in their cases.

The Committee is aware of the fact that discovery costs are not a problem for the vast majority of cases; at the least, its discussion defending a lowering of the presumptive limit for depositions references a finding from the FJC study and its memorandum states that "less than one-quarter of federal court civil cases result in more than five depositions, and even fewer in more than ten." Yet the Committee's proposal is at odds with the key lesson of the FJC study—that for most cases discovery costs are not disproportionate to case values. In addition, the FJC study provides ground for concern that changing the presumptive discovery limits will have adverse effects in the small percentage of cases in which more than five depositions are sought. First, a change in the limit will predictably have unequal effects on parties, tilting in favor of a typical defendant, as in a civil rights, tort, consumer, or employment discrimination case, who starts the lawsuit with greater access to relevant information than a typical plaintiff. There is little reason to think a defendant in this situation will extend the courtesy of consenting to waive the presumptive limit, because counsel will rarely need to take more than five depositions, leaving the plaintiff to seek relief from the court and increasing litigation as well as court costs.

The proposal thus will have many consequences that are unfair and inefficient. First, it will lead to increased litigation over the entitlement to seek more than five depositions. Judges will be asked to resolve disputes over the number of depositions much more frequently. Second, there is ample reason to believe, contrary to the Committee's assumption, that the change in presumptive limits will change how courts adjudicate requests for exceptions to those limits. Well-established cognitive science literature establishes that numerical presumptions such as those reflected in the proposal create "anchors" for judicial decisionmaking.[43] By shifting the presumption from 10 to 5 the Committee is suggesting that in most cases, seeking more than 5 depositions is unreasonable. This "anchor" will then affect how judges perceive requests to go beyond those limits. For instance, a judge faced with a motion seeking permission to take 12 depositions will view the request quite differently depending on whether the presumptive limit on depositions is 10 versus 5. In the former case, the party is seeking an additional 20% beyond the presumptive limit; in the latter case, the party will be seeking an additional 140% beyond the

[43] *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19-22 (2007) (reviewing data showing that judicial decisionmaking is influenced by numerical anchors); *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing anchoring biases, among others); Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1979-80 (2013) (summarizing data showing that judges are susceptible to anchoring effect); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013) (summarizing literature); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification--and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 748 (2011).

presumptive limit. It is likely that some judges will perceive the requests differently, based simply on the fact that the presumptive limit has changed.

The Committee, however, seems to assume that "reasonable" judges will liberally grant requests to exceed the presumptive limits. Aside from the anchoring effect referenced above (and the fact that parties seeking between 6 and 10 depositions will now incur the increased litigation cost of having to seek consent or judicial approval), the Committee's assumption does not accord with our reading of the case law that has developed since the 2000 Amendments. Far from reflecting a liberal approach to requests to exceed the presumptive limits, most reported court decisions apply an extremely strict analysis.[44] As some courts put it, the party seeking additional depositions "must demonstrate the necessity for each deposition she took without leave of court pursuant to the presumptive limit of Rule 30(a)(2)(A)."[45]

Under the presumptive limit proposed by the Committee, litigants would have to first cull a potentially long list of witnesses "to guess which of the . . . deponents are most knowledgeable" and then depose 5 of them.[46] It may generate gamesmanship on the part of those opposing deposition discovery to put forward a less-than-informed deponent in the guise of meeting the discovery request. But civil litigation should not depend on guesses or games. Guessing wrong could very well prejudice a request for additional depositions, because it might appear to a reviewing court that the party did not use the allocated five depositions wisely. But it will be precisely those litigants who guess wrong who will have the most need to seek additional depositions. Encouraging this kind of guesswork, at the same time that the Committee proposes to reduce access to other potentially informative discovery devices such as interrogatories and requests to admit, seems guaranteed to lead to outcomes that do not reflect the merits of the dispute. It was precisely this approach to adjudication that the Rules were meant to avoid when they were enacted in 1938; although we have traveled some distance from the principles that informed the Rules 75 years ago, certainly the Rules should not detract from the merits.

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[44] *See, e.g.*, Estate of Smith v. Marasco, 318 F.3d 497, 522 (3d Cir. 2003) (finding that district court did not abuse discretion in limiting plaintiff to 10 depositions in case involving 46 defendants); Raniola v. Bratton, 243 F.3d 610, 628 (2d Cir. 2001) (finding that record was insufficient to determine whether district court inappropriately limited discovery in multi-defendant case where court limited plaintiff to 3 depositions, "and that after defendants failed to produce one of the subpoenaed witnesses, the court reduced the number of permitted depositions to two"); Gordilis v. Ocean Drive Limousines, Inc., 2013 WL 6383973, *2 (S.D. Fla. 2013) (finding insufficient grounds to depart from deposition limits). Where courts have granted requests for additional depositions, it has been in extreme cases. *See, e.g.*, Thykkuttathil v. Keese, 2013 WL 6008459, *2 (W.D. Wash. 2013) ("As Plaintiffs have disclosed in excess of thirty potential lay witnesses as well as nine expert witnesses, Defendants' request to depose an additional seven witnesses is reasonable."); In re Weatherford Intern. Securities Litigation, 2013 WL 5762923, *3 (S.D.N.Y. 2013) (granting additional depositions for plaintiff because of complexity and value of case); El Dorado Energy, LLC v. Laron, Inc. 2013 WL 2237580, *3 (D. Nev. 2013) (granting additional depositions to defendant where plaintiff disclosed three experts and seven employee witnesses, interim status report contemplated 15-20 depositions and was not objected to by plaintiff, and where case was complex).

[45] Barrow v. Greenville Independent School Dist., 202 F.R.D. 480, 482 (N.D. Tex. 2001) (emphasis added); *Accord* Lebron v. ENSCO Offshore Co., 2013 WL 3967165, *5 (W.D. La. 2013).

[46] El Dorado Energy, LLC v. Laron, Inc., 2013 WL 2237580, *3 (D. Nev. 2013).

As for the proposal to reduce the number of interrogatories and requests to admit, the Committee ignores that both of these discovery devices serve cost-saving functions. For instance, interrogatories can provide a low-cost alternative to high-expense devices such as depositions. For parties with limited resources, limiting access to interrogatories may substantially limit access to court. Even when interrogatories are limited in scope by local rule,[47] they can be useful for helping parties identify whom to depose. As noted above, reducing access to interrogatories at the same time that the Committee proposes to increase the stakes in choosing whom to depose may have a perverse effect on the just resolution of cases. Reducing access to requests to admit is even more problematic, because this device is particularly useful in *narrowing* the scope of disputed issues, reducing trial costs, focusing parties on relevant discovery, and encouraging settlement. The Committee presents no basis for any concern that this device is being abused, overused or imposing excessive costs.

## IV. Elimination of the Forms

Finally, we turn to a proposed change that is perhaps the simplest but most significant: the abrogation of Rule 84 and the elimination of the Forms. The Forms were once described as "the most important part of the rules," particularly for pleading, because "when you can't define you can at least draw pictures to show your meaning."[48] The Committee offers two principal reasons for abandoning them: (1) according to "informal inquiries that confirmed the initial impressions of . . . members," lawyers and pro se litigants do not tend to rely on the Forms; and (2) the current Forms "live in tension with recently developed approaches to general pleading standards."[49] The Committee's first justification is wholly lacking in empirical rigor and, moreover, ignores the fact that federal judges at every level *do* look to the Forms for assistance. The second justification is certainly accurate—*Twombly* and *Iqbal* create tension with the Forms—but that tension is not insurmountable and, even if it were, one still needs a rationale for choosing one over the other. The Committee has provided no explanation for opting to abandon the Forms rather than to reexamine plausibility pleading.

The Committee's first explanation for why it is abandoning the Forms is based on casual empiricism and self-evident bias. As we understand it, a Subcommittee to study the Forms apparently started with the intuition that lawyers tend not to rely on the Forms, and then conducted an informal survey of undisclosed lawyers—unsurprisingly concluding that their initial intuitions were correct.[50] Needless to say, this is not a valid way to answer the question of whether lawyers rely on the Forms to construct their complaint. If one starts with a bias in one direction or another, one should be extremely cautious in conducting empirical research so as to ensure that the initial bias does not influence the ultimate interpretation of the results. Given the Committee's description of its research, we are not comforted that any steps were taken to reduce the potential for this confirmatory bias.

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[47] See, e.g., S.D.N.Y. Local R. Civ. P. 33.3(a); D. Or. Local R. Civ. P. 33-1(d).

[48] Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

[49] Advisory Committee on Civil Rules, Report to Standing Committee at 60 (May 8, 2013).

[50] It is unclear how the Committee concluded that pro se litigants do not rely on the Forms. They provide no indication as to how or whether they collected data related to that question.

Furthermore, it is surprising that the Advisory Committee would rely on the supposed irrelevance of the forms, when its own staff prepared a memo for the April 2013 Meeting that summarized in great detail the numerous lower courts that have grappled with the ongoing viability of the forms after *Iqbal* and *Twombly*.[51] Although we do not claim to have conducted a rigorous survey, our examination of the case law is consistent with the material already presented to the Committee. We note that the Supreme Court has relied on the Forms in the pleading context numerous times—perhaps most significantly in *Twombly* itself.[52] Moreover, lower court opinions cite to the forms often, relying on them as indicative of the pleading required under the Federal Rules, even after *Twombly* and *Iqbal*.[53] If federal judges have found the Forms illustrative of the relevant pleading standard, as our and the Committee's research suggests, it stands to reason that practicing lawyers have done so as well. Indeed, practitioner "blogs" indicate that lawyers pay close attention to lower courts' reliance on the Forms, particularly in the area of intellectual property.[54]

The Committee's second explanation, that the Forms cannot be squared with the Supreme Court's decisions in *Twombly* and *Iqbal*, prematurely resolves a question that the Committee has yet to fully consider. As the Committee is aware, the conflict between the rulemaking contemplated under the Rules Enabling Act and the Court's decisions in *Twombly* and *Iqbal* is a live one. Indeed, the Committee has noted in the past that it will be open to considering instituting rulemaking if it is shown that plausibility pleading is having a significant impact on the business of federal courts. It is premature to call an end to the debate, especially in light of recently emerging empirical data.[55] Given that the Committee has yet to take a definitive position on plausibility pleading, striking the Form Complaints commits the Committee to a position that implicitly adopts plausibility pleading as the standard going forward. This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process rather than through case adjudication.[56] If the Committee adopts this proposal, the door will be effectively shut and the pleading rules will have been altered without any of the participatory deliberation that legitimizes the Federal Rules.

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[51] *See* Memorandum by Andrea L. Kuperman at 8-26 (July 6, 2012), in Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 230-248.

[52] *See Twombly*, 550 U.S. at 565 n.10 (arguing that there was no conflict between Form 9 (now Form 11) and plausibility pleading); *see also* Mayle v. Felix, 545 U.S. 644, 660 (2005); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513 n.4 (2002).

[53] *See, e.g.*, K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1288 (Fed. Cir. 2013) (resolving tension between Form 18 and *Twombly* and *Iqbal*); Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010) (relying on Form 13); Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008) (drawing analogy from Form 9).

[54] *See, e.g.*, Charles J. Hawkins, *Iqbal And Twombly Notwithstanding: Form 18 Is The Standard For Direct Infringement Allegations*, available at http://www.mondaq.com/unitedstates/x/243158/Patent/Iqbal+And+Twombly+Notwithstanding+Form+18+Is+The+Standard+For+Direct+Infringement+Allegations (last visited January 23, 2014) (posting "practice note" related to intellectual property).

[55] *See, e.g.*, Kevin M. Clermont and Stuart Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PENN. L. REV. __ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360.

[56] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514-15 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).

Moreover, the Committee's explanation of its proposal to abrogate Rule 84 and the Forms seems strikingly inconsistent. For although it acknowledges the tension in its report to the Standing Committee, it states in the proposed Committee Notes that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[57] This public explanation, however, flies in the face of its description of the conflict between the Forms and plausibility pleading. The real problem may be that the plausibility standard articulated by the Court is so vague, standardless, and subjective that it is at odds with efforts to provide examples of pleadings that are sufficient. At times, the Committee's report to the Standing Committee suggests this conclusion.[58] This, however, is an indictment of the plausibility standard of pleading, not of the Form Complaints. Eliminating the Forms may eliminate the conflict, but in this case conflict avoidance may amount to a derogation of the Committee's institutional obligations.

## CONCLUSION

In conclusion, we urge the committee to closely attend to the two key questions that we think must be answered as it considers how to proceed. As to the first—whether the Committee is solving a well-identified problem—the empirical evidence is clear that in the vast majority of cases discovery costs are not disproportionate to their estimated value. Given the available empirical record, it appears to us that a key underlying assumption made by those who support these amendments is fundamentally called into question.

As to second inquiry—whether proponents have shown that the proposed amendments will make things better—we believe that their burden has not been satisfied. Indeed, quite to the contrary, in our judgment the proposed amendments unnecessarily risk a host of adverse consequences, including that they are likely to spawn confusion and wasteful satellite litigation, outcomes that, perversely, are contrary to the Committee's expressed intent to reduce costs and improve judicial efficiency.

Perhaps most perplexing to us is that many of the proposed amendments are predicated on a lack of faith in the ability or willingness of trial judges to manage the cases that come before them. We are aware that a majority of Supreme Court Justices in both *Twombly* and in *Iqbal* expressed their belief that "careful case management" has been beyond the ability of most district judges.[59] That view is at odds with the best current empirical evidence suggesting that trial judges are managing the vast majority of their dockets well.[60] Even assuming that a small subset of cases present problems that the current rules cannot solve, the proposed changes do not address and so cannot resolve these problems. Rather, the amendments will generate different problems and shift costs to litigants in cases where the rules are working well. We urge the Committee to reconsider and to reject the package of proposed amendments.

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[57] Preliminary Draft of Proposed Amendments, *supra* note 13, at 329.

[58] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 276-77 ("Attempting to modernize the existing forms . . . would be an imposing and precarious undertaking.").

[59] *Iqbal*, 556 U.S. at 685 (*citing Twombly*, 550 U.S. at 559).

[60] *See, e.g.*, Lee & Willging, Defining the Problem, *supra* note 6, at 779-81 (summarizing empirical literature demonstrating that discovery costs are generally low).

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