Suggested Answers to Questions for the Dallas Duke Mini-Conference. DRAFT 100212

Overview

Question: 1. Please review the sketched Rules changes. We value your thoughts on whether individual proposals are worthwhile, how they could be improved, what other proposals should be considered, and whether the proposals together are likely to increase the efficiency and effectiveness of civil litigation.

Answer: 1. A number of the proposals in the "Rules Sketches" submitted by the Duke Subcommittee seem to have the potential for some amount of incremental positive change. However, the proposed amendments on the whole amount to little more than "tinkering" and the time for "tinkering" with the rules should be over. Fundamental, meaningful reforms must be enacted now. In the words of Justice Powell, dissenting from the 1980 amendments introducing judicial management, "…adoption of these inadequate changes could postpone effective reform for another decade." 85 F.R.D. 521.

We respectfully submit that the Committee should focus on the fundamental rule revisions suggested by LCJ and many others that limit the scope of discovery, reverse perverse cost allocation rules, and require practical preservation/sanctions standards that will help curb systemic excesses, increase cost efficiency and generally improve the administration of justice under the Federal Rules. Continued tinkering with rules dealing with pre-trial conferences, judicial management, and counsel cooperation will have little, if any, positive impact on current problems. LCJ Comment, Duke Subcommittee Proposals, 060512 at 2.

It is encouraging to see in the "sketches" serious consideration of many of the changes proposed by LCJ, including the explicit incorporation of proportionality in the rules and the imposition of presumptive limitations on the number of discovery requests. Such limitations should result in some much needed reduction in the volume of discovery in modern litigation that would discourage the abusive overuse of discovery requests intended to trip up opposing parties, but not likely to result in the discovery of useful information. Self-executing rules, such as limitations on the number of requests for production, for example, will also reduce the need for costly and time-consuming judicial intervention. Adoption of these amendments is therefore strongly encouraged. But we should not stop there. To engage in limited reform would be counterproductive because it would effectively reinforce the failures in our current system. While such changes are no doubt vital components of meaningful change, they cannot, by themselves, repair the broken system. ***Id.*** at 3.

Substantial real world information has been presented to the Rules Committee that the lack of clear, concise preservation and discovery rules is harming businesses – even businesses at the pinnacle of the high technology community.[1] LCJ, New Standards Comment, 031512 at 5-6.

[1] A recent survey of Fortune 200 companies found that in 2008, the 36 companies responding spent an aggregate $4.1 billion on U.S. litigation – not including judgments and settlements or internal costs such as information technology to store and retrieve information for litigation and employee time spent attending depositions and responding to discovery requests. Litigation Cost Survey of Major Companies App. 1 at 8 fig.4 (2010). *On*

Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. In fact, due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite "meet and confer" amendments and calls for "cooperation". Better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences of unnecessary preservation and discovery. ***Id.*** at 6.

Unfortunately and despite the potential contribution to a larger discovery schema of many of the proposed rules (or "sketches), there is reason for concern that the Committee will once again accept the placebo of apparent change in lieu of any meaningful shift in the discovery paradigm. This danger is well illustrated by the Subcommittee's proposals incorporating the recommendations of Daniel Girard and Todd Espinosa in their submission to the Duke Conference.[2] LCJ has previously commented at length on the problems these proposals present[3]. While that comment makes clear that the proposals have the potential to create a myriad of additional discovery difficulties—not the least of which is the creation of "new" standards that may encourage the continuation of litigation by sanction[4]—one of the most problematic results may be the continued delay of meaningful reform of discovery. Indeed, the proponents have themselves described their proposals as "admittedly modest"[5] and have argued in favor of "small adjustments"[6]—hardly the antidote to the very serious problems currently ailing the civil justice system, and in particular discovery. LCJ Comment, Duke Subcommittee Proposals, 060512 at 3.

In short, concern remains great that significant and meaningful amendments will once again be sidelined and supplanted by "small adjustments" unlikely to affect the nature of discovery to any significant degree. Major reform is needed: the scope of discovery must be narrowed, preservation standards must be tightened and clarified, and the paradigm of producer-pays

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average, that year, for each dollar of global profit earned, companies spent 16-24 cents on U.S. litigation. Letter from Prof. Henry Butler to the Honorable Lee H. Rosenthal, *et al.*, June 2, 2010, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Discussion/0DEC29D460FD45DA85277190060E48DB/?OpenDocument. And, Professor William Hubbard has estimated that over preservation costs companies "billions of dollars". William H. J. Hubbard, *Written Statement*, U.S. House, Judiciary Comm., Constitution Subcomm. Hearing "The Costs and Burdens of Discovery" (2011).

[2] Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473 (2010).

[3] *See*, Lawyers for Civil Justice, *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action* (Aug. 18, 2011) *available here*: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-D-Comment-Bauman.pdf.

[4] *Id.* at 5 (citing Charles F. Herring, *The Rise of the Sanctions Tort*, TEXAS LAWYER, Jan 28, 1991, at 3-4.) (describing the "sanctions tort" or "litigation by sanction" in its "most dramatic" form as "discovery gamesmanship in which one party purposefully seeks impossibly broad discovery or, alternatively, discovery of the same information from multiple sources, and when mistakes are inevitably uncovered, moves for terminating sanctions.").

[5] Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473, 475 (2010).

[6] Letter from Daniel C. Girard and Todd I. Espinoza to Honorable John G. Koetl, Chair, Duke Conference Subcommittee (October 4, 2011).

discovery must be seriously re-considered. Stated simply, bold action is necessary; and time is short. ***Id.*** at 4.

Absent meaningful amendments to the rules of discovery, the problems of abuse and misuse will inevitably continue. Even more problematic are the difficulties of volume and cost created by the rise of electronic discovery. The staggering statistics regarding the proliferation of information in the modern age illustrate the need for action[7] and foreshadow the profound consequences of the failure to act. As the "problem" of the proliferation of data continues to grow, inaction will have greater and greater consequences. Already it is being reported that the costs of discovery are discouraging full participation in the legal process and driving cases to settle for reasons unrelated to the merits[8] or, worse, that parties willing to nonetheless forge ahead despite the difficulties anticipated may be unable to find representation because of costs related to their case.[9] Such consequences are in danger of becoming commonplace absent action to meaningfully address the problems that have been known to the Committee for years and which now have grown worse with the exponential increase in the volume of information and the scope of electronic discovery. ***Id.***

Changes in the Initial Stages of the Litigation Process

Question: 1. *Is it useful to shorten the time limits for the initial service of the summons and complaint and for the scheduling of the Rule 26(f) and Rule 16 Conferences? Are the proposed shortened time limits reasonable?*

Answer: 1. This section puts the emphasis on the wrong elements of the litigation process – increasingly prescriptive and shortened requirements for service of summons and complaint and scheduling Rule 26(f) and Rule 16 conferences. One of the sketches concerns a proposal to allow discovery to commence at an earlier point than now provided by the rules. Under this proposal, discovery could be propounded prior to the Rule 26(f) scheduling conference, although answers and responses would not be due until after the conference had taken place. Specific language is provided for changes to Rule 26(d), 30, 31, 33 and 34. ***Id.*** at 7-8**.**

The objective of this proposal, to attempt to shorten the length of time taken by the discovery process, is laudable. However, it must be pointed out that the current structure of discovery timing seldom causes significant delays in the progress of lawsuits. The foundations of delay in the discovery process lie in the overbroad and burdensome discovery which occurs all too often under the rules, even in light of restrictions imposed by past amendments. Excessive discovery requests, including e-discovery which requires the preservation, and possible production of untold terabytes of material, unreasonable preservation requirements, and the protracted discovery controversies thus engendered, are seen to be the real culprits. ***Id.*** at 8**.**

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[7] *See, e.g.,* John Gantz & David Reinsel, Extracting Value From Chaos 1 (IDC June 2011) ("In 2011, the amount of information created and replicated will surpass 1.8 zettabytes (1.8 trillion gigabytes) - growing by a factor of 9 in just five years."); John Gantz & David Reinsel, The Digital Universe Decade – Are You Ready? 1 (IDC May 2010) ("This explosive growth means that by 2020, our Digital Universe will be 44 TIMES AS BIG as it was in 2009.").

[8] *Hearing on Costs and Burdens of Civil Discovery Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (written statement of Rebecca Love Kourlis, Executive Director of Institute for the Advancement of the American Legal System at the University of Denver at 2).

[9] *Id.* at 3.

The enactment of this proposal would not result in a significant improvement in the orderly administration of justice. The thought behind the proposal is good. However, it simply is not the type of fundamental change in the discovery provisions of the rules which can make a real difference in the efficiency and efficacy of the federal court system. ***Id.*** at 8**.**

Question: 2. *In your experience do lawyers hold meaningful Rule 26(f) conferences and do judges hold Rule 16 case management conferences? Are such conferences effective in managing the litigation and controlling costs? Are there specific techniques or procedures used by some judges that improve the effectiveness of these conferences?*

Answer: 2. The practice of holding meaningful Rule 26(f) and Rule 16 conferences varies dramatically among judges in the many federal courts, even in the same circuit with the result that effectiveness varies dramatically from case to case and judge to judge. Although in some instances, with an active and interested judge, these conferences can be effective in managing the litigation, overall. they have been inadequate in controlling the continuously increasing costs and burdens of overly broad discovery.

Unfortunately, the Federal Rules have not kept pace with either the information or the litigation explosions and, as a result, federal courts are now failing in key ways to ensure the just, speedy and cost-effective determination of every action. This is largely because the many well intentioned earlier rule amendments have tinkered at the edges of necessary change and the sporadic, inconsistent holdings of various courts that have resulted from them, taken together, have failed to achieve the meaningful, systemic changes to inter-related rules that are now more necessary than ever before. LCJ, New Standards Comment, 031512 at 2.

Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. Due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite amendments to Rule 26 (f) ("meet and confers") and the urgings of judges and well-meaning third parties.[10] In practice, better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences of unnecessary preservation and discovery. LCJ, New Standards Comment, 031512 at 6.

Self-enforcing rules are the best path to efficient discovery. As evidenced by the extensive history of amendments to Rule 26(b)(1), establishing and enforcing a reasonable scope of discovery has proved a challenge. While the repeated attempts to address the ongoing problem

[10] The volume of data stored by organizations is staggering. According to Shira Ann Scheindlin & Daniel J. Capra, *Electronic Discovery& Digital Evidence* 41 (2009), "In the three year period from 2004 to 2007, the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte). Over the same time period, the average data sets at 9,000 American, midsize companies grew from two terabytes to 100 terabytes." "A terabyte is a measure of computer storage capacity that is 2 to the 40th power or more than a trillion bytes or a thousand gigabytes. "A terabyte is roughly the equivalent of the contents of books made from 50,000 trees. The books in the U.S. Library of Congress contain a total of approximately 20 terabytes of text." *Id.*

of discovery abuse through judicial intervention were commendable, the practical result of such intervention has not served to eradicate discovery abuse. Rather, the problem has persisted and grown. It is time to change course. Instead of relying on judicial intervention, a method that arguably encourages excessive motions practice by requiring parties to seek out the assistance of the courts, practitioners should be bound by the rules to narrow the scope of discovery without judicial oversight. *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century.* LCJ, DRI, FDCC and IADC 050210 at 23

Question: 3. *Do you find that litigation is more effective when the judge confers with the parties to resolve discovery disputes before discovery-related motions are filed?*

Answer: 3. Generally yes, but the Rules need to supply greater clarity and guidance so that judges can make faster, more certain decisions. In order for pre-motion conferences to be effective, the parties and the judge need the guidance of incentive based, bright line rules. Indeed, the existence of such rules will in most cases eliminate the need for time consuming judicial intervention, allowing judges to focus their efforts on the merits of cases.

The thought behind this proposal is, of course, that at least some motions can be rendered unnecessary if opposing counsel, with guidance from the court, can reach agreement in advance of any motion being filed. This also appears to have, on the whole, some potential for positive results. LCJ Comment, Duke Subcommittee Proposals, 060512 at 9.

"Meet-and-confer" conferences can be effective in avoiding discovery disputes. In many cases, of course, they will not be, and constitute more of a waste of time than anything else. The efficacy of such conferences always depends upon the particular circumstances of the case, and the predilections of the lawyers involved. Probably no rule ever written can guarantee good results in every case. ***Id.***

While such proposals may be unobjectionable, they are unlikely to have a major effect on the overall goal of reducing the time and expense involved in discovery under the federal rules and are no substitute for fundamental reform of the rules. ***Id.***

Such reform should be the Committee's primary focus. The current Rules are simply out of date and the myriad variety of "tweaks" to those rules over the last thirty years have been unable to keep pace with the skyrocketing increase in the costs, burdens, and complexity of modern litigation. The 2006 amendments to the Federal Rules of Civil Procedure are a case in point. Any hope or expectation that these amendments would curb the discovery "explosion" has been proven sadly unrealized over the last several years. Contrary to the expressed intent of the amendments, discovery burdens have increased exponentially – fueled by court decisions based upon indistinct, inadequate, guidelines and, in some instances in direct contravention of existing Rules. Broad-based rule reform has thus been shown to be essential to achieving the consistency, uniformity, and predictability that will reduce the costs and burdens of modern litigation. LCJ Comment, Duke Subcommittee Proposals, 060512 at 2.

Question: 4. *Do lawyers understand and follow the current moratorium on discovery imposed by Rule 26(d)? If parties are allowed to serve discovery requests before a Rule 26(f) conference is*

held, but responses are not required until after the Rule 16 case management conference has occurred, would parties file such requests? Would it be useful to be able to discuss such requests at the Rule 26(f) conference or the Rule 16 case management conference?

Answer: 4. Lawyers often do not follow Rule 26(d), but adding the additional steps contemplated by this question seems to add unnecessary complexity without solving the fundamental problems caused by the unduly broad scope of discovery. Such rules and pretrial conferences would be much more productive if the parties were limited to discovery of information that was relevant, material and proportional to the claims and defenses in the case. See, Draft Proposed Amendments, FRCP 26 and 37 Discovery Costs Preservation, 090812, Rule 26(b)(1).

Question: 5. *Rule 26(a)(1)(B) exempts eight categories of cases from initial disclosures; the same categories are exempt from the Rule 26(f) conference and the Rule 26(d) discovery moratorium. It is proposed to adopt these same categories as exemptions from the scheduling order requirement of Rule 16(b), displacing local rule exemptions. Is it useful to establish uniformity? Are these the right categories of cases to exclude? Should the uniform set of exemptions be included in Rule 16(b) rather than in Rule 26(a)(1)(B)?*

Answer: 5. Exempting the eight categories of cases from the conference requirements would help establish more uniformity among the federal courts, which is useful, but it is a very modest amendment that would have no impact on the fundamental problems the Rules Committee should be addressing.

Other Discovery Issues

Question: 1. *Are the initial disclosures required by Rule 26(a)(1)(A) helpful? Should they be abandoned as largely useless, amended in some way, made more demanding for the purpose of accelerating inevitable discovery, or left as written?*

Answer: 1. Initial disclosures should be kept in place as they are and **no** further Rules Committee efforts should be directed toward disclosure issues.

Question: 2. *Does the concept of "proportionality" in civil discovery have meaning to civil litigants and judges? Do you find that it is regularly considered in the cases that you handle? Would adding proportionality as an explicit limit on the scope of discovery in the first sentence of Rule 26 (b)(1) increase the efficiency and effectiveness of civil litigation? Is this more effective than the cross reference to Rule 26(b)(2)(C) in the final sentence of Rule 26 (b)(1) which does not explicitly use the term "proportionality," and should that sentence then be deleted?*

Answer: 2. Adding proportionality would be of some help, but only if the scope of discovery were limited to discovery of information that was relevant, material and proportional to the claims and defenses in the case. See, Draft Proposed Amendments, FRCP 26 and 37 Discovery Costs Preservation, 090812, Rule 26(b)(1). The substance of the final sentence of 26(b)(1) should be retained. For example, both alternative proposals by LCJ regarding the scope of discovery under FRCP 26(b)(1) incorporate the phrase: "the proportionality assessment required

by Rule 26(b)(2)(C)." Of course, proportionality does not mean that big cases justify big discovery. Proportionality requires that discovery not be unreasonably cumulative or duplicative, not be otherwise available, and that its burdens are outweighed by its likely benefits. See, *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century*. LCJ, DRI, FDCC and IADC 050210, at 30.

Question: 3. *Some are of the view that civil litigators – even those who are efficient civil litigators – conduct more discovery than is necessary to try a case, settle it, or brief a motion for summary judgment. The amount of such discovery is plainly far in excess of what occurs in a criminal case. In your view, do civil litigators conduct more discovery than is necessary and what, if anything, should be done to curtail unnecessary discovery?*

Answer: 3. Yes, more discovery than is necessary is conducted in too many cases. As has been discussed in prior comments from LCJ, the American College, IAALS, and others, the history of amendments to the Rules of Civil Procedure, and in particular the rules of discovery, is a long one, filled with repeated attempts to reign in the problems of abuse, misuse, and, more recently, to address the changing realities of preservation of information and litigation cost allocation in our modern world. Each round of amendments was the result of tough choices and close calls meant, with the best intentions, to better serve the legal system and uphold the mandate of Rule 1 to secure the "just, speedy and inexpensive determination of every action and proceeding." Unfortunately, in many cases, the amendments did not bring about the intended result or serve to minimize the discovery abuse and misuse at which they were aimed. LCJ Comment, Duke Subcommittee Proposals, 060512 at 9.

The history of discovery rules amendments in the last 40 years reveals some tension between those who advocate major change and those who do not. One example in particular, the scope of discovery, illustrates this tension quite well, and has been discussed at length in previous comments.[11] Stated simply, despite repeated calls to narrow the scope of all discovery from a myriad of highly respected organizations and individuals, the Committee has opted instead for more modest "solutions" which, thus far, have failed adequately to address the problems and have been insufficient to handle the new realities of electronic discovery. As a result, the problems of discovery have been repeatedly engaged, but never solved, and the civil justice system now sags beneath their weight. Id. at 9-10

In considering amendments to the Rules that will actually help solve today's excessively burdensome and costly discovery and preservation problems, the most crucial task of the Advisory Committee is to cut through the myriad of complex proposals that amount to mere tweaking of the existing Rules. For example, Congressman Trent Franks, Chairman of the House Judiciary Committee's Subcommittee on the Constitution, recently urged:

> You and your Committee have a monumental effort ahead of you as it is our view that the Rules have become an outdated, confusing and complex patchwork of vague and indeterminate standards that are in need of a major overhaul.

[11] *See, e.g.*, Lawyers for Civil Justice, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (Sept. 2010), *available here* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-D-Comment-Bauman.pdf.

> Accordingly, we suggest that your Committee consider focusing for now on developing a clean, straightforward rewrite of the Rules governing discovery, preservation, and cost allocation. *Letter, Hon. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell*, March 21, 2012.

Chairman Franks' words truly outline the problem facing the Rules Committee in considering appropriate solutions to discovery and preservation problems. Therefore, in our view, the focus must be on developing an interrelated package of bold, broad-based amendments that accomplish the following:

(1) Refocus discovery, especially e-discovery, solely on relevant and material information that would support proof of a claim or defense;
(2) Develop bright-line standards governing preservation triggers and sanctions without creating new pre-litigation preservation duties that are inconsistent with federal authority and state common law; and
(3) Deter runaway litigation costs with reasonable cost allocation rules premised on positive, cost benefit economic incentives.

Question: 4. *Are the proposed numerical limits on depositions, interrogatories, document requests, and requests to admit reasonable?*

Answer: 4. Yes, the presumptive limits on discovery methods are reasonable and could be reduced even further. Moreover, it is essential that they be adopted together with amendments that limit the scope of discovery and reverse existing perverse cost allocation rules. See, Draft Proposed Amendments, FRCP 26 and 37 Discovery Costs Preservation, 090812.

Question: 5. *Some believe that document requests are overused because they are essentially free and impose the costs and burdens on the producing party. Are there any reasonable ways of limiting the amount of free discovery, and then imposing on the requester the cost of the additional discovery, subject to reasonable exceptions for parties who could not afford to pay for the opponent's production costs? Don't courts currently have the power to allocate costs if the production sought is unwarranted? Do they not use whatever power they have? Are there any additional ways that the Rules should address the issue of cost-sharing or the reduction of costs?*

Answer: 5. Yes, there are very economically effective, incentive based ways to significantly reduce overly broad and burdensome document requests. As several scholars and LCJ have argued at some length, a much more effective remedy would be – to limit the scope of discovery and to enforce those limits by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it, by amending the rules to require that each party pay the costs of the discovery it seeks. LCJ, New Standards Comment, 031512 at 16-18 and see, Draft Proposed Amendments, FRCP 26 and 37 Discovery Costs Preservation, 090812.

Today, discovery is too often used as a weapon to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes of information that is very expensive to collect, review and produce in an effort to force opposing parties to consider settlement based primarily on the threat of excessive

litigation costs. And many parties do in fact decide to settle to avoid expensive and protracted discovery instead of undertaking a fair and practical examination of the merits. LCJ, New Standards Comment, 031512 at 16-18

A Rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party – the party in the best position to control the scope of those demands and, therefore, their cost. It would undoubtedly represent significant savings for the litigation system and the economy. The Rule would also discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. See, Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure, 37* (U. FLA. L. REV. (2012)

Conventional economic theory on price as a mechanism for efficient allocation of resources is adequate justification for a "requester pays" rule:

> Judges should not confuse costs with penalties. There is nothing punitive about requiring an economic actor to pay for resources that are consumed in an activity that they undertake to make a profit. On the contrary, the philosophy behind a market economy is that resources will be used most efficiently if those who decide to consume them pay the marginal costs of production. For the same reasons that electricity will be wasted and over-consumed if government requires it to be supplied at a price below the marginal cost to make it, litigation will be over-supplied, wasting societal resources, if those who initiate litigation pay only a small fraction of its cost. [Sources omitted.][12]

The abuses discussed herein are only possible because of the gross disproportionality engendered by the deadly combination of loose pleading rules, unlimited discovery, nebulous duties to preserve information, and the ability of the requester to "free ride" by demanding everything and paying for nothing. See Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation* at 12.

The perverse cost incentives of the current system are most pronounced in cases of asymmetrical information, those in which the bulk of information resides with one party. Incentives diverge and the burden of responding to discovery is largely borne by one side; there are fewer incentives to self-discipline. See Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 13 U. FLA. LAW REV. (2012) (referencing, Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 643 (1989).

The cost allocation rule proposed by LCJ will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to focus discovery on the merits and to settle meritorious cases before the completion of discovery. More cases will be tried and cases

[12] E. Donald Elliott, *Twombly in Context: Or Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, (2011), forthcoming, U. Fla. L. Rev; See also, E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306 (1986); E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 B.U. L. Rev. 487 (1989) (Because regulating by incentives is more efficient than by judicial command and control, incentive-based procedure is the first-best solution.)

will be fairer to both sides and more likely to be resolved on the merits without the perverse incentives created by the current system. LCJ, New Standards Comment, 031512 at 23-24.

Question: 6. *The proposed changes to Rules 26, 34, and 37 are intended to modernize the way in which document requests are answered in light of the way documents are actually produced, to eliminate evasive responses, and avoid delay in the production of documents. Are these changes reasonable?*

Answer: 6. On the assumption that this question is directed to what LCJ has characterized as the "Sanctions Tort" proposals, the answer is a respectful NO, the changes are not reasonable, notwithstanding the noble intentions assigned to them. These proposals were first suggested by Dan Girard and an associate in his plaintiff class action law firm. Mr. Girard, a former Civil Rules Advisory Committee member, opposed the 2006 E-Discovery amendments and cast one of the two votes against that package of amendments. Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010). In short: these proposals are insufficient to address the major problems of discovery. First, the proposed amendments are a perfect example of the type of tinkering changes which have repeatedly proven ineffective in making any substantive headway in addressing the real problems of discovery and which have long served as a justification for deferring meaningful action on necessary reforms. Second, the proposed amendments fail to address a major cause for the problems of discovery, namely the breadth of discovery requests. Third, the proposed amendments not only fail to meaningfully address the problems of discovery, they will worsen them. See, LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 3.

(1) These proposals will merely tinker with the rules and will not serve to fix our broken discovery system. Indeed, the authors describe their proposals as "modest" and admit that evasive conduct, the primary problem sought to be addressed, is "already prohibited" by the rules. Such tinkering amendments have been repeatedly adopted with little success. Beyond being ineffectual, however—a very real possibility as evidenced by the track record of such changes so far—is the danger that the acceptance of tinkering changes, such as those offered by these proposals, will once again justify a delay in taking meaningful action. Accepting the placebo of tinkering changes now will unnecessarily delay adoption of effective amendments for years. Meanwhile, the problems of discovery will inevitably worsen (as they have continued to do in years past), creating an even larger morass to be cleaned up in future. See, LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 4.

(2) The proposals fail to address the major problem of overly broad discovery requests, which encourage broad responses. As acknowledged by Judge Grimm in *Mancia v. Mayflower,* 253 F.R.D. 354, 358 (D. Md. 2008), "kneejerk discovery requests served without consideration of cost or burden to the responding party" are "one of the most prevalent of all discovery abuses." The original authors themselves acknowledge that "the problems often begin with overbroad, poorly crafted 'kitchen sink' style document requests", Girard & Espinoza, *supra* at 474-5, and that the current rules may "encourage propounding parties to serve broader discovery requests that they otherwise would in order to leave themselves room to bargain" *Id.* which "encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs." *Id.* The authors attempt to minimize this problem by opining that "[c]ourts have shown

little hesitation in paring back or restricting these overzealous or insufficiently focused discovery requests", *Id.* at 475, when, in fact, courts have instead clung to the tradition of very broad and liberal discovery which has contributed greatly to worsening problems. See, LCJ Comment, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* 09011 at 7-9. Thus it falls to the Rules Committee, finally to take the necessary action to address the problem at its root and to narrow the scope of discovery and stimulate compliance with focused discovery with economically based cost allocation provisions. See, LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 4-5.

(3) More serious than merely delaying the adoption of meaningful reform, adoption of these proposals would likely worsen current discovery problems. For example, despite acknowledging that evasive discovery is prohibited under the current rules, the first proposal contemplates the addition of a specific prohibition against evasiveness in Rule 26(g) by requiring that counsel certify that the responses to discovery are "not evasive." Such language would likely serve to increase the frequency of motions for sanctions which arguably result from the common misunderstanding of many parties that their opponent is obligated to produce ALL potentially responsive information in their possession—a nearly impossible task —and that failure to do so must result from an attempt to evade discovery. Even now, without specific language prohibiting "evasive" responses, the courts are inundated with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent. See, Charles F. Herring, Jr., *The Rise of the Sanctions Tort,* TEXAS LAWYER, Jan. 28, 1991, at 3-4. The addition of a specific prohibition against evasion would only serve to embolden accusations of discovery violations, particularly where the notion of what constitutes evasive behavior is open to interpretation and likely to encourage disagreement amongst the parties. Moreover, where courts are also known to fall prey to the myth of full and complete disclosure, the danger of more frequent instances of unjust sanctions is great, and a major threat to the administration of justice. See, LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 5.

These "Sanction Tort Proposals," by creating additional obligations for responding parties (despite widespread agreement that the burden of discovery is already threatening the administration of justice), would only serve to create more "discovery related 'traps' to trigger sanctions." Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Respondent, *Bahena v, Goodyear Tire & Rubber Co.*, No. A503395, at 11 (Nev. July 26, 2010). For example, a corporate defendant that produced large volumes of responsive material and whose counsel made the requisite certifications could be subject to a motion for sanctions for "evasion" or false certification upon discovery of even one email that was produced by a third party but not the defendant. Perhaps even more probable is a scenario in which the parties disagree regarding what constitutes responsive evidence, resulting in accusations of evasion against the responding party. This likelihood is all the more probable in light of many practitioners' misunderstanding of the difficulties of responding to discovery in the modern age. Indeed, in arguing for their proposals, the authors opined that "it is usually relatively clear whether a document is responsive to a particular request"—a premise that if true would have precluded the need for many of the discovery motions before the courts today. Even where sanctions are ultimately denied, the resources expended by a responding party to defend

itself can never fully be recouped nor the accusations erased. LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 6.

The Rule 34 and 37 proposals also would not meaningfully address any of the major problems of discovery and would likely serve to worsen them. Specifically, the proposal to require that parties choosing to produce electronically stored information (rather than allowing inspection) state that production must be completed "no later than the date for inspection stated in the request" will only serve to *encourage* the sort of discovery motions that result in the costs and delay which the Committee seeks to fix. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities and (as discussed above) misunderstand the difficulty of their requests. Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it. LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 6.

Moreover, despite the express acknowledgement in the Advisory Committee's earlier notes that the amendments to Rule 34 were "not meant to create a routine right of access to a party's electronic information system," the language of the proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection. This "choice" fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production (thus rendering the choice a fiction) or require the acceptance of the incredible risk and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time consuming satellite litigation to resolve disagreement surrounding production, as discussed above. LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 6-7.

The proposed amendment requiring specification of whether any responsive material is being withheld would also serve to fuel existing discovery problems rather than dampen them. The creation of yet another discovery obligation, particularly coupled with a heightened threat of accusations of evasion, would only serve to add to the burden of discovery, which in turn results in additional delays and inevitable disagreements regarding compliance. Moreover, the adoption of such an amendment creates for requesting parties yet another "sanctions trap" in which to snare their opponents. As proposed, the amendment would also negate the premise in at least one jurisdiction that where a discovery request is overly broad on its face, the respondent need not "provide specific detailed support" for its objection. *Contracom Commodity Trading, Co. v. Seaboard Corp.*, 189 F.R.D. 655, 665 (1999) ("A party resisting facially overbroad or unduly burdensome discovery need not provide specific, detailed support.") (citing *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197 [D.Kan. 1996]). Facially overbroad requests often seek information "relating to" or "concerning" a "broad range of items" and are quite common in modern discovery practice. *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377 381-382 (D. Kan. 2005). Even requests which cannot be reasonably characterized as overly broad *on their face*, but which are nonetheless likely to result in undue burden to the responding party, would create an unfair obligation under the proposed amendment. Responding parties should not be required to

first determine what if anything is responsive or not responsive to such a request in a manner sufficient to state whether information is being withheld. To require an objecting party to nonetheless determine the existence of responsive material for purposes of identifying it as being withheld would render moot the original objection—an absurd result. LCJ, FRCP Sanctions/Tort Comment, Stronger Medicine, 081811 at 7.

Once again, the proposed amendments, at best, are no more than tinkering, a strategy that will not bring about the changes necessary to address existing discovery problems and, in fact, will likely make those problems even worse.

Question: 7. *Is it useful to defer the responses to contention interrogatories and requests to admit with respect to opinions, until the close of discovery, subject to the ability to obtain earlier responses by stipulation or court order?*

Answer: 7. These very modest proposals are so dependent on the circumstances of individual cases and local practice that they do not seem to warrant incorporation into the Federal Rules of Civil Procedure and, if adopted, do not appear to offer the prospect of significant improvement.

Question: 8*. Is it useful to make preservation a specific subject for the Rule 26(f) conference and the Rule 16(b) scheduling order?*

Answer: 8. Whether or not further tweaks should be made to the Rules regarding the inclusion of preservation as a subject for conferences and scheduling orders should await determination by the Committee as to the much more significant matters of the nature of amendments governing preservation triggers and sanctions.

Litigants are today spending billions of dollars to address an undefined and largely non-existent spoliation risk based on the existence of a few high profile, un-tethered sanctions decisions. Allowing "inherent power" decisions in individual cases to define corporate conduct and adversely impact litigants in every corner of America is a misuse of that power, and is antithetical to the American system of justice. It is entirely appropriate to require that sanctions, if awarded at all, be awarded only pursuant to clear and consistent rules that subject only deliberate and willful acts to sanctions. And, that the "trigger" of any existing duty to preserve information for litigation purposes be codified in a "bright line" Rule that triggers the duty upon commencement of litigation. LCJ Comment, Duke Subcommittee Proposals, 060512 at 11.

Of course, a successful solution to the problems of costly and burdensome preservation must include a Rule governing the scope of **all discovery** – not a separate scope of preservation rule. Narrowing the scope of discovery limited to that information which is material and proportional to the claims and defenses in the case would provide a simple, straightforward, and easily understood solution to the problems of preservation—a simplicity that is sorely needed within the Federal Rules. Moreover, a narrowed scope of discovery would have the immediate and direct effect of reducing the costs and burdens of discovery and preservation of information — precisely the problems the Committee has been attempting to address for many, many years. LCJ Comment, Duke Subcommittee Proposals, 060512 at 11-12. See also, Draft Proposed Amendments, FRCP 26 and 37 Discovery Costs Preservation, 090812.

Cooperation

Question: 1. *Does the concept of "cooperation" in civil discovery have meaning to civil litigants and judges? Do you find that it is regularly considered in the cases that you handle? Would adding the concept to Rule 1 increase the efficiency and effectiveness of civil litigation? Is it useful to make it clear that Rule 1 is directed at the parties and not only at the Court?*

Answer: 1. Our civil justice system is plagued by a fundamental problem that is directly traceable to the intersection of the 20th Century philosophy of full pretrial disclosure and the 21st Century reality that even ordinary litigation files can comprise millions of pages, usually sprinkled randomly with privileged documents. "Full disclosure" – once an easy task and a laudable goal – has become onerous and expensive, a current reality not in anyone's contemplation when the Rules were first adopted in 1938. LCJ Comment, Duke Subcommittee Proposals, 060512 at 4.

Some think this unforeseen collision is manageable and propose, along with other "tweaks" to the Rules, that Rule 1 be amended to add a new *affirmative* requirement that the parties "cooperate" with each other. But adding an affirmative and subjective requirement of "cooperation," as used in this context is a new and untested concept in our adversary system and what is meant exactly by this new requirement of "cooperation" is entirely unclear. It is one more point on which parties can disagree and blame the other when it is to their advantage. We believe in professionalism and the need for lawyers to uphold their professional responsibilities. Unfortunately, the idea of mandating "cooperation" in Rule 1 is not as easy as accepting its potential desirability and our concern rests with the likely consequences of this apparently laudable goal. LCJ Comment, Duke Subcommittee Proposals, 060512 at 4.

While the Federal Rules do not proclaim a separate, affirmative requirement of "cooperation," Rules 16, 26(b)(2)(C), 26(f), and 37 already provide specific rules that effectively require cooperation. See David J. Waxse, *Cooperation – What Is It and Why Do It?*, XVIII RICH. J. & TECH. 8 (2012), http://jolt.richmond.edu/v18i3/article8.pdf. These rules and many others form the basis of the traditional check on the adversary system. Any departure from our adversary tradition, however well-intentioned and however much seen to be needed at this moment in the history of our judicial system is an open-ended invitation to mischief. LCJ Comment, Duke Subcommittee Proposals, 060512 at 5.

The questions ask themselves: What does it mean to cooperate? Federal Rule 37 was created to prevent persons from "unjustifiably resisting discovery," Adv. Cmte. Notes (1970), and to authorize the court to issue sanctions on parties "who fail to participate in good faith in the discovery process." Adv. Cmte. Notes (1980). What would the "cooperation" standard be? Would it require parties simply not to act in bad faith? Or would the new rule require a level of behavior greater than what is already implicitly required? Where is the line between proper advantage-seeking within the bounds of the adversary system and an improper failure to cooperate? What specific affirmative duties would "cooperation" require? Could a court punish a failure to cooperate without abridging or modifying substantive rights, which would violate the Rules Enabling Act's proscription in 28 U.S.C. § 2072(b)? Would a failure to alert an adversary party to an error in its argument be seen as a failure to cooperate? Would any fact finding that

was a predicate to such a finding have to be done only after a hearing in open court? Would a requirement to cooperate be used to change the operation of any of the other rules of procedure? One can imagine many more. LCJ Comment, Duke Subcommittee Proposals, 060512 at 5-6.

Good faith cooperation may be an important element of our judicial system. However, adding a new requirement of "cooperation" to the rules could have myriad unintended and unforeseen consequences that might undermine this very goal. Such a rule change is almost certain to increase, not diminish, the workload of the courts and the number of disputes over which they will have to preside. Strict adherence to ethical standards has always been required of trial counsel. A vague concept of "cooperation" has not. LCJ Comment, Duke Subcommittee Proposals, 060512 at 6.

As written, Rule 1 rule is plainly addressed to the court since only the court, and not counsel, can "construe" or "administer" the Federal Rules of Civil Procedure. Cmte. Notes (1993). Adding a requirement of cooperation among adverse parties would newly expand the reach of Rule 1 to every participant in the federal civil justice system. Moreover, as written, the rule currently is aspirational and is not intended to lay out hard requirements of certain action in particular circumstances. The Duke Conference Subcommittee itself acknowledges that the current rule is not a set of commands, but is properly regarded as "aspirational." The proposed change, if adopted without some conditions, would radically change an "aspirational" rule into a rule with hard, albeit vague, requirements. LCJ Comment, Duke Subcommittee Proposals, 060512 at 6.

Any change of this kind will certainly be the subject of very careful consideration, hearings and input in a process we are only beginning. The Duke Subcommittee's own notes echo this sentiment:

> "There is something to be said for a purely aspirational rule. But extending it to the parties — and thus to counsel — may be an invitation to sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution." Duke Conference Subcommittee Rules Sketches at 31-32.

The reporter for the Subcommittee, writing in the third person, added his own "skepticism" to his write-up of the Committee's discussions of the topic:

> "RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms — that is, terms considered reasonable by the court?" Duke Conference Subcommittee Rules Sketches at 32

Clearly, this proposal is not ready for adoption in its current form. As Judge Waxse has noted, the Federal Rules of Civil Procedure already "provide a clear path to cooperation." Waxse, *supra* note 10, at ¶23. Instead of creating a rule that raises more questions than provides guidance, the goal of Rule 1 is better achieved by providing counsel and the court with clear,

unambiguous, bright line rules that clearly set forth the parties responsibilities – those rules we have proposed throughout. LCJ Comment, Duke Subcommittee Proposals, 060512 at 6-7.

Overall Issues

Question: 1. *Are any of the proposals unreasonable for pro se litigants? Do any accommodations need to be made?*

Answer: 1. Unknown.

Answer: 2. *What can be done to educate the Bench and the Bar about the current means of reducing the cost and expense of litigation and the implementation of any changes?*

Answer: 2. There are innumerable ways in which the bar can be educated to reduce the cost and burden of litigation, but that education must start with and be tethered by the adoption of the bright line rules we advocate.

Question: 3. *What other suggestions do you have for improving the efficiency and reducing the cost of civil litigation in federal court?*

Answer: 3. The Rules Committee should focus on proposing rule amendments that will improve the efficiency and reduce the cost and burden of civil litigation.