

BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:)
)
 PUBLIC HEARING ON PROPOSED)
 AMENDMENTS TO THE FEDERAL)
 RULES OF CIVIL PROCEDURE)
 JUDICIAL CONFERENCE ADVISORY)
 COMMITTEE ON CIVIL RULES)
)

Thursday,
 November 7, 2013

The parties met, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE DAVID G. CAMPBELL, CHAIR

APPEARANCES:

Committee Members and Reporters:

HON. PAUL S. DIAMOND
 DEAN ROBERT H. KLONOFF
 LAURA A. BRIGGS, Esquire
 HON. ARTHUR I. HARRIS
 HON. GENE E.K. PRATTER
 PETER D. KEISLER, Esquire
 HON. JOHN G. KOELTL
 PROF. DANIEL R. COQUILLETTE
 HON. JEFFERY S. SUTTON
 PROF. EDWARD H. COOPER
 PROF. RICHARD L. MARCUS
 HON. PAUL H. GRIMM
 HON. SCOTT M. MATHESON, JR.
 HON. STUART F. DELEREY
 ELIZABETH CABRASER, Esquire
 HON. SOLOMON OLIVER, JR.
 HON. DAVID E. NAHMIAS
 HON. ROBERT MICHAEL DOW, JR.
 JOHN M. BARKETT, Esquire
 PARKER C. FOLSE, Esquire

Speakers:

JACK B. McCOWAN, JR., Gordon & Rees LLP
 JEANA M. LITTRELL, FedEx Express
 JOHN C.S. PIERCE, Butler Pappas Weihmuller Katz
 Craig LLP
 ALTOM M. MAGLIO, Maglio Christopher & Toale
 DAVID R. COHEN, Reed Smith LLP
 CORY L. ANDREWS, Washington Legal Foundation
 MARY MASSARON ROSS, Plunkett & Cooney
 PAUL D. CARRINGTON, Duke University School of Law
 JONATHAN M. REDGRAVE, Redgrave LLP
 PAUL J. STANCIL, University of Illinois at Urbana-
 Champaign
 THOMAS Y. ALLMAN
 DANIEL C. HEDLUND, Committee to Support Antitrust
 Laws
 ANNA BENVENUTTI HOFFMAN, Neufeld Scheck & Brustin,
 LLP
 PETER E. STRAND, Shook, Hardy & Bacon LLP
 DAN TROY, GlaxoSmithKline
 BURTON LeBLANC, American Association for Justice
 WAYNE B. MASON, Sedgwick LLP
 DARPANA M. SHETH, Institute for Justice
 ROBERT L. LEVY, Exxon Mobil Corporation
 MICHELLE D. SCHWARTZ, Alliance for Justice
 ANDREA VAUGHN, Public Justice Center, Inc.
 BARRY H. DYLLER, Dyller Law Firm
 ALEXANDER R. DAHL, Brownstein Hyatt Farber Schreck
 LILY CLAFFEE, U.S. Chamber of Commerce
 JOHN F. KARL, JR., McDonald & Karl
 STEPHEN Z. CHERTKOF, Heller, Huron, Chertkof &
 Salzman, PLLC
 JENNIFER I. KLAR, Relman, Dane, & Colfax PLLC
 NICHOLAS WOODFIELD, The Employment Law Group
 ROBERT C. SELDON, Seldon Bofinger & Associates,
 P.C.
 MARC E. WILLIAMS, Lawyers for Civil Justice
 JOHN P. RELMAN, Relman, Dane, & Colfax PLLC
 MALINI MOORTHY, Pfizer, Inc.
 JONATHAN SMITH, NAACP Legal Defense and Education
 Fund, Inc.
 WENDY R. FLEISHMAN, Lief Cabraser Heimann &
 Bernstein
 PATRICK M. REGAN, Regan Zambri Long & Bertram
 MICHAEL C. RAKOWER, New York State Bar Association
 WADE HENDERSON, The Leadership Conference on Civil
 and Human Rights

Speakers: (Cont'd.)

JANE DOLKART, Lawyers' Committee for Civil Rights
Under Law

FRANK L. STEEVES, Emerson

JOSEPH M. SELLERS, Cohen Milstein

P R O C E E D I N G S

(9:00 a.m.)

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3 JUDGE CAMPBELL: Good morning. We
4 appreciate everybody being with us this morning.
5 We're going to try to start in one minute so that we
6 can stay on schedule through the day.

7 Welcome to all the committee members who
8 we've not had an opportunity to greet, and thank you
9 for everybody else who is here. We very much
10 appreciate your being with us this morning. We
11 appreciate your input and your interest in the
12 committee's work.

13 I think I speak on behalf of the committee
14 when I say that we genuinely need your input, and we
15 value what you are going to be sharing with us. This
16 is very much an effort on the part of the committee to
17 be educated, and you are the experts who can help
18 educate us on the things that we are considering.

19 We want you to know that we are reading the
20 written submissions that have been coming in. It's a
21 big job. There are lots of them. We will continue to
22 do that. So, if you have additional thoughts you want
23 to put in writing and submit them, we will read them
24 all and we will consider them carefully.

25 I think it goes without saying that on the

1 proposals that have been issued there have been no
2 final decisions made. This is very much a work in
3 process, and the public comment process is perhaps the
4 most critical part of it.

5 So we are very interested in the input we
6 are going to receive today and appreciate your
7 willingness to be here. Unfortunately, we've got so
8 much interest that we are going to have to limit the
9 time of everybody who speaks today. We have 41
10 individuals slated to speak today. I think we could
11 have had more if we had allowed room, but we just
12 didn't have room.

13 If we're going to finish by 5:30 this
14 evening and we stay on schedule, that means we can
15 hear comments of five minutes from you and then have
16 five minutes for questions from the committee
17 afterward. And so we're going to run on that
18 schedule. We know you cannot say everything you would
19 like to in five minutes, but again, to the extent you
20 can't say it here, if you submit it in writing, we
21 will absolutely read it and consider it carefully.

22 We have lights that are going to help keep
23 us on time. There's a light on the podium. There's
24 one in front of me. And I'm told that at four minutes
25 the yellow light will come on and at five minutes the

1 red light will come on, and then it will be my job to
2 keep the committee questions to five minutes so we can
3 get to the next speaker on time. And along those
4 lines, for committee members, obviously I think we
5 need to resist the urge to talk too much and try to
6 put our questions as pointedly and as briefly as we
7 can.

8 So, with that introduction, we are going to
9 get started. The first speaker I have listed is Jack
10 McCowan. And, sir, if you could, and all the
11 speakers, just introduce yourself and your affiliation
12 if you have one, and we will get going.

13 MR. McCOWAN: Thank you very much. Good
14 morning, ladies and gentlemen of the committee. It's
15 a real pleasure to be here, an honor to be here to
16 offer a few thoughts on the rule changes that you're
17 proposing.

18 My name is Jack McCowan. I'm from San
19 Francisco. I'm with the law firm of Gordon & Rees. A
20 little background so you know where I'm coming from.
21 I'm a defense lawyer that's been practicing for about
22 38 years, and I have limited my practice to the
23 defense of civil cases.

24 I am a member of the board of directors of
25 the DRI, an association of defense lawyers that

1 numbers over 22,000 folks here in the United States
2 and abroad. I'm a faculty member, an adjunct faculty
3 member at the University of California Hastings
4 College of Law in San Francisco where I have the
5 privilege of coteaching with a plaintiff's lawyer a
6 personal injury litigation class.

7 My practice over the last 25 years has been
8 primarily devoted to the defense of manufacturers of
9 medical devices, pharmaceuticals, and other products.

10 My practice is both in state and in federal courts.
11 I've tried medical device cases in state and in
12 federal courts. In California, for instance, our rule
13 on the scope of discovery is almost identical to Rule
14 26.

15 I have been retained by manufacturers over
16 the years of medical devices and pharmaceuticals in
17 multi-plaintiff litigation in courts and also in
18 coordinated cases in California. And one of the
19 things that I did early on in my career in product
20 device cases is I had the honor of being trial counsel
21 in California for over 35 different cases and
22 consulted on the job on that basis.

23 JUDGE CAMPBELL: Mr. McCowan, can I
24 interrupt you just briefly? Can folks in the back
25 hear what he is saying? Yeah. I'm not sure that mike

1 is as sensitive as we need it. Why don't we see if we
2 can make an adjustment so everybody can hear.

3 (Pause.)

4 MR. McCOWAN: I would like to address --
5 that sounds better. I would like to address today
6 just the proposed changes to Rule 26. That would be
7 my focus. And first let me say that I support the
8 committee's goals of advancing early and effective
9 judicial case management, proportional discovery, and
10 attorney cooperation.

11 If these goals are achieved, I believe
12 progress will be made in reducing the high cost of
13 discovery for all parties in litigation without
14 adversely affecting the rights of plaintiffs or
15 defendants to have their cases tried before a jury.

16 I don't think it can be questioned that the
17 cost of discovery even for companies with significant
18 means drives the settlement of claims that would
19 otherwise be tried before a jury or a judge. I have
20 been involved in scores of multi-plaintiff personal
21 injury cases in which my clients have opted to settle
22 cases that should have been tried in my judgment
23 primarily because of the sheer volume of the cases and
24 the costs of preparing those cases for trial.

25 In the majority of the mediations in which I

1 participated over the years, I often hear the mediator
2 say isn't it more expensive to prepare this case to
3 try and to try than the settlement offer that's now on
4 the table. There's no question that we hear that all
5 the time, but in my judgment, the driving of the costs
6 of the litigation should not be the reason the case is
7 settled.

8 If the proposed changes to Rule 26 that
9 incorporate the concept of proportionality of
10 discovery and eliminate the phrase "appears reasonably
11 calculated to lead to the discovery of admissible
12 evidence" are adopted, I believe a great deal of money
13 and time will be saved and will inure to the benefit
14 of both plaintiffs and defendants.

15 I've been involved in many product liability
16 cases involving medical device, pharmaceutical, and
17 automotive products where plaintiff's counsel have
18 successfully argued that discovery of information on
19 products totally unrelated to the product involved in
20 the case must be produced because the documents are
21 reasonably calculated to lead to the discovery of
22 admissible evidence.

23 The phrase is too broad to define. Because
24 of the overbreadth of this phrase, companies and their
25 attorneys spend untold hours and money searching for

1 documents and other products that are almost never
2 placed on an exhibit list at trial. In most cases,
3 motions in limine are successful in preventing these
4 documents from being used at trial, yet the damage in
5 my opinion has already been done in lost productivity
6 of the company, costs associated with the outside
7 vendors who process the documents, and higher fees
8 paid to defense lawyers to try to keep these documents
9 from being disclosed or out of evidence.

10 Despite the fact that proportionality of
11 discovery is a concept that is already within the
12 rules, the courts in my opinion are still using orders
13 or issuing orders that are way too broad. One example
14 is an order issued by a magistrate judge just last
15 month in a case in Florida called McLane v. Ethicon
16 Endo-Surgery. It's a case pending in the Middle
17 District of Florida.

18 The case involves an alleged defective
19 staple that failed to secure an incision in the
20 plaintiff's colon. Plaintiff in its eighth request
21 for production sought adverse event reports and other
22 documents not only for the product that Plaintiff
23 received but for every predicate product or device on
24 which the FDA relied to clear that product for
25 marketing as a substantially equivalent product to

1 predicate devices.

2 Substantial equivalence under the FDA rules
3 is a term of art that's used in clearing new products
4 for the market under section 510(k) of the 1976
5 Medical Device Amendments. It does not mean that the
6 predicate product is identical to the product being
7 proposed. The proposed device can be substantially
8 equivalent for FDA purposes even if its technology is
9 substantially different than the technology of the
10 predicate devices upon which the FDA decides whether
11 to put the product on the market.

12 In order for FDA to grant 510(k) approval,
13 it demands only comparability of performance, not
14 design, with the predicate device. But it does not
15 require that they have the same type of technology.
16 Defendant in that case presented facts in its
17 opposition about the major ways in which the
18 technological characteristics of the device in
19 question that was implanted in the plaintiff differed
20 from the two predicate devices which plaintiffs sought
21 discovery. These facts included the ability to bend,
22 the method of closing the wound, reloadability, staple
23 configuration, tissue cutting, trigger and handle
24 design, and staple formation.

25 Despite these facts, the court apparently

1 ignored this testimony given in affidavits, and the
2 court granted plaintiff's motion, and defendant was
3 ordered to produce the documents related to the
4 predicate products.

5 It's clear from the ruling that the court
6 relied solely on a case that referred to the
7 "reasonably calculated" language in Rule 26(b)(1).
8 There was no discussion of the evidence that was
9 offered by the defendant about why the predicate
10 products were not similar to the product in question
11 in the case. The result was the court-ordered
12 discovery concerning other dissimilar products and
13 adverse events.

14 In my judgment, if the "reasonably
15 calculated" language were not in the rule, the
16 defendant in that case would have had a better chance
17 of preventing this overreaching discovery. Had the
18 court limited the discovery to design and
19 manufacturing and adverse events and documents
20 generated by the company for the product that was in
21 the lawsuit, the plaintiff would have had sufficient
22 evidence to try to prove his case.

23 If rulings like this one, which came out in
24 Florida but is not an isolated incident, are allowed
25 to stand, they could potentially expand discovery to

1 predicate devices and their adverse event reports in
2 every case in which a product in question is approved
3 for marketing under 510(k), and that includes
4 approximately 99 percent of all medical devices on the
5 market today.

6 In this case, the predicate devices were
7 manufactured by the defendant, Ethicon, but that's not
8 always the case. A manufacturer in offering a product
9 to the FDA for approval can rely on predicate devices
10 by other companies. So, with rulings like the one in
11 McLane, there is good reason to believe that
12 manufacturers of predicate devices not involved in the
13 lawsuit could be asked to produce documents on their
14 products just because a manufacturer of a later
15 approved product referenced their product.

16 JUDGE CAMPBELL: All right, Mr. McCowan, we
17 have just under a minute left if we're going to have
18 any questions. Did you have any final wrap-up points
19 you wanted to make?

20 MR. McCOWAN: The only thing I wanted to
21 say, Your Honor, is I believe that this rule if it is
22 adopted, if we change the proportionality of
23 discovery, move it into the rule, and if we remove the
24 language of the "reasonably calculated to lead to the
25 discovery of admissible evidence," we will go a long

1 way in reducing the costs of discovery for all
2 parties, which will inure to the benefits of
3 plaintiffs and defendants.

4 JUDGE CAMPBELL: All right. Thank you, Mr.
5 McCowan. We've used just about all of the time, so we
6 won't ask questions of you, but we appreciate your
7 comments.

8 MR. McCOWAN: Thank you very much.

9 JUDGE CAMPBELL: Ms. Littrell?

10 MS. LITTRELL: Thank you. My name is Gina
11 Littrell. I am the vice president of employment
12 litigation for FedEx Express, the world's largest
13 express transportation company. We appreciate the
14 committee's work in bringing forward these proposals
15 for comment and testimony, and thank you for the
16 opportunity to appear this morning.

17 At FedEx Express, we rely almost exclusively
18 on in-house attorneys and legal professionals to
19 litigate cases in state and federal courts in the
20 United States involving business transactions,
21 employment discrimination, and allegations of wage and
22 hour violations.

23 With regard to proposed amendments
24 characterized as case management proposals, we are
25 particularly supportive of proposed Rule 26(d)(2) to

1 allow for the early exchange of discovery requests.
2 We believe cases will get to resolution more
3 efficiently and with less ancillary litigation, and
4 for these reasons, we would not limit the exchange of
5 early discovery to simply requests for production.

6 With respect to the proposed amendments
7 categorized as proportionality proposals, I'd like to
8 focus on the proposed amendments to 26(b), 26(c), and
9 34. We support the proposed Rule 26(b)(1) revisions
10 to clarify the appropriate scope of discovery and
11 respectfully disagree with those who have cautioned
12 that the revisions represent a monumental sea change
13 that will impede plaintiffs' ability to obtain vital
14 discovery.

15 On the contrary, the current version of Rule
16 26 already places the burden on the requesting party
17 to ensure and certify that requests are proportional.

18 So some are questioning whether the amendment is
19 really needed. It's been suggested we just need to
20 better educate judges on the existing rules. We
21 submit that there is no better education for judges
22 and litigants than moving the proportionately
23 requirement to the most prominent part of the rule,
24 and we believe that doing so will result in fewer
25 motions.

1 The emphasis on proportionality is
2 particularly necessary now given the emerging trend of
3 discovery on discovery through which requesting
4 parties seek extensive information regarding the
5 thousands of software applications and systems in use,
6 details of preservation capabilities and efforts. And
7 this discovery on discovery campaign particularly is
8 disproportional because it typically precedes any
9 discovery on the actual allegations in the complaint.

10 In response to the suggestion that the
11 proposed amendments to Rule 26(b) would particularly
12 prejudice plaintiffs in employment discrimination
13 claims, it's important to note that employment
14 discrimination claims governed by federal law cannot
15 be litigated by charging parties until they have first
16 brought their claims to the Equal Employment
17 Opportunity Commission, which has investigative
18 powers, subpoena authority that is far broader than
19 the scope of discovery provided by the Federal Rules
20 of Civil Procedure.

21 The need for proposed Rule 26(c) amendment
22 to add explicit recognition of the courts' authority
23 to allocate discovery costs was recently demonstrated
24 in a putative commercial class action brought against
25 FedEx by a retail shipper. The amount in controversy

1 if the class is not certified is about 7- or \$8,000.
2 We don't think the class will be properly certified
3 because the issues are individual that would require
4 an inquiry into each shipment to determine if human
5 error caused the alleged overcharge.

6 But at our own expense, we have produced
7 more than a million pages of ESI from the 20 key
8 custodians plaintiff identified covering a six-year
9 time period. We spent more than \$150,000 for contract
10 attorneys to assist with review, plus an equal value
11 of in-house resources.

12 Plaintiff recently asked the magistrate
13 judge for a preemptive ruling that FedEx would have to
14 bear the costs of production of ESI from any
15 additional custodians. The magistrate judge reserved
16 ruling until an actual motion is filed but said his
17 preliminary inclination would be to require FedEx to
18 bear the costs because that's the general rule.
19 Clearly we think that courts need specific
20 authorization within the rules to shift costs in
21 appropriate circumstances.

22 We oppose the proposed Rule 34 amendment to
23 require responding parties to state whether any
24 documents are being withheld based on objections.
25 This amendment would definitely encourage ancillary

1 litigation because although the proposed rule itself
2 would not require the identification of withheld
3 documents, an affirmative statement that documents are
4 being withheld will undoubtedly be followed by a
5 request to identify each and every document withheld
6 and ancillary litigation over the sufficiency of the
7 corporation's disclosure.

8 Again, especially in light of the emerging
9 trend of discovery on discovery efforts, we urge the
10 committee to reconsider the proposed Rule 34
11 amendment.

12 FedEx Express is a member of the Lawyers for
13 Civil Justice. We support the positions taken with
14 regard to proposed Rule 37(e) and LCJ's public
15 comment. We also urge the committee to adopt the
16 recommendation of the Duke Law Center for Judicial
17 Studies requiring a showing of *some* degree of
18 prejudice before curative measures may be ordered for
19 the loss of ESI.

20 With regard to the concerns expressed that
21 courts will interpret willful to include intentional
22 acts, including an auto-delete function, please
23 consider that if meeting our preservation obligations
24 requires discontinuance of auto delete for all systems
25 and users, not just those subject to a litigation

1 hold, the stated purpose of the rules to ensure the
2 just, speedy, and inexpensive determination of every
3 action will be frustrated, if not defeated, because
4 we're already pushing the limits of the industry
5 leading technology for finding responsive ESI, and
6 multiplying the quantity of data for each custodian
7 would cripple the search.

8 I see that I am out of my allotted time, so
9 I will thank the committee again and take any
10 questions.

11 JUDGE CAMPBELL: Thanks, Ms. Littrell.

12 Are there questions? Rick.

13 PROF. MARCUS: Ms. Littrell, one of the
14 things that some have said about the 26(b)(1) change
15 is that it would somehow affect the burden of showing
16 whether discovery is or is not proportional. Do you
17 think that's true, and would you be expecting to take
18 that position if the rule change were made?

19 MS. LITRELL: Professor Marcus, that burden
20 is already in Rule 26. Rule 26(g) requires a
21 certification of each requesting party that their
22 request is proportional to what's at stake in the
23 case. And that isn't just limited to the amount in
24 controversy but whatever is at stake in the case. So
25 the rules already require that the proposed change

1 will not give responding parties a new argument.

2 JUDGE CAMPBELL: I have a question, Ms.
3 Littrell. You expressed concern that if a party
4 producing documents is required to say whether or not
5 they're withholding anything you'll get a follow-on
6 request saying what are you withholding. What
7 prevents parties from doing that now? And do you see
8 parties asking that question?

9 MS. LITTRELL: We don't. I was surprised,
10 Your Honor, to see this proposed amendment. This has
11 not been an issue in our practice. We properly pose
12 objections. Typically we get, as an example, tell us
13 every or produce every policy and procedure at FedEx.
14 Well, with 100,000 employees in hundreds of
15 locations, it's impossible and just not relevant to
16 produce every policy and procedure.

17 So we typically respond and say your request
18 is overly broad. Here are the policies that relate to
19 the specific claims. Your client was terminated for a
20 violation of our acceptable conduct policy. Here is
21 the acceptable conduct policy. It seems obvious that
22 there are other policies, and sometimes we have
23 negotiations with requesting parties. But I have not
24 seen that this issue of we can't tell what you're not
25 giving us is a problem. I was surprised by the

1 amendment but concerned about how it would be used in
2 practice.

3 JUDGE CAMPBELL: All right. We have about a
4 minute left. Any other questions for Ms. Littrell?

5 MR. BARKETT: I think the problem --

6 JUDGE CAMPBELL: Push the button, John,
7 would you? Push it, and it should be on.

8 MR. BARKETT: There it goes. The problem in
9 Rule 34 that the committee encountered was the
10 situation where boilerplate objections are being made
11 routinely in response after response after response
12 after response, and it's just impossible to know, so I
13 make an objection that privileged, work product,
14 overbroad, unduly burdensome, subject to these
15 objections we're producing. Is that what your folks
16 do when they make responses? Do you follow that
17 format?

18 MS. LITTRELL: Yes. And we shouldn't.

19 (Laughter.)

20 MS. LITTRELL: You know, I just have to be
21 honest. I think that if we'll allow this early
22 exchange of discovery requests, then when the parties
23 get together for the 26(f) conference, they can work
24 through these things. And generally speaking, yes, we
25 do the boilerplate objections, and then the requesting

1 party calls. We work out a compromise. And this is
2 not really a problem, but to move it further into the
3 beginning of the case I think will solve a lot of
4 this.

5 JUDGE CAMPBELL: All right. Thank you, Ms.
6 Littrell. We've run out of time. We very much
7 appreciate your comments.

8 Mr. Pierce?

9 MR. PIERCE: Thank you very much. Good
10 morning. My name is John Pierce. I'm an attorney in
11 Mobile, Alabama, practicing with the firm of Butler
12 Pappas. I am here on behalf of myself, my firm, and
13 my clients. I'm also here on behalf of DRI and its
14 23,000 members. I'm the chair of DRI's Trial Tactics
15 Committee, and what we do as a committee is we seek to
16 teach best practices in an age when more and more
17 cases are not being tried. And the trend is not to
18 try cases, and for those of us like me that enjoy
19 trying cases and believe that you get your best
20 outcomes with jury trials, that's a bad thing.

21 The Trial Tactics Committee and DRI are
22 committed to preserving the right to a civil trial by
23 jury. That's one of our key missions. And one of the
24 things that the amendments that this group has put
25 together will do is that it puts the focus back on the

1 merits of the case and not on money. Too often cases
2 are settled because discovery is expensive and
3 litigation is expensive, and we need a way to bring
4 the focus back to the merits and not money.

5 Just by way of background, I'm a bit of a
6 generalist in my practice. I try cases in state and
7 federal court, in Alabama, the Florida panhandle, and
8 in southern Mississippi. I try cases on behalf of
9 some larger companies, but most of my work is for
10 small companies, subchapter Ss, mom-and-pop
11 drugstores, compounding pharmacies, transportation
12 companies, companies that build things, construction
13 companies, clients like that that one of the key
14 drivers in litigation involving clients like that is
15 cost.

16 And cost cuts both ways. And it's not just
17 money, but it's time and opportunity costs and
18 resources. Preservation and production of discovery
19 material is one of the key elements of those costs.
20 And so I and the constituents I represent are in favor
21 of the limitations of the number of depositions, the
22 limitations on the discovery tools like requests for
23 production, requests for interrogatories, requests for
24 admission, in order to make lawyers sit and think
25 about their cases at the very outset.

1 I'll tell you I'm also a big fan of the
2 concept of early case management, of getting in before
3 the judge early on in a case, early Rule 16 issuance
4 of scheduling orders, and the idea that you have to go
5 to the court with a conflict before you file a
6 discovery motion.

7 There's been some mention in some of the
8 papers that have been filed with the committee that
9 defendants love discovery disputes and they love to
10 throw a bunch of paper out. I'll tell you my clients
11 do not like discovery disputes. They do not like
12 paying for discovery disputes. And so if we can get
13 the judge on the phone kind of like you do -- in 22
14 years of practice, I've only done this a few times,
15 but in a deposition sometimes you have to get the
16 judge on the phone. That resolves the issue. There's
17 no briefing. That is a wonderful tool that this
18 committee has recommended, to have early scheduling,
19 early scheduling conferences and informal conferences.

20 And in the early scheduling conferences, you
21 get around a lot of this problem that's been raised by
22 some of the opponents to these amendments about we're
23 not going to get enough discovery, we can't fully
24 develop the facts of our case. There's a relief valve
25 built in that allows you to raise that with the judge

1 early on so you're thinking about your case.

2 With regard to proportionality and cost
3 allocation, certainly the constituency that I
4 represent is in favor of the amendments to Rule 26 and
5 Rule 37. There are others that will speak about that
6 in greater detail, but it brings more fairness. It
7 limits what both sides get to do, not just one. It
8 doesn't favor big defendants.

9 A lot of times references are made to David
10 versus Goliath. And I watched the hearings in front
11 of the Senate Judiciary Committee on Tuesday. A lot
12 of times I'm David. I have a very well-organized bar
13 against me, and so, you know, I'm the David that is
14 getting crippled by discovery costs. Reducing the
15 amount of information that is exchanged through
16 discovery reduces the cost, but I don't think it
17 reduces the quality of the trial.

18 Needles in haystacks. How much are we
19 willing to spend to find needles in haystacks, these
20 peripheral, marginal facts that really don't bear on
21 the substance of a case? I take issue with some of
22 the overtones in some of the documents that have been
23 submitted that seem to question judges in their
24 exercise of discretion. I've tried cases in federal
25 courts for 22 years. I find that we have a federal

1 judiciary that is highly dedicated to the job at hand.

2 It is engaged and involved. And so to give them an
3 opportunity to be involved earlier I think is a good
4 thing.

5 My time is about up. I will tell you this.

6 There's going to be spillover into the state courts
7 from what happens here, and what's happening here is a
8 good thing. You are not closing the door to
9 litigation. By reducing costs, you're opening the
10 door for people like the constituency that I
11 represent.

12 JUDGE CAMPBELL: All right. Thank you, Mr.
13 Pierce. Are there questions from members of the
14 committee?

15 (No response.)

16 JUDGE CAMPBELL: All right. Thank you very
17 much for your comments.

18 Mr. Maglio?

19 MR. MAGLIO: Good morning. My name is Altom
20 Maglio, and I'm a small-firm attorney from Florida,
21 and I represent patients in medical product liability
22 suits, and I'm here today on my own behalf.

23 First I'd like to thank the committee for
24 the imminent changes to Rule 45. I believe these
25 changes will simplify discovery to the benefit of all,

1 and these changes are clearly a step in the right
2 direction. Unfortunately, some of the changes being
3 contemplated today are not. These changes I strongly
4 believe will have drastic, unintended, and very
5 negative consequences.

6 My clients are typically injured by a failed
7 medical device. They face mounting medical bills, are
8 out of work, and often in constant pain. They go to a
9 lawyer typically because their doctor told them to.
10 The manufacturer of the product is almost always an
11 enormous multinational corporation. David versus
12 Goliath was just mentioned, and this is your typical
13 or your textbook David versus Goliath situation.

14 Some manufacturers do take responsibility
15 for injuries caused by their product. Unfortunately,
16 these days that response is more the exception than
17 the rule. The typical multinational response is a
18 scorched-earth defense. Deny everything. Discovery
19 is essential in these cases. Proof that the product
20 works or doesn't work often can only come from the
21 manufacturer. The proof is often the amount and type
22 of other product failures.

23 This information is almost never publicly
24 available. Only the manufacturer has it. If the
25 product failure shows that a product is defective,

1 then my job is to turn to what the company knew and
2 when it knew it. This is fought, as you can well
3 imagine, even harder.

4 And let's talk about the business of law and
5 contingency fee practice specifically. I get paid a
6 percentage of what my client receives, if anything.
7 When I take a deposition, I don't get paid by the
8 hour. In fact, I pay the expenses of the deposition
9 out of my own pocket. I have zero incentive to take
10 unnecessary depositions. Likewise, once I get the
11 information I need in deposition, I have no incentive
12 to take an extra minute of deposition, much less fill
13 up seven hours. If the proposed rule changes are
14 intended to stop contingency fee attorneys from
15 conducting unnecessary discovery, don't bother.
16 Economics already does.

17 The proposed rule changes send the message
18 to magistrates and judges that they have been allowing
19 too much discovery. However, real discovery is
20 absolutely necessary for my clients to prove their
21 cases. Real discovery is necessary for justice to be
22 done. The proposed rule changes sends a message to
23 judges and magistrates that they erred when they
24 allowed real discovery. Getting back to the David
25 versus Goliath analogy, they take the rock for David's

1 slingshot away and replace it with a pebble.

2 Equally problematic to the administration of
3 justice is the limiting of the scope of discovery by
4 the five-part proportionality test. There will be
5 immense unintended consequences if this change is
6 made. Almost every discovery request will require a
7 hearing on proportionality. Judicial dockets will be
8 clogged with these proportionality hearings. Far from
9 making the administration of justice more efficient
10 and less expensive, goals I greatly applaud, they will
11 have the exact opposite effect.

12 The proportionality change is unnecessary.
13 Defendants are not shy about making proportionality
14 objections. Almost every discovery request, well,
15 many discovery requests raise an overly burdensome
16 objection often as a default response. If unresolved,
17 the defendant then has to explain to the magistrate or
18 judge why the discovery is overly burdensome and
19 convince the court.

20 This rule change turns that on its head.
21 The injured patient, my client, now has to show why
22 producing the requested information is not overly
23 burdensome or expensive to the defendant. Almost
24 certainly the only way to be able to show this will be
25 by conducting discovery on discovery.

1 Finally, moving the proportionality analysis
2 to the fore creates a perverse incentive for a
3 defendant to make any potentially incriminating
4 information as burdensome and as expensive as possible
5 to locate and collect. Then the defendant may not
6 have to produce it in litigation. They get to keep
7 their skeletons hidden, and this is certainly not
8 going to make justice more efficient or less
9 expensive.

10 Please carefully consider these proposed
11 changes. They are not minor. They are not modest.
12 They are drastic, and they will not help the cause of
13 justice. Thank you.

14 JUDGE CAMPBELL: Thank you, Mr. Maglio.

15 Are there questions from the committee?
16 Judge Koeltl?

17 JUDGE KOELTL: Do you find yourself usually
18 having to take more than 10 depositions in a case?

19 MR. MAGLIO: Unfortunately, Your Honor, in a
20 hard-fought case, I would say that the first five
21 depositions are typically of the witnesses put -- and
22 answers to interrogatories by a defendant described as
23 those with the most knowledge about the case. That
24 invariably turns out not to be the case. They are not
25 at all knowledgeable about anything other than

1 typically marketing, and it takes those five
2 depositions to even begin to figure out who you're
3 supposed to depose and who actually has knowledge.

4 And quite frankly, oftentimes 10 are
5 insufficient. But on the flip side of it, Your Honor,
6 I mean, these depositions don't always take seven
7 hours. Oftentimes they're fairly quick once you
8 realize you've got the wrong guy.

9 JUDGE KOELTL: But when you need to take
10 more than 10 depositions, do the parties usually agree
11 or does the judge grant you leave to take more than 10
12 depositions?

13 MR. MAGLIO: Well, it's certainly seen by
14 the judiciary, by the magistrates and judges, as a
15 yardstick as kind of what's supposed to be done in a
16 typical case. And I have the burden to explain to
17 them that this is not a typical case, that this is
18 much more complex than your usual case and thus more
19 discovery than typically allowed is necessary.

20 JUDGE KOELTL: But you do get it. The
21 judges typically give it, right?

22 MR. MAGLIO: But it's a fight. It's a
23 fight. And I in my practice have been successful in
24 getting it when necessary. But quite frankly, with
25 this rule change, I fear that that will not be the

1 case.

2 JUDGE CAMPBELL: Other questions?

3 Professor?

4 PROF. MARCUS: I'm interested in your
5 expanding a bit on the 26(b)(1) proposed change. I'd
6 like you to explain why that change produces the shift
7 in burden regarding burden that you say it will
8 produce and where that comes from in the proposal
9 that's out for comment.

10 MR. MAGLIO: Well, that comes from shifting
11 it from the limitations on discovery to the scope of
12 discovery and from a lay attorney perspective and
13 envisioning how courts, magistrates and judges, line
14 magistrates and judges will look at this. It
15 certainly seems to shift the burden from the
16 responding party to the discovery request to the party
17 that's making the discovery request. The party that's
18 making the request now has the burden of showing that
19 it is within the scope of permissible discovery.

20 JUDGE CAMPBELL: Other questions?

21 (No response.)

22 JUDGE CAMPBELL: All right. Thank you very
23 much, Mr. Maglio.

24 Mr. Cohen?

25 MR. COHEN: Good morning. My name is David

1 Cohen, and I'm with the law firm Reed Smith, and I
2 head the records and e-discovery practice group at
3 Reed Smith. I'm here today. I have not checked my
4 views with my clients or my law firm, so I have to say
5 they're my own views, but they're my views based on 30
6 years of experience, primarily representing companies,
7 from small to large companies, mostly on the defense
8 side but periodically on the plaintiff's side.

9 But I have a real view of discovery based on
10 30 years of experience and focusing on e-discovery.
11 It originally wasn't my intention to focus on
12 discovery. I hoped to try cases. But when I got to
13 my law firm and started working on big cases, I
14 quickly learned that very few cases actually go to
15 trial.

16 At the time -- I graduated from Harvard Law
17 School 30 years ago -- I think the statistics were
18 about 10 percent of federal cases went to trial. I
19 saw that drop to less than 5 percent. And just before
20 coming here, I went on the federal court website to
21 see what the percentage is now of the federal civil
22 cases that actually go to trial. The latest
23 statistics for 2011 are posted: 1.1 percent of cases
24 reach trial, in 2010 1.1 percent, 2009, 1.2 percent.
25 So about 1 percent of cases are making it all the way

1 to trial. And from my observation of hundreds of
2 cases over my career, maybe thousands of cases, the
3 main reason is the expense, and the main driver of
4 that expense is the cost of discovery.

5 We need to do something about the cost of
6 discovery. Our clients are settling cases all the
7 time because the discovery costs are out of
8 proportion. It's not about the merits anymore. It's
9 about how much it costs to try cases. And parties are
10 fleeing our courts and they're going to alternative
11 dispute resolution and other mechanisms to escape
12 this.

13 So I'm speaking out today in favor of the
14 amendments to Rule 26(b)(1), and I'll also say a quick
15 word about Rule 37(e). I believe those amendments are
16 very positive as well. And I just want to give you a
17 couple of personal insights into what's going on with
18 discovery right now.

19 My practice group at Reed Smith, which I
20 started there about three years ago, now employs 65 e-
21 discovery attorneys. And we call them e-discovery
22 attorneys, but what they're job is is to review
23 documents every minute, every hour, every day, eight
24 hours a day, five days a week, 50 [sic] days a year.
25 We have 65 attorneys. That's all they do pretty much

1 is review documents, and that is because of this.

2 Now that wouldn't be so bad if the documents
3 they were reviewing were actually going to lead to
4 resolving disputes. But my experience is this matches
5 what I've seen in statistics that have been gathered
6 by big companies. Of the documents we typically
7 produce in litigation, less than .1 percent are
8 actually used as exhibits in depositions or trials. I
9 pulled that statistic from an LCJ survey I saw in
10 2010, but that matches my subjective judgment of what
11 I see in litigation.

12 Specifically, in most of our cases these
13 days, we start with more than a million pages of
14 documents, and only a small proportion of those are
15 used as deposition or trial exhibits. And if you look
16 at the broader picture of the expenses that our
17 clients are facing to preserve documents and then
18 provide documents to us that we have to review, I saw
19 a statistic Microsoft calculated that 1 out of 340,000
20 is the proportion of documents that are actually used
21 in a case versus the number that they preserve.

22 Companies today are spending millions of
23 dollars, U.S. companies are spending millions of
24 dollars, to preserve documents that are never going to
25 be used in litigation, and it's putting our companies

1 in a competitive disadvantage compared to other
2 companies around the world. And we have a global
3 marketplace. We need our companies to be in a
4 position to compete.

5 Just one other comment on 26. A couple
6 years ago I convinced my firm to invest in predictive
7 coding technology, otherwise known as technology-
8 assisted review, with the idea that this would help
9 cut down the costs, cut down how much review is
10 needed. But having made that investment, we're
11 finding that we frequently can't use it because we
12 can't get the other side to agree. In many cases I
13 can't even convince case teams to try, or they know
14 it's impractical because they're facing cases in 25
15 different jurisdictions on behalf of the client and
16 they know they'd have to get all 25 judges or opposing
17 counsel, in some cases multiple opposing counsel, to
18 agree to be able to use this technology.

19 Plaintiffs have very little incentive to
20 agree to that technology if it's going to reduce the
21 burden on the defendant because they know that this is
22 great leverage for them that the defendants have this
23 burden, and that leads to settlements.

24 What we need to do right now, the focus of
25 the rules, 26(b)(1), the focus is on what may lead to

1 relevant evidence or what may be relevant. That is
2 too narrow a standard. We have to look at the other
3 side of the equation too. We have to level the
4 playing field by not only looking at the relevance but
5 also the costs. And that's what the amendment to
6 26(b)(1) does.

7 Yeah, the rules are already there in 26(g),
8 but all of us practicing know that most courts ignore
9 it. Moving it to 26(b)(1) is going to get folks'
10 attention, and people are going to start controlling
11 discovery, making sure it's reasonable, making sure
12 that parties get what they need but that costs are
13 also considered.

14 And then just very briefly on Rule 37(e), I
15 think that rule is absolutely necessary because it has
16 gotten to where in major litigation sanctions motions
17 are being used as a tactic. There's all kinds of
18 satellite litigation, and the stakes are so high that
19 parties are afraid to make reasonable judgments.
20 Where do I cut off the preservation? Is it enough to
21 preserve for 100 witnesses, or do I have to preserve
22 for 1,000 because some court is going to second-guess
23 me later and I'm going to be labeled as a spoliator of
24 evidence.

25 The thing about Rule 37(e), which the

1 committee wisely has done, is has left in remedial
2 measures so that parties can still get additional
3 discovery if they need it, even attorney's fees, the
4 things that we used to call sanctions but we're no
5 longer placing that bad label on it when you don't
6 have bad conduct to go with it.

7 And my only other comment on 37(e) is that I
8 caution the committee to be careful about the existing
9 language in 37(e)(2)(A) which requires in order for
10 there to be sanctions for the failure to preserve or
11 produce to be willful or in bad faith. Some courts
12 have interpreted willful very differently than most of
13 us think of willful.

14 If you just as part of ordinary document
15 maintenance don't turn off auto delete, that could be
16 intentionally deleting things, and courts in the
17 Second Circuit, the recent case of Sekisui and the
18 Residential Funding line of cases, even if you weren't
19 doing that because of litigation, even if you weren't
20 trying to hide evidence, even if you weren't aware of
21 the litigation, that's willful just because it was a
22 willful decision to follow your document retention
23 policy and eliminate obsolete data.

24 So I think that rule ought to be changed to
25 say the failure has to be willful and in bad faith, or

1 there ought to be a definition of willful that
2 actually means intentionally hiding evidence. Thank
3 you very much.

4 JUDGE CAMPBELL: All right. Thank you.

5 Questions? Judge Grimm?

6 JUDGE GRIMM: I think you just may have
7 answered the question that I had.

8 JUDGE CAMPBELL: Could you use the mike,
9 Judge Grimm, just so folks in the back can hear.

10 JUDGE GRIMM: Thanks. I think you may have
11 answered the question that I wanted to ask you most,
12 which was if the formula continues to be willful or
13 bad faith what the definition would be. And you are
14 saying it would be a definition that requires some
15 connection between the shortcoming on the part of the
16 party that should have preserved and an awareness that
17 that would have caused information that might be
18 relevant to be destroyed. An intentionality is what
19 you're saying.

20 MR. COHEN: Exactly. And that is how some
21 courts interpret it now. But what you have is split
22 between the circuits. You never know where your case
23 is going to go to trial sometimes. And so we need
24 that to be uniform, and I think a definition of
25 willful or simply adding the word "and" will help

1 solve that problem.

2 JUDGE GRIMM: Another question just to
3 follow up on that real quickly. Have you found that
4 when you and your firm did use the technology-assisted
5 review that it did drive down the costs of reviewing,
6 particularly with ESI?

7 MR. COHEN: Yes. When we can use it, it
8 does drive down costs, but that's I would say in 20
9 percent or fewer of our cases so far, and the reason
10 we haven't even tried in some other cases is because
11 of the fear that just having to convince the other
12 side, fight about it, et cetera, would cost more than
13 the savings. And we've seen that in cases like the
14 Clean Products case in Illinois where they spent so
15 much time fighting about it they eventually abandoned
16 trying to even use it. So there's a lot of fear of
17 actually driving up the cost for motions practice
18 because there's no balance now between cost and
19 benefit in discovery the way it's actually applied.

20 JUDGE GRIMM: Thank you very much.

21 JUDGE CAMPBELL: We've got about 30 seconds.
22 Judge Oliver, did you have a question?

23 JUDGE OLIVER: Yes.

24 JUDGE CAMPBELL: Push the button if you
25 would.

1 JUDGE OLIVER: I don't think you spoke about
2 this, but I was interested in your opinion. I know
3 some cases are probably simple, but I'm sure that you
4 also do some that are somewhat more complex and more
5 involved. What is your view about the five deposition
6 limit or proposed limit? Do you think that's actually
7 enough depositions, that's all you need in most of
8 your cases?

9 MR. COHEN: In most of the cases that my
10 firm handles, they tend to be bigger cases. There
11 tend to be more depositions. Even with the 10-
12 deposition limit, very often there's more. So I think
13 judges are used to applying discretion.

14 The thing I like about having some limits is
15 it gets people thinking about the depositions. And
16 while there are some contingent attorneys who do have
17 motivation to only take necessary depositions, we also
18 face all kinds of commercial cases where they're not
19 contingent fee cases. And believe me, I've seen a
20 lot. I've seen multiple-day depositions, and I think
21 most depositions that take seven hours can be done in
22 six and most cases that have 20 depositions can use
23 far fewer.

24 So I like the idea of that change to start
25 the conversation and get people thinking, but I think

1 most judges when shown good cause are going to grant
2 the extra depositions. And frankly, the parties
3 usually agree to that when they know that there's good
4 reason for more depositions in big cases.

5 JUDGE CAMPBELL: All right. Thanks very
6 much, Mr. Cohen.

7 Mr. Andrews?

8 MR. ANDREWS: Thank you very much, and good
9 morning. It's a pleasure to be here, and I'd like to
10 commend the work that you've done. It's tiring work
11 I'm sure, and it shows in the product, in the proposal
12 that you put forward, and I think I speak on behalf of
13 everyone on this side of the room in just saying thank
14 you for those efforts.

15 I'm here today on behalf of the Washington
16 Legal Foundation. WLF is now in its 36th year as a
17 public interest law and policy center. We advocate in
18 favor of free enterprise, limited accountable
19 government, and individual rights. WLF has a
20 longstanding interest in the work of this committee
21 and in its central role in shaping federal practice
22 and procedure, and I'd like to use my time today to
23 discuss sort of the macro view, the big picture.

24 WLF did submit formal comments a month ago
25 today actually on the specific proposals, and today

1 what I'd like to do is leave you with the main point,
2 and that main point is that the status quo is
3 completely unacceptable.

4 Everyone agrees that discovery-related
5 litigation costs are a competitive drag on the
6 American economy. The exponential growth in
7 discovery-related litigation, it doesn't merely
8 deplete the coffers of Fortune-500 companies. Massive
9 litigation costs can decimate small and medium-sized
10 businesses, many of whom can't afford to hire someone
11 to get on a plane and come up here and testify to you.

12 And all of these costs, large and small, are passed
13 along to every American every day in the form of
14 higher priced goods and services.

15 In fact, it's interesting to note, but
16 there's a story on the AP wire today that says despite
17 relatively stable inflation over the last several
18 years the cost of goods and services continues to
19 rise.

20 Now it would be bad enough if that was the
21 end of the story, but it isn't, and the reason it
22 isn't is because we are now competing in a global
23 market. Global businesses have many choices in
24 deciding where they'd like to locate their research
25 and development facilities, their factories, their

1 global headquarters. Survey after survey shows that
2 litigation costs here are higher than anywhere else.
3 And the costs of litigation, driven primarily by
4 discovery costs, is well recognized as a disadvantage
5 to bringing business investment here in the United
6 States, and in an increasingly global competitive
7 market, this is something that our nation cannot
8 afford.

9 The excessive costs of the U.S. legal system
10 don't simply deter foreign investment in America, but
11 they also disadvantage American companies who are
12 seeking to compete overseas. Because American
13 companies tend to locate their operations here and
14 disproportionately conduct their business here, they
15 are uniquely vulnerable to the high costs of American-
16 based litigation.

17 America's global competitors almost always
18 enjoy lower costs in their home country's legal
19 system, and as a result, when an American company
20 competes elsewhere, that company is at a peculiar
21 disadvantage.

22 Now, given all the talk of David and
23 Goliath, I think it's also important to remember that
24 the proposed reforms you're considering today are
25 about issues of fundamental fairness. And if it's

1 fundamental fairness that we're after, so-called deep-
2 pocketed litigants should not be denied the benefit of
3 otherwise sensible discovery limits. The fact that an
4 injustice is visited on litigants with a high net
5 worth is no more reason to ignore it than if an
6 injustice is visited on low net worth litigants.
7 After all, justice means justice for all, not merely
8 for some.

9 So no litigant should be essentially forced
10 to settle an unfounded substantive claim simply
11 because the discovery costs of defending the action on
12 the merits are too high and far too lopsided to permit
13 a just resolution of the dispute.

14 In conclusion, I think this is a time of
15 great promise for the committee and for American
16 justice. You can accomplish much needed change in the
17 way that federal litigation is conducted and
18 ultimately in the way state litigation is conducted
19 and also, more importantly perhaps, in the way that
20 American citizens and the world come to view the
21 administration of justice.

22 Burdensome litigation costs are an
23 unnecessary drain on American businesses who are
24 already deeply impacted by economic hardships.
25 Today's overly broad discovery regime imposes a heavy

1 burden with very little corresponding benefit.
2 Without any sacrifice to the pursuit of justice, the
3 modest revisions to the rules you propose will go a
4 long way towards reducing overall costs and improving
5 federal litigation practice. These are modest
6 revisions. They're modest, they're incremental,
7 they're common sense. They're not radical. They're
8 not draconian.

9 And with that, I yield the balance of my
10 time.

11 JUDGE CAMPBELL: Thank you, Mr. Andrews.

12 Questions from the committee? John?

13 MR. BARKETT: Is this still on? Yes. When
14 I was in law school, I had a civil procedure professor
15 named James William Moore who said to us that there
16 was no such thing as a debtor who isn't one day also a
17 creditor. We were discussing the Sniadach case in the
18 Supreme Court at the time. And I was just interested
19 in your remarks about litigation. I've seen antitrust
20 cases and patent cases where World War III would be an
21 apt description to describe two very large companies
22 on both sides taking advantage of these rules in
23 incurring the costs of litigation that you are now
24 describing.

25 So there are different obviously categories

1 of cases out there, but do you acknowledge that in
2 fact part of the reason why costs are so great can be
3 attributed in fact to people that just want to win in
4 big stakes litigation involving very large companies?

5 MR. ANDREWS: Sure, absolutely. There's no
6 discounting the role of psychology in litigation. My
7 current practice is primarily appellate, but before
8 that I was a complex commercial litigator in your neck
9 of the woods at White & Case in Miami, and before that
10 I saw federal law practice from the other side as a
11 law clerk for two years with District Judge Steven
12 Merryday. And routinely, as most district judges do
13 at least in the Middle District, he would order the
14 parties to mediation. And one of our mediators has on
15 his office a map of Napoleon's invasion of Russia, and
16 it shows month, the numbers of troops, and how they're
17 completely decimated all the way through to the end.

18 And he shows that to the parties who come to
19 try to mediate these settlements to try to get them to
20 understand that sometimes these suits are not really
21 about the merits as much as they are about winning.
22 So I think I certainly appreciate your point.

23 JUDGE CAMPBELL: Other questions? Judge
24 Pratter?

25 JUDGE PRATTER: Mr. Andrews, you wrote a

1 very lengthy letter, and among the suggestions, while
2 you applauded the limits that are proposed, you said
3 that you actually would suggest further limits. of
4 what variety and of what quantity?

5 MR. ANDREWS: Oh. Well, certainly I wasn't
6 suggesting further limits on the numbers of discovery
7 devices. One of the concerns that were expressed in
8 our comments was the attempt to sort of change the
9 culture and change the habits of practice with the
10 scope of discovery.

11 I know the committee already feels that it
12 made clear that the scope of discovery isn't items
13 reasonably calculated to lead to the discovery of
14 relevant evidence, but that didn't catch on. And so
15 one suggestion that we made and I think that some
16 others have made is that you might consider adding a
17 materiality element as well so that it would be
18 relevant and material. That way it will sort of
19 signal the change in paradigm that I think is
20 necessary to get day-to-day litigants and some judges
21 to get away from that language that's very unhelpful.

22 JUDGE PRATTER: So you're not really urging
23 numerical, further numerical adjusting?

24 MR. ANDREWS: Oh, absolutely not. No,
25 ma'am.

1 JUDGE PRATTER: Okay.

2 MR. ANDREWS: No, ma'am.

3 JUDGE CAMPBELL: All right. Thank you very
4 much, Mr. Andrews.

5 Ms. Ross?

6 MS. ROSS: Good morning. Thank you for
7 allowing me to appear. I'm here today in my capacity
8 as immediate past president of DRI, and DRI is an
9 organization, as somebody already said, of 22,000
10 lawyers who defend businesses and individuals in civil
11 litigation. Part of our mission is to work to assure
12 a fair and balanced civil justice system. That's one
13 of the key goals that our organization was created for
14 some 50 years ago, and it continues to be a key part
15 of what we try to accomplish.

16 And our members have a strong desire to
17 preserve merits-based jury system as a way of
18 resolving disputes. They believe very strongly that
19 our system of justice has been a wonderful system of
20 justice. It has allowed for people to rely upon
21 contracts, for people with injuries to pursue their
22 injuries and get legal remedies that are available,
23 and for those who are charged with violations to
24 defend themselves when the claims are not merit-based.

25 What we see happening, and this has become

1 really apparent to me over the last year as I've
2 traveled around the United States and also in Europe
3 speaking with our members and speaking also with the
4 over 50 state and local defense organizations that are
5 affiliated with DRI, is a huge concern about the state
6 of the civil justice system and the fact that our
7 clients are in many instances fleeing the system for
8 private arbitrations or are settling cases rather than
9 pursuing them on the merits because of a concern about
10 cost.

11 And so I applaud the committee for really
12 wrestling with these issues and putting out proposals
13 that we think will improve the situation and will help
14 to make sure that litigation is not about discovery,
15 it's not about setting up your opponent for some claim
16 of discovery abuse. It's about finding an efficient
17 way the key information that will allow the case to be
18 resolved on the merits. That should be the goal, and
19 we think these rules are moving in the right
20 direction.

21 I want to also address concerns that I know
22 some people have raised in the papers, and this is
23 based a little bit on part of my practice that has
24 been a significant part in some years at least, and
25 that is the whole area of civil rights. I know there

1 has been expressed a concern that perhaps changing
2 these is going to impact civil rights claims.

3 I speak with respect to this as the author
4 of an American Bar Association multi-author -- the
5 editor of a multi-author treatise on 42 U.S.C. § 1983
6 called *Sword and Shield* and as someone who has been
7 involved in representing both municipal governments as
8 well as individuals suing governments in the area of
9 42 U.S.C. § 1983 in civil rights claims for virtually
10 my whole career, and let me just say a word about the
11 kinds of clients.

12 Some of my municipal clients are very tiny
13 townships. I think probably the smallest and with
14 least resources municipal client I ever represented
15 was a very small rural township where the township
16 clerk had the city records in a room in his barn
17 because they didn't have any buildings. They don't
18 have a lot of resources in that circumstance.

19 And at the same time, I have represented
20 major metropolitan areas. I also represented the
21 property owners suing Wayne County, a fairly large and
22 well-heeled county at one time, not so much now, in
23 bringing their claim that the Michigan constitution
24 did not permit taking of private property for private
25 use, sort of the Kelo case at the U.S. Supreme Court.

1 Our case was Wayne County v. Hathcock. I'm lucky to
2 say we won, unlike the property owners in the U.S.
3 Supreme Court.

4 But the point of making these comments about
5 my experience is to say in the area of government
6 civil rights kinds of litigation, I do not see these
7 as being a problem whether I would be representing the
8 individual or the government. And I think it's
9 important to keep in mind in the area of civil rights
10 how much government information is freely and widely
11 available.

12 First of all, the FOIA statutes that most
13 states have and the U.S. Government has make tons and
14 tons of information readily available. Secondly,
15 governments operate in the public eye. Their meetings
16 are public. Their decision-making process is public.
17 Their minutes are public. All of that is public. And
18 even in some of the areas of individual claims, such
19 as the many, many claims that arise in local lockups
20 or jails or involving police, today so many of those
21 claims the governments are using videos, video
22 monitors, and the jail lockup's video monitors on the
23 police cars, and that plus the testimony of a fairly
24 limited number of people is enough to prove or
25 disprove those claims.

1 So I think these rules would be helpful both
2 to those bringing suits and to those defending suits
3 because governments are struggling, as are
4 individuals, with the economics, and what we want in
5 those very important cases is the ability to get the
6 key information, have a merits-based resolution of the
7 dispute, and not have people having to settle their
8 claim in a somewhat unsatisfactory way because the
9 costs are too high to proceed.

10 I'm happy to answer any questions.

11 JUDGE CAMPBELL: All right. Thanks, Ms.
12 Ross.

13 Dean Klonoff?

14 DEAN KLONOFF: In the 1983 cases that you've
15 handled --

16 JUDGE CAMPBELL: I'm not sure your mike is
17 on, Bob.

18 DEAN KLONOFF: In the 1983 cases that you've
19 handled, roughly what percentage were done with five
20 or fewer depositions?

21 MS. ROSS: You know, I'm not going to be
22 able to be entirely accurate about the number of
23 depositions. My work on them has been more at the
24 appellate level than at the trial level, so I'm aware
25 of the number of depositions obviously. I think many

1 of them are not huge number deposition cases, but I
2 don't want to give you a special number because I
3 didn't go back and look and I don't want to be
4 inaccurate.

5 JUDGE CAMPBELL: Judge Diamond?

6 JUDGE DIAMOND: Has the DRI with its many
7 members considered reducing litigation costs by
8 reducing the fees they charge, whether it's reducing
9 their hourly rates or figuring a different way to get
10 paid besides hourly?

11 MS. ROSS: I would say that certainly DRI as
12 an organization is not in the business of aligning its
13 members' rates. I think that would have some legal
14 consequences that we try very hard to stay away from.
15 But I can tell you that we have many discussions about
16 the business of legal practice, and it is uniformly
17 agreed that our members are experiencing serious
18 pressure on their rates. Many of the clients that our
19 members work for are extracting significant rate
20 reductions. Many of our members are now working very
21 often on alternative fee arrangements. They could be
22 capped fees. They could be a lower hourly rate with a
23 success bonus. They could be a single lump-sum amount
24 for a certain number of cases to be handled over the
25 course of a year. All of those changes are happening

1 in the litigation industry in defense firms all across
2 this country and are causing a reduction in the legal
3 spend. I think that's a fair statement.

4 JUDGE CAMPBELL: Other questions? Judge
5 Oliver.

6 JUDGE OLIVER: Just very briefly just
7 following up on Dean Klonoff's question. I don't mean
8 to push you too far, but my question to you is if
9 you're dealing with a 1983 case, let's say excessive
10 force or something like that, and you have to deal
11 both with liability issues generally as well as with
12 policy and custom kinds of issues, do you think five
13 depositions would likely be enough?

14 MS. ROSS: I think very often five or 10
15 would be enough, but again, my practice is more
16 appellate. I would say this. The policies, you know,
17 that's paper discovery. Often in policymaker cases
18 the information is going to be available. And then
19 it's targeted individuals that you can figure out from
20 the structure of the government which is fully
21 available.

22 Let me add this point about a distinction in
23 the government arena versus the private corporation.
24 When you're looking at the government, the government
25 structure, who is in command formally, who are the

1 people, including their job descriptions and what
2 they're doing, that information is available through
3 FOIA. And so a lot of that preliminary work at
4 figuring out who the key players are can be done
5 through these other mechanisms so that then the actual
6 discovery can and should be very targeted.

7 JUDGE CAMPBELL: All right. Thank you very
8 much, Ms. Ross.

9 Professor Carrington?

10 PROF. CARRINGTON: Thank you very much. I
11 guess I should identify myself. I am a retired
12 professor. I spent eight years as the reporter for
13 this committee back in ancient times, and it was a
14 wonderful adventure. I was appointed by Warren Burger
15 to that role and continued with a number of different
16 federal judges, all of whom were very dedicated to the
17 work of the committee, and I thoroughly enjoyed it.

18 But there was an adversary process at work.

19 One of the things that happened in the first couple
20 of years that I was a reporter was there appeared on
21 the scene something called the Competitiveness
22 Commission, which was led by Vice President Quayle on
23 the appointment of President Bush, and I attended a
24 couple of their sessions, and one of the things that I
25 was asked informally on such events was couldn't we

1 just get rid of Rules 26 through 37. Wouldn't that
2 make the whole system a whole lot better if we just
3 got rid of discovery, because it costs a whole lot of
4 money, and it makes American business less profitable,
5 and consequently we can't compete as well in the
6 international global market. And we were hearing a
7 little about this sort of thing just a few minutes
8 ago, an echo of that same notion.

9 It was ultimately resolved in a way. There
10 were a lot of minor changes made in the rules, some of
11 which I served as draftsman for. And one of them did
12 have to do with the idea that an attorney had a duty
13 to make a disclosure. If you already had the document
14 and you knew perfectly well the other side needed it,
15 you ought to turn it over.

16 That was proposed by one of the members of
17 the committee, and we put it in the rules, and it did
18 go to the Supreme Court. Everybody said it was okay.

19 It went through and was presented to Congress. And
20 sometime after that the president of the American Bar
21 Association exploded at the idea of our trespass on
22 the adversary tradition, and he actually went to the
23 House of Representatives and got them to vote 365 to
24 nothing that the rule that I had drafted for the
25 committee and was going through the process to that

1 point should not become the law of the United States.

2 But they didn't get to the Senate in time
3 and so the rule did become the law. And I hold the
4 distinction of having written a law that became the
5 law of the United States, notwithstanding the fact
6 that the House of Representatives voted 365 to nothing
7 that it should not become law.

8 So I am a veteran of that kind of political
9 process. I have written a short statement that I
10 didn't get in the mail, but maybe I can just pass it
11 around. It was something I did prepare for this
12 presentation, and I thought maybe for the few minutes
13 I'm here today I would like simply to emphasize the
14 historical mission of this committee and of this
15 function, what are the purposes of the rules, and to
16 remind you that in the 19th century the United States
17 and its legal system was in pretty deep trouble.

18 Things were kind of falling apart because of
19 diverse conflicts that were arising in the national
20 economy, that we had railroads and we had factories,
21 but nobody was taking care of much of anything, and a
22 lot of harm was being done to a lot of people, a lot
23 of businesses, and as a result, there was a good deal
24 of conflict, which led to the comment -- produced the
25 comment by Roscoe Pound about the necessity of somehow

1 or other getting to solve the conflict problems. And
2 he was the author of the purposes of the rules, which
3 was to convince everybody that their rights would be
4 enforced, and everybody's rights are going to be
5 enforced. And that really was the message of Roscoe
6 Pound's statement. The American Bar Association
7 bought into it, and that's what produced the Federal
8 Rules, that enabling act, and where we got the rules
9 in 1938.

10 And that is the principle expressed in Rule
11 1, and I beg you to keep that very much on your minds,
12 that our aim is to convince everybody that their
13 rights will be enforced, whatever those rights,
14 substantive rights may turn out to be. And to some
15 extent, the efforts to economize on the process of
16 course do have the potential to jeopardize somebody's
17 interests. And I think you have to be very careful
18 about what you're doing with the discovery process in
19 that regard. And it may well be that the ABA will be
20 back again if you are trying to make lawyers betray
21 their clients in some way or do something that is seen
22 not to be in the interest of their clients.

23 That was the problem we got into with the
24 rule that I wrote, and I think there's still some
25 little echoes in these present rules that do invite

1 concern, particularly the amendment to Rule 1, which
2 didn't appeal to me at all anyway, but particularly I
3 think it kind of suggests that lawyers are supposed to
4 be not too vigorous on behalf of their clients if it
5 would somehow be a pain to the other side.

6 The cost of discovery is in many minds an
7 inflated item. The Federal Judicial Center doesn't
8 find the cost of discovery to be out of control in
9 most cases. And the ones where we really can say
10 obviously a lot of money is being wasted on discovery
11 tend to be those big cases in which big enterprises
12 are already on both sides of the case, and that
13 sometimes does lead to them getting out of hand.

14 I have no doubt that one of the consequences
15 of the discovery rules -- and not of the discovery
16 rules but the Federal Rules and other -- the discovery
17 process particularly is the elevation in hourly
18 billing by American law firms. That idea really
19 didn't catch on until about 1950, somewhere along in
20 there, and the price just kept going up and up and up.

21 And it is pretty amazing to think about somebody
22 charging \$10,000 for half an afternoon of deposition.

23 But a lot of that kind of expenditure goes
24 on, and I do think that has been a problem. We get
25 some reassurance from the current literature

1 indicating that the value and the price of legal
2 services is going down. The market has affected that,
3 and it's harder to charge \$1,000 a minute for your
4 time than it used to be. Clients are more
5 mistrustful, more likely to control the expenditure of
6 time by their lawyers.

7 So the proportionality question is less of a
8 problem than it is sometimes presented to be. And I
9 urge you to be cautious about trying to save on
10 discovery expenses at the cost of making individual
11 rights harder to enforce. And there are a lot of
12 detailed circumstances in which there's a risk of that
13 happening.

14 The kinds of cases that are most likely most
15 vulnerable to invocation of the idea of constraining
16 disproportionality are going to be those cases in
17 which an individual has a claim or a small business
18 has a claim against a big enterprise and is trying to
19 figure out what was going on out there, who was doing
20 what to whom, and who is responsible for this. And
21 that does run up the costs, no question.

22 So that is a caution that I wanted to
23 express. The other items, well, I guess I have pretty
24 much said what I have put out at little further length
25 in that two-page statement, but --

1 JUDGE CAMPBELL: Professor, we will read
2 this with care, but if I can ask you a question on
3 something you just said?

4 PROF. CARRINGTON: Sure.

5 JUDGE CAMPBELL: One of the interesting
6 dynamics in this process is that concern about access
7 to justice is pushing on both sides of this. Those
8 who are seeking to reduce the cost of litigation are
9 doing so in part because so many people are priced out
10 of federal court. They can't get in. They can't get
11 a lawyer to take their case because it just costs too
12 much to litigate. And part of the thought is if we
13 can somehow try to reduce the cost, we will enable
14 more people to come into federal court. And of
15 course, the opposite side is saying you make these
16 changes, you're going to preclude more people from
17 federal court because they can't prove their case.

18 Do you have a thought on that tension and
19 how we ought to be trying to balance those arguments?

20 PROF. CARRINGTON: Well, my sense is that
21 the individual plaintiffs are not the ones who are
22 complaining very much about the cost of presenting
23 their cases or defending themselves and that it tends
24 to be a problem primarily, not exclusively but
25 primarily of big enterprises who are engaged in

1 litigation of one kind or another and who necessarily
2 have more individual officers and employees who are
3 engaged in the controversy, and the price tends to get
4 high.

5 And that tends to be -- I mean, the Federal
6 Judicial Center's data tends to point in that
7 direction. It's the disputes between big enterprises
8 that really run off the charts for cost. And I'm not
9 convinced that in an ordinary civil rights case that
10 there's really a serious problem about excessive
11 costs. There are undoubtedly some episodic cases,
12 some odd ones here and there in which you encounter
13 some extraordinary waste of time, but I'm not
14 persuaded that the real purpose here is to save costs.

15 I think there is an underlying purpose that
16 was expressed to me by the Quayle Commission, which
17 was to make American business more competitive by
18 protecting it from liability. And I think it's not
19 always candidly presented that way, but I think that's
20 a lot of what we're talking about.

21 JUDGE CAMPBELL: All right. John?

22 MR. BARKETT: Professor, I'm interested in
23 your reaction to this question. When Edson Sunderland
24 was put on the advisory committee, he was put on there
25 in large part to draft the discovery rules, and he did

1 that, draft the summary judgment rule, the pretrial
2 conference rule, and I've wondered a lot if those
3 rules -- and if Professor Sunderland were writing
4 those rules today on a clean slate in an era where we
5 have social medial and social media discovery on the
6 plaintiff's side, which is becoming a very significant
7 issue both in terms of preservation and spoliation,
8 and an era where you've heard already about the amount
9 of electronic discovery where we're not dealing with a
10 few pieces of paper, where under Rule 34 originally
11 there was a good-cause requirement when the rules were
12 first adopted before you could even get documents.

13 Now we're in an era where judges have been
14 basically taken out of the discovery process and we're
15 dealing with large volumes of data that you need a
16 vendor to help you with in many cases, including a lot
17 of small cases.

18 How do you think the rules would have been
19 written if the rules committee members were dealing in
20 an environment that we're dealing with today where
21 there are terabytes and even larger amounts of
22 information on the corporate side. We've heard about
23 the preservation costs. And even little people walk
24 around with eight and 16 and 32 gigabyte devices in
25 their pockets representing hundreds of thousands of

1 files. I'm curious as to how you think Professor
2 Sunderland would have dealt with something like that
3 and how it might guide us based on your historical
4 perspective.

5 PROF. CARRINGTON: Well, Edson Sunderland
6 was a fine scholar and a good voice for the cause. I
7 don't have a direct answer to your question. I mean,
8 I think it's -- well, I'm not sure exactly what the
9 question is. Edson Sunderland, yeah. Go ahead.

10 MR. BARKETT: Well, I'm interested in your
11 reaction. I appreciate very much what you said, that
12 you don't think the costs are really that great.

13 PROF. CARRINGTON: Yeah.

14 MR. BARKETT: I don't know when the last
15 time was that you actually worked on a document
16 production involving electronically stored
17 information, whether on the plaintiff's side or the
18 defense side, whether it's a small case or a large
19 case. But I do recognize that these costs can get
20 expensive.

21 PROF. CARRINGTON: Well, I'm sure they can
22 in extraordinary cases.

23 MR. BARKETT: Well, I beg to differ with you
24 there. It doesn't have to necessarily be that
25 extraordinary. But that's my point is how familiar

1 are you of what goes on day to day in both state
2 courts and federal courts.

3 PROF. CARRINGTON: I'm not pretending to be
4 engaged in daily litigation.

5 JUDGE CAMPBELL: Could we have you just back
6 at the mike, Professor? We're sort of losing you.

7 PROF. CARRINGTON: Sure. I'm a senior
8 citizen. I'm a little over the hill for all of this,
9 and I grant you that I'm not into all of the
10 technology. But I am aware of the fact that the same
11 engineering that produces the technology also produces
12 ways of tracing and tracking and getting information
13 out of a huge pile of documents. And it also enables
14 us, for example, if you don't want to read all the
15 documents, you can hire somebody in Asia somewhere who
16 can read English who can do this for a very small fee.

17 MR. BARKETT: But there's a cost associated
18 with every one of those steps.

19 PROF. CARRINGTON: Oh, to be sure, there's a
20 cost. Litigation is not free, and I didn't mean to
21 suggest that it is. But the important step, more
22 important step here in my view is to make sure that we
23 are making a pretty full effort to enforce the rights
24 of individual litigants.

25 One of the -- maybe if I can just take a

1 moment. There's a wonderful book out recently that
2 inspires me to think about the kind of issues that
3 this group puts together, and maybe some of you
4 have -- maybe all of you have read it, *Why Nations*
5 *Fail*. It's written by economists, and it's got
6 endorsements by a whole series of Nobel Prize-winning
7 economists. And the point of the book is that if you
8 want a country to work, you have to make sure you run
9 a system that is inclusive, that gives ordinary
10 citizens a sense that it's their country, it's their
11 place, and they have a stake in it.

12 And if you don't do that, then you're going
13 to have some serious problems. And they go all over
14 the world with examples of countries that have fallen
15 apart, others that have come together, a striking
16 contrast of Botswana as a country that works and it's
17 prosperous, although they don't have any natural
18 resources and they don't -- it's just amazing right
19 there in the middle of South Africa is a prospering
20 little country. Why? Because everybody in Botswana
21 thinks of themselves as having a dog in the fight, as
22 having a stake in the enterprise. And somehow they
23 got that way.

24 The contrast between North and South Korea
25 is another one that they dwell on at some length and

1 very persuasively, that the poorest people in Asia are
2 in North Korea, and it's because the government is so
3 full of itself and the people who are prospering
4 control everything, and they control it to make sure
5 that they continue to prosper and prosper more if
6 possible, never mind what happens to ordinary folks.

7 And they go all over the world taking
8 examples of this. And the change that occurred in
9 England in 1688 was a change of that kind in which
10 suddenly, suddenly all the citizens, all the subjects
11 of the king felt that they had some role, some
12 participation, some sense of mutual commitment that
13 made it into a more prosperous nation than it had been
14 before.

15 So I do think it is very important to pursue
16 that objective, and the Federal Rules of Civil
17 Procedure were designed to do precisely that. That
18 doesn't answer all the questions. I don't pretend to
19 say exactly what ought to be done. And as I say, I
20 wrote one rule myself that the American Bar
21 Association thought was terrible, and maybe it is.
22 I'm not sure.

23 I would certainly not want to go very far
24 down the road of burdening plaintiffs' lawyers with
25 duties that will diminish their ability to bring their

1 cases, and the amendment to Rule 1 troubled me on that
2 ground. I didn't particularly like the idea of making
3 the plaintiff's lawyer responsible for the outcome as
4 under Rule 1. I mean, Rule 1 is a very good rule, and
5 we want to make it as efficient as possible, but
6 trying to impose an independent duty on the part of a
7 lawyer representing the plaintiffs to try to save
8 costs and prevent this from being too vigorous a
9 dispute is I think subject to the same kind of
10 complaint that was brought to the House of
11 Representatives in my time.

12 JUDGE CAMPBELL: All right. Well, thank you
13 very much, Professor Carrington.

14 PROF. CARRINGTON: Okay. Thank you, thank
15 you.

16 JUDGE CAMPBELL: We are going to take a 15-
17 minute break. We will resume promptly at 10:43.

18 (Whereupon, a brief recess was taken.)

19 JUDGE CAMPBELL: Folks, let's get started if
20 we can, please. It's 10:43.

21 (Pause.)

22 JUDGE CAMPBELL: Okay. We are going to
23 continue with Mr. Redgrave.

24 MALE VOICE: Would you like me to shut the
25 doors?

1 JUDGE CAMPBELL: Actually, in fairness to
2 you, I'm going to go out and call folks in.

3 MALE VOICE: I'll get it.

4 JUDGE CAMPBELL: Okay.

5 MALE VOICE: We'll fight for the honor.

6 (Pause.)

7 JUDGE CAMPBELL: All right. Mr. Redgrave.

8 MR. REDGRAVE: Thank you, Your Honor, and
9 it's a pleasure to be here. I appreciate the
10 opportunity to address the committee. My name is
11 Jonathan Redgrave. I'm a partner in Redgrave LLP.
12 I'm here in the Washington, D.C. office. The views
13 I'm expressing are mine and mine alone. I've had the
14 privilege of litigating cases over the last 20-some
15 odd years, a wide variety. I've certainly been
16 involved in the big ticket litigation, but I've also
17 done things from wrongful repossessions to small
18 business-to-business disputes, to lawsuits involving
19 employment rights, a wide variety of cases I've seen
20 in my time.

21 And I've also been involved in the Sedona
22 Conference Working Group on Electronic Document
23 Retention and Production for years. I was the first
24 chair for the first five years, and I'm currently a
25 chair emeritus of that group.

1 I want to commend the Advisory Committee and
2 especially the discovery subcommittee for its work on
3 these proposed rules. I think it's a tremendous
4 undertaking, and it has considered and addressed views
5 and concerns from all angles.

6 While I'll be submitting written comments by
7 the deadline probably in January, I want to provide
8 specific testimony today on three subjects, the first
9 being why I believe the committee should move forward
10 with these rules; secondly, my particular views on the
11 proportionality provisions of Rule 26; and then some
12 views on Rule 37.

13 With respect to the imperative to act, I do
14 not believe that we can wait forever for the ever-
15 elusive empirical data to develop. I've heard that
16 and seen that in many of the comments. But we all
17 know the famous quote attributed to Benjamin Disraeli.

18 There are three kinds of lies: lies, damn lies, and
19 statistics. Perhaps a fourth is the absence of
20 statistics.

21 The absence of empirical data, especially in
22 this age of electronic information that is continually
23 developing at warp speed, is not a stop sign. In
24 fact, there are many well-experienced voices in this
25 room and amongst the judges around the country as well

1 as practitioners and clients who have lived the past
2 and the present and can help and understand what lies
3 ahead and what needs to be done.

4 Indeed, I believe that the comments that
5 arose at the Duke conference more than three years ago
6 and in many of the written comments that have been
7 submitted from disparate groups reflect a consensus
8 that the civil rules governing discovery need further
9 amendments.

10 I also commend the steady and deliberate
11 pace that has been pursued by the committee and the
12 discovery subcommittee. Anyone who thinks that this
13 process is rushed has missed the first six-plus years
14 of this movie.

15 Finally, I also believe that all parties,
16 all parties in federal civil litigation, individuals,
17 small businesses, state, local, and federal government
18 agencies, as well as large businesses, will benefit
19 from the proposed rules changes that adjust procedures
20 to better honor Rule 1.

21 With respect to the 26(b)(1) amendments, in
22 short, I support the proposed changes. This is not a
23 radical change. This is a change that gives
24 meaningful life to the promise of proportionality
25 envisioned by the 1983 amendments.

1 In 1984, Professor Arthur Miller, obviously
2 known as a contributing architect to the 1983
3 amendments, said, "Redundancy and disproportionality
4 most people would agree should be excised." Now,
5 although Professor Miller may not have viewed these
6 proposed changes in 2013 as favorably, the sentiment
7 he expressed at the time in 1983 is absolutely true
8 today and perhaps in my opinion more compelling than
9 ever in light of the exponential growth of data that
10 everyone has. It's not just large businesses.

11 Mr. Barkett noted earlier in his questioning
12 about the vast growth of information in social media
13 and in the cloud. This impacts everyone, individuals,
14 and we're just beginning to see the tip of that
15 iceberg and what that means and why proportionality is
16 critical for all litigants.

17 I've been doing a lot of work on this in
18 trying to write a law review article on the failed
19 promise of proportionality, and I think there are
20 three reasons why it has failed to meet the promise in
21 1983. First, partisan courts quite frankly ignore the
22 proportionality factors altogether. Haphazard
23 arguments are made regarding burdens and needs, and
24 there's no meaningful body of stare decisis.

25 Second, when parties have argued

1 proportionality, they've missed the point of
2 proportional discovery, the focus on the discovery
3 device and whether it's worth the candle and instead
4 just cite to a factor, it's a big case, or cite to a
5 factor by itself without really tying it with a
6 discovery device.

7 And third, I think the absence of a
8 consistent mandated approach to proportionality causes
9 the parties to seek and courts to default to a view
10 that I'm not going to get reversed if I give too much
11 discovery.

12 So why do the proposed rule changes help?
13 First, I believe it reinforces the need to consider
14 proportionality factors when addressing discovery in
15 every case. It can no longer be ignored by parties or
16 courts. The proposed deletion of existing language is
17 likewise necessary to achieve this end.

18 Importantly, proportionality is employed in
19 the amended rule, as I read it and understand it, it's
20 still party and position neutral. Proportionality
21 helps those seeking discovery as much as those seeking
22 to limit discovery. What the rule does is require
23 lawyers to do their jobs better.

24 What are the claims or defenses? How does a
25 particular discovery request seeking relevant

1 information move the ball forward? Is it worth that
2 candle? And asking and answering these questions does
3 not equate to a roadblock at all. They're fundamental
4 questions that with appropriate answers can justify
5 extensive discovery in those cases where it's needed,
6 and that goes for whether it's in the context of a
7 massive intellectual property rights dispute, an
8 employment law fight, or even a civil rights context.

9 Proportionality is inherently and remains in
10 this proposed rule infinitely elastic upon proper
11 justification, and this rule doesn't inherently harm
12 anyone or change the burdens.

13 With respect to Rule 37, I know I only have
14 a few seconds possibly to address this. I believe
15 that Rule 37(e) in its current formation has failed to
16 live up to the promise. I think what the discovery
17 subcommittee has done in formulating a new 37(e) is
18 commendable, but I think there are still some issues
19 with the drafting.

20 I suggested a year and a half ago a simpler
21 formulation of the rule, and I may with all due
22 respect submit something in my January written
23 comments. But I think in terms of putting forth some
24 ideas besides just less language, I think that the
25 curative measures right now is untethered to any idea

1 of culpability as well as prejudice. I think John
2 Rabiej has submitted a comment in this regard. I
3 think that it is worthy of consideration by the
4 discovery subcommittee and this committee.

5 In terms of the bad faith or willful that's
6 currently in (b)(1), I believe we should focus on one
7 of those terms and define it, and I would pick bad
8 faith. I think having the alternative terms leads to
9 a sense of confusion, and I think that will lead to
10 more disputes.

11 In terms of (b)(2)'s language, and I know
12 several people are opposed to that in its entirety. I
13 think the real harm here is in any meaningful
14 opportunity to present or defend against the claims.
15 That kind of concept, any meaningful opportunity, is
16 far distant from what we at Sedona when we wrote the
17 Sedona Principles talked about in terms of the
18 materiality of loss. In other words, it mattered to
19 the outcome for any sort of sanction. And I think
20 when we're talking about these even larger sanctions,
21 tying it back to materiality, you can say do they have
22 an opportunity to present or defend a case or a claim.

23 That's not really the issue. Did it make any
24 difference? Was it going to make a difference to the
25 outcome? And that's a more important test and a

1 narrow one I admit, but I think it's the right one.

2 In terms of the 37(e)(2) factors, I do not
3 believe they should be in the rule. I think that
4 you've got five different factors that are purporting
5 to define four different things that are not necessary
6 to an understanding or an implementation of the rule.

7 If I were in the committee, I would suggest putting
8 them in the committee notes. And then I think finally
9 the notion of the sanctions that are going to be
10 opposed being the least severe available to do the
11 job, that I believe should actually be elevated into
12 the text of the rule itself.

13 Those are my comments, and I'd be happy to
14 take any questions.

15 JUDGE CAMPBELL: Thank you.

16 Questions? Parker.

17 MR. FOLSE: I wanted to give you a chance
18 to --

19 JUDGE CAMPBELL: Could you push the button,
20 please, Parker?

21 MR. FOLSE: Thank you. I wanted to give you
22 a chance to comment on two thoughts I had as I
23 listened. You said that the proposed language in Rule
24 26(b)(1) is party and position neutral. Would you
25 agree that in a case in which there is an imbalance in

1 the possession of information where one party has
2 information that the other side needs to prove its
3 case, but the reverse is not true, that the rule
4 favors parties that are in possession of information
5 that they don't want to disclose by giving them
6 additional tools to resist discovery requests? So
7 that's the first point.

8 And the second is you said that the language
9 as phrased is infinitely elastic in that it still
10 allows courts to provide and tailor discovery
11 depending on the needs of the case. And I wondered if
12 it is in fact infinitely elastic, then why do you
13 believe the change in the language is going to work
14 any kind of a change in the landscape of discovery and
15 the costs of litigation?

16 MR. REDGRAVE: I'm happy to address both.
17 With respect to the first one, I don't believe this is
18 providing additional tools in a disparate situation of
19 the one side having a lot of information and the other
20 side not. I say that because the formulation in 1983
21 of proportionality, and I can go back to some of the
22 original concepts here, but there are a lot of
23 students of the rules on the committee.

24 That last sentence on 26(b)(1) right now
25 says the courts shall consider the 26(b), (c) or the

1 renumbered factors over time with respect to
2 proportionality considerations has already been in
3 there. But what we've seen, and this is my caselaw
4 research, is people haven't effectively used those.

5 So it's not a matter of additional tools now
6 being given to let's say large corporations to beat
7 down plaintiffs who want information. It's saying
8 everyone needs to come to that consistent with the
9 Rule 26(g) obligation to say, hey, what is this case
10 really about? What do I need?

11 So, in the instance here with respect to a
12 true uniform application of proportionality, I think
13 representing an individual, you can justify why I need
14 whatever number of depositions or why we need
15 discovery from X number of custodians or why we need
16 information from certain databases. And it's getting
17 more complex. It's not just turning over documents.
18 But the idea of proportionality, as I said, helps both
19 the requesting and the responding party in discovery.

20 That's why I say it's neutral. And I think
21 what you're seeing in terms of, you know, a lot of
22 arguments that it's going to be unfair. It is not
23 some new roadblock because it currently exists as a
24 tool. It's just not being uniformly applied and
25 there's not a body of consistent practice about how to

1 do this. And quite frankly, I think that development
2 of this under this new rule will help those requesting
3 parties better translate what they need for their
4 claims to articulate why the discovery they seek from
5 a large entity is proportional to give them the right
6 of access to justice.

7 And I will say one of the important things
8 from the last speaker was we do need a rule set that
9 everyone believes gives them a fair shake in court,
10 that they're not going to be overly burdened, but
11 they're not going to be cut off from their rights.
12 And I think this rule set does that balance.

13 Now the second question you asked with
14 respect to the infinite elasticity, I think there is
15 an element --

16 JUDGE CAMPBELL: If you could cover this in
17 about 30 seconds, we would appreciate it.

18 MR. REDGRAVE: I'll cover it in 20 seconds.

19 JUDGE CAMPBELL: Okay.

20 MR. REDGRAVE: The infinite elasticity point
21 is focused purely on the fact that the rule doesn't
22 cut off anyone from the ability to argue and show
23 their need in a particular case. It doesn't give a
24 company a blanket power to say we're not doing it.
25 That concept as prescribed in this rule just says

1 everyone has to come to the table understanding you've
2 got to deal with it both from a requesting and a
3 responding side, deal with it responsibly, consistent
4 with your duties, and if you can justify it based on
5 that discussion, go to the judge, you can get enormous
6 amounts of discovery if it's right for that case,
7 whether it's civil rights, intellectual property,
8 whatever it is.

9 JUDGE CAMPBELL: All right. Thank you.
10 Peter Keisler has a brief question.

11 MR. KEISLER: Just one question. Could you
12 elaborate, Jonathan, on why with respect to Rule 37,
13 why materiality you think would be a narrower standard
14 than irreparably deprive a party of any meaningful
15 opportunity to present or defend against claims in the
16 action? My instinct would be the opposite.

17 MR. REDGRAVE: In terms of -- well, there's
18 a couple things here. Materiality as we use it in the
19 Sedona world applied to all. There had to be some
20 showing that for sanctions there is a breach of the
21 duty to be fair. There's culpability and then there
22 was material prejudice. So there is an element
23 applying to all sanctions no matter what.

24 With respect to the specific term that you
25 used there, the irreparable deprivation, that is

1 pretty tight. But the of any opportunity to present,
2 that becomes very loose as opposed to saying it was
3 any -- not any opportunity to present. But
4 irreparably deprived, or I would say actually had a
5 material -- it was reasonably probable to have a
6 material impact on the outcome. In other words, it
7 really did change the outcome rather than your ability
8 just to argue.

9 Does that make sense? I'm really saying
10 it's that ability to argue that's -- anyone can say I
11 could have argued, I should have argued and maybe that
12 would make a difference to what I could have argued.
13 I'm saying no, it should make a difference to what the
14 outcome would have been.

15 MR. KEISLER: Although by definition here
16 you're dealing here with something that people
17 couldn't obtain and was lost or destroyed. So, you
18 know, there could be an issue with applying that kind
19 of standard to something where the content is not
20 fully or even perhaps at all understood.

21 MR. REDGRAVE: That is absolutely right.
22 There is a close alignment between those two standards
23 and the reality that you're arguing about things that
24 no one knows exactly what they were. I agree, that is
25 a problem.

1 JUDGE CAMPBELL: All right. Thank you very
2 much.

3 Professor Stancil?

4 PROF. STANCIL: Thank you. My name is Paul
5 Stancil. I'm a professor of law at the University of
6 Illinois. Before that, I practiced law for 10 years
7 as a litigator at both large and small firms. My
8 comments are informed by both perspectives. I should
9 also note at the outset two things. One, I need to
10 make sure I'm first because it makes me sound more
11 intelligent next time instead of repeating what others
12 have said; and second, that it's more difficult than I
13 expected to come up and be critical of people and work
14 that I deeply admire, but I'm going to go ahead and
15 forge on with that as well.

16 So, on the flight from Chicago to Washington
17 yesterday, I had the pleasure of sitting next to a
18 young legal aid attorney and she was on her way to a
19 conference here. We'll call her Angela. Angela
20 represents homeowners who are facing mortgage
21 foreclosure actions from their lenders.

22 As we talked, I realized I had to scrap my
23 planned remarks in favor of a couple of stories she
24 told me that I think highlight my concerns about the
25 proposed amendments much better than the abstract

1 academic account that I was going to offer.

2 I'm going to start with something maybe a
3 little different than you're used to, a proposal to
4 allow Rule 34 early request for production. As you
5 might expect, Angela mentioned that her clients enjoy
6 few advantages relative to their opponents. Mortgage
7 lenders typically have a few more dollars in the bank
8 even today than the homeowners who can't make their
9 payments. But one thing the homeowners can do and
10 their lawyers can do, they can turn the pressure up
11 and impose costs by handling discovery requests just
12 like we handle voting in Illinois: do it early and
13 often.

14 (Laughter.)

15 PROF. STANCIL: She acknowledged that they
16 often file requests at the earliest possible moment
17 both because that puts the screws to their opponents
18 and because they know their opponents can't do the
19 same to them.

20 I'm concerned about the proposal to allow
21 early submission of Rule 34 requests primarily because
22 it will effectively move the most expensive part of
23 many cases, document discovery, forward. One can
24 characterize the period in between filing and the
25 first Rule 26(f) conference as the calm before the

1 storm, but it doesn't necessarily follow that we want
2 the storm to arrive any earlier. It depends on
3 whether we can use that calm to the net benefit of the
4 society and the system. In my experience, the no-
5 discovery period is enormously valuable, not least
6 because it allows adversaries to assess the strength
7 of their claims and defenses without being distracted
8 by the breeze generated as the discovery meter spins
9 out of control.

10 If the proposed rule change is adopted, the
11 realities of complex litigation dictate that for some
12 cases the meter will start running more or less upon
13 delivery no matter when the rules declare service to
14 have taken place. Depending on the cases, it's likely
15 to have one of two undesired effects. For cases
16 involving potentially valid claims or defenses, it
17 might stiffen the spine of the responding party,
18 making them less willing to compromise despite their
19 legal vulnerability.

20 For frivolous claims or defenses, something
21 that seems to be a matter of significant concern,
22 moving document discovery up makes filing suit and/or
23 asserting the defense more attractive because the
24 immediacy of cost imposition makes it more threatening
25 to the adversary.

1 Second, I want to talk like many others
2 about proportionality. Because I know very little
3 about foreclosure litigation and defenses available to
4 the homeowner, I asked Angela what percentage of her
5 clients have valid legal defenses to lenders' claims.

6 She indicated it was surprisingly high. In her
7 experience, upwards of 80 percent of homeowners facing
8 foreclosure have some good faith legal defense to the
9 claim.

10 This does not mean, by the way, she's
11 correct. This is just her perception, which is an
12 important point. But she also noted that only a
13 fraction of these defenses are obvious from the
14 homeowner's own records and recollections. The
15 remainder must be uncovered on discovery.

16 Finally, she noted that her biggest
17 challenge in some ways was not the banks against whom
18 she litigates but rather the judges in front of whom
19 she appears. Liberal or conservative, the judges
20 Angela sees have a decidedly low opinion of her
21 clients. They of course couldn't even manage to make
22 their mortgage payments. And they tend to believe
23 that very few will have any sort of defense to a
24 foreclosure action in the end.

25 While I applaud the Advisory Committee's

1 attempt to address discovery cost concerns with the
2 proportionality rule, I'm skeptical that any
3 proportionality rule is going to get around two core
4 problems that are inherent in the situation.

5 First, although it may be possible for many
6 judges to perform reasonable proportionality analyses
7 with respect to say the amount in controversy, those
8 sorts of factors, it's unlikely in the extreme that
9 those judges will be able to make any meaningful
10 assessment of the likely value of the proposed
11 discovery. Worse, any judge who thinks they can do so
12 will almost certainly be influenced by his or her own
13 priors regarding the type of claim at issue, and there
14 is substantial reason to believe that those priors are
15 unreliable even for the most committed and well-
16 meaning jurists.

17 Still worse, there is a serious correlation
18 problem. The very cases in which the temptation will
19 be strongest to reduce allowable discovery on
20 proportionality grounds are those in which we should
21 have the least confidence in judges' ability to assess
22 certain of those relevant factors. They're typically
23 the cases that involve significant informational
24 asymmetry problems for the parties seeking discovery.

25 In other words, they're the cases in which the

1 proponent of discovery is least likely to be able to
2 demonstrate ex-ante, as the previous speaker
3 suggested, that the likely benefit of the discovery
4 outweighs the burden or cost.

5 So in the absence of reliable data -- and
6 I'll admit right off the bat that's a very confounding
7 problem, how do you get reliable data on this -- but
8 in the absence of reliable data, rather than judicial
9 impressions regarding the likelihood that such
10 discovery will bear fruit, it seems to me
11 inappropriate to authorize the judge to invoke her own
12 priors regarding the likely value of discovery. But
13 that is exactly what the proportionality rule
14 contemplates. And making it mandatory or sort of
15 bringing more focus to it the way that these changes
16 do I think is problematic.

17 I've written elsewhere about the risk of
18 systemic bias by even the most well-meaning of judges,
19 and this is certainly not my attempt to suggest that
20 judges are anything other than people who do their
21 very best day in, day out. But I believe this is a
22 particularly salient problem, these biases, with the
23 proportionality proposal as currently drafted. And I
24 think I'm under five minutes for the first time in my
25 life.

1 JUDGE CAMPBELL: Congratulations. All
2 right. Questions?

3 PROF. STANCIL: Yes, sir?

4 MR. FOLSE: What is your view -- there have
5 been some arguments made by prior speakers today that
6 this really isn't a dramatic or a drastic change
7 because the language still already exists in Rule
8 26(g). You obviously have some concerns about the
9 appearance of many of the same words in the proposed
10 rule change to 26(b)(1). What is your view with
11 respect to whether or not moving the language into
12 26(b)(1) is or isn't a significant change?

13 PROF. STANCIL: So, when deciding whether to
14 spend limited research funds on a ticket to
15 Washington, it was my thought that maybe this ends up
16 not being such a big deal that it counts along the
17 side of not coming. In other words, I think that
18 there are a number of cases in the rules where it
19 turns out to be very difficult to move judges to
20 change behavior, and so I don't see -- you know, it is
21 possible that at the end of the day this is not much
22 of a difference functionally.

23 At the same time, I think you are very
24 deliberately in a very high profile way making this
25 issue of proportionality much more salient to judges

1 and to litigants to some degree. And so I hate to
2 sort of dodge the question because I don't know what's
3 going to happen. The one thing that I've learned --
4 and I hope you know any comment I give is that you
5 need to be modest about this sort of stuff and see how
6 it works out. I think, you know, Twombly and Iqbal
7 taught us some lessons along those lines as well. The
8 sky it turns out maybe wasn't falling quite like some
9 people predicted.

10 MR. FOLSE: I probably should have asked the
11 question a little more carefully --

12 PROF. STANCIL: Yeah. I apologize.

13 MR. FOLSE: -- because it's not just the
14 movement of the language, it's the movement and
15 replacement of other language that is in 26(b)(1).
16 But you may have answered the question already.

17 PROF. STANCIL: Yeah. I think I'm probably
18 still going to stick with the answer.

19 MR. FOLSE: Right.

20 JUDGE CAMPBELL: All right. Judge Koeltl.

21 JUDGE KOELTL: You had mentioned that the
22 legal aid lawyer liked to serve Rule 34 requests and a
23 lot of them as early as possible. What would the
24 change be under the proposed rule? Under the proposed
25 rule, yes, the document requests could be served

1 before the Rule 26(f) conference, but the requests
2 only -- the time to respond to the request is measured
3 from the 26(f) conference, and under the proposal,
4 that same legal aid lawyer can have the 26(f)
5 conference and serve, if it's that same diligent
6 lawyer who wants to serve as much as possible as early
7 as possible, you go to the 26(f) conference, you serve
8 your 34 request and it's the same time to answer.

9 PROF. STANCIL: So I'll answer this more
10 from the perspective of --

11 JUDGE KOELTL: Could I just add one other
12 thing?

13 PROF. STANCIL: Yes, sir. I'm sorry.

14 JUDGE KOELTL: The comments that we've
15 gotten from plaintiffs' lawyers almost uniformly
16 applaud this rule because --

17 PROF. STANCIL: As I would expect.

18 JUDGE KOELTL: -- they want to move forward
19 and they want to get their discovery requests out and
20 they think it would be useful to do it. And some
21 defendants say, well, we'd like to see what's going to
22 be involved.

23 PROF. STANCIL: So a couple of responses.
24 I'll speak at least to some degree as a former
25 associate at a big law firm doing electronic discovery

1 work in the earlier days of electronic discovery.
2 With respect to what that timing gives you, yes,
3 obviously it's not deemed served until the Rule 26(f)
4 conference takes place. This is going to start that
5 clock running. But I will also tell you that in the
6 words of my 14-year-old daughter, my typical response
7 when I saw a discovery request whenever it came across
8 my desk was OMG. How in the world am I going to
9 respond to this in the time I have? And if we thought
10 the case was something that was likely to survive a
11 motion to dismiss, something pretty much the norm in
12 pre-Twombly or Iqbal era, we started work immediately
13 on that, and that starts the clock running for the
14 client, and it had some effect on the client's
15 mentality as well.

16 With respect to the plaintiffs' lawyers,
17 yeah. I don't want it to come across that I am a pro-
18 plaintiff witness. I think probably my
19 proportionality comments are on balance more pro-
20 plaintiff than pro-defendant because I think it's more
21 likely the dynamic I'm concerned with is going to
22 affect plaintiffs there. But I actually think the
23 opposite is true with respect to the Rule 34 request.

24 I think moving that forward is likely to advantage
25 plaintiffs over defendants disproportionately, and I

1 think it's that -- so I don't want to suggest that
2 there is any ideological valence to the sum of my
3 comments. It's really two different things.

4 JUDGE CAMPBELL: All right. Thank you,
5 Professor Stancil. We appreciate your comments.

6 Mr. Allman?

7 MR. ALLMAN: Good morning. My name is Tom
8 Allman. I am I guess the third professor to talk to
9 you today. I'm an adjunct professor at the University
10 of Cincinnati College of Law. Prior to that I was
11 general counsel of a very large chemical company for a
12 decade that spanned the trend from documents to e-
13 discovery. And during that decade, I formed some
14 fairly strong views about the role of preservation and
15 was one of the folks that advocated that you should
16 adopt what became Rule 37(e).

17 I also served along with John Barkett on the
18 e-discovery panel at the Duke conference where we
19 advocated both a preservation rule and a rule dealing
20 with spoliation. You have before you now Rule 37(e),
21 and I'm here to endorse it, and I'm also here to plead
22 somewhat of an evolution of my thinking.

23 I originally proposed to you folks that you
24 should take the existing Rule 37(e) and tweak it. And
25 I and others, among them the Sedona conference, have

1 suggested ways in which that could be done. You have
2 chosen not to do so, and I have come to the conclusion
3 that that is *the* correct decision, and I strongly
4 support the enactment of Rule 37(e) with a certain
5 amount of tweaks in that one as well, and the reason I
6 do it is because of the role of inherent power.

7 In my view, the occupation of the field of
8 spoliation sanctions by the current draft of Rule
9 37(e) is such that it effectively cabins the
10 sanctioning power of the judges and will discourage
11 the unnecessary and overuse of inherent power to avoid
12 the restrictions that you have placed into the rule.
13 And if I could cite you to a case that really in my
14 view just captures this very well, and that's The
15 United States v. ALEO, which is 681 F.3d 290. And at
16 page 310, Judge Sutton said, "A judge may not use
17 inherent power to end-run a cabined power." And I
18 take that as a very strong support for what your
19 efforts are.

20 Let me tell you why I think what you're
21 doing is the correct thing. In my view, the lack of
22 uniformity among the Circuits on the issue of
23 spoliation is an affront to the entire judicial system
24 and it's having unnecessary consequences to both
25 individuals and entities, and I believe that the goal

1 of alleviating that confusion is worth the candle. To
2 me, that's what you're trying to do, and that's worth
3 it.

4 I believe that it will incentivize
5 reasonable and proportional preservation conduct, not
6 deinvertivize it. I think it will help do it, and it
7 will do it because it will allow people to have
8 certainty in their preservation planning, especially
9 in their primary conduct. It's often forgotten that
10 so much of what happens in the preservation world at
11 least happens before there is litigation. And it is
12 that area of primary conduct that has always concerned
13 me from day one and is the reason why I support the
14 bill.

15 However, I must caution you that some of the
16 factors and some of the wording in the committee note
17 about the factors is roughly reminiscent of some of
18 the unfortunate language in the 2006 committee notes
19 that led into a per se world where the mere failure to
20 institute a litigation hold, the mere failure to adopt
21 a preservation standard that some federal judge felt
22 should be applied universally to all cases was held to
23 justify sanctions.

24 I think you need to address in the committee
25 note that risk in ways that it will not have

1 unintended consequences. I concede that close to what
2 I'm saying is a possibility that you might want to
3 consider dropping the factors out of the rules into
4 the notes. And there is even a possibility of
5 eliminating those factors for the reasons that one of
6 the witnesses just suggested, that they're trying to
7 do too much in those factors in a very complex and
8 difficult field that is best left to folks like the
9 Sedona conference. And I confess that I'm also a
10 chair emeritus of the Sedona conference and so I'm
11 somewhat biased. But I think we do a better job at
12 Sedona of articulating the considerations of how to
13 manage a litigation hold than you can in a rule that
14 is fixed in time and only changed every 10 years.

15 Another quick comment about what you're up
16 to. I take it that you are rejecting the Second
17 Circuit decision in Residential Funding. John Barkett
18 made that point at the November 2010 conference, rules
19 committee conference. I sat behind him at the time he
20 made it. It's an extraordinarily important point.
21 But you need to think through the implications of that
22 decision. It doesn't just mean that gross negligence
23 does not justify sanctions. It also means that
24 presumption shifting is not justified by gross
25 negligence.

1 The discovery subcommittee felt that gross
2 negligence was not equivalent to willful conduct, that
3 they were quite different things. But some of these
4 recent decisions do not agree, and so you're going to
5 have to address that problem, perhaps by defining
6 willfulness to include that extra element of willful
7 intent to prevent the use of adverse information.
8 Perhaps that's the way to do it. Or perhaps you're
9 going to have to drop willfulness, or even as some
10 have today suggested, link willfulness by the word
11 "and" to bad faith.

12 Finally, dealing with Silvestri. I
13 recognize your concerns about Silvestri, but I do not
14 believe that Silvestri belongs in the Federal Rules.
15 I believe that the best way of handling it is to
16 introduce the key (e)(1) rule by the phrase "absent
17 exceptional circumstances," much as we've done in
18 current Rule 37(e), with success I might add, and I
19 see no reason to believe that you cannot do that and
20 then in the committee note explain the extraordinary
21 circumstances that lead to the Silvestri exception,
22 and it would not then be an exception. It would
23 simply be a recognized principle of law which would
24 exist outside the federal rule.

25 And in response to your penultimate

1 question, if you don't do that, what, I would suggest
2 too you might want to take a look at Rule 34(a), which
3 distinguishes between documents and ESI and tangible
4 things, and you might want to confine the rule just to
5 documents and ESI. Not just ESI. I totally agree you
6 cannot draw a line between documents and ESI, but you
7 could draw it between documents and ESI and tangible
8 things.

9 I don't recommend it. I don't like it. But
10 if you're not willing to take away some of the
11 temptation to equate (b)(2) with (b)(1) and make it
12 sound as though if you don't like the fact that you
13 can't find culpability, all you have to do is say the
14 damage is irreparable and you can avoid the rule. I
15 don't like that temptation, and I don't think it's
16 fair to the judges to give that to them. Thank you.

17 JUDGE CAMPBELL: All right. Thank you. We
18 have about two minutes for questions.

19 Judge Grimm?

20 JUDGE GRIMM: A quick question. Tom, with
21 the issue of whether we keep the factors or don't keep
22 the factors --

23 MR. ALLMAN: Yeah.

24 JUDGE GRIMM: -- if the goal is uniformity
25 to try to have a standard that is not going to change

1 dramatically from one jurisdiction to another, and
2 maybe the factors as listed are not the best factors,
3 but --

4 JUDGE CAMPBELL: Could you turn on that
5 mike? Folks can't hear you in the back.

6 JUDGE GRIMM: Sorry. But my question is
7 that if the goal is to try to have a uniform standard
8 that will be applied in the same fashion in all
9 jurisdictions as much as possible, if the choice is
10 having factors and having no factors, is there not a
11 greater risk of having less uniformity if there's no
12 guidance whatsoever as to how you might try to apply
13 those factors to achieve the goals that you're
14 advancing in the rule itself? And if we got the wrong
15 factors, are there other factors that should be in
16 there?

17 MR. ALLMAN: I would like to be able to say
18 to you I know what the factors are and here is what
19 they should be. I'm not in a position to say that. I
20 think it's an extraordinarily difficult thing. I call
21 it rulemaking by committee note really is what it's
22 about. I just think the risk of not -- reasonability
23 and proportionality clearly are related to and
24 important to this process, but when you throw in those
25 other factors -- I'm just not happy with your factors.

1 (Laughter.)

2 JUDGE GRIMM: We'll factor that in.

3 MR. ALLMAN: Okay.

4 (Laughter.)

5 JUDGE CAMPBELL: Judge Koeltl?

6 JUDGE KOELTL: If you dropped (b)(2) and
7 added "absent extraordinary circumstances," wouldn't
8 that be far more expansive than (b)(2) is now and lead
9 to the problem that it's really undefined so that
10 you're really back in the situation that sanctions
11 could be imposed under the standards that some have
12 said are too broad?

13 MR. ALLMAN: Yes, I agree it's a risk. I do
14 think a really carefully written committee note --
15 here I am advocating a good committee note, but I
16 think a carefully written committee note that explains
17 and especially touches on the point I tried to make
18 kind of subtly in my paper, that using the irreparable
19 prejudice standard as an excuse to enter a default
20 judgment and allowing a party to go immediately to the
21 damages suffered is equivalent to creating a
22 spoliation tort.

23 I think what you need to do is carefully
24 define in the committee note that the purpose of the
25 Silvestri exception is to permit parties who would be

1 unfairly asked to defend a case to have that
2 avoidance, and I think you could do that in a
3 committee note. So it's a risk, but I think based on
4 the fact we've had -- you know, since 2006, we've had
5 a rule that says that, and I've never seen any case
6 that has questioned or tried to use that as a hole
7 through which to drive a truck. I just haven't seen
8 it.

9 JUDGE CAMPBELL: All right. Thank you very
10 much, Mr. Allman.

11 Mr. Hedlund?

12 MR. HEDLUND: Good morning, Mr. Chairman and
13 members of the committee. First I wanted to thank you
14 for all your efforts on this committee and all the
15 hard work that you put forth, and thank you for giving
16 me a chance to speak today about these important
17 proposed changes.

18 My name is Dan Hedlund. I am a member of
19 the law firm of Gustafson Gluek in Minneapolis where I
20 practice antitrust and consumer protection law. I am
21 also vice president of the Committee to Support the
22 Antitrust Laws, or COSAL, of which I am here on behalf
23 of today.

24 I realize the time is limited given the
25 number of speakers that are appearing, so I refer the

1 committee to our written comments submitted in March
2 for a more complete recitation of our views on the
3 proposed rules. Those comments contain the input of
4 COSAL members from around the country, members with
5 many years of prosecuting complex litigation cases on
6 behalf of small businesses and consumers.

7 Today I am here to testify regarding the
8 proposed changes to Rules 26(b)(1), 30, and 33. These
9 changes are potentially unfair to parties bearing the
10 burden of proof in complex civil litigation in
11 particular and could result in increasing the costs,
12 inefficiencies, and burden of litigation for all
13 parties. These proposed changes raise serious
14 concerns because they could substantially curtail the
15 ability of litigants to gather evidence from
16 defendants and third parties. This is a problem for
17 the following reasons.

18 First, plaintiffs in antitrust cases are
19 faced with substantial information asymmetry.
20 Defendants and third parties have the bulk of relevant
21 information regarding the market, the product, and the
22 alleged conduct, while plaintiffs tend to be on the
23 outside looking in at the outset of a case. Price-
24 fixing conspiracies by their very nature are secretive
25 and hidden ventures, and oftentimes they can only be

1 proved by stringing together numerous pieces of
2 circumstantial evidence known as plus factors.

3 The evidence vital to plaintiffs' claims is
4 regularly in the sole possession of the defendants or
5 sometimes disbursed among a variety of far-flung third
6 parties. To effectively enforce the antitrust laws
7 and obtain recoveries for the businesses and consumers
8 that have been harmed, private litigation is the only
9 way to do that because although the Department of
10 Justice issues a lot of fines, as everyone here is
11 aware, that money does not go through to the people
12 who have been harmed by the illegal behavior.

13 So, in order to effectively enforce the
14 antitrust laws, the discovery rules must provide fair
15 access to defendants' and third parties' information
16 and documents.

17 Second, many recent court opinions have been
18 increasing the evidentiary burdens on plaintiffs. For
19 example, the requirements to prove class certification
20 have been expanding pursuant to recent cases,
21 including the Dukes case and Hydrogen Peroxide. This
22 has led to a period where we are required to gather
23 substantial amounts of data and to comprehend and
24 understand a great deal of documentary and testimonial
25 evidence.

1 Third, the Class Action Fairness Act has
2 brought many state law class actions into federal
3 courts. These cases typically assert the laws of
4 multiple states, further adding to the complexity of
5 the discovery process.

6 Specifically with regard to the rules, I'll
7 start with the proposed changes to 26(b)(1). Decades
8 of law students have learned the simple rule that
9 discovery is limited to that which appears reasonably
10 calculated to lead to the discovery of admissible
11 evidence. The new rule proposes to eliminate this
12 currently familiar language without replacing it with
13 an equivalent.

14 This is troublesome for several reasons.
15 First, we do believe that it is the case that the
16 burden as it stands now is presently on the party
17 withholding the information to establish that the
18 withheld information is beyond the scope or too
19 burdensome to produce.

20 In contrast, we believe that the proposed
21 rule imposes a multifactor proportionality
22 determination that will place a heavy burden on the
23 party seeking information to satisfy the requisite
24 proportionality. As we read it, the proposed
25 proportionality inquiry is open to interpretation and

1 will subject potentially every discovery request to
2 scrutiny, and we believe that will lead to
3 inefficiencies in the discovery process.

4 Third, the proportionality concept is
5 unworkable at the outset of a complex case
6 characterized by asymmetric information. Where one
7 party has all the information, discovery will
8 necessarily appear disproportional until the evidence
9 is discovered and used to prove the claims.

10 As currently written, Rule 26(b)(1)
11 generally treats litigants equally without regard to
12 the amount of potentially relevant information they
13 may have. In contrast, the proposed rule appears to
14 offer protection to larger parties who have a monopoly
15 on information by allowing them to use that
16 disproportionate burden to avoid document production
17 through the use of the proportionality argument.

18 With regard to Rule 30 and the two proposed
19 changes, first to change the presumptive limit from 10
20 depositions to five and to reduce the number of hours
21 from seven to six. With regard to antitrust cases,
22 which are oftentimes or almost always MDL cases,
23 dozens of depositions are often required to gather
24 evidence from far-flung witnesses and to preserve
25 testimony of witnesses that will not be available at

1 trial.

2 In addition, experts play a very large role
3 in the cases that we work on. One side may even have
4 more than five expert witnesses. Due to the unique
5 nature, expert witnesses should be, it's our position,
6 excluded from the proposed limit.

7 Third, reducing the presumptive limit to
8 five depositions significantly alters the bargaining
9 position of the parties. The net effect we believe
10 will be to drag down the number of allotted
11 depositions below a level necessary to prosecute a
12 complex case, which can prevent parties from obtaining
13 all the information that they need to litigate. Five
14 instead of 10 becomes the new baseline for negotiating
15 purposes.

16 With regard to the proposed six-hour limit,
17 antitrust cases involve large amount of documents and
18 data and a large amount of time during the depositions
19 is spent going through those documents and
20 authenticating them. Another issue that arises is
21 that oftentimes seven hours needs to be split between
22 multiple parties. We've been in cases where we've
23 shared time on behalf of the class with the Department
24 of Justice and with opt-out cases. We've also had
25 cases where states attorneys general are involved, and

1 so once the limit is cut to six there's fewer pieces
2 of pie to go around between the various parties taking
3 depositions.

4 At the very least, COSAL suggests that the
5 proposed presumptive limit should be modified by
6 committee comments to exempt expert and third-party
7 depositions from the proposed limits. In addition, we
8 suggest that the proposed rule could include a
9 clarification that the presumptive limit on
10 depositions is per party and not per side.

11 Finally, with regard to the interrogatories,
12 we believe that the proposed shift from 25 to 15 is
13 similarly problematic for the same reasons that I've
14 stated with regard to depositions. And in our
15 proposal, we actually put forth a suggestion with
16 respect to contention interrogatories, proposing that
17 they not be required to be answered until the close of
18 discovery.

19 To conclude, as a lawyer who works on
20 contingent cases, we at COSAL are familiar with the
21 expenses of discovery because we bear it until the end
22 of a case, and sometimes, if the case isn't
23 successful, we bear it forever. We believe these
24 proposals to restrict discovery are unnecessary and
25 should not be adopted, but in the alternative, any new

1 restrictions should include commentary and the
2 Advisory Committee notes observing that courts should
3 be expected to substantially vary the rules and
4 especially the presumptive limits and caps in complex
5 and large cases, consistent with the interests of
6 justice.

7 JUDGE CAMPBELL: All right. Thank you, Mr.
8 Hedlund. We've got about a minute of time. General?

9 GENERAL DELEREY: Thank you. Given that
10 your subject is antitrust cases, I wanted to ask you
11 about your experience. I'm not an antitrust
12 practitioner, but I sort of assume that the arrival of
13 an antitrust case would bring with it an assumption by
14 everybody, including the court, that it's going to be
15 complicated and will require more than whatever the
16 defaults are. And so I was curious about your
17 experience under the current rules in terms of getting
18 the needed discovery given the complexities of the
19 case.

20 You mentioned frequent cases with dozens of
21 depositions. Do you see an issue now with getting the
22 discovery that you need in these which almost by
23 definition would be viewed as complicated?

24 MR. HEDLUND: Thank you. Yes. I mean, I
25 think generally the experience has been that, you

1 know, for example, we're not limited to 10 just due
2 to, you know, the complexity of the case and in
3 particular the number of parties that are involved.
4 But our concern is that if the numbers shrink that,
5 you know, when we start negotiating -- for example,
6 we're negotiating with some defendants now, and their
7 proposal is that, you know, we should have three
8 depositions of each defendant family, which equals
9 more than 10 for the case. But it seems to me that it
10 becomes -- when the number is diminished, it becomes
11 sort of a new guideline or a framework to work within,
12 and the assumption of the courts will be, well, then,
13 you know, for example, if they were going to give say
14 60 depositions in a case, now they can say, well,
15 that's six times the number of depositions that are
16 allowed under the rules. But now if you did 60
17 depositions in a case and it's five, then it's 12
18 times. I think it's a harder argument for us to make.

19 Plus, I do think that with respect to cases
20 that are not like the cases that I prosecute but with
21 respect to smaller plaintiffs and cases, you know,
22 we're used in our practice to going to the court and
23 talking to the defendants about expanding the number
24 of depositions. But I do think there's probably
25 litigants out there who don't have that sort of level

1 of knowledge with respect to going about that practice
2 and I think they can be negatively impacted by this as
3 well.

4 JUDGE CAMPBELL: All right. Thank you very
5 much, Mr. Hedlund.

6 MR. HEDLUND: Thank you.

7 JUDGE CAMPBELL: Ms. Hoffman?

8 MS. HOFFMAN: Hello. My name is Anna
9 Benvenuti Hoffman, and I'm a partner at Neufeld
10 Scheck & Brustin, a small civil rights law firm --

11 JUDGE CAMPBELL: Ma'am, could you pull that
12 mike down just a bit?

13 MS. HOFFMAN: Sorry.

14 JUDGE CAMPBELL: Thanks so much.

15 MS. HOFFMAN: A small civil rights law firm
16 that handles serious police misconduct and other civil
17 rights cases around the country. Obtaining enough
18 discovery, particularly document and deposition
19 discovery, is absolutely critical to the success of
20 our civil rights suits, but we already have a strong
21 incentive to keep the costs of discovery down as much
22 as possible. As lawyers representing disadvantaged
23 clients, we advance discovery costs out of pocket,
24 carrying them for the multiyear life of the case
25 against the risk that they will never be repaid if we

1 lose.

2 Although we object to the proposed new
3 limits on depositions, interrogatories, and requests
4 to admit, I will focus today on the proposed limits to
5 depositions and the new spoliation rules.

6 In our serious civil rights cases, we always
7 need to take more than five depositions and routinely
8 more than 10, including at least seven hours with lead
9 deponent. It is one thing to give judges discretion
10 to limit discovery, but by creating presumptive limits
11 that we can never meet, our ability to prove civil
12 rights violations is left to the essentially
13 unreviewable mercy of the district judges to grant us
14 an extension in every single case.

15 For example, we represented Eddie Joe Lloyd,
16 who was exonerated by DNA testing after serving 17
17 years in prison for a 1984 rape and murder he did not
18 commit. While he was involuntarily committed to a
19 psychiatric hospital, Mr. Lloyd was interrogated by
20 Detroit police officers who deceived him into
21 confessing by telling him he could help smoke out the
22 real killer. The detectives then fed nonpublic facts
23 about the crime to the innocent Mr. Lloyd to make this
24 confession falsely appear reliable and then
25 misrepresented that this nonpublic information had

1 originated with Mr. Lloyd.

2 As with most of our cases, the defendants
3 did not admit the misconduct. We had to prove our
4 case through circumstantial evidence. This mostly
5 comes from witnesses who generally will not talk to us
6 outside of a deposition, defendants, other police
7 employees, prosecutors, and witnesses who testified
8 against our clients at their criminal trials.

9 As most of these witnesses are hostile to
10 us, the depositions are slow-going, with even basic
11 facts conceded only begrudgingly. In Mr. Lloyd's
12 civil rights suit, we took 18 depositions spanning 24
13 days. Discovery established that several details
14 included in Mr. Lloyd's confession were things that
15 the detectives believed to be true when they
16 interrogated Mr. Lloyd but that were later proven
17 false. The only possible source of these details was
18 the detectives.

19 Discovery also revealed at least two other
20 instances of coerced or fabricated confessions taken
21 by the Detroit Police Department around the same time.

22 At the end of discovery, Detroit not only agreed to
23 provide substantial compensation for Mr. Lloyd but
24 also to begin videotaping interrogations in homicide
25 and other serious felony cases to prevent similar

1 tragedies.

2 As another example, we represented Michael
3 Greene, another DNA exoneree who spent 13 years
4 wrongly imprisoned for rape. Mr. Greene's conviction
5 was based on deeply flawed forensic evidence. Mr.
6 Greene should have been excluded as a suspect at the
7 time of his initial prosecution. Instead, a Cleveland
8 criminalist falsely claimed that hair comparison and
9 blood type evidence were highly incriminating.

10 To prove our civil rights case, however, we
11 had to establish the criminalist knew these findings
12 were false at the time he reported them. Only after
13 we took 15 depositions over 17 days did Cleveland
14 agree to a settlement. It would compensate Mr. Greene
15 and perform an audit of its forensic laboratory. This
16 audit in turn led to the exoneration of two more men.

17 The criminalist, who had remained on the job after
18 Mr. Greene's exoneration and the prosecution of the
19 real perpetrator, was fired several months after the
20 settlement.

21 Both of these cases show how critical
22 adequate discovery is to the essential objective of
23 § 1983, ensuring that victims of unconstitutional
24 misconduct may recover damages or secure injunctive
25 relief. We firmly believe that had we been limited to

1 five depositions of six hours each we would not have
2 succeeded in getting the agreement to videotape
3 interrogations in Detroit or the audit in the
4 Cleveland crime lab.

5 The proposed changes to Rule 37 are also of
6 concern. We routinely face serious difficulties
7 obtaining the underlying files from our client's
8 criminal prosecutions even when according to policy
9 and law they should have been preserved. These files,
10 the contemporaneous records of the investigation,
11 often contain critical evidence. The new rules
12 encourage stonewalling and the destruction of this
13 evidence.

14 An adverse inference is not a very powerful
15 sanction. It merely permits the jury to find that
16 evidence the defendant should have kept but cannot
17 produce may have been helpful to plaintiff. But it
18 does provide some incentive for defendants to look for
19 and produce files. With the change, that would be
20 gone as it would be essentially impossible to meet the
21 threshold required for sanctions.

22 Even if files have been willfully destroyed,
23 it may be difficult to prove that. Typically all
24 anyone will say is the files have disappeared or
25 cannot be located. On top of that, we would also have

1 to prove the loss caused substantial prejudice, which
2 is particularly difficult when you don't have the
3 files.

4 We urge you to reject this change entirely.

5 At the very least it should be limited to
6 electronically stored evidence. The committee's aim
7 to make civil litigation more accessible for average
8 citizens is laudable, but limiting discovery in civil
9 rights cases will have the opposite effect. It can
10 effectively shut the courthouse doors to victims of
11 serious police misconduct.

12 JUDGE CAMPBELL: All right. Thank you, Ms.
13 Hoffman.

14 Questions? Judge Koeltl.

15 JUDGE KOELTL: Did you reach agreements with
16 the defendants to take that number of depositions in
17 the Lloyd and Greene cases, or did the judges give you
18 the authority to do it?

19 MS. HOFFMAN: To be honest, I don't remember
20 in those cases whether that was by agreement or --

21 JUDGE KOELTL: But plainly there would have
22 had to have been either agreement or a decision by the
23 court to go beyond the 10 deposition limit, and the
24 rules say that the court must do that if the discovery
25 is consistent with the rules. Why do you think that

1 judges would be more reluctant to give you the same
2 number of depositions when the presumptive limit is
3 five rather than 10? The judge is still looking at
4 the same case. The judge is still going to have to
5 make the determination that this is the number of
6 depositions that is the reasonable number in this
7 case. The judge is going to have to say in fact I
8 must do this if the amount of depositions is
9 consistent with the purposes of the rules.

10 MS. HOFFMAN: Well, I think there are two
11 issues. First is by changing the rule from 10
12 depositions to five depositions, you'd be sending a
13 strong signal that you think there's too much
14 discovery. I mean, that's what you've been talking
15 about. You think there's too much discovery in civil
16 cases. So I think conscientious judges will take that
17 signal and say, well, we've been allowing too many
18 depositions. We should cut down. And I think that as
19 the gentleman who spoke before me mentioned, when you
20 have a lower limit of five and you're arguing for
21 above that instead of arguing for, you know, slightly
22 over the limit of 10, we're now arguing for triple the
23 limit of five.

24 The other issue is, to be honest, I mean,
25 we've faced some judges who are -- not most, but some

1 judges who are very hostile to our clients, and I
2 think that if we have to get either agreement from the
3 defendants or permission from the court to take any
4 more than five depositions, we run the risk of just
5 simply not being able to prove our claims at all, and
6 it would be a very difficult thing to get reversed or
7 to get review of in any way.

8 JUDGE CAMPBELL: Other questions? Dean
9 Klonoff?

10 DEAN KLONOFF: Do you see serious prejudice
11 by the reduction from seven hours to six?

12 MS. HOFFMAN: I mean, I see prejudice. It's
13 hard to say one hour is serious prejudice. I do think
14 that with lead defendants in our cases we often have
15 to take more than seven hours. And frankly, a lot of
16 that is because of the obstruction by both the
17 defendants and the defense lawyers. They say they
18 don't remember anything, they won't admit anything.
19 There's lots of speaking objections, all kinds of
20 things which are not permitted by the rules but which
21 everyone does and you don't want to run to the court
22 every single time someone's violating the deposition
23 rules.

24 And as long as you are permitted enough time
25 in depositions to get what you need anyway, you don't

1 have to bother anybody with it. You can just kind of
2 ignore it and go ahead. But the shorter you make the
3 depositions, the easier it is to just frustrate the
4 ability to get the necessary discovery at all.

5 JUDGE CAMPBELL: Judge Diamond?

6 JUDGE DIAMOND: You kept saying your firm
7 represents plaintiffs in serious civil rights cases.
8 Do you have any sense of how many depositions are
9 usually needed in less serious civil rights cases?

10 MS. HOFFMAN: I mean, I don't want to say
11 any civil rights cases are not serious, but I --

12 JUDGE DIAMOND: Your word.

13 MS. HOFFMAN: I understand. Our cases are
14 all cases with very high damages, often people who are
15 in prison for many years, you know, death cases, that
16 kind of thing. My understanding is from plaintiffs
17 who are representing, you know, people who are held
18 for 24 hours or something that routinely they don't
19 take as much discovery because it's not in anyone's
20 interest for them to take as much discovery. So I
21 think it's a self-limiting --

22 JUDGE DIAMOND: It's the less exceptional
23 cases that we see perhaps more frequently. A five-
24 deposition limit might be perfectly okay.

25 MS. HOFFMAN: But I think that they're

1 already -- I don't think there's a problem now. I
2 don't think they're routinely taking more.

3 JUDGE DIAMOND: But the five-deposition
4 limit would be okay.

5 MS. HOFFMAN: For those cases, they might
6 take less than five depositions, yes.

7 JUDGE CAMPBELL: All right. Thank you very
8 much, Ms. Hoffman.

9 Mr. Strand?

10 MR. STRAND: Good morning. Thank you all
11 very much for having me here today. Thank you all
12 very much for the very hard work that you've done in
13 working on the rules over the past several years. I'm
14 here today on behalf of the Defense Research
15 Institute. I am currently chair of the DRI
16 Intellectual Property Litigation Committee, and I am
17 immediate past chair of the DRI Commercial Litigation
18 Committee.

19 When I'm not doing DRI work, I am a partner
20 at Shook, Hardy & Bacon in their Washington, D.C.
21 office. Over the past 30 years I have been trying
22 commercial and intellectual property cases, generally
23 very complex, and I have been living with and under
24 the very federal rules we're here talking about today.
25 So I do not come to you as a scholar. I come to you

1 as someone who has worked with the rules and
2 oftentimes with judges across the table.

3 I'm here today to urge the committee to
4 adopt the rules in the form that they're advanced with
5 the modifications suggested by the Lawyers for Civil
6 Justice in their written submission. I won't go over
7 all of that and don't have the time. There are two
8 things I'd like to talk to, Rule 26(b)(1) and Rule
9 37(e). We've also submitted written submissions from
10 the chairman of our firm and you have those before
11 you.

12 If I can only leave you with one word today,
13 this is the word I'd leave you with: focus, focus.
14 Rule 1 of the Federal Rules of Civil Procedure, and I
15 believe it's Rule 1 for a purpose, talks about the
16 just, speedy, and inexpensive resolution of claims.
17 Just, speedy, and inexpensive. And just is first.
18 Why? Because an inexpensive resolution without
19 justice is no good. A speedy resolution without
20 justice is no good. So it's about justice.

21 Now, when I started litigating, the purpose
22 of litigating was the trial, and the purpose of anyone
23 in our firm that had any clout was as a trial lawyer
24 because you walked in to a judge, you walked in front
25 of a jury, you declared ready and you tried the

1 lawsuit. Today we have lost focus. Our system is a
2 system of trial by litigation and trial by discovery,
3 not trial by jury. We have lost focus.

4 The rules that you all have considered are
5 attempting -- they're not the total solution. They're
6 not a panacea. They're attempting to shift that focus
7 back to the just, speedy, and inexpensive resolution
8 of claims. Here's what I mean.

9 I do a lot of patent work. I try not to do
10 a troll litigation. I hate troll litigation, because
11 what happens? You get a troll that comes in. They
12 file a lawsuit. They've never practiced. They're out
13 buying foreign lawyers. Every document they have is
14 privileged. They come in to your client. They say we
15 want all documents for all time over everything you've
16 ever done related to all of your products. It will
17 cost \$100 million to produce -- or it will cost \$10
18 million to produce 100 million documents. And the
19 first thing your client says is how fast can we settle
20 this.

21 That's not just, speedy, and inexpensive.
22 That is litigation for litigation's sake. It is not
23 litigation for the purpose of the Federal Rules.
24 That's the most egregious example that's being
25 considered by our friends across the way here with

1 legislative changes. Your rules will assist in fixing
2 that.

3 What do I mean? 26(b)(1). I've been a
4 plaintiff, I've been a defendant. I have argued as a
5 plaintiff that I am reasonably calculating to lead to
6 the discovery of relevant information as I seek
7 everything in the entire world. I'm not proud of
8 that, but you do that when you zealously represent
9 your client.

10 By eliminating that reasonably calculated
11 language, you are focusing the issue on what is the
12 claim about. First day of law school we all learn
13 there are certain elements in the cause of action.
14 Today we don't talk about elements. We talk about the
15 litigation.

16 Last week I received a 30(b)(6) notice in a
17 competitor-on-competitor case seeking right off the
18 bat ESI discovery. We want a 30(b)(6) day-long
19 deposition regarding your ESI processes. Now how does
20 that have anything to do with a patent infringement
21 case? Take your patent, take my product, look at it,
22 and we either infringe or we don't. But no, we're
23 going to spend \$100,000 fighting about ESI discovery
24 right off the bat.

25 Focus: speedy, just, and inexpensive

1 resolution. 37(e), same type of thing. Let's focus
2 there on when there is really something that has gone
3 wrong. I would agree with LCJ that the willful and
4 bad faith, not or, would make a huge difference there.

5 Folks don't destroy documents. Many of you are
6 judges. There is no way in the world if a client's
7 destroyed documents that's a good thing. You know
8 you're going to die sooner or later, so just get it
9 over with. I don't think Rule 37(e)'s change -- I
10 think it benefits. I don't think it hurts things.

11 I'm slightly over my time.

12 JUDGE CAMPBELL: All right. Thanks, Mr.
13 Strand.

14 MR. STRAND: So if you have any questions.

15 JUDGE CAMPBELL: Questions?

16 (No response.)

17 MR. STRAND: Thank you all very much.

18 JUDGE CAMPBELL: All right. Thank you.

19 Mr. Troy?

20 MR. TROY: Thank you. I'm Dan Troy. I'm a
21 senior vice president and the U.S.-based worldwide
22 general counsel for GlaxoSmithKline, a London-
23 headquartered research-based global health
24 organization of 100,000 people, 17,000 in the U.S.
25 committed to helping people do more, feel better, and

1 live longer. I'm keenly aware that I'm what stands
2 between you and lunch. I'm always short. I'll try to
3 be brief.

4 (Laughter.)

5 MR. TROY: In my position, I see firsthand
6 almost every day how the U.S. legal system harms the
7 U.S. competitiveness in the global marketplace.
8 Within the last 10 years, as a percentage of GSK's
9 global relative revenues, our annual U.S. external
10 litigation case costs have been as much as 50 times
11 higher than our non-U.S. costs. More than 45 percent,
12 almost half, of GSK's U.S. employees are subject to at
13 least one preservation notice. By contrast, in the
14 rest of the world, it's just about one in eight.

15 Foreign-headquartered, worldwide, global
16 multinationals like GSK, we have many choices about
17 where to invest, where to expand, where to establish
18 our new operations. As a 2008 U.S. Commerce
19 Department report recommended, and I quote, "If high
20 U.S. legal costs are not commensurate with high
21 benefits, policymakers will need to find ways to
22 reduce uncertainty and to bring U.S. legal costs more
23 in line with those of other advanced economies."

24 I'm here to tell you the costs at least from
25 where we sit are not commensurate with the said

1 benefits. To take but two examples, I was in Germany
2 two weeks ago, in the U.K. last week. We can get way
3 more cost-effective justice in the United Kingdom and
4 in Germany. And as a patriotic American, it pains me
5 to say that, but it is true.

6 When we make contracts with our peers these
7 days, we opt out of the U.S. courts. That is not the
8 way it was perhaps 30 or 40 years ago, but that is the
9 way we as multinationals have to play things.

10 Indeed, a 2011 Harvard Business School
11 survey of nearly 10,000 alumni identified cost and
12 delay of the U.S. legal system as an important
13 impediment to business investment in America. The
14 U.K., for example, their current economic development
15 efforts highlight their legal system and its emphasis
16 on proportionality and cost containment. And I really
17 think it behooves us to look to places like the U.K.
18 and Germany to see how you can have an effective court
19 system which does not function the way ours does.

20 So I'm going to talk about two rules
21 quickly, and I very much endorse the previous comments
22 and LCJ's comments. The current overly broad scope of
23 discovery allowed under current Rule 26(b)(1) creates
24 an overwhelming burden for corporate litigants and
25 provides little evidentiary benefit to any party at

1 trial.

2 Fortune 200 companies reported that in 2008
3 there were an average of 1,000 pages produced in
4 discovery in major cases for every one page used at
5 trial, 1/10th of 1 percent. Our experience is
6 similar. I will submit these comments for the record.

7 But in one federal multidistrict product litigation
8 that settled recently before trial in 2011, we
9 produced 1.2 million documents, yet plaintiffs
10 included only 646 GSK documents on their exhibits
11 list, less than 5/100ths of 1 percent of the
12 production.

13 So we strongly support the proposed changes
14 to 26(b)(1), with the addition of a materiality
15 requirement which we think is necessary to ensure that
16 the proposal isn't undermined by historically broad
17 views of discovery and relevance that have
18 unfortunately made ineffective the previous scope of
19 discovery reforms.

20 Turning briefly to Rule 37(e), preservation,
21 like many corporate defendants, we are forced to take
22 an extremely conservative approach to the
23 preservation, collection, review, and production of
24 documents. In one example, we have preserved 57.6
25 percent of our company email. That's 203 terabytes of

1 information. That's 20 times that of the printed
2 collection of the Library of Congress.

3 Just to take another example, the amount of
4 material collected to respond to specific requests in
5 litigation has increased, this is from 2010, 2.86
6 terabytes, to 2012, 9.03 terabytes. That's 316
7 percent in two years.

8 So we believe that the proposed Rule 37(e)
9 is an incredibly important step towards establishing a
10 national preservation standard desperately needed to
11 allow corporate defendants to reduce costly
12 overpreservation so we can spend the money on more
13 socially valuable activities like R&D.

14 We do ask that the proposed rule be further
15 reviewed to make clear that sanctions are available
16 only if the actor had a culpable state of mind and
17 acted with both willfulness and bad faith, though
18 willfulness has been interpreted inconsistently.

19 To pick up and in conclusion, the favorite
20 words you'll hear from me, what someone said before is
21 not right. We don't want to be protected from
22 liability where it is warranted. We do want to be
23 protected from what some courts have accurately called
24 legalized blackmail. We believe that taken together,
25 the proposed changes, especially as we suggest with

1 the amendments, would go a long way towards making the
2 U.S. legal system more fair, efficient, cost-
3 effective, and, yes, competitive.

4 Thank you for the opportunity to testify.
5 I'm happy to take any questions.

6 JUDGE CAMPBELL: All right. Thank you.

7 Judge Grimm?

8 JUDGE GRIMM: A question when we're trying
9 to address some of the notions of the economic
10 consequences of our system versus another system, and
11 you expressed some confidence in the one in the U.K.,
12 and also you say that you don't want to avoid
13 liability where liability is proper. In the U.K.,
14 they require disclosures, to include disclosures of
15 information which is harmful to the party by their
16 civil rules.

17 I've had some time and contact with the
18 judges in the U.K. and how they do that, and that's
19 ingrained in their system. It would certainly help
20 reduce the amount of document production, discovery
21 requests and other things that have to be -- that
22 happen under our system if there was a requirement
23 that both plaintiff and defendant produce as a
24 mandatory disclosure information that was, in the case
25 of a medical device that allegedly caused some sort of

1 an injury, the information they had that shows that it
2 was in fact harmful or that they had knowledge of it.

3 Should we be considering measures like this
4 when we look at other countries like the U.K.?

5 MR. TROY: I'm not a U.K. lawyer. I'm not
6 an expert in their system. I can't practice law in
7 the U.K. That said, I think that if you take a look
8 at the requirements or the proposals for the American
9 College of Trial Lawyers, both plaintiffs and
10 defendants, the best lawyers believe that they
11 actually can get to the resolution of a litigation
12 much quicker, much speedier, and by and large they
13 believe that those kinds of -- I'm not endorsing one
14 or the other specific thing -- focused information
15 exchange can lead to better justice and better
16 resolution. And that's why even plaintiffs' lawyers
17 like Steve Sussman have endorsed a much more focused
18 approach to discovery that's much more like the U.K.
19 than you have here in the U.S. unfortunately.

20 JUDGE GRIMM: You can't get much more
21 focused than giving up the stuff you know you have
22 which is harmful to your case, right?

23 JUDGE CAMPBELL: Judge Matheson.

24 JUDGE MATHESON: We've heard now several
25 times this morning the suggestion about adding

1 materiality, and I'd be interested in what your
2 definition of materiality would be and how it should
3 be applied.

4 MR. TROY: That is a good question. I'm not
5 sure I've given that enough thought. I'd like to
6 respond to that in written comments. I mean, as
7 lawyers, I want to say we know it when we see it.
8 Materially means materiality does have a sense of
9 there's something that's important as opposed to being
10 trivial, whereas I think it's fair to say the
11 interpretation and application of 26(b)(1) has been
12 anything that could potentially be relevant as opposed
13 to things that are again more focused and material.

14 JUDGE CAMPBELL: Elizabeth?

15 MS. CABRASER: Yes, thanks. I'm just
16 curious if you know what percentage of the business
17 records of Glaxo that it keeps in the normal course
18 are now kept solely as ESI.

19 MR. TROY: Great question. I do not know
20 that offhand.

21 MS. CABRASER: Okay. Thanks.

22 MR. TROY: A lot of it.

23 JUDGE CAMPBELL: We've got several other
24 hands that have come up. I think the next one up was
25 Judge Koeltl's.

1 JUDGE KOELTL: It's not clear to me how
2 adding material to Rule 26(b)(1) would actually work
3 since it's the standard for discovery, and you're
4 going to be sending people out into the field or
5 outsourcing it to contract people abroad to go over
6 documents. You tell them that these are the documents
7 which are relevant to a claim or defense, and then
8 they're going to have to sift through the documents
9 also to determine whether they're not only relevant to
10 a claim or defense but also material. Wouldn't that
11 just sort of increase all of the costs of review,
12 discovery, sifting? How would it work?

13 MR. TROY: I'm not sure that it would. And
14 we don't offshore our review, by the way. We tend to
15 do it here in the U.S. And even if there's an initial
16 cut made by contract lawyers, the people who are
17 working on the litigation do take a second cut at
18 things.

19 So I think it absolutely could work, and it
20 would just again shrink down the massive amounts of
21 information that each side is really sort of dumping
22 on the other, which again, if you go back to the
23 American College of Trial Lawyers, the plaintiffs'
24 lawyers who at least participated in that, they don't
25 want that much information dumped on them either. It

1 gets to the needle in the haystack problem that was
2 identified before.

3 JUDGE CAMPBELL: Judge Pratter.

4 JUDGE PRATTER: To understand rather than to
5 presume the context in which your comments have been
6 made, could you say just very briefly what it means to
7 say you get better justice in the U.K. or Germany than
8 here? I mean, what justice is this?

9 MR. TROY: What I mean is that if we have a
10 contract dispute and we can choose a forum in which to
11 litigate, we tend to put in an ADR clause. Why?
12 Because we think that the courts are too expensive,
13 the courts are too burdensome, the courts take too
14 long. But if we can't agree to an ADR clause, we will
15 often litigate in the U.K. because again the process
16 is not as burdensome, it's not as costly, it's not as
17 random.

18 I mean, I can't tell you that in this
19 individual case versus that individual case, but in
20 general, the U.S. litigation system does not have a
21 very good reputation abroad. Go and talk to the
22 Europeans even as they adopt things like modified
23 class action kinds of measures. The first thing they
24 say is, well, we don't want to be like America. We
25 don't want to be like America. Well, why is that?

1 It's because our system is the ridicule of the world.

2 JUDGE PRATTER: And excuse me for following
3 up.

4 MR. TROY: Please.

5 JUDGE PRATTER: But I'm just saying maybe we
6 could just listen in on what they're saying, but maybe
7 I won't.

8 (Laughter.)

9 MR. TROY: That hasn't helped us either.

10 (Laughter.)

11 JUDGE PRATTER: But what I'm hearing is that
12 you're talking more about cost and process, not
13 result. Or is that how you quantify the result?

14 MR. TROY: Well, I guess two things. First
15 of all, I'm much more willing and able to try cases in
16 other places because it's not a process of extortion.

17 I can actually get to a result much more easily,
18 quickly, and less expensively, okay? And I think that
19 this goes way beyond where this committee's
20 discussions are, but often in certain kinds of complex
21 cases, I'm a lot better off in front of a judge than I
22 am in front of a judge and a jury.

23 JUDGE PRATTER: Okay. Thanks.

24 JUDGE CAMPBELL: All right. Thank you very
25 much, Mr. Troy.

1 We appreciate everybody's comments this
2 morning. We will take a one-hour break and resume at
3 1:00.

4 (Whereupon, at 12:01 p.m., the hearing in
5 the above-entitled matter was recessed, to reconvene
6 at 1:00 p.m. this same day, Thursday, November 7,
7 2013.)

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1 will have on the administration of justice. The rules
2 will increase the burden and expense for plaintiffs
3 and give defendants more tools to avoid discovery --
4 more tools to producing relevant discovery that
5 plaintiffs need to meet their burden of proof.
6 Ultimately these proposed rules will make it far more
7 difficult for consumers and small business owners to
8 hold wrongdoers accountable.

9 Now AAJ has a number of concerns about the
10 proposed rules. I'll be submitting extensive comments
11 to this committee detailing all of those concerns.
12 But today I want to focus on the harm the new
13 proportionality standard of 26(b) will create.

14 The proposed changes to Rule 26(b) shifts
15 the discovery process from a focus on relevancy to an
16 economic calculation. In doing so, relevancy will
17 give way to proportionality and defendants will
18 benefit from step-by-step instructions on how to avoid
19 producing critical, relevant information that
20 plaintiffs need to prove their case. Each of the five
21 factors would benefit defendants at the expense of
22 plaintiffs, ultimately raising more questions than
23 they will answer while creating collateral litigation
24 in each and every case, in our view drastically
25 increasing the workload of the federal judiciary.

1 The factor that will have the greatest
2 impact on the fair administration of justice is the
3 specific consideration of burden or expense.
4 Discovery is more than a cost-benefit analysis. It is
5 necessary in the search for the truth, and it is the
6 method by which injured individuals are able to obtain
7 information from alleged wrongdoers.

8 Defendants already argue in almost every
9 case that discovery is simply too burdensome and
10 expensive to produce, including that as one of the
11 specific factors at the outset, but when we codify
12 this practice, you give the argument credibility even
13 when there is no basis for the claim. This factor
14 upends incentives for defendants to preserve documents
15 in an easily accessible format and encourages them to
16 ensure that discovery will be too expensive or
17 difficult to retrieve.

18 Justice would not be served in numerous
19 cases litigated by our members if the burden or
20 expense factor is codified. For example, in a
21 complicated qui tam case that resulted in a very large
22 verdict, plaintiffs alleged that a nursing home
23 defrauded the federal government and the State of
24 Illinois by billing Medicare and Medicaid for services
25 that were so deficient as to be essentially worthless.

1 Discovery in the case involved 25 fact
2 depositions, five expert depositions, and the review
3 of approximately 350 patient files and company
4 records, all of which were necessary because
5 plaintiffs were required to prove that proper care was
6 not documented or provided. Discovery also included
7 the late production of 50 boxes of inappropriately
8 withheld but relevant documents.

9 There is no doubt that defendants had a
10 significant burden and expense to produce medical
11 records for the residents in this case that lasted
12 over six years. Plaintiffs would never have been able
13 to prove their case if the defendants had been able to
14 hide behind the burden of cost of producing relevant
15 documents, and significant funds would not have been
16 returned to the federal government and U.S. taxpayers.

17 I'd like to briefly address AAJ's objection
18 to the proposed changes to the new limits on
19 depositions, interrogatories, and requests for
20 admissions. We believe these proposed limits will
21 place limitations on important discovery tools that
22 will make it far more difficult for parties to get the
23 information that they need to support their case and
24 will eviscerate tools the parties currently use to
25 resolve simple issues of fact.

1 The problem that the new limits will create
2 are enhanced by the fact that the proposed rules
3 require that these exceptions now be granted only to
4 the extent consistent with the new proportionality
5 test.

6 While AAJ supports the proposed changes to
7 Rule 34(b) relating to requests for production, the
8 totality of the other proposed changes is
9 overwhelmingly unbalanced against the interests of
10 plaintiffs, and in our view, the changes are not
11 necessary. Thank you for your time today.

12 JUDGE CAMPBELL: Thank you, Mr. LeBlanc. A
13 question. You focused on the burden or expense factor
14 that would be part of 26(b)(1), and as you know,
15 that's in the rule now. It's in Rule 26(b)(2). It's
16 also in Rule 26(g). So it can't be the presence of
17 that language in the rule that's the problem. It's
18 the relocating of it that it sounds like you're
19 objecting to. Could you address what you think the
20 relocating of it does given the fact that 26(b)(1) now
21 says all discovery is subject to that factor which is
22 in 26(b)(2)(C)?

23 MR. LeBLANC: We believe that the relocating
24 will heighten the burden or expense factor. It will
25 make it more complicated and challenging for the

1 plaintiff to deal with that particular burden of proof
2 early on in the litigation right up front.

3 JUDGE CAMPBELL: How will it do that? I
4 mean, in every Rule 16 conference I hold, I ask myself
5 the question and also the parties the question of
6 proportionality, and we have that discussion right at
7 the beginning of the case to ensure that the discovery
8 is proportional to what is needed in the case. And in
9 most cases, that's what they're proposing, but in some
10 they're proposing out-of-proportion discovery.

11 MR. LeBLANC: Right.

12 JUDGE CAMPBELL: Is AAJ opposed to that
13 discussion occurring at the Rule 16 conference, or do
14 you see other problems arising from the presence of
15 the language in 26(b)(1)?

16 MR. LeBLANC: We believe that it will
17 emphasize the proportionality aspect as opposed to the
18 relevancy aspect of seeking the information sought.
19 So, yes, we have a problem with the location. Placing
20 the proportionality test and codifying it up at the
21 beginning as opposed to the end after determining what
22 is relevant is a problem for us. We don't oppose
23 discussing it in a rule conference, though.

24 JUDGE CAMPBELL: Other questions?

25 PROF. MARCUS: A similar kind of question.

1 You didn't mention the proposed permission to serve
2 Rule 34 requests earlier than presently allowed. Does
3 AAJ have a view on that?

4 MR. LeBLANC: We don't oppose the changes to
5 Rule 34, so we support the proposals as written. I
6 was running short on time, so I focused on the
7 proportionality and even had more to say on that but
8 for time. But no, we do not have opposition to
9 requests for production.

10 JUDGE CAMPBELL: If I can ask you one other
11 question. I don't know your particular practice, but
12 I know your firm is often engaged in large-scale
13 litigation.

14 MR. LeBLANC: Yes.

15 JUDGE CAMPBELL: Do you find that you
16 encounter difficulty getting more than 10 depositions
17 in most cases? And if the answer to that is no, is
18 there a reason you think you would encounter
19 difficulty getting more than five?

20 MR. LeBLANC: Let me answer it this way. In
21 my case, I handle toxic tort and environmental cases,
22 and at the outset of the type of litigation that I
23 handle, we did encounter problems getting the
24 depositions that we needed to prove our case. As this
25 area of the law has matured and developed, we now

1 generally enter into consent arrangements with the
2 defendants concerning depositions.

3 Our concern with limiting the depositions to
4 five is the same that we heard earlier from the
5 antitrust bar. It will become the new normal, and it
6 will be much more difficult to get 15 or 25
7 depositions, 25 being the norm in the type of cases we
8 handle.

9 JUDGE CAMPBELL: We have another minute.
10 Any other questions?

11 (No response.)

12 JUDGE CAMPBELL: All right. Thank you very
13 much, Mr. LeBlanc.

14 MR. LeBLANC: Thank you for your time.

15 JUDGE CAMPBELL: Mr. Mason?

16 MR. MASON: Thank you, Mr. Chair. My name
17 is Wayne Mason, and I hope to bring you maybe a little
18 different perspective. I have a national trial
19 practice where I travel around the country and try
20 cases both in federal as well as state court,
21 primarily on the defense side, although I do do some
22 plaintiffs' work.

23 I want to talk with you about Rule 26, which
24 seems to be a popular subject today, and give you my
25 perspective perhaps of where the rubber meets the road

1 out on the road so to speak. My experience is and my
2 recommendation to you is if you did one thing and made
3 one change through all of this, that it would be to
4 remove the language as you have proposed with respect
5 to reasonably calculated to lead to admissible
6 evidence.

7 I heard in the Dallas mini-conference, I
8 believe it was the chair who mentioned the experience
9 of having lawyers come in and believing that that
10 phrase meant you could pretty much have anything you
11 wanted. And I would tell you that when he said that
12 that it resonated with me and my experience not only
13 in the federal system but in the state system and in
14 arbitrations.

15 And we can't ignore the fact that that is
16 the reality of this. In arbitrations where they're
17 going to apply the federal rules, we have the same
18 reference to it. So I applaud the fact that you have
19 included that in and recommend that that remain in.

20 This issue of discovery in Rule 26 has
21 become an issue of leverage. We used to in the trial
22 bar talk about resolving a case because the person on
23 the other side was a great trial lawyer and you may
24 get your bell rung. Now it's just about how much
25 discovery that they can push the button on and how

1 much media attention and destructive that the other
2 side can be.

3 It's an unfortunate situation. So, when I
4 talk about change and changing this, one might say,
5 well, wait a minute, this has been in the rule
6 forever. Why are you saying that this is such a
7 powerful thing? E-discovery has changed the world,
8 and it has highlighted and it has created an
9 opportunity for parties, and not just defendants,
10 plaintiffs, commercial plaintiffs in cases that know
11 they can do it, to push the button and use the
12 leverage there do it.

13 And the importance of focusing on narrowing
14 that is really an important thing that I think that
15 you have to consider. The practical realities then of
16 all of this massive documents, which is not limited to
17 just multinational corporations, but because everyone
18 has an iPhone and everyone has a smartphone and an
19 iPad, the amount of information available from smaller
20 companies is now disproportionate to what it used to
21 be, and it does matter in litigation in cases.

22 Here is how it matters too. It's not just
23 about we'll send it to India and save money, and
24 defense lawyers, you charge too much money. The
25 reality is these documents have to be reviewed and

1 they have to be reviewed typically for attorney-client
2 privilege, work product, and things like that, and
3 it's an enormous expense.

4 What I'm suggesting to you is that justice
5 is not being denied. But my personal view of what I
6 see is the fact that when I have to produce 2 million
7 documents and the reality is two dozen of them wind up
8 in trial of any significance, that there's so much
9 waste in the system of stuff that is being requested
10 under the auspices of reasonably calculated to lead to
11 discovery that it's a real problem.

12 The proportionality, those five factors, I
13 don't see how that increases the burden and expense to
14 plaintiffs. I just don't see it. And I would say to
15 you that in a civil rights context I think there is
16 clearly protection. And if Ms. Hoffman were to
17 suggest to anyone as she did in giving her anecdote
18 today, I think she'd get more discovery. I'm not here
19 to talk about limits because I'm not exercised about
20 whatever you decide on that to be honest with you.

21 The pretrial process it's been said this
22 week is littered with stop signs, and I would suggest
23 to you that that's an improper metaphor to suggest
24 that there is not justice in the implication of that.

25 To just carry out the metaphor, a stop sign does not

1 say do not enter. You cannot enter, which would
2 preclude justice.

3 To the extent that a stop sign is in place
4 in pretrial like we discussed here, it's a moment to
5 pause, like if we were taking our car to a stop, and
6 to reflect, which is a powerful and a good thing
7 typically, and then move forward if appropriate.

8 That's not to say there aren't dispositive
9 motions and things like that, but to suggest that it
10 is improper is I think really wrong. Any lawyer who
11 has the ability to pass the bar exam in any state in
12 my opinion has the intellectual acumen to focus their
13 requests and to ask good questions. In my experience,
14 the best lawyers take the shortest depositions. They
15 know the questions to ask. And so whatever the number
16 is, the reality is here we're not precluding justice
17 by what you're proposing in terms of relevant
18 evidence.

19 They can still ask the questions without
20 trouble to sit down, and we can do that, and I should
21 do that, to be reflective, to ask the right questions.

22 And that is not changing here, and it is not favoring
23 one side or the other.

24 The last thing would be just again I
25 mentioned it briefly, but the reach is really

1 significant here in state courts dealing with this all
2 the time and in arbitration. And we can't just say,
3 well, we're here about the federal system, we can't
4 talk about that. This matters to justice in the
5 United States, and it's a pervasive problem, and I
6 encourage you to stand firm in your recommendations
7 and to act. Thank you.

8 JUDGE CAMPBELL: Thank you.

9 Questions? Judge Pratter?

10 JUDGE PRATTER: Mr. Mason, did you hear the
11 comment this morning about predictive coding and
12 whether or not that was useful or not? Have you any
13 observations about whether in your practice you've
14 seen any tendency to use predictive coding, or has it
15 been a good idea that is just a good idea?

16 MR. MASON: Well, it's an evolving idea. So
17 far it's just a good idea. We haven't bought all the
18 software that the other gentleman spoke about, but the
19 reality is we're always looking for ways. I mean,
20 fees are too high. We're to blame. Defense lawyers
21 have some responsibility in this. And the reality,
22 though, is there is enormous pressure to keep costs
23 down and the like.

24 And so I embrace that kind of technology and
25 the like, but it is only one step and it is not the

1 answer. My experience is the same as the speaker in
2 terms of multiple cases and things like that. You
3 can't get agreement on it. You can't afford to use
4 it. And so, as a practical matter, it's used very
5 little.

6 And as I said earlier, the other practical
7 problem is you still have to review a ton of documents
8 under the current system, millions of documents that
9 are unnecessary. They're wasteful. There's no --
10 there is not -- and I want to emphasize -- a
11 preclusion of an ability to find the smoking gun under
12 your proposals. Or forget the smoking gun. And there
13 is an ability for justice to be served for people to
14 get what they need. They need to focus -- someone
15 used the term focus, focus on the claims.

16 JUDGE CAMPBELL: Other questions? Let me
17 ask one final one. You talked about producing 2
18 million documents and 12 became relevant at trial.
19 Why are you persuaded that if you only had to produce
20 250,000 documents the plaintiff would still get those
21 12 for trial?

22 MR. MASON: Because I know what the
23 documents were, and I know what the claims were, and I
24 know exactly that, you know, anybody that is capable
25 of passing a bar examination can ask questions that

1 would have gotten those documents and not just those.

2 In fairness, there's an appropriate number in excess
3 of that. But every one of those documents without
4 question in my mind were discoverable, would have been
5 had. It's the waste of the other over million and the
6 storage costs that we had of every month having to
7 store all these things and the holds and things that
8 is the real-world problem.

9 JUDGE CAMPBELL: All right. Thank you very
10 much, Mr. Mason.

11 Darpana Sheth?

12 MS. SHETH: Good afternoon. My name is
13 Darpana Sheth, and I'm an attorney with the Institute
14 for Justice, a nonprofit public interest law center
15 dedicated to protecting constitutional rights. Thank
16 you for the opportunity to testify on behalf of IJ at
17 the first public hearing on the proposed amendments to
18 the civil rules.

19 I applaud the Advisory Committee and the
20 distinguished panel for its extensive work in
21 proposing these reforms. Although IJ welcomes the
22 amendments encouraging early and active judicial case
23 management, we are tremendously concerned about the
24 proposals to narrow discovery and limit the use of
25 discovery devices. These measures will cause serious

1 problems in constitutional litigation and contrary to
2 their intent will in most cases profoundly increase
3 discovery disputes and therefore litigation costs.

4 Since 1991, IJ has represented individuals
5 and small businesses in federal courts across the
6 country to challenge unconstitutional conduct by
7 government officials at all levels. IJ litigates to
8 protect free speech, property rights, economic
9 liberty, and educational choice. Perhaps uniquely
10 among the witnesses, IJ represents both plaintiffs and
11 defendants to protect these constitutional rights.

12 For example, I represented the Monks of St.
13 Joseph Abbey in a constitutional challenge to
14 Louisiana law prohibiting anyone but a licensed
15 funeral director from selling caskets. I also
16 successfully defended a family-run motel against a
17 civil forfeiture action brought by the U.S. Attorney
18 in Massachusetts.

19 Most IJ cases are moderate in size.
20 Typically they are resolved on summary judgment, but
21 when required trials can last between one and five
22 days. Routinely they require more than five
23 depositions, although rarely more than 10. Invariably
24 these depositions do not last the full seven hours,
25 but more depositions are required because of the

1 amount of witnesses.

2 Whether representing plaintiffs or
3 defendants to protect constitutional rights, there is
4 an asymmetry in access to information, with the
5 government in sole possession of most of the facts
6 needed to prove a constitutional violation. Based on
7 this perspective of representing both kinds of
8 litigants in moderate-sized litigation to address
9 constitutional wrongs, I offer testimony opposing the
10 proposals related to discovery.

11 First, the proposed proportionality
12 requirement threatens the very ability of
13 constitutional plaintiffs to obtain relevant
14 information from the government. As an initial
15 matter, through the use of the conjunctive "and," the
16 amendment requires materials sought to both be
17 relevant to a claim and defense and proportional to
18 five subjective and very fact-dependent criteria.

19 Many witnesses today have even suggested
20 adding a third requirement of materiality. Thus a
21 government defendant can simply resist requests for
22 information needed to prove a constitutional claim
23 based on its own subjective belief that the request is
24 not proportional to the action. Oftentimes these
25 actions only seek injunctive or declaratory relief.

1 Moreover, to address Judge Campbell's
2 earlier comment, relocating the proportionality
3 factors shifts the burden under the existing rule from
4 defendants to prove that discovery requests are
5 disproportional to plaintiffs to prove that the
6 discovery requests are in fact proportional. The
7 proposed advisory note makes this burden shifting
8 clear.

9 Consequently, contrary to its intent, this
10 requirement will increase litigation costs given the
11 uncertainty as to what proportionality means in a
12 particular case and recalcitrant litigants. This
13 shift will inevitably lead to a barrage of motions to
14 compel and a concomitant need for judicial
15 intervention.

16 Second, the amendments reducing the
17 numerical limits on discovery devices are also
18 counterproductive to the goals espoused by the
19 committee. I will focus my comments on limiting the
20 requests for admission.

21 Empirically there has been no problem with
22 burdensome or abusive requests for admission. Indeed,
23 to the extent there is a problem, it is that litigants
24 underused this very useful tool that can reduce costs
25 both for parties and the judicial system. Rule 36

1 requests serve additional vital purposes beyond laying
2 foundation to admit documents into evidence.

3 First, admissions narrow the issues in the
4 litigation. Second, they facilitate proof with
5 respect to the remaining issues. Both of these
6 purposes expedite litigation by reducing other more
7 burdensome discovery or making a suit amenable to
8 summary judgment or even reducing trial time.

9 This is particularly true in constitutional
10 cases subject to the rational basis standard of
11 review. For example, in the litigation challenging
12 the casket monopoly in Louisiana, IJ effectively used
13 Rule 36 to obtain admissions to prove material facts
14 about the lack of any health or safety justification
15 for the licensing requirement. As a result, the trial
16 was shortened to three hours rather than the
17 anticipated three days.

18 IJ is sympathetic to the problems raised by
19 many of the witnesses regarding cost-prohibitive
20 discovery and extortion at settlements, but changing
21 the default rules for *all* civil litigation to address
22 a problem that occurs in only 30 percent of the cases
23 is not the solution. This blunt and heavy-handed
24 approach threatens to close the doors of justice to
25 meritorious cases, and for nonprofits like IJ with

1 limited budgets, they threaten to severely curtail the
2 vindication of constitutional rights.

3 Thank you for your time, and I'm available
4 for questions.

5 JUDGE CAMPBELL: All right. Thank you.

6 Judge Grimm?

7 JUDGE GRIMM: Can I just sort of as a
8 practical way of understanding, because the notion of
9 the shift in the location of the existing requirements
10 regarding proportionality, I understood you to say
11 that it shifts the burden to the plaintiff at an
12 earlier point to be able to justify it instead of at
13 some later point when the person who is resisting
14 discovery wants to assert it.

15 But how in practical terms are you able to
16 meet the requirements that you have under Rule 26(g)
17 that says that your signature on a discovery request
18 certifies, and the third element of that is that it
19 has the same analysis that's required under Rule
20 26(b)(2)(C), which is it's neither unduly burdensome
21 or expensive given the needs of the case and the
22 importance of the evidence?

23 So you've got to make that proportionality
24 assessment before you can comply with your obligations
25 under the rule when you initiate it. How if you

1 already have to do that does moving the language of
2 proportionality into the scope significantly change
3 what you already have to do? I don't understand in a
4 practical matter how does it do that.

5 MS. SHETH: I think there are two points.
6 One, under current rules, you have the party-
7 controlled discovery where it's relevant to a claim or
8 defense, and then you have court-controlled discovery
9 where it's relevant to the subject matter. And so the
10 current rules contemplate I think more disputes over
11 that larger sphere of information that's simply just
12 relevant to the subject matter. And there I think
13 that's where 26(g) comes into effect where the signing
14 the discovery requests indicates that you are aware of
15 all these factors and you're considering them.

16 With the proposed revisions, you're inviting
17 more disputes over not just whether it's relevant to
18 the claim or defense but whether it is in fact
19 proportional. And at those disputes, it's going to
20 require judicial intervention, and in that motion to
21 compel, it's going to be plaintiff's burden rather
22 than the defendant's burden to show disproportionality
23 or proportionality.

24 JUDGE CAMPBELL: Rick?

25 PROF. MARCUS: Following up I think on what

1 you just said, and earlier I think you said the
2 committee note shows or says that there's a burden
3 shift. That's what you just said. Can you tell me
4 where it says that?

5 MS. SHETH: I don't have it in front of me,
6 but I recall that at least the proposed committee note
7 that was in the draft --

8 PROF. MARCUS: That's what I'm talking
9 about.

10 MS. SHETH: Right, right. My understanding
11 was that that was the implication of the note. If
12 that's not the case, then, you know, I'm very
13 relieved, but I think a lot of people --

14 PROF. MARCUS: So, if the committee note
15 didn't say that, you'd be very relieved.

16 MS. SHETH: I'd be very relieved if there is
17 not in fact a burden shifting. That's correct.

18 JUDGE CAMPBELL: Any other questions? Go
19 ahead.

20 JUDGE SUTTON: Yes, just one question. You
21 know, there's a current safeguard in the rules, which
22 is that if your opponent is behaving unreasonably with
23 discovery or the district court judge is being
24 unreasonable, if a Rule 56 summary judgment motion is
25 filed against you, and that's usually the big event in

1 a 1983 case, you can say under 56(d), you know, I
2 can't respond to this because I haven't gotten enough
3 discovery. There were three decisionmakers, there
4 were four other witnesses. I've only had discovery of
5 five people. I need all seven to be able to respond
6 to the summary judgment motion.

7 So I'm curious in constitutional litigation
8 is that a waste -- is that really not a safeguard? Or
9 maybe you just haven't come across it.

10 MS. SHETH: I haven't actually come across
11 it because right now the rules adequately protect
12 rights to discovery, but by severely curtailing that,
13 I don't know how that would.

14 JUDGE SUTTON: Because what I'm wondering
15 with the current proposals, it's hard to figure
16 exactly where things should be. But you've got
17 safeguard of the person on the other side being
18 reasonable. If that doesn't work, you're hopeful the
19 district court judge is being reasonable. But a
20 concern of an earlier person testifying or commenting
21 was, well, what if you have an unreasonable district
22 court judge. It's very unusual to get review of a
23 limit on depositions or interrogatories, which I think
24 is true.

25 But I think if you lose a summary judgment

1 motion having said I can't respond to this, that would
2 strike me as a pretty serious exception, and I do
3 think courts of appeals would step in and say how can
4 they possibly respond to this summary judgment motion
5 if they're not getting the evidence or a deposition of
6 a decision-maker or a witness.

7 MS. SHETH: Well, in our practice usually, I
8 mean, although you can make a summary judgment motion
9 before the close of discovery, it usually happens
10 after discovery is closed when all the evidence is in.

11 So I'm not sure how the rule would take -- the 56
12 provision would be implemented after with the proposed
13 rules, but it doesn't seem like it would be an
14 adequate safeguard. Or it would come into play a lot
15 more often, whereas right now the current rules
16 adequately safeguard against it, provide for enough
17 discovery.

18 JUDGE CAMPBELL: All right. Thank you very
19 much, Ms. Sheth.

20 Mr. Levy?

21 MR. LEVY: Good afternoon. My name is
22 Robert Levy, and I am counsel for Civil Justice Reform
23 and Law Technology at Exxon Mobil Corporation, and I
24 also serve as chair of the Federal Rules Committee of
25 Lawyers for Civil Justice. Thank you for the

1 opportunity to come and speak to you and give a
2 perspective on the proposed amendments. And my goal
3 today is to give you some empirical facts that
4 hopefully will reinforce the reasons why the
5 amendments to these rules are so important and really
6 essential to resolving some of the fundamental
7 challenges that we have in our current litigation
8 system in federal courts.

9 One initial issue, I know there's been a lot
10 of discussion, and at the Tuesday hearing there was
11 discussion as well, about the FJC study. And while
12 that brought -- the closed case study. That brought
13 some important information to the process. One of the
14 areas that was not addressed in that study were costs
15 and impact of discovery on the parties themselves,
16 which I think is a very important factor, and
17 therefore I'm not sure that we can draw the conclusion
18 from the FJC study that discovery is not a broad issue
19 and it's solely limited to what's been called a narrow
20 band of cases. I think that the issue is much broader
21 and much more severe.

22 A significant driver for why Exxon Mobil
23 currently has over 5200 individuals on litigation hold
24 for U.S. matters is the lack of standards for
25 preservation obligation. Each time we put someone on

1 hold it impacts up to 10 different parts of our
2 technology organization, not to mention the impact
3 that it has on the individual involved.

4 A significant percentage of these holds are
5 put in place long before the litigation actually is
6 formally begun, a lawsuit filed, we file one or the
7 other side files one, and certainly long before we
8 know who the court is or the opposing party. Plus, we
9 have to entertain and address and evaluate
10 preservation issues in all of our e-discovery
11 platforms, of which you can imagine are quite
12 significant in number. And so we are making decisions
13 about what our preservation approach is when we're
14 looking at implementing new technology or updating
15 technology. Even as simple as switching out computers
16 involves preservation issues.

17 So we are very, very focused on these
18 changes. These holds also impact each individual
19 employee who is on hold. We estimate that it involves
20 at least 10 minutes a day for the individual on hold
21 to address the issues related to the hold and the
22 obligations in the notification, which include some
23 pretty direct and important language to each
24 individual. And they take that very seriously, and so
25 they have to change the way they do their business.

1 So, if you look at it for the 5200
2 individuals on hold, and some of those are former
3 employees, but the vast number are current employees,
4 it translates into about 867 hours per day in the
5 company, which on a yearly basis is over 327,000 hours
6 that are impacted just by the fact of people having to
7 address litigation holds.

8 And this in terms of productivity even for a
9 company of my size is talking about real dollars, in
10 tens of millions of dollars that are impacted simply
11 by dealing with preservation issues. And, you know,
12 it is a significant issue.

13 So the next issue or question is why do we
14 have this vast overpreservation of information. And
15 as I pointed out before, without the clear standards
16 and consistent standards throughout all of the
17 Circuits, we're forced to overpreserve because we're
18 faced with the risk that in hindsight, looking at the
19 facts of a particular case, we will be held to what is
20 referenced as Monday morning quarterbacking about what
21 we could have done and therefore what we should have
22 done in that context.

23 Preservation, as I noted, is a big element
24 in our design and approach to our technology systems,
25 and I've described it as throwing sand in the process

1 of efficiency. These systems are designed to make our
2 people do their jobs more effectively, more
3 efficiently, to give them more information, and yet
4 when we have to deal with all of these issues and
5 hamstring the technology, it slows down the process.
6 We end up sometimes making significant changes in our
7 technology and other times not approaching technology
8 solutions because of these concerns.

9 We also know that very rarely in actual
10 discovery is this information ever used. In 2012, we
11 collected data on about 3.8 percent of all the
12 custodians that we have on hold in the U.S. So just
13 3.8 percent, so that's about four out of 100 people.
14 And then we know that even when we collect the
15 information, so we collect it to preserve it or
16 sometimes because we needed it, it's very rarely used
17 in litigation.

18 So of these individuals, the four out of
19 100, we processed only 16, a little over 16 percent of
20 that data in terms of matters. So what it's saying is
21 that 16 percent of the 4 percent is for each 100
22 people, less than one of those individuals ever has
23 their information put into the discovery cycle. And
24 as you know, once it goes into the discovery cycle,
25 the chances of particular information being needed is

1 also pretty, pretty limited, a relatively small
2 percentage.

3 These costs are very significant obviously.
4 We spend over 40,000 hours in internal costs just in
5 terms of discovery activities. That's the internal
6 time of our personnel. That's not including the
7 outside review time, the outside counsel costs or the
8 outside costs for our review vendors.

9 So these are significant costs. Obviously
10 the impact to a smaller company could be devastating,
11 and it's a big impact for us as well. And I don't
12 want to belabor this issue, but we know that the
13 question about costs and the ability to seek and
14 obtain efficient justice can be a gatekeeper for
15 whether people can get relief.

16 People don't bring lawsuits because they
17 know the costs are going to be so high. And I know
18 that there was a question before about the
19 nonsignificant civil rights cases. I posit that
20 there's probably a number of civil rights cases that
21 are not being brought today because the lawyers can't
22 make an economic case to bring them because of the
23 costs of discovery.

24 This is an issue that impacts plaintiffs and
25 defendants, and these changes will make a meaningful

1 difference in our civil litigation system. I want to
2 point out that we endorse obviously the LCJ comments,
3 and I do agree with John Rabiej's comments on the
4 issue of curative measures. I think that's a very
5 important change that should be considered. And I'm
6 happy to answer any other questions.

7 JUDGE CAMPBELL: Questions? Judge Oliver?

8 JUDGE OLIVER: I think we would all agree
9 that the plaintiffs didn't cause all these problems
10 with e-discovery and neither did the defendants, but
11 technology, as a result of advances in technology,
12 some of which actually do benefit businesses, that
13 means that we've got a lot more documents, a lot more
14 things to control, and there may actually be a lot
15 more relevant information because people do more
16 recordkeeping.

17 It's legitimate obviously to think about how
18 can you lay down a rule where you have some certainty
19 or relative certainty and that you don't have to
20 overpreserve. But it's got to be somewhat imprecise
21 necessarily because of the number of documents and
22 things you have to anticipate. Wouldn't it be
23 reasonable to build in some business costs as a result
24 of decisions that are made that may have you getting
25 rid of documents that may be pertinent?

1 MR. LEVY: Well, when we look at our
2 information systems, we, I think like any company,
3 have to try to figure out the most effective way to
4 manage information, to govern that information, to
5 make our company work more effectively. We do have a
6 tremendous amount of information, and we struggle with
7 how to get rid of what we don't need in terms of the
8 business decision-making and have access to the things
9 that we do need.

10 We also know that when we try to be the most
11 efficient and effective in making that decision, the
12 exception is the preservation obligation and what
13 happens if we get rid of a lot of things that we know
14 we'll never need, it won't advance our business, but
15 we're going to be questioned later about why we didn't
16 save it because it might be related to some future
17 lawsuit or even an existing lawsuit, and that's a
18 tough standard.

19 But, yes, business decisions are a factor.
20 We know we benefit from this information, but we need
21 to be able to use it in the most effective way
22 possible. I hope I answered your question on that.

23 JUDGE CAMPBELL: Parker?

24 MR. FOLSE: Given that the rule --

25 JUDGE CAMPBELL: Could you push the button

1 on that, please?

2 MR. FOLSE: Okay. Given that the rule
3 doesn't change the obligation to preserve information,
4 how specifically would the proposed amendments in the
5 case of your company reduce the number of individuals
6 who would be on hold or reduce the cost and money
7 incurred internally devoted to preservation? It
8 sounds as if there's been a very conscious, well
9 thought out effort at Exxon Mobil to try to preserve
10 information. Do you as a result of these rule
11 amendments do something less, and if so, what language
12 of the rule allows you to do that?

13 MR. LEVY: I think the difference is that
14 the decisions that are made, some of them are
15 decisions that are put to me -- my ability to make
16 what I think is the reasoned and appropriate and
17 efficient result that won't cause any loss of
18 information that relates to a lawsuit will be -- I'm
19 not going to say no, let's just keep everything, which
20 sometimes we do now. We have 600 terabytes of data
21 that's only on hold simply for the potential it might
22 be needed in a lawsuit.

23 I can guarantee you that of that 600
24 terabytes, maybe 50 gigabytes would ever be used. But
25 I can't feel comfortable getting rid of that knowing

1 that I don't know what the standard against which I
2 will be judged in that decision, whether it's
3 reasonableness, whether it's negligence, whatever it
4 is. So I have to keep it all.

5 And that cost, we're spending a significant
6 amount of money right now just dealing with the
7 preservation of that information. It's not free just
8 to sit that stuff down. There are a lot of costs
9 associated with that. Those are the types of examples
10 where we will save money and not lose any information
11 that will be needed in ongoing lawsuits.

12 MR. FOLSE: Because the standard by which
13 sanctions would be imposed changes?

14 MR. LEVY: I don't what sanctions -- I don't
15 know what standard against which my decision will be
16 made. So, if it's negligence, I'm not sure what --
17 you know, how can I decide whether I will meet that in
18 deciding I don't think it's reasonably likely that
19 it's going to be needed, and so I keep it. But if
20 it's a standard based upon what the committee has
21 proposed, I think that I'm justified in making the
22 decision that we don't need to spend the money to keep
23 it because I know it's probably never going to be
24 used. But the probably is the part that I think the
25 difference between some Circuits and other Circuits

1 could be determinative.

2 JUDGE CAMPBELL: All right. Thank you very
3 much, Mr. Levy.

4 Ms. Schwartz?

5 MS. SCHWARTZ: Judge Campbell, members of
6 the committee, thank you for the opportunity to
7 testify today about proposed amendments to the federal
8 rules. My name is Michelle Schwartz, and I'm the
9 director of justice programs at Alliance for Justice,
10 a national association of more than 100 organizations
11 dedicated to the creation of an equitable, just, and
12 free society. AFJ has submitted comments, as have
13 several of our members.

14 I speak today to urge you to consider these
15 amendments in the broader context of numerous factors
16 already affecting everyday Americans' access to the
17 courts and to reject those proposals that would
18 further diminish that access.

19 I want to push back on the suggestion that
20 was made earlier that our justice system is somehow a
21 black mark on our nation's reputation. Quite to the
22 contrary, thanks in no small to the efforts of those
23 on the committee and others in this room, our justice
24 system is the envy of the world. Disputes that in
25 other places might be decided on the streets here are

1 decided in the courtroom.

2 The system works because people know that
3 when they enter an American courtroom, they do so on a
4 level playing field. Whatever inequities of status,
5 class, or money exist on the outside do not matter
6 before an impartial judge and jury. This ideal is
7 inscribed on the U.S. Supreme Court: equal justice
8 under law.

9 The system only works as long as the
10 American people believe they can in fact have their
11 day in court if they are wronged, but that belief is
12 being eroded by a number of factors. First, with one
13 in 10 federal judgeships vacant and courts suffering
14 under the weight of draconian budget cuts, more and
15 more Americans are being forced to wait for justice
16 despite the efforts of federal judges.

17 Second, consumers, employees, and even small
18 businesses are being blocked from the courthouse
19 because of forced arbitration agreements in the fine
20 print of contracts.

21 Third, the class action device is facing
22 increasing limitations. That device often is the only
23 path to relief for individuals who have been harmed
24 but whose injuries alone are not worth the cost of
25 litigation. It is also an incredibly important

1 mechanism for addressing societal wrongs.

2 And fourth, pleading standards have been
3 increased in recent years such that victims who make
4 it through the courthouse doors frequently cannot make
5 it past the initial pleading stage.

6 Together these recent developments mean that
7 it's harder for victims to find a lawyer who will take
8 their case, and victims are questioning whether they
9 can really have their fair day in court. As a result,
10 more and more wrongdoing will be pushed underground.
11 That has dire consequences for the victims themselves,
12 but it also harms our society when wrongdoing
13 continues unpunished and the public doesn't learn of
14 threats to their health, safety, and well-being.

15 Unfortunately, a number of the proposed
16 amendments to the federal rules will only magnify the
17 barriers that already exist for those seeking justice.

18 In particular, we are concerned about the changes to
19 Rules 26(b), 30, 31, 33, and 36. By limiting
20 discovery, these changes would further serve to
21 discourage victims from going to court, discourage
22 lawyers from taking victims' cases, and privilege
23 parties with money and power.

24 I've heard it suggested that these proposed
25 amendments are minor and would have little effect.

1 That may be true in cases where the parties have equal
2 power and resources, but where a victim with few
3 resources is coming up against a powerful corporation,
4 the impact will be anything but small.

5 I began by speaking about an inscription on
6 the U.S. Supreme Court. I would like to end my
7 remarks with an inscription on the Frank R. Lautenberg
8 Federal Courthouse in Newark, New Jersey. I had the
9 great honor of working for Senator Lautenberg, my home
10 state senator, for six years. Although he was not a
11 lawyer himself, Senator Lautenberg had a deep and
12 abiding respect for our justice system, a respect no
13 doubt shaped by his experience fighting in Europe
14 during World War II.

15 And so, when it came time for Senator
16 Lautenberg to choose an inscription for the courthouse
17 that bears his name, he wrote, "The true measure of
18 democracy is its dispensation of justice." At a time
19 when public confidence in two of our three branches of
20 government is disturbingly low, it has never been more
21 important for Americans to believe in the fair
22 dispensation of justice. Therefore, AFJ urges the
23 committee to reject changes to the federal rules that
24 would undermine those beliefs. Thank you.

25 JUDGE CAMPBELL: All right. Thank you.

1 Comments or questions for Ms. Schwartz?

2 (No response.)

3 JUDGE CAMPBELL: All right. Thank you very
4 much for your comments.

5 MR. BARKETT: I have one.

6 JUDGE CAMPBELL: Yes, please, Justice
7 Nahmias (sic). Could you pull a mike over toward you?

8 MR. BARKETT: Oh, sorry. No. I have one.

9 JUDGE CAMPBELL: Oh, it's John. Okay.

10 MR. BARKETT: Did you have a specific
11 reaction to the scope of discovery in 26(b)(1)? You
12 rolled a number of numbers together, but did you have
13 a particular reaction to the scope changes?

14 MS. SCHWARTZ: The concern about Rule 26(b)
15 is by moving the proportionality requirement up, by
16 taking out the longstanding language that has existed
17 in that rule, we're very concerned that that will
18 increase litigation around those questions and further
19 burden already overburdened courts, therefore making
20 it even more difficult for people to get justice,
21 delaying trials and so on.

22 MR. BARKETT: Even though you've heard
23 already the (b)(2)(C) factors have been part of (b)(1)
24 for a long time, reasonably calculated has been
25 subject since 2000 to a good cause standard, and the

1 26(g) certification language that all lawyers now sign
2 essentially say the same thing.

3 MS. SCHWARTZ: Well, I think the concern is
4 twofold. One is taking out the reasonably calculated
5 language altogether and --

6 MR. BARKETT: Well, it's not removed
7 altogether. It's just adjusted to reflect its
8 original intent.

9 MS. SCHWARTZ: I would submit that the
10 change is going to lead to corollary litigation around
11 that question, and also the concern of moving it up in
12 the rules and making it so that that burden is placed
13 on the proponent of the discovery at the outset as
14 opposed to being a question that may be determined
15 later on.

16 JUDGE CAMPBELL: Okay. Any other questions?

17 (No response.)

18 JUDGE CAMPBELL: All right. Thank you very
19 much for your comments.

20 Ms. Vaughn?

21 MS. VAUGHN: Good afternoon, members of the
22 committee. My name is Andrea Vaughn. I'm a staff
23 attorney with the Public Justice Center. We are a
24 nonprofit social justice law firm in Baltimore,
25 Maryland that works to expand and enforce the rights

1 of those who have suffered due to poverty or
2 discrimination, and we do this through litigation,
3 legislative advocacy, and community education.

4 I very much appreciate the opportunity to
5 come here today to provide input on how these proposed
6 changes to the rules will impact our clients' ability
7 to enforce their basic rights under the law. I'll be
8 brief because we've also submitted written comments,
9 and I'll just focus on our three main concerns.

10 First, the presumptive limit on deposition
11 hours and the reduction of depositions from 10 to five
12 would significantly burden our clients in employment
13 cases. Our workplace justice project litigates many
14 cases on behalf of low-wage workers for nonpayment of
15 wages, and these cases often involve complicated
16 employment relationships.

17 For example, we litigate a lot of cases
18 around labor broker arrangements or rental worker
19 schemes. These all have multiple employers, which
20 often require several 30(b)(6) depositions of the
21 corporate employers as well as additional depositions
22 of foremen, managers, supervisors, et cetera.

23 All of these depositions are necessary to
24 take out the facts around control that is required to
25 show joint employment under federal employment laws.

1 These depositions also take a significant amount of
2 time in order to uncover the necessary and relevant
3 evidence to establish these relationships.

4 In addition, I'm sure not only in our
5 litigation but in much more litigation than was
6 previously true, many depositions require the use of
7 an interpreter. Using an interpreter in depositions,
8 as you can imagine, often can take more than double
9 the time that is normally needed for a deposition.
10 While in theory a judge could permit a party more time
11 to depose a non-English speaker, the need to argue
12 exceptions each time, which in our cases would be for
13 most depositions that we defend and even some that we
14 conduct, could deter reliance on such witnesses at
15 all.

16 Reducing the presumptive limits both in
17 number and hours would therefore particularly burden
18 our clients' access to key evidence and would require
19 us to routinely demonstrate why the presumption would
20 not apply. In short, altering limits we don't see as
21 necessary, and we think that it would increase the
22 costs of litigation and impede access to justice for
23 low-wage workers.

24 Second, in employment and civil rights case,
25 defendants typically are in possession of the facts

1 that plaintiffs need to support their claims, and the
2 proposed rules we believe would further this imbalance
3 by adding additional limits to plaintiffs' access to
4 information.

5 For example, in employment discrimination
6 claims, plaintiffs need records of hiring decisions,
7 pay scales, names of coworkers who may have heard
8 improper remarks, names of comparators. All of this
9 evidence is in the hands of the employer, and
10 plaintiffs' only tool to get this evidence is through
11 discovery, especially interrogatories and depositions.

12 Therefore, decreasing the number of
13 interrogatories and depositions will usually be
14 inadequate to generate the evidence that a plaintiff
15 needs to prevail, and this is especially true in cases
16 where we are arguing a joint employer relationship, as
17 I alluded to earlier.

18 And finally, as you've heard a lot about
19 already today, we are definitely concerned about the
20 new limitations on discovery based on proportionality.

21 Defining the scope of discovery to include, in our
22 cases, consideration on the amount of controversy at
23 the outset puts low-wage litigants at a distinct
24 disadvantage.

25 For many low-wage worker plaintiffs,

1 including our clients, the amount in controversy may
2 be relatively small, especially in comparison to the
3 costs of litigating a case in federal court. Clearly
4 low-wage workers will be at a disadvantage in
5 litigating their wage claims if the scope of
6 permissible discovery shrinks in proportion to the
7 monetary value of their claims.

8 We also believe that this proposed rule is
9 in direct conflict with the remedial purposes of
10 important employment laws like the Fair Labor
11 Standards Act, which drafters intended to facilitate
12 the enforcement of important rights, especially in the
13 case of low-wage workers.

14 So not only does this rule adversely impact
15 low-wage workers in employment claims, it will cause
16 more delays and more increased costs while the parties
17 litigate more discovery disputes.

18 In conclusion, typical civil rights and
19 employment plaintiffs can prevail only through the
20 liberal use of discovery. These proposed rule
21 changes, especially the ones that I've just discussed,
22 will subject litigants, especially low-income
23 litigants, to an unfair and often insurmountable
24 disadvantage.

25 Thank you. I'm happy to take any questions.

1 JUDGE CAMPBELL: All right. Thank you.

2 Questions?

3 MR. FOLSE: To what extent in the work that
4 you described have you been facing proportionality-
5 related objections based on undue cost or expense
6 already under the existing rules?

7 MS. VAUGHN: That's a great question.
8 Defendants now often bring up, for example, the amount
9 in controversy. This is a case about a small amount
10 of money. The discovery you are seeking is too much.
11 But typically we are still able to get the information
12 we seek, and if not, then -- or the defendants have to
13 move for a protective order. Our concern is that with
14 this rule, it puts the presumptive responsibility --
15 or the parties have the ability to resist discovery
16 based on something like amount in controversy, whereas
17 now it would be a question for the court.

18 JUDGE CAMPBELL: Judge Pratter.

19 JUDGE PRATTER: Have you run into any
20 circumstances or cases where a judge who's been
21 requested to give you more time on depositions because
22 of a translator or an interpreter has refused that
23 kind of a request?

24 MS. VAUGHN: We have not had that come up
25 ourselves yet. I think my main concern with the

1 shortening of the deposition hours, and I heard
2 someone earlier say one hour may not seem like a lot,
3 but the idea is that by just shortening it, you know,
4 going from seven to eight hours may not be seen as a
5 big deal. Maybe going from six to eight or six to
6 nine is seen as a larger jump. So I think the issue
7 is more why are we lowering the bar.

8 JUDGE PRATTER: Well, if your alternative
9 was to speak to your opponent and say you understand
10 that the plaintiff or the witnesses are not English
11 speakers, we're going to have to bring a translator,
12 do you really think that you're going to run into
13 problems with opposing counsel, who is going to say,
14 you know, five hours are five hours? I mean, really?

15 MS. VAUGHN: I certainly hope not, of
16 course, because we all understand -- I think it's
17 pretty intuitive that an interpreter is going to take
18 longer. They want to get the information, or we want
19 to get the information. It's in the interests of
20 everybody that the interpreter be allowed to interpret
21 for as long as it takes. And I would say that
22 typically we are able to come to an agreement with
23 defendants on the number of hours when an interpreter
24 is involved.

25 JUDGE PRATTER: Because obviously with what

1 we are all -- the underpinning of much of this is that
2 it may be not as simple-minded as can't we all get
3 along, but it really does shock me to think that on
4 basic kinds of propositions do we really have to have
5 rules about them. Maybe that's a rhetorical question.

6 JUDGE CAMPBELL: Judge Matheson, did you
7 have a question?

8 JUDGE MATHESON: I had the same question.

9 JUDGE CAMPBELL: Judge Koeltl?

10 JUDGE KOELTL: I'm really not sure how your
11 issue with respect to proportionality would work out
12 in practice. You say it's now going to be the
13 responsibility of the plaintiff's lawyer to assure
14 that the requests that the plaintiff's lawyer makes is
15 consistent with the scope of discovery, which includes
16 such things as consideration of burden and expense.

17 Under 26(g), that's already a responsibility
18 of the plaintiff's lawyer. But the specifics of how a
19 request might be too burdensome, not proportional to
20 the needs of the case is really going to require some
21 input from the defendant, who comes forward and says,
22 look, if we were to comply with this request as you've
23 worded it, we would have to search the files of 500
24 people.

25 And so that would usually be something that

1 would be discussed in the context of attempting to
2 work out what the requests are, what the reasonable
3 proportional responses to the requests would be, and
4 only if the parties disagreed with that would it ever
5 come to the court. It just seems -- and you can
6 respond from your own practice -- that it's
7 unreasonable to think that the change in the rule
8 would somehow require the plaintiffs to be omniscient
9 with respect to what the effect of the request would
10 be on the defendant's recordkeeping and the documents
11 and the custodians. It plainly requires some input
12 from the other side. It requires a discussion as to
13 what a reasonable request is in terms of this case.
14 And you would also expect that in the context of a
15 civil rights case that the interests involved, which
16 are part of the factors to be considered, would be
17 taken into account by the parties and certainly by the
18 judge who if you ever had to bring it before the judge
19 would make that determination.

20 So I don't understand why putting the
21 factors into the scope of discovery would change the
22 actual practice other than to remind people that all
23 of this is still there, which some people don't
24 appreciate when it's not in the first sentence of the
25 rule.

1 MS. VAUGHN: Sure. And I can speak again
2 from our own experience. I think largely in most -- I
3 think litigators would agree that discovery is a
4 collaborative process. There's lots of discussion
5 that happens before anything is brought to the judge.
6 In the District of Maryland, for example, it's
7 required that there be very extensive discussion
8 between counsel before --

9 JUDGE KOELTL: We require a pre -- in the
10 Southern District of New York, we also require a
11 conference. We also require the lawyers to first of
12 all discuss and then to have a conference with the
13 judge before you ever make a discovery motion.

14 MS. VAUGHN: Right. And in the District of
15 Maryland, you're even required to exchange briefing
16 before it goes before the court. So I don't mean to
17 imply that in every single case it's this contentious
18 battle between the two sides and we're unable to come
19 to an agreement. Our concern about the language, the
20 changes in the language of the rule, is that it puts
21 the -- that it allows defendants to resist discovery
22 from the onset based on the factors instead of
23 requiring them to bring it before the court.

24 JUDGE KOELTL: But can't they do that now?
25 They file an objection to a request for discovery and

1 they say burdensome, not proportional, not consistent
2 with 26(b)(2)(C)(iii)?

3 MS. VAUGHN: Right. And I think what the
4 difference is is that here -- well, in our current
5 practice typically there are objections and
6 occasionally some withholding of information. But for
7 the most part, the rules require that you move for a
8 protective order or that before you can resist the
9 discovery to that level -- and our concern is that by
10 moving the language up, it makes it easier for parties
11 to resist discovery and also potentially increases the
12 risk of abuse, discovery abuse.

13 JUDGE CAMPBELL: All right. Thank you very
14 much, Ms. Vaughn.

15 Mr. Dyller?

16 MR. DYLLER: Thank you. My name is Barry
17 Dyller. I'm a civil rights attorney in a small civil
18 rights litigation law firm. Thank you for hearing
19 from me.

20 I'm an attorney in the trenches of the
21 federal courts. I represent citizens whose civil
22 rights, their constitutional rights, were violated by
23 government entities or government employees or actors.

24 Most of my clients have little or no money. So I
25 make the decision up front what cases are valid, what

1 cases are provable, what cases have significant
2 societal issues or personal issues, and I mention this
3 because so much of these proposed rules changes have
4 to do with costs, but I think that it is generally
5 plaintiffs' lawyers who weed out frivolous cases
6 because we're paying for the costs, we're paying for
7 the excessive discovery.

8 If I take a deposition that's not needed, it
9 costs me hundreds of dollars, so I don't do it. I
10 believe these rules will thwart the goals of reducing
11 costs. I know the proposed rules will prevent valid
12 claims from being brought and prevent valid claims
13 from being proved. And this will permit or encourage
14 bad conduct by government actors, which violates
15 citizens' constitutional rights.

16 I'd like to talk about two of the proposed
17 amendments, not proportionality because I know that's
18 been discussed extensively. I have not heard anyone
19 speak about Rule 4, service. And the proposed change
20 to Rule 4(m) would reduce the time for service from
21 120 to 60 days. I think this is unnecessary, first of
22 all, because it's always in plaintiff's interest to
23 get the summons and complaints served as soon as
24 possible.

25 I also think that the proposed rule change

1 is a de facto repeal of Rule 4(d), which permits
2 waiver of service by mail, the cheapest, most
3 inexpensive, and easiest mode of service, and the
4 reason it does that is because Rule 4(d), if I file my
5 complaint today and put it in the mail today, the
6 other side has 30 days to not respond. By the time I
7 learn they haven't responded, maybe I have 25 days,
8 and I have to really hustle, and it's not always
9 possible. So I think it doesn't do anything except
10 make it more difficult and expensive.

11 I would also like to discuss the proposed
12 rules change to the number of depositions. I think a
13 limit of five depositions is a disaster. When one
14 considers the need to depose parties, eyewitnesses,
15 supervisors, people involved in making governmental
16 policy, document custodians, medical providers,
17 countless other types of witnesses, five depositions
18 is nothing or in many cases is nothing.

19 Not only do we need to be able to survive
20 summary judgment, we need to be able to make a
21 convincing case to a jury. So even if I can survive a
22 summary judgment motion, I need people's testimony and
23 if I can't get it, I can't protect my client's rights.

24 And that applies equally to defendants
25 because I want defendants to take as many depositions

1 as they want because if they can't assess my case,
2 they can't assess whether to go to trial or to try to
3 resolve the case. I want all information on the
4 table. And this limit I think is just a disaster.

5 Now there are abuses, but federal judges are
6 more than capable of stemming those abuses. I think
7 the severe limits in the proposed rules presume that
8 attorneys and judges cannot exercise good judgment,
9 and I just don't think that's so. The proposed rule
10 change reminds me of something that Judge Max Rosen of
11 blessed memory from the Third Circuit wrote in an
12 opinion in a different context, and he wrote that
13 formalism is often the last refuge of scoundrels.
14 History teaches us that the most tyrannical regimes
15 from Pinochet's Chile to Stalin's Soviet Union are
16 theoretically those with the most developed legal
17 procedures. And that's from Beck v. City of
18 Pittsburgh.

19 The more restrictive our rules, the more we
20 rely on their formalism, the less accountable our
21 government, our government actors, and our corporate
22 and individual citizens need be. The more restrictive
23 our rules, the more at risk the most vulnerable
24 citizens are. The more restrictive our rules, the
25 fewer tools at our disposal to prevent corruption or

1 other law violations and to pursue remedies where bad
2 acts have already occurred. Thank you.

3 JUDGE CAMPBELL: Mr. Dyller, it seems to me
4 that a limit of five depositions is a disaster only if
5 you can't get more when you need more, and to say that
6 a presumptive limit is a disaster necessarily implies
7 that judges won't exceed it in cases where it should
8 be exceeded. At the same time, you said that judges
9 are more than capable of preventing abuses. One seems
10 to be a vote against the competency of judges to make
11 the right decision on the number of depositions and
12 the other seems to be a vote in favor of judges being
13 able to control abuses. Could you address that
14 dichotomy?

15 MR. DYLLER: Sure. When I bring a case, I
16 always think I'm right, and from time to time, the
17 judge tells me I'm not. So, when I say I need more
18 depositions, in my experience, I've never had a
19 problem, but that doesn't mean I won't have a problem.

20 And I also think that if there's a change from 10 to
21 five in the rules, that is a message to judges. You
22 know, we want you to limit this. It's also a message
23 to opposing counsel. Here is a weapon at your
24 disposal to limit proof.

25 So while judges certainly have the

1 discretion to give me everything I want, it doesn't
2 mean they will, and I think it's a message not to.

3 JUDGE CAMPBELL: Dean Klonoff.

4 DEAN KLONOFF: Two questions from your
5 written submission. The first one, you say most cases
6 require more than five depositions, and I'm wondering
7 if you have any empirical support for that. And then
8 secondly, you talk at some length about how bad it
9 would be to have a four-hour deposition. I wonder if
10 you're as vigorously opposed to a six-hour.

11 MR. DYLLER: I don't have studies about how
12 many depositions. It's really my own personal
13 experience that generally more than five are needed,
14 and I can certainly give examples. I have a case, a
15 wonderful case where there were 27 depositions taken,
16 every one needed by both sides. It was about half and
17 half, by the way.

18 DEAN KLONOFF: Well, that's a very different
19 statement to say most of your cases than to say most
20 cases.

21 MR. DYLLER: Well, that's true, that's true.
22 And I am talking from my own experience. In terms of
23 four hours versus six hours, most of my depositions
24 aren't more than four hours, but it doesn't mean that
25 many are -- you know, many are more than that. A

1 minority, but many.

2 I also think that it invites abuse. For
3 example, I did have a deposition of a corporate
4 president who after every question paused 25 or 30
5 seconds. A question like what is your name, and we
6 would wait and we would wait and we would wait. And
7 that was every question, and I waited, and I took the
8 deposition over two days.

9 You know, I don't really want to have to go
10 to a judge and while I think I would get what I want,
11 I think it's a waste of the judge's time for me to go
12 and say, you know, Mr. Smith, you know, paused a lot,
13 please, judge, make him come back.

14 JUDGE CAMPBELL: Judge Harris, did you have
15 a question?

16 JUDGE HARRIS: Thank you. With 4(m), have
17 you ever had any trouble getting an extension of time
18 to perfect service from a judge where you've had
19 trouble?

20 MR. DYLLER: I never have had a problem.
21 But I do think that it will make me think twice about
22 trying to serve by mail. It is generally how I do
23 serve because it is the most efficient. And it will
24 make me think twice, but, you know, in the handful of
25 times when I just couldn't find somebody or needed

1 more time, I have not had a problem.

2 JUDGE CAMPBELL: We've got about one more
3 minute. Judge Pratter?

4 JUDGE PRATTER: Just very quickly. Thank
5 you for the written submission because it's very
6 helpful to put into context some of the things that
7 you've mentioned. One of them that caught my
8 attention was your suggestion that by reducing the
9 number of interrogatories, the unintended consequence
10 might be that lawyers being reduced in the number they
11 can write will write the ones -- will draft them more
12 broadly and therefore defeat what we're trying to
13 accomplish. I thought that was a fairly interesting
14 comment. Is that how you approach discovery?

15 MR. DYLLER: Well, actually, if I'm correct,
16 that comment that I made was to the prior proposed
17 rule about limiting document requests.

18 JUDGE PRATTER: I thought it was about
19 interrogatories.

20 MR. DYLLER: The only reason I say that is I
21 rarely use interrogatories, so I don't care how many
22 there are personally. I personally think they're
23 useless.

24 JUDGE CAMPBELL: All right. Thank you very
25 much, Mr. Dyller.

1 MR. DYLLER: Thank you.

2 JUDGE CAMPBELL: Mr. Dahl?

3 MR. DAHL: Good afternoon. My name is Alex
4 Dahl, and I'm counsel for Lawyers for Civil Justice.
5 Thank you very much for this opportunity to
6 participate in the public comment process, and we
7 appreciate your recognition that there is a serious
8 problem. As you know, there's widespread agreement in
9 the bar that discovery is too expensive, that costs
10 are driving the outcomes of cases, and that discovery
11 is being abused.

12 The overbroad scope of discovery is in a big
13 picture the reason for these problems. We have filed
14 a lengthy comment, so I just want to touch on three
15 points briefly here. I'd like to start with Rule
16 37(e) because I believe that this is one area in which
17 the public comment process has already achieved
18 clarity on one issue, and that issue is what it means
19 to say willful or in bad faith.

20 On the first day of the public comment
21 process, the Sekisui case defined willful and made
22 clear that willful means knowing but not necessarily
23 with any culpability. In other words, that phrase has
24 now been defined. Willful or in bad faith means
25 willful.

1 It's been defined as such to one of the
2 audiences that matters most, the people who make
3 preservation decisions, because their job is to make
4 sure that their organizations don't get sanctioned.
5 And so, to those people, it doesn't matter whether
6 that's the majority rule or most jurisdictions or
7 almost all jurisdictions because if their jurisdiction
8 is where that's the standard, that is the standard
9 that they are going to use to make preservation
10 decisions. So those people, they don't know whether a
11 case is going to be brought or where it's going to be
12 brought, but they know there's a chance that it's
13 going to be brought in a jurisdiction where willful
14 simply means knowing without any culpable intent, and
15 they will make preservation decisions to preserve
16 everything to avoid sanctions in that event.

17 So, if the committee is going to adhere to
18 its goal, as the note says, to ensure that potential
19 litigants who make reasonable efforts to satisfy their
20 preservation obligations have the confidence that
21 they're not subjected to serious sanctions, then the
22 committee should change the "or" to the "and" or
23 define willful in a way that makes that clear that
24 there is a culpability requirement for that rule.

25 Now I'd like to address (b)(2). The

1 provision in (b)(2), the exception to the rule, is an
2 example of rule writing for a very rare exception, but
3 putting that into the rule, that will run a very high
4 risk of being used more than the committee expects it
5 to be.

6 As we laid out in our comment, we also
7 believe that the exception is unnecessary. The cases
8 that gave rise to the concern have some showing of
9 culpability in the facts of those cases. They also
10 could have been dealt with by what is incorporated in
11 the current draft as curative measures. So the risk
12 of a rule written for a very rare exception being
13 overused does not outweigh the cost -- sorry -- the
14 cost of -- the potential cost of that rule does not
15 outweigh the usefulness of it, and we urge that the
16 (b)(2) exception be removed.

17 Finally, I'd like to comment on the change
18 proposed to 26(b)(1), and we addressed this in the
19 comment as well, but I'd like to make the observation
20 that it seems to me that the opponents of this change
21 really aren't afraid of proportionality. They're
22 afraid of not having proportionality.

23 What we've heard today is arguments why
24 proportionality means different things to different
25 cases, which is exactly the point of the

1 proportionality analysis to begin with, and
2 demonstrates that thoughtfulness given to cases in
3 advance is an appropriate way to gauge discovery
4 because again there's widespread belief that the
5 discovery is overbroad.

6 So putting that language into 26(b)(1) we
7 think would be a substantial improvement for the
8 reason that it will make people think about their case
9 and their claims and have discovery that is related to
10 the claims and defenses in the cases.

11 JUDGE CAMPBELL: Mr. Dahl, let me ask you a
12 question on that last point. As I understand some of
13 the comments on proportionality, the concern is this.

14 Where it currently resides in the rule in (b)(2), it
15 is a consideration a court can take in limiting
16 discovery, and in order to invoke it, somebody needs
17 to ask the court to limit discovery, and that's
18 usually going to be the party who's received the
19 discovery, and they then have to go to the court and
20 say this isn't proportional, please limit it.

21 I think one of the points that has been made
22 is that if we put that right into the definition of
23 the scope of discovery, we now empower lawyers who
24 receive discovery to say, I object, I won't produce it
25 because even though it's relevant, it's not

1 proportional. And that then in effect creates a new
2 obstacle that those lawyers who don't want to turn
3 over information can invoke that isn't in the present
4 version of the rule. Could you address that?

5 MR. DAHL: Sure. And I confess that that's
6 a new idea, even though I've read the draft a number
7 of times, a new idea to me because that's not what I
8 understood the change to mean. And I frankly don't
9 understand why that would be a change of burden
10 because it seems to me that in discovery disputes as a
11 pragmatic thing that they're going to arise in the
12 same way today that they would in the future under the
13 rule, which is that there's a request and a response,
14 and one party or the other is going to move either to
15 compel or for a protective order, and I don't
16 understand how as a practical matter moving the
17 language is going to change which party does that or
18 what the burden is.

19 So that's off the top of my head. I admit
20 that that's a new concept because that is not how I
21 understood the change to mean.

22 JUDGE CAMPBELL: Professor?

23 PROF. MARCUS: I note you refer to the
24 Sekisui case and in particular in relation to the use
25 in our rule of willful. I'm right, am I not, that the

1 Sekisui case contains some fairly strong disagreement
2 with our rule. Is it really the measure of our rule?
3 I'm a little surprised at that idea.

4 MR. DAHL: The Sekisui case says that
5 willfulness is sufficient for a sanction without
6 culpability standard --

7 PROF. MARCUS: In the Second Circuit, citing
8 Residential Funding.

9 MR. DAHL: Correct. And then it says or
10 negligence. And in the footnote that you refer to, it
11 says that the rule if adopted would abrogate
12 Residential Funding with respect to negligence. And I
13 can't give you the *Law Review* answer off the top of my
14 head, but I can tell you that those two phrases
15 together is enough to cause serious concern. And
16 again, my point is to keep in mind the audience --
17 isn't most judges or most jurisdictions, it is the
18 preservers, the people who are making decisions whose
19 job is to avoid sanctions and whether that creates
20 risk.

21 But the text of that case, of the Sekisui
22 language says that knowledge without any degree of
23 culpability is sufficient for sanctions or negligence.
24 And I think that for the people making preservation
25 decisions that's it. That's all they need to know,

1 that there are jurisdictions where they can get
2 sanctioned under that standard, and therefore their
3 option is only to preserve everything and to continue
4 what's happening today, which is a really extravagant
5 amount of overpreservation needlessly.

6 JUDGE CAMPBELL: Judge Grimm, last question.

7 JUDGE GRIMM: Mr. Dahl, help me out if you
8 would. If the decision is made to have willful or bad
9 faith, disjunctive instead of conjunctive, is there a
10 definition of willful? Knowing that the definition in
11 the footnote that you've been referring to is very
12 broad, is there language that you believe you would
13 think that we should be well-served to consider to
14 define willful either in the rule itself or in the
15 advisory note that you think gets at the conduct that
16 would cause those decision-makers who may have to act
17 before there's even a lawsuit to have some comfort as
18 to where they can go safely without being fearful of
19 sanctions?

20 MR. DAHL: Yes. I think the important
21 concept to put in the definition is a level of
22 culpability, bad faith or -- I can't dictate the exact
23 words, of course, but to put that concept in so that
24 it's not simply knowing without any kind of culpable
25 conduct.

1 JUDGE GRIMM: Some notion of awareness of
2 the consequence in terms of making the information
3 unavailable as opposed to I'm not sleepwalking when I
4 didn't do this.

5 MR. DAHL: Correct, something that is
6 related to an intention to get rid of that data or
7 information for the purpose of not allowing it to be
8 considered in a future lawsuit.

9 JUDGE CAMPBELL: All right. Thank you very
10 much, Mr. Dahl.

11 Ms. Claffee?

12 MS. CLAFFEE: Good afternoon. Thank you so
13 much for the chance to testify this afternoon. My
14 name is Lily Fu Claffee. I am the general counsel of
15 the U.S. Chamber of Commerce, which is the world's
16 biggest business federation, as well as the general
17 counsel of the U.S. Chamber's Institute for Legal
18 Reform. I'm also the head of the Chamber's Litigation
19 Center, which is a public policy law firm that
20 litigates on behalf of the Chamber in state and
21 federal courts all over the country.

22 Before I joined the Chamber, I was a
23 litigation partner at Mayer Brown and the Jones Day
24 law firms. I was a government lawyer for four years
25 serving at three agencies, including the Justice

1 Department. And I've thought about the federal rules
2 as a practitioner, as a government GC, as a corporate
3 GC, and as a public interest litigator who tries to
4 shape litigation policy. But today I'm speaking as a
5 voice on behalf of the Chamber's tens of thousands of
6 members who are affected by the federal rules every
7 day.

8 I'm not going to rehash the Chamber's
9 technical comments to the proposed amendments, but
10 instead I just want to make one overarching point, and
11 that is the proposed amendments to the federal rules
12 overall in the Chamber's view is a cautious and well-
13 reasoned, carefully balanced effort to address among
14 other things two of the most important aspects of
15 civil litigation that affects the business community
16 today: one, the scope of discovery, and two, document
17 preservation.

18 In the Chamber's view, the proposed changes
19 represent moderate but positive steps toward
20 clarifying the rules and making them work as they were
21 intended. The committee correctly focused on scope
22 and preservation. These are two areas that are major
23 drivers of litigation costs. And I know that this
24 committee is lousy with data at this point, but allow
25 me to throw a few more points on the pile.

1 Studies show that discovery costs alone
2 account for anywhere between 25 to 90 percent of
3 litigation costs. Scope helps determine whether we're
4 closer to the 25 percent side or to the 90 percent
5 side. Preservation costs are a little bit more
6 difficult for us to quantify on a broad basis, but
7 preliminary reports suggest that those costs are
8 pronounced as well, and testimony such as Mr. Levy's
9 earlier would confirm that point.

10 The reason for this is the amount of
11 material, as we've discussed -- other witnesses have
12 discussed is so great today with electronic discovery,
13 and overpreservation for safety's sake is so
14 prevalent.

15 In my position, I can confirm that
16 preservation exacts a heavy psychic toll on in-house
17 lawyers and outside lawyers who are worried about it
18 not just in the context of sanctions. Discovery costs
19 are also not just an inconvenience or a drag on
20 profits for the business community. Litigation costs
21 have real-world implications for everyone, and I just
22 want to raise three specific harms.

23 The first is a harm to our global
24 competitiveness. In a June 2013 analysis by Nera
25 Economic Consulting comparing liability costs across

1 Europe, Canada, and the United States, the analysis
2 found that the United States has the highest liability
3 costs of all the countries surveyed, comprising a full
4 1.66 percent of U.S. GDP. That figure is 2.6 times
5 higher than the average level of Eurozone economies.

6 The oversized costs of litigation for
7 companies doing business in the United States
8 undermines our efforts to attract innovators and
9 entrepreneurs to American shores. It puts companies
10 doing business in the United States at a competitive
11 disadvantage at least in this respect to companies
12 that do not, and it does not matter if the company is
13 a U.S. company, although U.S. competitiveness does
14 disproportionately impact U.S. businesses, but it
15 certainly affects the U.S. employee and the U.S.
16 customer.

17 Whether analyzed in terms of foreign direct
18 investment in the United States or the impact on U.S.
19 businesses, litigation costs have negative real-world
20 impacts on every person that's dependent on or has an
21 interest in the health of U.S. markets.

22 The second harm I would like to raise falls
23 squarely on the shoulders of small businesses, defined
24 roughly as companies with 100 or fewer employees or in
25 some other contexts companies with less than \$10

1 million of revenue a year. Some circles are
2 accustomed to talking about discovery costs in terms
3 of terabytes and petabytes, but in my opinion, a much
4 larger-scale problem exists with respect to discovery
5 costs, is the effect that discovery costs have on
6 small businesses. They make up the majority of the
7 Chamber's membership, and as the Small Business
8 Administration has reported, small businesses create
9 most of the nation's new jobs, employ half of the
10 nation's private sector workforce, and provide half of
11 the nation's non-farm private real-growth domestic
12 product, as well as a significant share of innovation.

13 It's estimated that litigation costs small
14 businesses well over \$1 billion a year. In one study,
15 one in three small businesses reported that they had
16 either been threatened or sued, threatened with a
17 lawsuit or sued. If sued, more than two-thirds of
18 them said that they would have to pass legal costs on
19 to customers, reduce employee benefits, or delay
20 hiring new employees.

21 A majority who were sued said their
22 businesses suffered because litigation was very time-
23 consuming, and almost a majority said that litigation
24 caused them to "change business practices in ways that
25 do not benefit customers". That is worse in my

1 opinion than any petabyte.

2 The third harm is more fundamental. The
3 fact that it can be economically rational for a
4 defendant to settle unmeritorious claims rather than
5 pay the inevitable high cost of having to defend
6 against them raises serious fairness concerns. It's
7 disappointing that the very rules governing federal
8 litigation can be manipulated to make the process
9 itself more costly than a bad outcome on the merits or
10 to make the process costly regardless of the merits.

11 So I just want to conclude by commending the
12 committee for focusing on these important areas in a
13 positive although a modest way. We don't expect that
14 these proposed amendments will revolutionize
15 litigation behavior, in part because the amendments
16 are largely clarifying tweaks with court intervention
17 mechanisms built in throughout as pressure valves.

18 Dire arguments suggesting that the changes
19 will lead to cataclysmic problems are simply not
20 credible. This committee's own memorandum proves its
21 evident caution by laying out a series of more
22 aggressive approaches it could have taken but that it
23 then rejected. The committee obviously deliberated
24 carefully before choosing not to pursue these more
25 aggressive reforms at this time, and it's the

1 Chamber's view that the committee should not let its
2 measured approach be watered down further by
3 naysayers.

4 That concludes my remarks, and I'm glad to
5 take any questions.

6 JUDGE CAMPBELL: All right. Thank you.

7 Questions? Judge Diamond?

8 JUDGE DIAMOND: Wouldn't the great majority
9 of your small business members be covered by insurance
10 of various kinds? Do you have data on that?

11 MS. CLAFFEE: I don't off the top of my head
12 now, but regardless of that, they are affected by
13 litigation regardless of whether there's ultimate
14 insurance coverage. As you know, a lot of deductibles
15 are quite high, and it's also the time and energy and
16 the psychic pain it causes small businesses --

17 JUDGE DIAMOND: Many of those decisions,
18 though, that you talk about are going to be made by
19 the insurer. I mean, wouldn't it be more complete,
20 wouldn't your analysis be more complete, if you
21 figured what role the insurer and insurance companies
22 play in all this?

23 MS. CLAFFEE: The rule amendments focus
24 largely on scope of discovery and preservation, and
25 those two areas impact small businesses in a way that

1 insurance companies can't really ameliorate.

2 JUDGE DIAMOND: Even if they're paying the
3 legal fees?

4 MS. CLAFFEE: In terms of disruption and
5 concern, yes.

6 MS. CABRASER: Thank you. Exxon Mobil's
7 counsel gave us a snapshot a few minutes ago of
8 employees at Exxon Mobil engaged in litigation hold.
9 I believe he said 5100, and that they spent 10 minutes
10 a day. Do you have any comparative data on the
11 percentage of employee time or the percentage of
12 employees that were engaged in record preservation
13 activities back in the day of paper discovery?

14 MS. CLAFFEE: I did a lot of research on
15 that before I came to the hearing today. I didn't
16 find anything that I felt concrete enough to present
17 to this committee, which is why I said it was harder
18 to measure. There are some preliminary reports. I'm
19 aware of one in particular, but that report calls on
20 further study. I think the most compelling evidence
21 on that is testimony like Mr. Levy's where he can say
22 at my company this is what happens.

23 JUDGE CAMPBELL: Judge Matheson.

24 JUDGE MATHESON: It seemed to me towards the
25 end of your remarks that you thought the committee

1 should go much further. Do you have any specific
2 recommendations that the committee should continue to
3 consider as we work through this public hearing
4 process?

5 MS. CLAFFEE: Yes. The answer is yes. I'd
6 love to submit a personal wish list, but in our
7 written comments, we did suggest a number of ways in
8 which although we are supportive of the proposed
9 amendments as they currently read, we suggested a
10 number of ways they could have gone even further.

11 JUDGE MATHESON: Well, I know we have
12 limited time, but why don't you just give us your top
13 suggestion.

14 MS. CLAFFEE: Top suggestion, okay. Well,
15 as a GC myself, my worry with respect to preservation
16 is trigger, scope, and duration. That's what I worry
17 about. I worry about when I've got to do a hold how
18 broad that hold has got to be and how long I've got to
19 leave it in place. These amendments don't go there.
20 I understand why not. I know that the committee
21 considered it and decided not to go there.

22 Sanctions is the least of my problems,
23 frankly. I'm not going to take actions for other
24 reasons. My ethical duties, what's going to happen to
25 me in court if I spoliates evidence, that stuff is

1 going to keep me from doing the stuff that I do now to
2 preserve documents, and back-end sanctions are not
3 what's going to drive me. So, as a result of the
4 committee's suggested amendments, I'm not going to
5 change how I preserve. I am a chronic overpreserver,
6 and I'm going to continue to do that. So that's one
7 thing.

8 On scope, I think that those changes are --
9 they're good. You can see this committee has pointed
10 out a number of ways in which they're actually not
11 that different from the way the rule currently reads.

12 The big change is moving away from being able to ask
13 a judge for evidence that's relevant just to subject
14 matter rather than relevant to a claim or defense.

15 Frankly, I think you could narrow down
16 relevance because I can drive a truck through
17 relevance. My opponents in litigation certainly have
18 before. I've never sat down and argued with somebody
19 about whether or not something is discoverable because
20 it's related to subject matter. They always argue
21 that it's relevant, and relevance is a very, very
22 broad concept.

23 I think that there could be an amendment to
24 the rule that says that it should be material and
25 relevant, and that gets us closer to a place where we

1 discover discovery is better matched to the small
2 amount of documents that actually get used at trial or
3 that get used in dispositive motions rather than the
4 gigantic amount of paper and electronic paper that
5 ends up getting discovered.

6 So I think there's not any number of ways to
7 skin that cat, but there's a substantial distance that
8 these rules could go to bring litigation costs under
9 control.

10 JUDGE CAMPBELL: All right. Thank you very
11 much, Ms. Claffee.

12 We're going to take Mr. Karl, and then we'll
13 take a break.

14 MR. KARL: Mr. Chairman and members of the
15 committee, I thank you for the opportunity to speak
16 before you. My name is John Karl and I've been in
17 private practice since 1979. I'm an adjunct professor
18 at American University Law School, but I'm here
19 speaking on behalf of my experiences, and I'm a member
20 of the National Employment Lawyers Association and its
21 local affiliate, the Metropolitan Washington
22 Employment Lawyers Association.

23 And over the years, I've done practically
24 every kind of litigation, from airplane crashes to
25 medical malpractice to securities litigation. Much of

1 my current practice is employment discrimination,
2 whistleblower cases, and the challenge of doing those
3 kinds of cases is that you have to show intent. Those
4 cases are different. It's not a question of merely
5 satisfying a negligence standard.

6 I'm here to speak on behalf or in opposition
7 to the proposals to severely limit the written
8 discovery and the number of depositions that parties
9 can take. As an attorney, I owe a professional
10 obligation and a duty to my clients to prepare for the
11 inevitable opposition to the motion for summary
12 judgment or in other cases to prepare for trial.

13 And I'd suggest that it's simply impossible
14 to do that in a professionally responsible way under
15 the proposed changes. It has never happened to me in
16 any of the employment cases that I've done where I
17 could prepare the case for summary judgment or for
18 trial doing -- or living under a five-deposition
19 limit, to living under a 15-interrogatory limit. I
20 just don't think it's possible to do it properly. I
21 don't think it will work for employment cases.

22 I recognize that some cases require only a
23 couple depositions, but in those cases that's all
24 that's going to be taken in any event. And I had a
25 recent wrongful termination case, and one of the

1 issues was -- and this just underscores perhaps some
2 of the complexity and some of the issues that come up.

3 There was a dispute over who was the decision-maker,
4 who made the decision to terminate, and under Staub v.
5 Proctor Hospital, this required additional
6 depositions.

7 Obviously I had to take the depositions of
8 the people who I thought were the decision-makers, but
9 I certainly had to take the depositions of the people
10 whom the defendants claimed were actually the
11 decision-makers. And ultimately that judge ruled that
12 that was a matter to be decided by the jury, and the
13 jury rejected the defendant's claim as to who actually
14 made the decision.

15 You've got all sorts of internal dynamics in
16 a case like this because the defense really was the
17 persons who made the decision to know about the
18 protected activity. The jury didn't believe that
19 explanation. And so, in addition to having to deal
20 with the question of two possible sets of decision-
21 makers, I had to depose the HR people. The defendant
22 in the middle of the litigation started changing its
23 rationale for the decision. That required an
24 additional deposition. And then you've got the whole
25 issue about what was said at a particular meeting and

1 how you go about proving pretext.

2 You've got a need certainly as an
3 attorney, you have a need for defining corroborating
4 witnesses. You need to find or want to find
5 conflicting testimony. And it's just impossible to do
6 that without taking a sufficient number of
7 depositions. And so the attorney is faced with a
8 situation where they're not properly preparing or
9 incurring the additional cost of going to the court
10 and asking for additional depositions.

11 I think in most cases, certainly in most
12 employment cases, the lawyer's requirement of diligent
13 representation -- I mean that the parties are going to
14 have to certainly in employment cases seek permission
15 of the court. It's one more delay, and it's one more
16 thing for the judges to do, and I think the judges
17 certainly have enough on their plates without having
18 to get involved in the process or progress of
19 discovery for cases that are filed before them.

20 And what this does is it unfairly increases
21 the cost to the parties and increases an additional
22 burden, particularly on the plaintiffs who are
23 bringing the claims, and in a wrongful termination
24 case, you've got a plaintiff who can't afford to pay
25 these additional costs. And I can tell you that no

1 one on the plaintiff's side wants to incur additional
2 deposition costs, and I can really be sure that I
3 really don't want to pay any deposition costs that I
4 don't believe that I absolutely have to pay.

5 I think it's going to have the impact of
6 reducing the number of depositions and have the impact
7 of discouraging pro bono attorneys, and it could very
8 easily lead to having more people come in as pro se
9 plaintiffs. I think with respect to the question of
10 the time of the deposition, as a practitioner, I can
11 say I don't know in advance how long a deposition is
12 going to take. And if you're subject to a really
13 severe time limit -- and I think certainly the seven-
14 hour limit is something that we've learned to live
15 with.

16 You've got a -- there's an incentive for
17 opposing counsel and the witnesses as well to run out
18 the clock. You've got to go through in many cases,
19 certainly in employment cases that are document-
20 intensive, you've got to go over the documents with
21 the witnesses. You've got to ask specific and precise
22 questions about it. And sometimes there's just
23 obstreperous conduct on the other side.

24 I had one case, a whistleblower case, where
25 the attorney objected to practically every single

1 question that I proposed. There was an average of 3.2
2 objections per transcript page. And when you think in
3 terms of the impact that this has, what the attorney
4 was doing was taking advantage of this opportunity to
5 delay the deposition, to take up additional time, and
6 ideally dissuade me from following up on some of the
7 questions.

8 And I think shortening the time available or
9 allowed for depositions runs the risk of encouraging
10 this sort of conduct in other cases. I would ask that
11 you take into consideration the impact that reducing
12 the number of interrogatories, reducing the number of
13 depositions and reducing the time allowed for these
14 depositions, that you reject the proposed changes.
15 Thank you.

16 JUDGE CAMPBELL: Thank you, Mr. Karl.
17 Questions?

18 JUSTICE NAHMIAS: It sounds like many of
19 your cases involved more than 10 depositions, much
20 less five. Have you had any difficulties working with
21 counsel to get the number of depositions that you
22 think you need?

23 MR. KARL: Frankly, it depends who the
24 counsel is. If the counsel is experienced, then I
25 don't have trouble. But some of the local

1 institutional defendants often staff their cases with
2 younger attorneys who while they are very competent
3 just don't have the authority to agree to additional
4 depositions.

5 JUSTICE NAHMIAS: And what about a judge and
6 judicial involvement at that point in the cases that
7 you have now when you're working with those talented
8 lawyers but the ones that don't have authority? What
9 happens then?

10 MR. KARL: I hate to bother the judges. I
11 do it no more than once a year.

12 JUSTICE NAHMIAS: So, if you need more than
13 10 and the lawyer doesn't agree, you just take less
14 than 10?

15 MR. KARL: No, because I've been able to
16 reach agreement, and where I've needed a couple more
17 than 10, we agreed to 12 or 13, and there's been no
18 problem reaching an agreement with the other side.

19 JUSTICE NAHMIAS: Then why would you think
20 that if five was a presumptive limit you'd have any
21 less or any more difficulty in reaching agreement?

22 MR. KARL: Because I've dealt with a number
23 of obstreperous attorneys who have given me a hard
24 time on behalf of the institution that they represent.

25 JUDGE CAMPBELL: Judge Diamond?

1 JUDGE DIAMOND: I'm curious that you say
2 that employment cases are document-intensive. Do you
3 really think they are?

4 MR. KARL: Certainly with the production of
5 emails. I have a Rehabilitation Act case that
6 involved about a foot and a half worth of printouts
7 and emails and I had to go through them.

8 JUDGE DIAMOND: Well, I don't doubt that you
9 have an occasional case, but aren't the great majority
10 of workplace discrimination cases rather
11 straightforward? I was fired because of my age, I was
12 fired because of my race, very few documents.

13 MR. KARL: I've had cases where the
14 particular defendant had a policy of not backing up
15 any part of its email system, and so there were
16 perhaps no more than 15 or 20 documents at issue in
17 that case. That's certainly correct that it varies
18 from case to case depending upon what's at issue,
19 depending on how many decision-makers were involved in
20 the process. And the problem is that there's no
21 precise rule of thumb to say that there's never just a
22 few documents or that -- you know, part of the thrust
23 of my concern is that if you look at it from the point
24 of view of how many people do you have to depose, I
25 think you've got to -- it's always in my experience

1 been more than five, and requiring the litigants to go
2 to the court if they can't work it out just imposes
3 additional burdens on both sides, but it's on the
4 judicial system as well because then the judge has got
5 to read the papers, he's got to decide whether or not
6 the additional depositions are warranted, and so
7 creating the presumptive limit just creates more work
8 for anybody, and it's procedural work rather than work
9 that's related or directed to the merits.

10 JUDGE CAMPBELL: All right. Thank you very
11 much, Mr. Karl.

12 MR. KARL: Thank you.

13 JUDGE CAMPBELL: We will break and resume at
14 3:00.

15 (Whereupon, a brief recess was taken.)

16 JUDGE CAMPBELL: All right, folks. Could
17 you please take your seats? We're ready to get
18 started.

19 (Pause.)

20 JUDGE CAMPBELL: Mr. Chertkof.

21 MR. CHERTKOF: Good afternoon. I'm Stephen
22 Chertkof. I'm a lawyer in Washington, D.C. I'm
23 speaking on behalf of the Metropolitan Washington
24 Employment Lawyers Association, about 300 people who
25 bring claims on behalf of individuals in employment

1 discrimination cases primarily and other civil rights
2 cases.

3 The refrain we hear from the defense bar is
4 essentially litigation takes too long and it's too
5 expensive. And yet plaintiffs, the plaintiffs' bar,
6 have no greater interest than getting inside a
7 courtroom and in front of a jury as quickly and as
8 inexpensively and efficiently as possible. Running up
9 the clock and running up the bill are classic defense
10 tactics, not the plaintiffs' bar.

11 I'm here to focus on two particular issues,
12 although we'll submit written comments on others: the
13 restriction of depositions and proportionality.
14 Professor Miller, Arthur Miller, wrote an article
15 earlier this year called "Simplified Pleading and
16 Meaningful Days in Court" in which I thought he
17 summarized eloquently and at great length the problem
18 of asymmetrical cases, that is, where nearly all of
19 the information is in the control of one side.

20 In such cases, deal-making and horse trading
21 is virtually nonexistent. In your typical employment
22 case, the employer has access to nearly all the
23 documents and controls in one manner or another all or
24 nearly all of the witnesses. You add on top of that
25 that employers try to expand their reach by broad

1 claims, sometimes unreasonably broad claims, under
2 Rule 4.2 of the rules of ethics to say every employee
3 or virtually every employee is represented and you
4 can't talk to them even if they're willing to talk to
5 you.

6 Then settlement agreements and severance
7 agreements are more and more often having gag orders
8 that says in exchange for some money you can't
9 voluntarily cooperate with anybody who's bringing a
10 claim against the company. Only under subpoena can
11 you talk to them. Sometimes these nondisclosure
12 provisions end up earlier where as part of routine
13 paperwork employees agree to nondisclosure and that
14 everything they learn at the company is confidential.

15 We've had such agreements applied to the personnel
16 policies, to internal evaluation forms, saying what's
17 company confidential.

18 You've heard in other contexts about doctors
19 practicing defensive medicine. Well, I think that's
20 true in employment cases and many probably civil cases
21 in general where there's asymmetrical information. A
22 lot of the depositions and other discovery devices we
23 use aren't necessary for trial. That was one of the
24 points made in the committee's report is that judges
25 say, oh, in criminal cases, people cross-examine

1 witnesses they never deposed. That's true. I've done
2 that. But you don't get to trial unless you overcome
3 the summary judgment motion, which is virtually
4 inevitable in every such case. It's virtually
5 inevitable. Some defense lawyers have joked it would
6 be malpractice not to file one.

7 And so we practice defensive lawyering. We
8 take a lot of depositions and other discovery because
9 we have to prove our case on paper before we ever get
10 to trial. And defense tactics are good at hiding the
11 ball. How do you do that? You can do that by not
12 identifying a single decision-maker, by having
13 decision-makers' decisions made by committees. Oh,
14 this one recommended, but that one approved, but this
15 one signed off.

16 We just had a recent case where the decision
17 was made in a room with 12 people. Whether minutes
18 were kept or not is in dispute, but they certainly
19 weren't produced, and nobody could remember what was
20 said. After deposing nine of them, we got bits that
21 leaked out about what was said as the reason for the
22 firing. And that was before we deposed anybody for
23 comparative evidence or for me-too evidence, other
24 people had brought claims, or to get things like how
25 are the emails kept and destroyed and things like

1 that.

2 In a case where one side has all the
3 information, they have no interest in offering to let
4 the other side have any more discovery than the rules
5 entitle them to. My experience -- I heard Mr. Karl
6 testify -- my experience and other people I've talked
7 to even during the break is you never get agreement to
8 exceed the number of depositions in the rules from
9 opposing counsel.

10 The nice ones laugh and say, yeah, I'd love
11 to if I could, but, you know, my client would fire me
12 if I agreed to give you an extra three or four
13 depositions. And I've never in my experience seen
14 somebody sanctioned for arguing that the limit in the
15 rules is reasonable. Even when we win those motions,
16 there is never a downside to the defendant. In fact,
17 there's an up side because delay happens.

18 Every time we go to court, every time we
19 file a motion to compel or a motion to exceed
20 depositions, it's months and months of delays,
21 sometimes years, which doesn't suit plaintiffs. It
22 runs up the costs. It doesn't make things more
23 efficient.

24 Under the current rules, active judges who
25 want to be involved in discovery early on, who want to

1 be very involved and have reports and manage
2 discovery, can already do so. But for many other
3 judges where discovery motions are the unloved
4 stepchildren who aren't gotten to very quickly, it is
5 just a delay. Every time you go to the courthouse it
6 adds time and money.

7 Here is what the rule on depositions looks
8 like to me. The empirical data in the report was that
9 around 80 percent of cases already, civil cases in the
10 federal court, are done with five or fewer depositions
11 per side.

12 So this is what it looks like to me.
13 Suppose our state insurance commissioner said, we did
14 a study and concluded that 80 percent of people only
15 have five or fewer doctor visits per year, so we're
16 going to pass a rule that says insurance companies
17 only have to reimburse for five doctor visits a year.

18 Now, of course, if you need more, you can ask for
19 more, but it's up to their discretion.

20 And there's no analysis of whether the other
21 20 percent of cases and discovery are more complex,
22 require more depositions, properly require more, none
23 at all. All we get is anecdotes. So back to the
24 example, that the insurance company says, well, I can
25 tell you an anecdote about a claimant or two or three

1 that abused the system and was a hypochondriac, saw
2 too many doctors. Great. I'm sure in any system
3 there is abuse. But that's not the rule. There's no
4 empirical data whatsoever here that says that the
5 deposition rule needs to be changed. In fact, if 80
6 percent are already coming in at five or fewer per
7 side, it's working.

8 If I can have one minute on proportionality.

9 One of the problems we have in civil rights cases is
10 that there's a tendency to view the value or the
11 burden of discovery in monetary terms only. And that
12 means in practical effect is that an employee who's
13 earning minimum wage or slightly above and is getting
14 paid 20- or \$25,000 a year and has lost their job for
15 discriminatory reasons, their claim is worth less in
16 monetary terms maybe than somebody who's earning
17 \$100,000 or \$200,000 a year.

18 While the rule, the proposed rule, suggests
19 that other values come into play, I fear that it will
20 be simply dollars and cents. Why should we spend
21 \$10,000 producing emails if the guy was only earning
22 \$20,000? And what will happen is people at the lower
23 end of the pay scale whose entitlement to injury is
24 just as valid and just as important under these
25 private attorney general statutes, their claims get

1 much less discovery, which will translate into a much
2 higher rate of dismissal on summary judgment.

3 I think I'm over my time, but I would
4 welcome questions.

5 JUDGE CAMPBELL: Thank you.

6 Judge Koeltl?

7 JUDGE KOELTL: Thank you. You know, NELA
8 has been very helpful to the committee both in terms
9 of input into the proposals as well as in developing
10 the employment protocols for early discovery in
11 employment discrimination cases. So we really
12 appreciate and respect NELA's views.

13 The one thing that you said I'm not sure is
14 accurate, that there's no empirical information that
15 suggests there's a problem in cases where you have
16 five or more depositions on a side. In the report
17 that accompanied the rules, proposed rules and
18 Advisory Committee notes, we noted that in the FJC
19 study when both plaintiffs and defendants take more
20 than five depositions, about 43 percent of plaintiff's
21 lawyers and 45 percent of defendant's lawyers report
22 that they consider the discovery costs to be too high
23 relative to their client's stake in the litigation.

24 Now we can't draw a causal relationship
25 between that because there are other forms of

1 discovery that are still going on. On the other hand,
2 it certainly is a source of concern when depositions
3 get to be more than five and almost 50 percent of the
4 lawyers say that the costs in the litigation are
5 disproportionate to the stakes involved.

6 You know, similarly, when the NELA lawyers
7 were surveyed with the assistance of the FJC, the NELA
8 lawyers thought that there was a problem with
9 disproportionate litigation. Eighty percent of the
10 NELA lawyers thought that in small cases the amount of
11 the discovery was disproportionate to the stakes in
12 the case. And in larger cases, it was about 50
13 percent of the lawyers thought that the costs were
14 disproportionate.

15 So I'm not sure that it's correct to say
16 that there's no empirical data. My question really is
17 don't you think that the Advisory Committee note to
18 the five depositions makes it sufficiently clear that
19 the judge ought to look carefully and that there will
20 be many cases where just as the presumptive limit of
21 10 was insufficient, there will be more cases where
22 the presumptive limit of five is insufficient.

23 So the judges must increase the number, must
24 grant the request for an increased number. In even
25 more cases, they've been doing it before, under the 10

1 limit, when they're faced with a five limit. But they
2 should look at it.

3 MR. CHERTKOF: I fail to see how it's more
4 efficient to have ever more motions going back to the
5 judge to get depositions in fewer than 20 percent of
6 the cases. On the committee's report on page 267, it
7 expressly said there was no proof that depositions
8 caused dissatisfaction or were even the major cost of
9 discovery battles. So there is no empirical evidence
10 that that's what we're relying on in this.

11 But let me go back because I again say that
12 the problem with the expensive litigation and delay
13 happens in two places primarily: the early motion to
14 dismiss, which is fast becoming routine, and that can
15 be fixed by -- it all can be changed by just changing
16 Rule 8 -- this committee can do that -- and the
17 summary judgment.

18 And one of the ways with summary judgment is
19 the hide-the-ball shell game. If we're going to be
20 living in a world where the presumptive limit is five
21 and we have to file a motion and wait potentially for
22 months to get a ruling, and we're afraid to use up our
23 five, not knowing if we're going to get seven or eight
24 or 12, how about if the defendant had to produce early
25 on in discovery all the affidavits it plans to use for

1 its summary judgment motion? So now we know what the
2 universe is we have to aim for, which people whose
3 opinions matter, which people we're going to have to
4 cross-examine on paper because we don't get to them at
5 trial if we don't get past summary judgment. Pipe
6 that up early, or make Rule 56(d), which is the rule
7 that allows you to get additional discovery after
8 seeing the summary judgment motion, not something that
9 is very, very rarely granted and hard to get anything
10 out of but the routine, that when the defendant has
11 held you to five depositions because they haven't
12 agreed to more, then you should almost presumptively
13 get more discovery once you see what they put in their
14 summary judgment motion, the people you haven't talked
15 to, people haven't examined yet.

16 But what's happening here is we've got all
17 the information and we've talked to our witnesses.
18 We're not going to let you talk to them informally.
19 We're not going to let you talk to them off the
20 record. We're not going to let you see any documents
21 unless you fight for them. And by the way, we're
22 going to put in summary judgment stuff that you
23 haven't seen and people you haven't talked to.

24 JUDGE CAMPBELL: We have a number of folks
25 who want to ask questions, but we are about 13 minutes

1 into your discussion, and I fear if we go much longer
2 we're going to shortchange those at the end of the
3 schedule. So thank you very much for your comments,
4 Mr. Chertkof.

5 And let's hear from Ms. Klar.

6 MS. KLAR: Thank you. Mr. Chairman and
7 members of the committee, my name is Jennifer Klar.
8 I'm a partner at the civil rights firm of Relman, Dane
9 & Colfax here in Washington, and I'm the secretary of
10 the Metropolitan Washington Employment Lawyers
11 Association. And I thank you for hearing my testimony
12 today.

13 My testimony will focus on proposed Rule
14 37(e), which would establish a new standard to govern
15 remedial measures and sanctions as a result of
16 spoliation. I have four principal concerns about the
17 proposed rule. First and primarily, it will impede
18 the search for truth. Second, it changes the
19 substantive law of multiple Circuits. Third, it will
20 disproportionately hurt civil rights plaintiffs. And
21 fourth, at a minimum, it should not apply outside of
22 the context of ESI, which is provided as the
23 justification for the change.

24 First, the proposed rule focuses on the mens
25 rea of the spoliating party instead of the search for

1 truth. The point of civil rights cases is the search
2 for truth. Did the defendant violate our civil rights
3 laws? Instead of focusing on the mens rea of the
4 spoliating party, the question should be whether a
5 remedial measure or a sanction is necessary to
6 counterbalance the damage to the search for truth that
7 was caused by the spoliation.

8 This is not just my point as a civil rights
9 attorney. The D.C. Circuit has repeatedly held this,
10 as have other Circuits, including the Second, Fourth,
11 and Sixth. As the D.C. Circuit explained earlier this
12 year, and this is a quote, "Where the evidence is
13 relevant to a material issue, the need arises for an
14 inference to remedy the damage spoliation has
15 inflicted on a party's capacity to pursue a claim
16 whether or not the spoliator acted in bad faith."

17 Negligence or gross negligence would be a
18 more appropriate standard. The committee's comments
19 say that the intent of this proposal is to protect
20 parties who act reasonably in preservation. This goal
21 is achieved by a negligence or a gross negligence
22 standard because if a party has acted reasonably, they
23 haven't acted negligent or grossly negligent.

24 Because the proposed willfulness or bad
25 faith standard is so difficult to prove, the

1 destruction of evidence will go unchecked and it
2 creates a perverse incentive to destroy bad evidence.

3 Moreover, disallowing specifically an adverse
4 inference instruction, which is in the comments,
5 without willfulness or bad faith is specifically
6 incorrect because an adverse inference is a remedial
7 measure, not a sanction, as suggested by the comments
8 to the proposed change.

9 Again, the D.C. Circuit has held that issue
10 related sanctions like an adverse inference
11 instruction are "fundamentally remedial" rather than
12 punitive and are properly imposed when the destruction
13 of evidence has "tainted the evidentiary resolution of
14 an issue." Thus the focus should be on the effect of
15 the spoliation on the search for truth and not the
16 intent of the spoliating party.

17 Second, this rule represents a substantive
18 change in the law of several Circuits, not a
19 procedural change. The comments recognize there is a
20 Circuit split on the substantive law and then they
21 resolve it. And this should not be the role of the
22 Federal Rules of Civil Procedure. It impedes the role
23 of the federal judiciary also and individual federal
24 judges and Circuits.

25 The comments foreclose reliance on inherent

1 authority and state law, also changing substantive
2 law, and disregard established EEOC regulations
3 requiring the preservation of personnel records.

4 Third, the proposed rule raises grave
5 fairness concerns, especially for civil rights
6 plaintiffs. In civil rights cases, documents that can
7 substantiate discrimination where it occurred are
8 largely in control of the defendant and not the
9 plaintiff. For example, hiring and personnel
10 documents and documents about comparators in an
11 employment case are controlled by the employer.

12 If the employer destroys that evidence, the
13 plaintiff, the court, and the public are all unable to
14 determine the truth of what happened. In the words of
15 Judge Lamberth, former Chief Judge of the DDC,
16 "Plaintiffs alleging discrimination should not be
17 forced to prove their cases based on defendant's
18 choice of files and records due to spoliation."

19 The proposed rule sets out a standard that
20 will be hard for civil rights plaintiffs or *any*
21 requesting party to meet because the rule places the
22 burden on the requesting party to show both
23 substantial prejudice and the mens rea of the
24 spoliating party.

25 Obviously it's hard to demonstrate

1 substantial prejudice when you don't know what was in
2 the documents. You can't prove there was a smoking
3 gun if you don't know what the document said because
4 it was destroyed. That gives a perverse incentive to
5 fail to preserve or destroy. It's hard to prove
6 willfulness of bad faith of someone else because the
7 knowledge of what was done and wasn't done is in the
8 hands of the spoliating party. So the burden should
9 be on the party that destroyed the evidence that we
10 recognize it was obligated to preserve.

11 Finally, while I oppose changing the rule
12 altogether, I would strongly suggest that if adopted
13 it should only apply to ESI and not paper documents.
14 The concerns expressed by the committee relate only to
15 the cost of ESI preservation. The comments say
16 electronic documents would likely be duplicative where
17 alternatives exist. And while I disagree with that
18 with respect to ESI, it's certainly not true with
19 respect to paper documents that are frequently
20 irreplaceable and important to prove discrimination:
21 handwritten interview notes, application forms,
22 comments on application forms that can be crucial to
23 showing discriminatory intent.

24 Allowing more discovery or shifting
25 attorney's fees is not a solution. If documents are

1 destroyed, many times additional discovery will not
2 replace them, especially for paper documents, and
3 shifting fees can't undo the harm to the search for
4 truth and the requesting parties' ability to prove its
5 case.

6 In sum, I urge you to reject this rule,
7 leave the spoliation law as it now stands. If some
8 version of the amendment is adopted, it should reflect
9 a negligence standard or gross negligence standard
10 rather than bad faith or willfulness. And
11 additionally, the rules should be restricted to ESI.

12 I'm finished with my presentation on
13 spoliation, but I'd like if I may have 30 seconds to
14 provide an example with respect to the deposition rule
15 that was discussed.

16 JUDGE CAMPBELL: Sure.

17 MS. KLAR: I recently had a case, an
18 employment case where there were many witnesses
19 disclosed by the other side on their initial
20 disclosures, and I asked for additional depositions
21 because they had identified these witnesses. That was
22 very, very hard fought and litigated and opposed,
23 briefed, et cetera, argued. And what I was allowed to
24 get was two hour depositions where I had to pay for my
25 transcript and the transcript for the other side

1 because they said that the depositions were
2 unnecessary. But then they put those witnesses on
3 their trial witness list and called them. So
4 obviously they opposed and then intended to call the
5 witness, which is a gotcha that will happen more and
6 more often if the number is reduced.

7 The judge, who I think in the end was fair,
8 pushed very hard on why is your case so different from
9 the standard case, so special that you need extra
10 depositions when you don't need them in another case.

11 And that's just going to be more and more difficult
12 with the normative effect of a rule where you have to
13 prove your case is really more complicated, more
14 difficult, bigger in order to get the depositions you
15 need to depose people that will be put on at trial.

16 JUDGE CAMPBELL: Thank you, Ms. Klar.

17 Questions?

18 PROF. MARCUS: Regarding Rule 37(e)?

19 MS. KLAR: Yes.

20 PROF. MARCUS: As you've heard today and
21 we've heard also, there are a number of reports that
22 currently preservation is a very large and expensive
23 burden for a significant number of enterprises. And
24 I'm wondering, do you think those reports are
25 inaccurate, or is the notion that that's the way

1 things should be?

2 MS. KLAR: Well, let me respond to that in
3 two ways. First of all, the rule is and has always
4 been under the current 37(e) that documents can be
5 destroyed in the normal course. So there's no reason
6 to just preserve everything. Under a normal
7 destruction policy, they can be destroyed.

8 So the rule only attaches when there's a
9 reasonable belief that there would be litigation,
10 which should not be everything. And the proposed rule
11 changes don't change that because while there was a
12 discussion in the comments about possibly clarifying
13 what has to be preserved, in fact, that's not the
14 change that's being made here.

15 So I don't think the rule as it's written
16 really goes to that problem, and instead we get a type
17 one, type two error situation where in excusing
18 negligent and grossly negligent conduct in order to
19 make sure that defendants who -- or companies who
20 behave reasonably aren't punished, when of course
21 negligence, gross negligence, isn't reasonable, the
22 search for truth is impeded.

23 So even if there is overpreservation right
24 now, I don't think that this rule changes that without
25 a clarification of what has to be preserved and also

1 creates a harm in the search for truth.

2 JUDGE CAMPBELL: All right. Thank you very
3 much, Ms. Klar.

4 Mr. Woodfield?

5 MR. WOODFIELD: Good afternoon. My name is
6 Nicholas Woodfield. I'm a principal at the Employment
7 Law Group, a Washington, D.C.-based employment law
8 firm. I'm also president of the Virginia Employment
9 Lawyers Association, which is the NELA affiliate of --
10 or the Virginia affiliate of NELA.

11 JUDGE CAMPBELL: Could you pull the mike up
12 just a little higher, please? Thanks.

13 MR. WOODFIELD: Yes, sir. I'm here today to
14 speak about Federal Rule of Civil Procedure 4(m) and
15 the proposal to shorten the time for service from 120
16 days to 60 days. There are a couple of concise points
17 I'd like to raise.

18 First, it's problematic for employment law
19 cases. Employment law cases have additional factors
20 that are unlike other cases wherein you have
21 frequently people coming to you at the last minute
22 because they got a right-to-sue letter. Then they
23 show up and say, I have to file this in the next day
24 or two. In those situations, you're very often
25 dealing with someone where you're trying to protect

1 their statute of limitations, but you cannot
2 necessarily do the type of due diligence that you'd
3 like to do. In those situations, you can prepare pro
4 se complaints over your own name or you can file it.
5 And while you have an admittedly lower standard,
6 you've got to perform your due diligence. And to
7 perform that due diligence, you have to go out in a
8 situation where again, as Mr. Chertkof said, the
9 evidence very often is asymmetrical, and who controls
10 it?

11 In that situation, that 120 days can be used
12 very quickly. You can also run into that situation of
13 trying to get FOIA information waiting for results
14 from other agencies and trying to get witness
15 statements. In the False Claims Act area in which my
16 firm also practices, you run into an interesting
17 situation wherein when you file the government is
18 immediately involved. The U.S. attorneys immediately
19 are involved. At that point, to protect your client's
20 interests and to stop the case from going out from
21 underneath the seal order, to avoid violating the
22 seals, the plaintiff's attorneys at that point are
23 relegated to the back seat.

24 We can be in the back seat for six months to
25 years depending on how long DOJ or the U.S. Attorney's

1 Offices may take. And at the end, they may simply
2 say, we're not going to take a position on this or
3 we're not going to intervene or we're going to
4 intervene. Intervention occurs in roughly 18 percent
5 of the filings.

6 On those other cases, we can be finding out
7 18 months down the road that they've spoken to any
8 number of witnesses and got any number of documents,
9 and at that point we have 120 days to FOIA documents
10 potentially to find out who we may be able to speak to
11 at that point. To shorten that in half is to put us
12 in a difficult situation where you've halved our time
13 to try and get the information necessary to come
14 forward with very good cases.

15 Now not all cases are spectacular, but we
16 try and put forward the very best that we can.
17 Importantly, though, when we look at our cases, we
18 have to make a decision at the beginning based on the
19 evidence. And if we have finite evidence in front of
20 us, we have to make less guided choices.

21 Many of these cases, the False Claims Act
22 cases, are turned down by the government not because
23 of the merits of them but because of internal politics
24 at the agency or because of some issue or concern with
25 the AUSA that doesn't stop the case from proceeding if

1 it goes forward as represented by individual counsel,
2 but it puts the individual counsel at an incredible
3 disadvantage in that they really can only prepare
4 their clients and prepare their cases very, very
5 briefly.

6 My suspicion, and this is my suspicion as
7 Nicholas Woodfield, attorney who practices in
8 Washington, D.C., that part of the impetus for this
9 reduction is to shorten the time that these cases go
10 from filing date to terminal date. And I would say to
11 a degree that this is pointing at the wrong creature
12 that's causing these problems. There are many reasons
13 for the delays in these cases. There are many reasons
14 for the length of federal dockets. One of them is the
15 Iqbal and Twombly standard that becomes the de rigueur
16 standard for -- or the de rigueur motion to dismiss
17 motion that comes up in every case in the summary
18 judgment.

19 In the last couple of years, in the last two
20 years, in this particular jurisdiction, I have waited
21 18 months for a motion to dismiss ruling, and I have
22 waited three years for a summary judgment decision
23 where we had to mandamus the D.C. Circuit to get a
24 decision on the summary judgment.

25 To say that we need to reduce 120 days to 60

1 days to speed these things up is pointing at the wrong
2 creature. The reason that we are having this
3 expedited or this shortening is I presume to expedite
4 the process. I don't think that's it. Moreover, I
5 think on a simple cost benefit analysis, there are
6 times where when we have to file a case after we've
7 been able to do a little more due diligence, we
8 determine that this may not be the case to do and you
9 voluntarily withdraw.

10 If you had to serve within 10 days, we would
11 serve. There would be no voluntary withdrawal, and it
12 would be proceeding forward. This gives us a chance
13 to finalize when there is a short limitation or there
14 is some other pressure on the case for us to pull
15 back. That 120 days is of great value. And there is
16 no cost to defending or not being served and the case
17 being dismissed out.

18 If, however, the time is shortened, what we
19 end up doing is having to go in those cases is trying
20 without guarantee that we're going to get additional
21 time filing motions, which creates more load on the
22 dockets and potentially causes more issues with the
23 courts. So I think we essentially on this rule have
24 something that isn't broken and I don't think needs
25 fixing. Unless there's any issue, I would yield my

1 roughly remaining one minute to Mr. Chertkof because I
2 thought what he had to say was very astute.

3 JUDGE CAMPBELL: Well, thank you for that
4 generous offer. Let's see if there's any questions.

5 (No response.)

6 JUDGE CAMPBELL: Okay. Thank you very much
7 for your comments, Mr. Woodfield.

8 We'll come back to Mr. Chertkof at the end
9 if that one minute remains.

10 (Laughter.)

11 JUDGE CAMPBELL: All right. Mr. Seldon?

12 MR. SELDON: My name is Bob Seldon. I have
13 been practicing law for 37 years as a member of the
14 District of Columbia Bar. And the primary place that
15 I practiced have been in the federal courts here in
16 the United States District Court and in the D.C.
17 Circuit.

18 Several of my colleagues asked me to speak
19 about the issue of the number of depositions and where
20 the default rule would go to five and speak about it
21 to the committee, and I think they did it because my
22 background I think gives me some sort of unique
23 experience.

24 I began as a plaintiff's lawyer for the
25 federal government doing antitrust work. I became a

1 defendant's lawyer for the federal government as an
2 Assistant United States Attorney here in the District
3 working for former Chief Judge Lamberth and then a
4 colleague of mine when he became the chief of the
5 Civil Division, Judge John Bates. And we were
6 entrusted with defending the federal government,
7 largely during the Reagan Administration, from all
8 sorts of attacks and in all sorts of trials.

9 It gave me broad experience, enough so that
10 at one point I went next to head the litigation
11 department of a corporate law firm, where I defended
12 -- represented I should say for the most part
13 financial institutions. Some of them are large enough
14 to be on Main Street, and some of them are small
15 enough -- I'm sorry, large enough to be on Wall
16 Street. You can tell I messed that up. And some were
17 small enough to be on Main Street. And then I went to
18 open my own plaintiffs' law firm where I now work.

19 I think in my observation the great thing
20 about the United States judiciary is that you can walk
21 into court with anybody and you can say, I don't know
22 what's going to happen with your case. But here, here
23 as opposed to any other place on earth, you're going
24 to get a fair shake, I can promise you that. And I've
25 seen that for my many years of experience. I've seen

1 that as the rules have evolved. I've seen the concept
2 of disclosures, and whoever came up with that idea for
3 my money deserves to get the Nobel Peace Prize. Not
4 the peace prize, but the prize.

5 I'm going to give you an example or two
6 about how the five deposition limit rule would work if
7 in my view this awful rule were put in place. I
8 represented in one case a fellow who blew the whistle
9 on the internal affairs division in the D.C.
10 Department of Corrections and they paid him back by
11 phonying up a report that he beat up a first degree
12 murderer.

13 Before we could get to the people, before we
14 could get to the defendants, before we could get to
15 the investigators, we had to do the witnesses. We
16 started with the two who said they saw him do it. And
17 those depositions showed they really didn't say that
18 until they were put under investigation.

19 There were nine more people who said, you
20 know, they didn't see anything. And we sort of sorted
21 our way through, saw from some of the reports that the
22 first eight didn't see anything because they couldn't
23 see anything. And we get to the ninth guy and I said,
24 did you see anything, and he said no. And I said,
25 could you. He said, sure. I said, what happened. He

1 said, that man did not beat up the prisoner.

2 That's before we could start with the real
3 depositions. I have another case where a fellow was
4 intentionally exposed to asbestos at the workplace by
5 the Department of Commerce. There were many, many
6 witnesses, and there was a report that went to the
7 President of the United States that confirmed this.
8 We had to prove that case with many, many witnesses or
9 would have had to had we not had in the third witness
10 of what was going to be 10 or more, when asked about
11 this, said everybody knew he wasn't given medical
12 monitoring equipment. Everybody saw him coughing up
13 blood at the workplace. And I said, do you know that
14 the supervisor knew that and wouldn't help him out.
15 She said, sure. We were both watching him coughing up
16 blood one day, and I said, why don't you transfer him
17 to my staff, I've got an opening. And she said no.

18 Now this first fellow is a Gulf War vet and
19 a Marine, and he's driving a FedEx truck today. And
20 if I didn't start his case five years ago and I
21 started it next year, I'd have to say, Emmett, you
22 know, there's a lot here and I don't think you did it.

23 But there's a new presumptive rule, and if I can't
24 talk a federal judge into giving us more than five
25 depositions, I don't think you're going to get that

1 fair shake.

2 And if I say to the next guy, Dion, I know
3 you're a Gulf War vet and I know your lung tissue is
4 so brittle you are never going to see your young
5 children grow up, but I'm here to tell you there is a
6 new presumptive rule, your case is not proportionally
7 big enough, and I may not be able to tell a federal
8 judge and convince them to let me take more than five
9 depositions.

10 Now I am here to tell you that that rule is
11 beneath the dignity of the United States Courts to put
12 in place. And I am just here as one practitioner to
13 ask you don't ever make me go to court and have to say
14 to a client I don't think these courts are going to
15 give you a fair shake. I just don't think you should
16 do it. Thank you.

17 JUDGE CAMPBELL: All right. Thank you.

18 Questions for Mr. Seldon?

19 (No response.)

20 JUDGE CAMPBELL: All right. Thanks so much.

21 Mr. Williams?

22 MR. WILLIAMS: Thank you, Mr. Chairman. My
23 name is Marc Williams. I'm president of Lawyers for
24 Civil Justice, and I'm a practicing lawyer in
25 Huntington, West Virginia, with the firm of Nelson

1 Mullins Riley & Scarborough.

2 You've had the benefit of LCJ's written
3 comments, and Mr. Dahl and Mr. Levy have expanded on
4 those. I'd like to if I could give a little bit of a
5 different perspective for those LCJ members who are
6 practitioners in the federal courts, essentially
7 talking about my experience over 28 years having a
8 practice that was primarily in the federal courts and
9 various districts. And I would like to direct my
10 comments to the proportionality component of Rule 26,
11 which is in the proposed amendments, and the
12 presumptive limits on discovery. And if I could, I'll
13 deal with the proportionality change first.

14 A lot of the discussion, and I've been here
15 since this morning, has been pointing out the fact
16 that proportionality as it exists in the current rule
17 and being moved would allow the courts to have the
18 benefit and the lawyers and practitioners to have the
19 benefit to focus on that issue early in the case when
20 we are preparing our discovery plans.

21 The most recent case that I litigated the
22 current iteration of proportionality unfortunately --
23 and I might add is the only time that we had to go to
24 a magistrate judge on that issue -- unfortunately got
25 bogged down in the whole question of whether or not

1 the discovery that was being requested was reasonably
2 calculated to lead to the discovery of admissible
3 evidence.

4 Even though it's clear from the language of
5 the rule that that's not what it was intended to
6 define as scope, by eliminating that language and
7 pushing proportionality into the scope of discovery,
8 it will allow us then to focus on proportionality as
9 it relates to the discovery that is necessary for the
10 type of case that is being prepared.

11 Ultimately, if you go back to the '93
12 amendments and go forward, the efforts that these
13 committees have made in trying to amend these rules
14 has been to try to force lawyers and judges to not
15 make the same mistake generals have made of trying the
16 last case -- or discovering the last case or fighting
17 the last war, but to focus on the facts that are in
18 dispute, the issues that have been raised by the
19 pleadings, and craft a discovery that is necessary for
20 that.

21 This amendment would allow that to happen
22 and would give us the tools to make a decision. And
23 frankly, to the extent that there are objections about
24 proportionality and the prospect that it could end up
25 eliminating meritorious claims, I think that the way

1 this committee has drafted the proposed rule has
2 provided an excellent balance to guarantee access to
3 justice, to deal with what most lawyers from
4 plaintiffs and defense would acknowledge, and that is
5 discovery is too expensive and oftentimes too
6 extensive. It provides a good balance for that so
7 that at the beginning of the case we can sit down
8 lawyer to lawyer and perhaps with the judge if that's
9 the way that they do that in that district and craft a
10 discovery plan that would incorporate and consider
11 proportionality in relation to the case.

12 So, to that extent, we would avoid what I
13 see unfortunately often, and that is cases that are
14 resolving because of the costs of discovery or, as
15 described by Mr. Mason in his comments, discovery that
16 is used as leverage not to find the facts of the case
17 but to exercise leverage points to try to force a
18 resolution.

19 Good lawyers, very smart lawyers, have
20 recognized that most of the work that takes place in a
21 case is in the discovery process, and they use
22 discovery, especially with the explosion of
23 electronically stored information, to demand
24 information as a result of which parties are then
25 forced to make judgments as to whether or not they are

1 willing to go forward to test the merits of the claims
2 or whether they have to make an economic decision in
3 that resolution. This amendment would put us back in
4 the position of actually using discovery for the
5 purpose of searching for truth, which I think is the
6 intent.

7 In the last minute, I'd like to talk about
8 presumptive limits. In the 20 years that I've been
9 practicing since presumptive limits were put in place,
10 I can tell you that the '93 amendments on
11 interrogatories, for instance, eliminated many of the
12 abuses that I had grown up learning about in terms of
13 written discovery. And frankly, over 20 years,
14 whenever there was a question about the number of
15 interrogatories, the number of depositions, the length
16 of a deposition, I can only think of one case in 20
17 years in handling hundreds and hundreds of cases in
18 the federal courts where we were not able to work out
19 an agreement, whether it was horse trading with
20 opposing counsel in terms of, well, you want this, I
21 need this, why don't we agree on that, or just saying,
22 okay, you need more than 10 depositions. Why don't
23 we -- tell me how many you need and who you need to
24 depose, and then we can make a judgment on that.

25 It's almost invariably resolved by

1 agreement. And on one occasion, when we had to go to
2 the judge, the judge was able to work out an agreement
3 once again by asking the parties to define exactly the
4 type of deposition schedule that they needed.

5 The vast majority of cases in my experience
6 -- and I've handled a lot of big cases and small cases
7 in federal court. The vast majority of cases are
8 going to fall within the presumptive limits that are
9 set out in these amendments. But I trust the judges
10 to know that if I make a request and can justify my
11 request for something that falls outside of those
12 limits that I'll get that.

13 That's the comments I wanted to make, and
14 I'll be happy to answer any questions.

15 JUDGE CAMPBELL: Judge Oliver.

16 JUDGE OLIVER: It sounds like you haven't
17 had any problem with the 10-deposition limit.

18 MR. WILLIAMS: None.

19 JUDGE OLIVER: And so you haven't had to
20 fight over someone getting too many or what have you.

21 MR. WILLIAMS: Only one time in 20 years,
22 Your Honor. And I can't say that most of the cases
23 that I've handled -- because as I get longer in the
24 tooth, the cases get more complex. That's what we all
25 hope as we advance as experienced lawyers. But I can

1 tell you that most of the cases I see across the
2 platform in our firm fall within that, and to the
3 extent that they fall outside of it, it usually is
4 resolved by agreement.

5 JUDGE OLIVER: So you're not here to argue
6 for a five-deposition limit based on your experience.

7 MR. WILLIAMS: I think a five-deposition
8 limit is appropriate because I think that falls within
9 what most cases that are in the federal courts are
10 actually using. For instance, the note that came with
11 the proposed amendment indicates that the way that
12 that five-deposition limit was identified was because
13 that should handle the majority of the cases that fall
14 in the federal courts.

15 JUDGE OLIVER: But it's not based on the
16 fact that you've had a problem with the prior limit.

17 MR. WILLIAMS: I believe that five is a good
18 default from which we can start, and I can tell you
19 that the 10-deposition limit that we currently have
20 has not been a problem in cases where it's justified
21 to ask for more than that.

22 I can tell you this, though. I've never had
23 a case at the end of the resolution that I thought,
24 gosh, I wish I'd had more time for discovery. Lawyers
25 will expand the discovery to the outside limits. It's

1 like air in a bottle. And at the beginning of a case,
2 if I know that the presumptive limit is five, what I'm
3 going to be forced to do is sit down and think about
4 who do I need to depose in this case, what are the
5 sorts of witnesses I'm going to need to identify so
6 that I can then have a plan in place as opposed to
7 prior to the '93 amendments when it was open season
8 and we could just hopefully within the time limited
9 for discovery take as many depositions as possible.

10 Five makes sense as a starting point. Ten
11 has not been a problem for what we currently have.
12 And I trust the judges that in appropriate cases that
13 they will allow the parties to take more than five if
14 necessary.

15 JUDGE CAMPBELL: Parker?

16 MR. FOLSE: I'd like to get your reaction to
17 some themes that have come through in some of the
18 comments we've heard today. There's been an argument
19 made that by taking the proportionality factors and
20 moving them explicitly into the scope definition in
21 Rule 26 that what that will do in practice is to
22 provide a new range of tools that can be used as
23 objections by people who want to resist discovery,
24 which will in turn lead to a lot of satellite
25 litigation in front of federal judges who are already

1 overworked and already underfunded, which will in turn
2 lead to delays in the resolution of cases on the
3 merits. And as someone who has been in the trenches
4 of litigation and has seen the way people use
5 objections, I'd like to get your reaction to that.

6 MR. WILLIAMS: Well, if I make a
7 proportionality objection, which we're entitled to do
8 now, and on occasion we do based upon looking at the
9 nature of the claims, the scope of the questions that
10 are being asked, particularly let's say in a 30(b)(6)
11 deposition notice where oftentimes the net is cast
12 very broadly and I'm trying to narrow it down to the
13 actual issues in dispute.

14 To the extent that I make a proportionality
15 argument, it seems to me that I have the
16 responsibility to make that showing as to why it's not
17 in proportion. I understand that the offering or the
18 demanding party has certified that under 26(g), under
19 those circumstances, they believe that it is
20 proportional to the needs of the case. If I'm going
21 to make an objection on burdensome or privilege or
22 proportionality, then that falls to be my
23 responsibility. And I suspect that the magistrate
24 judges or the judges that hear that are going to
25 demand me to make that showing.

1 So I'm going to have to think about that as
2 to how I can justify limiting that within the
3 parameters of how proportionality is defined in the
4 proposed amendment, which gives pretty good guidance
5 to me as a practitioner on the showing that I'm going
6 to have to make in order to prevail on that issue.

7 Ultimately I suspect proportionality
8 objections are going to result in a narrowing or a
9 focus of the discovery, with an understanding that
10 once that is completed, we would give them the right
11 to revisit that issue, much in the same way we do, for
12 instance, when we're negotiating 30(b)(6) notices of
13 saying let's narrow it down to these topics, let's
14 have witnesses testify to those, and then after you've
15 heard those, if you need additional -- if you want to
16 broaden it from that point, let's come back and
17 revisit that issue.

18 JUDGE CAMPBELL: All right. Thank you very
19 much, Mr. Williams.

20 MR. WILLIAMS: Thank you.

21 JUDGE CAMPBELL: Mr. Relman?

22 MR. RELMAN: Good afternoon, Mr. Chairman
23 and members of the committee. Thank you for the
24 opportunity to testify today. My name is John Relman.
25 I'm the managing partner of Relman Dane & Colfax.

1 And our firm specializes in litigating civil rights
2 cases. Our focus is on discrimination cases in the
3 areas of fair housing, fair lending, unemployment, and
4 disability discrimination, and my comments are based
5 on more than 25 years of experience litigating
6 literally scores of civil rights cases both at the
7 firm and before that at the Lawyers Committee for
8 Civil Rights, where I worked before founding the firm.

9 I want to focus my remarks in the couple of
10 minutes that I have on concerns that I have about two
11 of the changes, and the first is the proposed
12 reduction in the number of depositions, and the second
13 is the proposed amendment to Rule 26(b) regarding the
14 scope and burden of discovery.

15 First, with respect to depositions, lowering
16 the cap, the presumptive cap, on the number of
17 depositions is a change that I believe in my judgment
18 in the context of individual civil rights claims will
19 dramatically tip the balance in favor of large
20 companies and against individual plaintiffs. The
21 restriction is going to make it much more difficult
22 for plaintiffs to prove the case, and it's not going
23 to have the same effect on defendants. And I want to
24 take a minute and explain why, and I'll focus my
25 comments specifically on the civil rights

1 discrimination context.

2 Discrimination cases today are rarely proven
3 by a smoking gun, but rather they depend upon
4 inferences that are drawn from circumstantial
5 evidence. The key to any individual case is proving
6 pretext, that is, that the asserted reason or defense
7 is not true, it's a lie. And the way that you test
8 that to determine if it's pretext is that you've got
9 to test the reasons that are given and explore the
10 treatment of similarly situated individuals to the
11 plaintiff so that you can show that individuals not in
12 the protected group, people who are not African
13 American, someone who is not a woman or someone who is
14 not Hispanic, for example, is not treated the same
15 way, that the excuse doesn't apply.

16 Establishing the evidence of how similarly
17 situated folks are treated requires multiple
18 depositions, and the reason for that is very simple.
19 Ethically, plaintiffs' attorneys are often barred from
20 informally speaking with employees of companies.
21 We've got to rely on formal depositions to explore
22 their knowledge and testimony.

23 If multiple reasons are given by a defendant
24 for why an adverse decision is made, for instance, why
25 he didn't get the housing, why he didn't get the job,

1 the only way we can test the truthfulness of that
2 statement, the only way we can do it is to identify
3 potential similarly situated folks, and we've got to
4 depose them. We've got to test out and ask them
5 questions. That frequently requires well more than
6 five depositions, and in fact, it may take a
7 deposition or two just to determine who the actual
8 decision-maker was in the process, who was the person
9 who actually sets the rules and made the decision.

10 So for this reason, this restriction in this
11 critical discovery tool of depositions is going to
12 weaken the ability to prove meritorious discrimination
13 cases, and it's ultimately in my view going to
14 undermine the enforcement of civil rights laws.

15 In contrast, this change for depositions
16 doesn't hurt the defendant because they have access to
17 all of their own employees. They can conduct their
18 own informal discovery without restriction. They
19 don't need depositions to test that out or to check
20 for whether there are actually similarly situated
21 folks. They only need to depose the plaintiff.
22 That's one deposition, and that's it. And because the
23 plaintiffs bear the burden of proof, the defendants
24 have more to gain by blocking discovery. So they're
25 going to have an incentive to try and limit the

1 depositions to the bare minimum that are there. So
2 defendants have little to lose by lowering that limit.
3 Plaintiffs have a lot to lose.

4 Second, there is no risk of an abuse or
5 overuse of depositions under the current system by
6 plaintiffs because most of the plaintiffs are indigent
7 and can't recover the costs of litigation. And so
8 attorneys are working on a contingency or a fee-
9 shifting basis. They front the costs of litigation,
10 and they have no incentive to take unnecessary
11 depositions. And, of course, depositions are costly.

12 If there is to be a change, I think the more
13 palatable change -- I don't think there should be a
14 change, but if there is to be a change, the change
15 should be one where there is a limit on the number of
16 hours, total number of hours, and that would preserve
17 the plaintiffs' access to the witnesses they need to
18 depose while ensuring that the overall time spent in
19 deposition is reasonable. It preserves the
20 flexibility for the plaintiff to be able to address
21 the evidentiary needs of each case on a case-by-case
22 basis, and it's going to reduce discovery disputes by
23 decreasing the likelihood that a plaintiff will file a
24 motion for leave to take more depositions.

25 If I could have leave just to say just a few

1 words about the proportionality test, would that be
2 permissible?

3 JUDGE CAMPBELL: Yes.

4 MR. RELMAN: With respect to
5 proportionality, here is the problem with the change
6 that moves the language up into 26(b)(1). The problem
7 is that the factors in the proposed rule weigh the
8 amount in controversy against essentially the cost and
9 burden of discovery on the defendant. In a typical
10 individual case, the amount in controversy may be 50-,
11 \$60,000. But in almost every case, that is going to
12 be outweighed by the cost to a large defendant of
13 searching for emails or producing loan files, for
14 example, if it's a lending discrimination case or even
15 in a housing discrimination case. It's almost always
16 going to be outweighed, and the defendant will almost
17 always say that it is too burdensome and more costly
18 to produce those files to check that email than the
19 amount in controversy.

20 But for the reasons I've said, that
21 discovery is essential. You can't prove the pretext
22 without seeing the emails, without getting into the
23 files.

24 I'll give you one example as I wrap up my
25 comments. I represented an individual who was here in

1 D.C. years ago who was HIV positive and gay and was
2 applying for housing. He had a rental application for
3 a townhouse that was rejected. The property
4 management company first told him that he didn't
5 qualify because he had a blemished credit record. He
6 said, I'll find a cosignor, and the management company
7 said, we don't take cosignors, sorry, rejected.

8 He then offered to pay a second month's rent
9 as security. They said, we don't do that. We don't
10 accept that. And finally he said, I will prepay the
11 entire year's rent, \$11,000, just to show you that you
12 don't have a risk here. They said, we don't do that.

13 We can't take that. That's not our policy. We've
14 never done that.

15 I didn't believe that was true. That defied
16 logic. It didn't make any sense why you wouldn't
17 accept that. So we said we want to see the files.
18 We're certain it was a large management company that
19 ran it. We said, we're certain we're going to find
20 similarly situated individuals for whom you've either
21 taken cosignors, accepted extra rent, or even taken a
22 whole year's of rent.

23 They resisted, saying, of course, it would
24 be burdensome, costly, it shouldn't be done. The
25 judge ultimately, Judge Kessler in the case, ruled

1 that we were entitled to that discovery because she
2 said this is essential to proving pretext. The result
3 was we got into the files, we found out what they said
4 was pretext. They did take cosignors, they did allow
5 for prepay, and their reasons were not true.

6 The point is that were this a
7 proportionality test, and where that was the case
8 because there wasn't a lot of damages involved in this
9 case, we would never have gotten into those files and
10 the rights of a deserving plaintiff would have gone
11 unvindicated.

12 And finally, the last thing I want to say,
13 and then I'll stop, is that the problem here in moving
14 the rule is that it takes the proportionality test out
15 of an issue that is squarely in front of a judge when
16 there is a contested motion for protective order and
17 puts it, the plaintiff, at the mercy of the defendant
18 because the plaintiff, who has the burden, is asking
19 the defendant for that discovery, for those emails, in
20 a bank case for those loan files. There is no bank,
21 there is no large company that will not tell me that
22 it's way too burdensome in light of how much is at
23 stake to produce those emails, to produce those loan
24 files, and if that's the test, I'll never get what I
25 need.

1 That means every single time there is going
2 to be a disputed discovery motion I will have to go to
3 the judge every single time to fight this battle and
4 I'll have the burden to show it. Sometimes I may win
5 if the judge is favorable, other times I may lose.
6 But the point is the presumption is being set against
7 an individual civil rights plaintiff who may have a
8 very meritorious case. I think this sets civil rights
9 back. I would ask that these changes not be put into
10 effect.

11 JUDGE CAMPBELL: All right. Thank you very
12 much, Mr. Relman.

13 Malini Moorthy.

14 MS. MOORTHY: Good afternoon, Mr. Chairman
15 and members of the committee. My name is Malini
16 Moorthy, and I'm a vice president and assistant
17 general counsel at Pfizer, Inc. Specifically, I head
18 the company's civil litigation group, which includes
19 oversight of our e-discovery team.

20 Pfizer is frequently a defendant in a wide
21 variety of civil litigation matters, including product
22 liability, securities, and antitrust litigation. But
23 Pfizer is also occasionally a plaintiff in litigation,
24 and it is from these dual perspectives that I'm
25 speaking here today.

1 Rather than reviewing point by point the
2 proposed amendments, I'd like to give you a concrete
3 narrative of our experience. This narrative
4 complements our written comments, which were submitted
5 earlier today, and illustrates how the current rules
6 have forced Pfizer to preserve, collect, and produce
7 staggering amounts of information at even more
8 staggering costs, and much of the information has no
9 bearing on the litigation we face.

10 In the hormone therapy litigation, Wyeth,
11 which was subsequently acquired by Pfizer, it was
12 subject to a discovery preservation order Rule 26 that
13 required us to preserve 1.2 million backup tapes over
14 the course of six years.

15 Backup tapes are intended for disaster
16 recovery to enable companies to restore data on our
17 systems in the face of a catastrophic event. Like
18 most companies, Pfizer's policy is to recycle its
19 backup tapes at regular intervals as the data on the
20 tapes becomes duplicative and it is expensive to
21 purchase new tapes and store huge volumes of old ones.

22 In connection with the hormone therapy
23 preservation order, we estimate that Wyeth and Pfizer
24 spent nearly \$40 million to buy and store the 1.2
25 million backup tapes that were preserved. Each one of

1 the tapes holds roughly 100 gigabytes of data, so in
2 total they hold approximately 100 petabytes of data.

3 I was largely unfamiliar with the term
4 petabyte until recently, and the number meant very
5 little to me. But I've since learned that 50
6 petabytes is roughly equivalent to the entire written
7 literary works of all mankind in all languages since
8 the beginning of recorded time, and we preserved twice
9 that much.

10 The most remarkable fact is that despite
11 preserving 100 petabytes of information, we never went
12 back to those backup tapes to retrieve a single
13 document, not once, as the information on those tapes
14 was completely redundant. There was no need to go to
15 the backup tapes because in the same litigation Pfizer
16 collected millions and millions of documents from its
17 live data environment, which included retrieving data
18 from more than 170 custodians and more than 75
19 centralized information systems.

20 From those collection efforts, Pfizer
21 produced approximately 2.5 million documents,
22 representing more than 25 million pages. Of those 2.5
23 million documents, we estimate that only about 400
24 company documents were marked as exhibits in the 23
25 trials that have taken place in the litigation to

1 date.

2 Over the course of those trials, plaintiffs
3 consistently used the same 400-odd documents, most of
4 which were produced early on in the litigation,
5 notwithstanding our continued production of documents.

6 This means that for every one document used at trial,
7 about 625,000 additional documents were produced.

8 Another point to consider is that
9 fortunately or unfortunately depending on your
10 perspective, Pfizer was able to comply with the
11 overbroad preservation order and plaintiffs' discovery
12 demands notwithstanding the significant expense and
13 burden.

14 The hormone therapy litigation is only one
15 example. Pfizer dedicates substantial time and
16 resources to complying with overbroad discovery
17 obligations on a daily basis. In order to support
18 these efforts, Pfizer employs 10 full-time colleagues
19 and three full-time contractors to manage our legal
20 discovery exclusively.

21 In addition, we have a team of dedicated
22 vendors, including 13 people devoted exclusively to
23 document collection, eight people responsible for the
24 technology side of electronic discovery, and on
25 average 215 people reviewing documents at any given

1 time.

2 Surely the great majority of defendants
3 cannot bear this expense. The impact of burdensome
4 preservation and discovery obligations on small and
5 mid-sized companies must be immense. And even though
6 many companies will not have the volume of data that
7 Pfizer generates, preserving even one backup tape has
8 the potential to directly impact the bottom line of a
9 company.

10 Yet under the current rules, companies like
11 Pfizer preserve, collect, and produce documents that,
12 as the hormone therapy example illustrates, bear
13 little, if any, relationship to the real claims and
14 defenses raised by the litigation it faces and serve
15 no business purpose whatsoever.

16 I thank the committee for the opportunity to
17 testify, and I also thank you for your efforts to
18 address the much needed amendments in the rules.

19 JUDGE CAMPBELL: Thank you.

20 Questions? Justice Nahmias.

21 JUSTICE NAHMIAS: You give us an example
22 that has some astounding numbers, but the proposed
23 amendments, what effect do you think they would
24 actually have on that type of case?

25 MS. MOORTHY: I think they'll have a fairly

1 significant impact, particularly the amendments to
2 Rule 37(e). I would like to see them go further, but
3 at least it eliminates the risk of sanctions in the
4 event of pure negligence. I do think, as I think
5 others have suggested, that it should not be just be
6 limited to -- that willfulness alone is insufficient
7 and that sanctions should only be afforded in
8 instances where a party has intentionally deprived a
9 litigant of information or data that should have
10 otherwise been produced.

11 Just to add to that one point is that at
12 this point we've just taken the most conservative road
13 because of the risk and threat of sanctions. And I
14 think what this gives us the opportunity to do is with
15 the amendments to the rules just continue to focus on
16 being responsible and take the most defensible
17 position but also one that is responsive to the
18 discovery obligations that we face.

19 JUDGE CAMPBELL: Parker, did you have a
20 question?

21 MR. FOLSE: I'd just like to follow up on
22 the last question that was asked because I'm still
23 having trouble understanding how that example you gave
24 relates to amendments under the rules that we're
25 considering. It sounded to me like that was a court

1 order entered in that litigation that defined and
2 prescribed what you had to preserve, which obviously
3 sounds like it was a \$40 million escapade. But what
4 part of the rules that we are considering now does
5 that story help us decide?

6 MS. MOORTHY: Absolutely. I think there's
7 two things. One is I actually think this one reflects
8 the proportionality requirement and the amendments to
9 Rule 26(b)(1) because I think what has happened is and
10 what our experience is is that it's quite disparate in
11 terms of how courts have interpreted that rule and in
12 terms of what constitutes relevance and the extent of
13 our discovery obligations.

14 So it is because of the lack of uniformity
15 in the approach and also I think the lack of
16 consideration of proportionality within the concept of
17 scope, which is what resulted to the extensive
18 preservation order there.

19 Now I should say that after six years we
20 were able to convince the court to lift that order,
21 but it was after significant spend and demonstration
22 that it was overburdensome and demonstrating that the
23 parties had never gone to the backup tapes a single
24 time.

25 JUDGE CAMPBELL: All right. Thank you very

1 much, Ms. Moorthy.

2 Mr. Smith?

3 MR. SMITH: Good afternoon, Mr. Chairman and
4 members of the committee. I am a lawyer with the
5 NAACP Legal Defense and Educational Fund. LDF was
6 founded in 1940 by Thurgood Marshall. It is the
7 nation's oldest civil rights legal organization, and
8 we are here today because we are deeply concerned
9 about a number of the proposed changes to the
10 discovery process currently under consideration by the
11 committee and the impact it will have on the ability
12 of civil rights plaintiffs to obtain relief through
13 the federal courts.

14 We are deeply concerned about these changes.

15 And in fact, earlier this week our president and
16 director counsel, Sherrilyn Ifill, testified before a
17 Senate Judiciary subcommittee about this very
18 important issue.

19 It is our view that the most troubling
20 change currently under consideration relates to Rule
21 26(b)(1). Throughout the history of the Federal
22 Rules, the scope of discovery has been defined through
23 a lens of relevance. Adding a proportionality
24 requirement to Rule 26(b)(1) represents a sea change
25 in the discovery process and will lead to a dramatic

1 reduction in the scope of discovery.

2 This change will be particularly harmful to
3 civil rights plaintiffs, who are often dependent on
4 discovery to substantiate their claims. Very often
5 victims of discrimination are not in possession of
6 information they need to support their claims. That
7 information is in the exclusive province often of a
8 defendant and can only be obtained through the
9 discovery process.

10 Moreover, as Mr. Relman just explained, as
11 discrimination has become more subtle and
12 sophisticated, civil rights plaintiffs face an even
13 higher burden as they are often required to establish
14 discrimination through circumstantial evidence. Thus,
15 civil rights plaintiffs use the discovery process to
16 ferret out and expose discriminatory policies,
17 practices, and actions.

18 The addition of this proportionality
19 requirement to Rule 26(b)(1) will only exacerbate the
20 information asymmetry between plaintiffs and
21 defendants in civil rights cases and will give
22 defendants a multitude of opportunities to squirrel
23 out of their obligation to produce relevant and
24 necessary discovery.

25 For example, we are particularly concerned

1 about allowing defendants to rely on the amount in
2 controversy as a factor determining the scope of
3 discovery, and they will use it as an opportunity to
4 minimize the significance of civil rights cases which
5 often don't involve large sums of money or primarily
6 seek injunctive relief.

7 To be clear, we do not deny that
8 proportionality has a role to play in the discovery
9 process, but the current formulation of the rule,
10 which places that review squarely in the hands of the
11 court, strikes a far better balance. It has been our
12 institutional experience that federal judges and the
13 magistrates who assist them in the discovery process
14 are more than capable of making assessments about the
15 extent to which discovery should be allowed in a
16 particular case and then overseeing the discovery
17 process.

18 I would also like to address the argument
19 that dramatic changes to the discovery rules are
20 necessary to curtail abuses on the discovery process
21 and control litigation costs. As an initial matter,
22 we are aware of no empirical data or research showing
23 that civil rights cases are categorically prone to
24 have exorbitant discovery costs. And that certainly
25 has not been our experience for the last seven decades

1 litigating civil rights cases across the country.

2 At most, there may be a small handful of
3 cases where discovery costs have grown exponentially.

4 However, the appropriate solution is not to narrow
5 the scope of discovery in all civil litigation. Such
6 a heavy-handed approach will only have a devastating
7 result on civil rights actions.

8 Moreover, this proposed amendment will
9 likely have the unintended consequence of making
10 discovery processes longer and more costly. The
11 addition of a proportionality requirement will likely
12 lead to greater motion practice, which itself is
13 costly, takes time, and consumes judicial resources
14 that can be spent in other ways.

15 We do, however, believe there is a cost
16 consideration that this committee should pay careful
17 attention to as the costs that these proposed
18 amendments if adopted would have in preventing civil
19 rights plaintiffs from obtaining the relief they
20 deserve.

21 Our system of civil rights enforcement is by
22 design dependent on individual plaintiffs serving as
23 private attorney generals who use civil litigation to
24 vindicate important congressional policies and
25 fundamental constitutional rights. Procedural changes

1 such as the ones currently before this committee will
2 only have the unintended consequence of undermining
3 this vital component of our justice system.

4 There are a number of other proposals that
5 we also have a concern about that are detailed in
6 greater length in our written comments. I did want to
7 note, though, that the lowering or imposition of
8 presumptive limits for depositions, interrogatories,
9 and requests for admission will also have the net
10 result of making it harder for civil rights plaintiffs
11 to get access to the discovery they need.

12 Also, interrogatories and requests for
13 admission are some of the least expensive forms of
14 discovery. If the committee is concerned about cost,
15 it should consider proposals that increase and do not
16 decrease the use of these very important and useful
17 discovery tools.

18 In closing, the proposed amendments are at
19 odds with the longstanding and fundamental premise
20 that the federal courts should be open and available
21 to those who seek redress for civil rights violations.

22 Thank you again for this opportunity. I'm
23 happy to answer any questions.

24 JUDGE CAMPBELL: Thank you, Mr. Smith.

25 Questions?

1 (No response.)

2 JUDGE CAMPBELL: All right. Thank you very
3 much.

4 Ms. Fleishman?

5 MS. FLEISHMAN: Good afternoon. Thank you
6 very much for permitting me to testify today. My name
7 is Wendy Fleishman, and I'm here on behalf of the New
8 York State Trial Lawyers as well as the AAJ and
9 specifically the members of AAJ that are involved with
10 environmental toxic tort and product liability
11 litigation.

12 I want to address two specific changes of
13 the rules, and then I will submit papers in addition.

14 Rule 26(b)(2)(C) already encourages judicial
15 involvement in the discovery process and empowers
16 judges themselves to limit duplicative or
17 disproportionately burdensome or expensive discovery,
18 and sanctions are already available in the case of
19 truly egregious abuses.

20 There is no evidence that suggests that
21 these mechanisms are insufficient or ineffective. In
22 many instances, we already have in place the Rule 16
23 conference, at which time we can then address and deal
24 with any issues that will arise that will perhaps
25 raise the specter of an abuse of discovery, and it's

1 through that mechanism that is already in place that
2 we can address the specific and very important issues.

3 Countless costly and time-consuming disputes
4 would arise from the proposed changes in the scope of
5 discovery in Rule 26(b)(1), from changing the
6 relevance standard to a proportionality standard.
7 This will give rise like the Daubert change to a
8 plethora of new motions and lots of discovery
9 disputes, which will just encourage defendants,
10 frankly, to bring more and more objections and be more
11 and more obstreperous to the form of discovery
12 possible for plaintiffs in environmental torts, in
13 toxic torts, in individual cases involving medical
14 devices and pharmaceutical devices.

15 In each of those cases, the individuals, the
16 small businesses are faced with defendants that are
17 huge multinational corporations with enormous amounts
18 of money, rooms full of lawyers, who will then come in
19 and file motion after motion, and now by changing the
20 rule, we are just setting up a new device for them to
21 utilize.

22 We cannot know the value of a piece of
23 information until we get the information. The most
24 classic example of that, of course, is the Vioxx case.

25 In that case, the defendant, Merck, had failed to

1 disclose to the *New England Journal of Medicine* and
2 failed to adequately disclose to the FDA that its
3 painkilling medicine actually increased the risk of
4 cardiovascular episodes. And it wasn't until thorough
5 discovery was able to unearth the fact that Merck and
6 the authors that it supported had failed to disclose
7 that to the *New England Journal of Medicine* when the
8 drug was first put on the market, and the *New England*
9 *Journal of Medicine* then endorsed the drug.

10 It was that fraudulent concealment, that
11 secret that would have been otherwise impossible to
12 unearth without the ability to do adequate discovery.

13 And that discovery was brought on because Judge
14 Fallon was able to oversee the discovery and because
15 he in his wisdom used Rule 26(b)(2)(C) to control that
16 discovery.

17 Rule 30 now calls for a presumptive limit of
18 10 depositions. And you've heard over and over today
19 people talk about and testify before the committee
20 about how difficult it will be for plaintiffs to
21 appear and limit their discovery to only five
22 depositions. It will be impossible to know what five
23 depositions are critical. It will be impossible to
24 develop their case in that way, especially in the case
25 of a toxic tort, in the case of an environmental tort,

1 in the case of a simple product liability case.

2 In each of those cases, it is necessary to
3 do more than five depositions. And by utilizing a
4 presumptive limit of five, the plaintiffs will be
5 forced to come before the court time and time again to
6 ask for more depositions and to involve the court and
7 further overburden the court and further increase
8 their costs. Thank you.

9 JUDGE CAMPBELL: Thank you.

10 Questions? Judge Koeltl.

11 JUDGE KOELTL: How would the Vioxx case have
12 been any different under the proposed rules? You must
13 have taken far more than 10 depositions in the case.
14 The judge controlled the case by using the standards
15 in 26(b)(2)(C), which now under the proposal would be
16 part of the first sentence in the scope of discovery.
17 The judge would still have to do the same thing.

18 MS. FLEISHMAN: The way it would be
19 different would be that the plaintiffs would have to
20 show that the information was available, that the
21 information existed. And without doing the discovery,
22 they couldn't show that because what typically
23 happens, Your Honor, is that the plaintiff comes up
24 with a list of depositions that they think are
25 necessary. The defendants then say, oh, no, those are

1 too many depositions, it's completely unnecessary, and
2 it's going to cost us gazillions of dollars to produce
3 those megabytes of data.

4 And then they'll say there is no
5 proportionality. You can't prove in that instance
6 that a drug caused cardiovascular events and that we
7 failed to disclose that, that was a fraud. So they
8 will argue that the proportionality will not justify
9 or warrant that intense investigation and discovery.

10 JUDGE CAMPBELL: Professor Marcus?

11 PROF. MARCUS: One of the things we've heard
12 from a number of witnesses today has been that they
13 represent low-wage workers where the monetary value of
14 the claims may be relatively limited. Isn't Vioxx a
15 case where the monetary value of the claims is
16 astonishingly high? Wouldn't proportionality in such
17 a case actually operate to support very broad and
18 aggressive discovery, indeed perhaps more than would
19 otherwise be legitimate?

20 MS. FLEISHMAN: In that case, as Your Honor
21 remembers or rather the professor remembers, there
22 were many instances where the claims were very
23 minimal, where the claims, the individual claims were
24 simple claims where there was a cardiovascular event,
25 but it was difficult to prove that the event was

1 caused by the increased risk of the Vioxx in addition
2 to the circumstances. And so, as a result, there were
3 defense verdicts when these cases went to trial.

4 It's only when the cases are aggregated
5 under an MDL that the position of power changes. But
6 if the rules are changed by the rule changes, the rule
7 will adversely impact the individuals who go to trial
8 and the individuals who bring these cases even when
9 the cases are not abrogated as part of an MDL.

10 So, for example, the painkiller case. In
11 those cases, the JPML denied the request for the
12 motion to transfer and centralized those cases. So
13 those individuals all have to prove their cases by
14 individual discovery. In that instance, they don't
15 have the power of the number of cases abrogated
16 together.

17 JUDGE CAMPBELL: Thank you very much, Ms.
18 Fleishman.

19 Mr. Regan?

20 MR. REGAN: Good afternoon, and thank you
21 for the opportunity to testify before this committee.

22 I am Patrick Regan, and I'm a lawyer practicing here
23 in Washington with the law firm of Regan Zambri Long &
24 Bertram. I'm a trial lawyer, and I represent
25 plaintiffs in civil actions in state and federal

1 courts throughout the D.C. area. I'm a fellow of the
2 American College of Trial Lawyers and a longtime board
3 member of the American Association for Justice.

4 I regularly practice in four courts, four
5 federal courts, and I tell you that so that you can
6 take my comments in context. The federal courts are
7 in D.C., Baltimore, Greenbelt, and Alexandria. During
8 the course of my career, I've litigated somewhere
9 between 300 and 400 cases in federal court and tried
10 more than 50 civil jury trials.

11 The proposed rule changes in my judgment
12 will make it much more difficult for my clients,
13 ordinary citizens, small businesses, to achieve a fair
14 trial in federal court. They will be denied the
15 ability to meet their burden of proof and thus denied
16 access to the courts and in the end be denied justice.

17 I will be submitting extensive written
18 comments to this committee detailing my concerns with
19 all of the rules, and today I'll address just two of
20 the proposed changes: the harm caused by the
21 proportionality, which you've heard a lot about during
22 the course of today, and two, the presumptive limits
23 in Rules 30, 31, 33, and 36.

24 Rather than repeat what's been said
25 throughout the morning and afternoon about the

1 proportionality, let me cite to you and take a minute
2 if you'll allow me to talk about a case that was
3 pending just down the street here before former Chief
4 Judge Thomas Hogan in the D.C. Federal Court.

5 This case I submit to you illustrates the
6 problem with the proposed proportionality issues.
7 This particular case involved the death of a 22-year-
8 old construction laborer who was accidentally shot in
9 the head by a nail gun on a construction site. This
10 young man had just graduated from community college,
11 was not married, and had no dependents.

12 Under the D.C. statute, his case, the value
13 of his claim, was capped at roughly \$750,000. Why do
14 I tell you that? Because it relates to one of the
15 factors, which is the amount in controversy. The nail
16 gun in question was a high-velocity nail gun, and it
17 was capable of firing a nail at a speed slightly
18 faster than an M16 rifle. We took deposition after
19 deposition of the employees of the manufacturer and
20 the distributor of the product, probably 12 or 14
21 witnesses, all of whom said that it was perfectly safe
22 for use and that it was suitable for use in the
23 construction industry.

24 Well, the 13th or 14th witness had a
25 different view and testified that five years earlier,

1 before my client was killed, the manufacturer had
2 recommended that it only be used in shipyards where
3 you're attaching two-inch thick steel plates to each
4 other and not be used in the construction industry.

5 Well, that was a sea change, as you can
6 imagine, in my case, resulting in a resolution of the
7 case. But it had a much greater societal impact, and
8 that is as a result of this case, those guns were
9 taken off of construction sites throughout the
10 country. I would have failed on the proportionality
11 factors on several of the cases.

12 Judge Hogan, who I'm sure is well known to
13 most of you, is one of the fairest jurists that I've
14 ever appeared before. He would have been confronted
15 at the outset after my fifth deposition with a motion,
16 and as fair as he is, he probably would have said,
17 Regan, you can have two more depositions. So I would
18 have gotten to seven. And the defense argument would
19 have been, look, it's too burdensome, it's too
20 expensive, and they're all saying the same thing.

21 Well, they were all saying the same thing
22 until the 13th or 14th witnesses, which resolved it.
23 They would have said it was a waste of time, and so
24 with all of this, that's a perfect example. I mean,
25 the folks that I represent are ordinary people.

1 They're teachers and firefighters and lawyers and
2 judges and civil servants and so forth. I don't do
3 class action work or anything else. These are
4 ordinary folks.

5 And the other thing I want to talk about in
6 the remaining time, which is only 40 seconds at this
7 point, is the presumptive limit on five depositions.
8 I think that Mr. Williams, who was up here just a few
9 witnesses ago, said it about as succinctly as it can
10 be said, and I would echo his comments. There is no
11 problem with the current limit of 10. He has never
12 had a problem. I've never had a problem with it.
13 Five would result in a -- in virtually every case I
14 have, the judge is going to have to be involved.

15 Another witness before Mr. Williams said
16 it's silly to think that there will be an agreement on
17 that issue because there won't be. The defense
18 counsel would indeed be in trouble with their client
19 if they agreed to more depositions without getting a
20 ruling from the court. So that presumptive rule -- I
21 know I'm out of time. That presumptive rule would
22 simply increase the burden on the federal judiciary.
23 Every single case would now involve motions.

24 One final point, and I'll take your
25 questions. The limit on requests for admissions I

1 would submit is a solution in search of a problem.
2 The purpose of requests for admissions is to narrow
3 the issues. Why should I file a motion with a judge
4 asking to increase the number of requests for
5 admissions, which will only serve to limit the issues
6 that that judge has to decide?

7 I have never in those 3- and 400 cases that
8 I've talked about, plus all the cases that I've
9 litigated in state court, ever, ever had a problem
10 with the excessive number of requests for admissions.

11 I apologize for exceeding my time. Thank
12 you for listening to me.

13 JUDGE CAMPBELL: Thank you.

14 Questions?

15 JUSTICE NAHMIAS: We've heard today a number
16 of cases where there was an extensive amount of
17 discovery that proved justified because the case
18 ultimately turned out to be meritorious. Have you
19 ever had a case where you ended up taking 15 or 20
20 depositions and then lost them and required the
21 defendant obviously to bear the additional cost of
22 that discovery and then lost on the merits?

23 MR. REGAN: Well, Judge, you know, if there
24 is a lawyer who stands before you and says that they
25 haven't lost a trial, they're not trying cases. So,

1 yes, of course I've lost trials.

2 JUSTICE NAHMIAS: But I think that's the
3 real issue. I mean, obviously, if every case in which
4 there was enormous discovery and preservation produced
5 a result for the plaintiff, then obviously that would
6 be justified. The question is the cases where all of
7 that extra discovery and all of the enormous costs
8 that may be involved don't do anything to advance
9 justice and how to balance it. And that's why I'm a
10 little concerned when we only hear kind of the
11 positive stories of we did all this extra discovery,
12 the defendant beared the cost, but that turned out to
13 be entirely justified. What is on the other side of
14 that? What cases is all of that discovery paid for by
15 the party that prevails?

16 MR. REGAN: Well, I think -- I was tempted
17 to make a joke about trial lawyers never talking about
18 their losses, but it's a serious question that
19 deserves a serious response. And the answer is that
20 it's not as if -- the fact that one party loses at
21 trial doesn't mean that their prosecution or defense
22 was nonmeritorious. In every case that I win, that
23 doesn't mean that it was a nonmeritorious defense from
24 the outset and that I should be awarded costs for that
25 defense. And the flip side is true.

1 And to the extent that there are
2 nonmeritorious cases, I think you have more than
3 enough tools at your disposal right now under the
4 current rules to deal with abusive tactics. I don't
5 have a lot of discovery disputes, and maybe it's
6 because I'm getting long in the tooth, as one of the
7 other witnesses commented earlier, but I don't have a
8 lot of discovery disputes. But I have found that when
9 I do, the judge is perfectly competent and comfortable
10 in calling it a ball or a strike and making a
11 resolution on it. And I don't see where any of the
12 presumptive limits or the proportionality issues will
13 advance the goal of every single person in this room,
14 which is, you know, trying to make sure justice is
15 done.

16 I recognize it has to be done. I have to
17 advance the costs. My clients can't afford the
18 litigation costs, very few of them. You know, maybe
19 the doctors, lawyers, and judges could, but the others
20 can't. So I'm not wasting my time or money when I do
21 it. I try to think about it. I try to be
22 appropriate. So, you know, it's a long-winded answer
23 to a simple question. I apologize.

24 JUDGE CAMPBELL: Judge Sutton?

25 JUDGE SUTTON: Just a quick question. You

1 know, several witnesses have been concerned about
2 limiting depositions from 10 to five or changing the
3 presumption, and I think the suggestion is that the
4 change is designed to encourage district court judges
5 to allow fewer depositions. So I've heard that from a
6 lot of people.

7 I'm not sure that's what the committee has
8 in mind. I mean, the idea of a presumption is to
9 reflect the norm, so as I understand the number five,
10 it's that there is a study that showed that in 75
11 percent of cases there are fewer than five depositions
12 taken. And I'm just wondering from your perspective,
13 given the anxiety of, oh, we're not going to get these
14 depositions in the future, if it would help to have
15 the committee note explain that, in other words,
16 explain this is not designed to prevent depositions.
17 It's designed to explain to the world what the norm
18 is. And all you have to do in one of your cases is
19 say, well, I'm just not in that 75 percent category,
20 here is why.

21 MR. REGAN: Well, that sounds reasonable,
22 and if every jurist --

23 JUDGE SUTTON: Well, it is.

24 MR. REGAN: -- was as reasonable as you, it
25 wouldn't be a problem. But the point is I am now at

1 the discretion of someone when I don't think that this
2 needs to be. I would say that in my cases -- you
3 know, obviously surveys are surveys, and you don't
4 really know the quality of the respondents in terms
5 of, you know, how big a sample it is.

6 But I would say this. I can tell you in my
7 personal cases very few of my cases have involved more
8 than 10 depositions, and I cannot think of one that
9 has involved five or less. So I sort of fall into the
10 category of Mr. Williams, who stood here before me and
11 while he was a proponent of the changes admitted that
12 10 was fine. And when it needs to be exceeded, you
13 work around it. So I don't think it needs to be
14 changed. Anyway, I don't think it needs to be
15 changed.

16 JUDGE CAMPBELL: All right. Thank you very
17 much, Mr. Regan.

18 MR. REGAN: Thank you, Your Honor. Thank
19 you.

20 JUDGE CAMPBELL: Mr. Rakower.

21 MR. RAKOWER: Good afternoon, Mr. Chairman
22 and members of the committee. Thank you for hosting
23 today's event. My name is Michael Rakower. I'm a
24 principal of a commercial litigation law firm in New
25 York City called Rakower Lupkin. I'm also on the

1 executive committee of the New York State Bar
2 Association of the --

3 JUDGE CAMPBELL: Could you just pull that
4 mike up a little higher, please?

5 MR. RAKOWER: Sure.

6 JUDGE CAMPBELL: Thanks. That's better,
7 thanks.

8 MR. RAKOWER: You're welcome. I'm also on
9 the executive committee of the commercial and federal
10 litigation section of the New York State Bar
11 Association and the co-chair of the federal procedure
12 committee of that section, and I stand here before you
13 today as a representative of that section. We have
14 submitted a fairly detailed report to your committee
15 identifying our thoughts and responses, and today I
16 just wanted to cherrypick a few significant or fine-
17 tuning points that we raise in our report. And I
18 thought I would follow the style that the committee
19 followed in its memo. Instead of going in seriatim
20 from one rule to the other, I would go thematically.

21 Your memo begins with case management
22 proposals. I would note that we support the proposal
23 for Rule 4(m). But we do recommend that an Advisory
24 Committee note be included to provide examples of when
25 good cause could be found because we think that the

1 good cause component, the good cause exception, is an
2 important exception to this acceleration of the
3 service rules, and it would help practitioners and the
4 court I think for you to show the situations in which
5 good cause can be employed so that parties don't think
6 that good cause should be a limited form of remedy.

7 Similarly, with Rule 16(b)(2), we also
8 support the rule, and we again think that the good
9 cause exception should be underscored. We support
10 adding the preservation in Rule 502(d) orders to the
11 list of issues which may be included in discovery
12 plan, as we think that would very much help the
13 parties when they commence discovery discussions.

14 We think that early Rule 34 requests would
15 substantially assist litigation so that when the
16 parties come to court and discuss the discovery plan,
17 they would have a set of discovery requests in hand,
18 and they would have actual real-life issues to face
19 rather than theoretical ones with respect to the scope
20 of discovery.

21 Rule 26(b)(1), proportionality, here is
22 where we begin to -- we continue to support the
23 proposal, but we do so with caution. I think there
24 was a question earlier today about whether
25 proportionality would increase the amount of

1 litigation that would occur. We think it probably
2 would in the early stages while parties and courts
3 become comfortable with the notion and the boundaries
4 and how to assess proportionality, but because we
5 think it's a good move, we think that that collateral
6 litigation will even itself out over time and
7 proportionality will prove to be a very good thing.

8 We do want to point out that with respect to
9 proposal 26 -- the proposed amendment to 26(c), the
10 allocation of costs, internally as we read that
11 proposal, there was some discussion as to whether or
12 not that was intended to change the American rule, and
13 we don't think it should. We don't think the Advisory
14 Committee meant to do so, but because there was some
15 doubt and question, we thought perhaps it might be
16 advisable to include an advisory note with that
17 proposed rule so that there's no confusion on that
18 front.

19 With respect to the presumptive numerical
20 limits, here is where we diverge. We weren't
21 comfortable with those presumed limitations. We
22 didn't feel as if the data supported a reduction in
23 the number of depositions. I did read the report
24 fairly carefully and I did hear the questions today.
25 And I think the primary question was, well, what --

1 it's not so much that there's discovery abuse on one
2 side, but as a whole, if parties each take their fair
3 share of depositions collectively, that increases the
4 costs of litigation to a degree that becomes
5 unsupportable for the dollar figure at stake.

6 We didn't feel as if in our experience --
7 and we come from a cross-section of lawyers, through
8 all the big firms and the small firms, working on a
9 variety of types of commercial litigation. We didn't
10 see an extensive amount of abuse that would warrant a
11 reduction in the number of depositions. We thought
12 that the data supported leaving things as they are.
13 And to the extent that there's a concern that
14 collectively the use of depositions increases the cost
15 of litigation, we thought there must be a better way
16 to solve it than these presumptive limits.

17 This time the clock is going up. Does that
18 mean I've actually run through my five minutes
19 already?

20 JUDGE CAMPBELL: It does, it does. But if
21 you have concluding thoughts, we want to hear them.

22 MR. RAKOWER: I do, and I apologize.

23 JUDGE CAMPBELL: That's all right.

24 MR. RAKOWER: I will skip to the end, which
25 is Rule 37. I think that's probably the most

1 significant area where we have concerns other than
2 with respect to the limitations on the number of
3 depositions and so forth. We support the formulation
4 of sanctionable conduct. We do recommend that
5 willfulness be defined. We think willfulness should
6 be defined in terms of either intentional conduct or
7 conduct that's sufficiently reckless to enable someone
8 to foresee the high likelihood of harm. And I think
9 our report formulates a definition better than I just
10 did off the cuff, but I tried to paraphrase as best as
11 I could.

12 We do also think that action should be
13 defined as actions or omissions, and we assume that
14 the Advisory Committee intended that, but we think it
15 should be laid out clearly. We think that the
16 prefatory language in Rule 37 should explicitly direct
17 courts to impose the least curative measure or
18 sanction necessary to repair prejudice. We think that
19 that's consistent with the methodology of the courts,
20 but we also think it would be helpful to set that
21 forth.

22 I realize my time is up, so unless the
23 committee has questions.

24 JUDGE CAMPBELL: All right. Are there
25 questions?

1 (No response.)

2 JUDGE CAMPBELL: All right. Thank you very
3 much, Mr. Rakower.

4 MR. RAKOWER: Thank you.

5 JUDGE CAMPBELL: Mr. Henderson?

6 MR. HENDERSON: To the members of the
7 Advisory Committee, good afternoon. I'm Wade
8 Henderson, president and CEO of the Leadership
9 Conference on Civil and Human Rights. Thank you for
10 the opportunity to testify at today's hearing.

11 The Leadership Conference is a coalition
12 charged by its diverse membership of more than 200
13 national organizations to promote and protect the
14 civil and human rights of all persons of the United
15 States. The Leadership Conference is committed to
16 building an America that is as good as its ideals, an
17 America that affords everyone access to quality
18 education, housing, healthcare, fairness in the
19 workplace, economic opportunity, and financial
20 security.

21 We understand the vitally important role
22 federal protections play in ensuring equality of
23 opportunity and fair treatment under the law. It is
24 with that understanding and history that we express
25 our concerns about the proposed changes to the federal

1 rules, which we believe would place unequal burdens on
2 plaintiffs seeking to have their rights redressed in
3 federal courts.

4 The cumulative impact of the proposed
5 changes to the discovery rules, specifically the
6 proposed changes to Rule 26(b), 30, 31, 33, 36, and
7 37(e), will have serious adverse impacts on civil
8 rights litigants. The burden that these changes would
9 impose is heavy. Simply put, the upending of reliable
10 and settled rules will create a continually moving
11 goalpost, resulting in additional burdens and barriers
12 for civil rights plaintiffs and their attorneys, often
13 keeping plaintiffs from having their rights protected
14 and enforced.

15 For decades, the federal judiciary has
16 served as the place where individuals facing unfair
17 and illegal treatment have turned for the enforcement
18 of their rights. Private parties bring more than 90
19 percent of actions under civil rights and other
20 statutory enforcement actions that implicate the
21 public interest. In 2005, out of 36,096 civil rights
22 cases brought, the U.S. was the plaintiff in only 534
23 cases or 1.5 percent of all civil rights cases brought
24 that year. The rest were brought by private
25 plaintiffs.

1 Now virtually all modern civil rights
2 statutes rely heavily on these private attorneys
3 general whose importance has been recognized by
4 courts, academics, and Congress. If these private
5 litigants are restricted in their ability to bring
6 cases, the system breaks down. Recent Supreme Court
7 rulings have limited access to the courts for
8 vulnerable Americans, narrowing both procedural and
9 substantive rights for civil rights litigants.

10 In this context where the courthouse door
11 has now been shut on so many, a move by this body to
12 further restrict access to justice is ill-advised and
13 antithetical to the pursuit of justice. Although the
14 goals of the proposed changes to the federal rules,
15 such as improving efficiency and increasing costs, in
16 an overburdened system are laudatory, many of the
17 proposed changes will fail to accomplish those
18 objectives and will in fact have unintended
19 consequences that are far more damaging than the
20 potential good contemplated by the proposals.

21 Civil rights litigants will be the ones most
22 burdened by these changes. Specifically, the rules
23 limiting discovery and particularly creating the
24 proportionality standard under Rule 26(b) will impact
25 plaintiffs such as the victims of employment

1 discrimination, who already bear the burden of proving
2 their claims in the face of severe imbalances and
3 access to relevant information.

4 Such information asymmetry requires
5 discovery rules that rectify these imbalances, not
6 exacerbate them, limiting discovery and creating a
7 proportionality standard that will only function to
8 wide the gap between those who control the information
9 and those who need to access to it to vindicate their
10 rights.

11 I refer you to an article written in 2004 in
12 the *Journal of Empirical Studies* entitled "How
13 Employment Discrimination Plaintiffs Fare in Federal
14 Court." It's by Kevin Clermont and Stewart Schwab.
15 And one of the findings is that in employment
16 discrimination cases plaintiffs won 4.23 percent of
17 pretrial adjudications in those cases compared with
18 22.23 percent in other types of cases.

19 That imbalance that already exists under
20 present rules will be exacerbated to an even greater
21 degree under the proposed changes that you have
22 submitted. Now, placing additional procedural
23 barriers in the path of those trying to protect,
24 vindicate, and enforce their rights, and the rights of
25 the public is not only bad policy. It is bad

1 precedent and bad for efficiency.

2 Now one additional point needs to be
3 underscored. The federal judiciary is in crisis. I
4 don't have to tell you that. We know that judicial
5 resources are limited and that judges have limited
6 time. Yet the problem should be dealt with through
7 the confirmation of pending judicial nominees, not by
8 changes in the discovery rules that will place
9 additional barriers in the way of the most vulnerable
10 plaintiffs.

11 Although I'm confident that it was not the
12 intent of this body, the result of many of these
13 proposed changes would be to impose the greatest cost
14 on those least able to bear that burden. Those most
15 vulnerable with fewest resources and least access to
16 information should be protected rather than harmed.

17 Thank you for giving me the opportunity to
18 share these views.

19 JUDGE CAMPBELL: Thank you.

20 Questions?

21 (No response.)

22 JUDGE CAMPBELL: All right. Thank you very
23 much, Mr. Henderson.

24 Ms. Dolkart?

25 MS. DOLKART: Good afternoon, and to the

1 chair and the members of the committee, my name is
2 Jane Dolkart. I'm a senior counsel at the Lawyers
3 Committee for Civil Rights Under Law, and I was for 17
4 years a law professor teaching in the area of civil
5 procedure. The Lawyers Committee is presently
6 celebrating its 50th anniversary this year of fighting
7 in federal courts to secure equal justice under law.
8 It certainly has had much experience using the Federal
9 Rules of Civil Procedure.

10 We oppose the proposed amendments to Rule
11 26(b)(1), 30, 31, 33, 36, and 37. And I'd like to
12 make four points. First, the federal courts have
13 traditionally been the last bastion of the
14 disenfranchised. Civil rights legislation has
15 provided plaintiffs with a private right of action in
16 federal courts to protect them from the prejudices and
17 passions of state courts.

18 Attorneys bringing civil rights cases have
19 been seen as private attorney generals going forth to
20 protect the rights of the less powerful. The federal
21 courts have been unique tribunals for preserving the
22 civil rights of people. There should be a compelling
23 reason to roll back the protection of the federal
24 courts through rule changes, and there is no such
25 compelling reason.

1 First, these rule changes have, as many have
2 suggested, a vastly disproportionate effect of
3 plaintiffs in civil rights cases. As has been noted,
4 in 80 percent of the cases, there are fewer than five
5 depositions taken, which means that these rule changes
6 have absolutely no effect on those cases. There is
7 also at the other end of the spectrum a significant
8 number of what would be called large and complex
9 cases. Some of them are class action, some of them
10 may be large commercial litigation.

11 In all of those cases, it not only is likely
12 to be but almost always will be more than 10
13 depositions taken by either side. And indeed, there's
14 some greater equality because defense counsel also
15 have an interest in taking a number of depositions.

16 I did an informal poll at the Lawyers
17 Committee to see if there was anyone who had litigated
18 a case in recent years that went through most of the
19 discovery process and had used fewer than 10
20 depositions, and the answer was that there weren't
21 any.

22 Now most of these were class actions,
23 although not all of them. So we are talking about a
24 small group of cases involving individuals or a few
25 individuals who bring suit in federal courts. A large

1 percentage of federal court dockets that fit this
2 category are civil rights cases, and thus these rules
3 will have a significant effect, particularly on civil
4 rights cases.

5 For over 40 years there has been a debate
6 over the cost and efficiency of discovery, with
7 corporate defendants urging more restrictions and
8 plaintiffs urging broader discovery. This debate
9 appears intractable. The discovery rules have been
10 amended many times with major amendments meant to
11 respond to costs and delay. None of these amendments
12 have lowered the volume of criticism from corporate
13 defendants, and in particular the 1993 amendments,
14 like the present proposed rules, had a particularly
15 significant impact on civil rights cases.

16 The fact that there is a debate does not in
17 any way answer several fundamental questions. Are
18 discovery costs and delays excessive and
19 disproportionate, and are the present proposed
20 amendments likely to remedy such perceived excesses?

21 The Federal Judicial Center's 2009 study of
22 discovery finds no empirical evidence in support of
23 excessive and disproportionate discovery. That does
24 not mean that there aren't costs that can't be
25 perceived as excessive, but it did not find the actual

1 amount of discovery was excessive, nor have any other
2 empirical studies. The study found that the primary
3 factors in driving up litigation are complexity of the
4 case, high monetary stakes, and discovery disputes.
5 And I suggest that contentious litigation is in fact a
6 good part of the reason that there are unnecessary
7 costs in discovery, and that perhaps that is what we
8 should be focusing on.

9 And in particular, I'd like to suggest that
10 there is apparently already some consensus that we
11 should look at early and active case management.
12 There are presently several pilot projects that have
13 established protocols in areas where there are
14 significant amounts of discovery, and I think it would
15 be useful to wait and see what we learn from those
16 protocols in terms of whether more aggressive and
17 different case management helps.

18 The second thing is that we could reduce the
19 time and delay of contentious litigation. And I would
20 suggest that judges in some instances are already
21 trying to do that. They are using letter motions
22 instead of full-blown motions. They're holding
23 hearings by phone. They're attempting to resolve
24 discovery disputes more efficiently and more quickly.

25 And I think and the Lawyers Committee thinks that

1 these are areas that promise benefit in terms of cost
2 and efficiency that will not impact negatively on one
3 or the other side of litigation. Thank you.

4 JUDGE CAMPBELL: All right. Thank you.

5 Questions?

6 (No response.)

7 JUDGE CAMPBELL: Okay. Thank you very much,
8 Ms. Dolkart.

9 Mr. Steeves?

10 MR. STEEVES: Good afternoon. My name is
11 Frank Steeves, and I am the general counsel and
12 secretary of Emerson Electric Co., which is
13 headquartered in St. Louis, Missouri.

14 Emerson is an American corporation, as
15 opposed to the Korean Emerson Radio Corp. Some people
16 get us mixed up a little bit. Makes clock radios. We
17 don't do that. Made up of five business platforms
18 that produce products and provides services in areas
19 from process management, network power control
20 systems, to climate and industrial automation systems,
21 renewable energy products, and all the way to products
22 for the home. In 2013, Emerson was named as one of
23 *Fortune's* world's most admired companies, and also in
24 2013, it was placed on Thomson Reuters' list of the
25 top 100 global innovators.

1 I'm speaking today from a background that is
2 perhaps unique among general counsels of global
3 companies. I began in the early 1980s with the
4 Wisconsin State Public Defender's Office defending
5 impoverished juvenile defendants, and I spent after
6 that more than two decades trying commercial and tort
7 cases in state and federal courts in the upper
8 Midwest. During that time I tried many, many juries.

9 I tried many, many court trials and argued countless
10 discovery motions in state and federal court. And I
11 also held many appeals.

12 My direct involvement ended six and a half
13 years ago when I joined Emerson and I took my present
14 position, and I now see civil justice in a broader
15 light, particularly with respect to the types of cases
16 and with respect to how justice systems function on a
17 global scale just as in other countries that we also
18 work within.

19 Emerson is a company, I want to make it very
20 clear, that believes deeply, deeply in the American
21 system of justice and in particular in the jury
22 system. As a matter of philosophy and as a matter of
23 policy, whether we are a plaintiff or a defendant, we
24 will always preserve our right for a trial by jury,
25 always. We will never waive that right, even when the

1 plaintiff and our co-defendants are begging for us to
2 enter a stipulation to waive the trial.

3 The reason is that we, contrary to much
4 popular belief, have found that juries with a very
5 high level of consistency find justice with a clear-
6 eyed, bottom-line, common sense view.

7 Last night I reviewed Sherrilyn Iffil's
8 comments, the president and director counselor of the
9 NCAA Legal Defense and Education Fund, and I couldn't
10 agree with her more that it is the procedures in civil
11 litigation, the procedures when applied evenly that
12 protect all of us. Tragically, though, the well-
13 meaning protections enshrined in our statutes do not
14 function the way they are intended. They do not.

15 Long ago and throughout my courtroom years,
16 they, together with a reluctance of judges to manage
17 their cases, have allowed civil justice in the United
18 States to become reduced to a series of guides where
19 cases can be just as much about finding and exploiting
20 the other side's errors during pretrial phases as it
21 is about finding what truthfully happened and
22 therefore finding justice.

23 This unhappy fact may be denied by many, but
24 I'm telling you as a practitioner that it is the truth
25 of our otherwise great justice system. It is the

1 truth whether acknowledged or not that is crystal-
2 clear to those who actually practice in the system on
3 either side of the courtroom. And as a consequence,
4 both plaintiffs and defendants both suffer. And it
5 goes even further.

6 It's tragic that the United States justice
7 system, which has contributed so much to making this
8 the greatest nation on the planet, is cited as a
9 reason not to come here to do business. In this job I
10 work constantly with the chief legal officers of
11 companies across the globe, and the U.S. justice
12 system often comes up for discussion. Sadly, I find
13 myself in the role of first an explainer and
14 occasionally an apologist.

15 I cannot recall a single conversation where
16 what our system has become is not cited by many of my
17 peers as a reason to stay away from the United States.

18 People and their businesses should be coming here
19 because of the great justice system. They should be
20 here because of it, not citing it as a reason to stay
21 away.

22 The changes proposed in my opinion will go
23 far to knocking down opportunity for abuse. They will
24 move the process in the right direction for all
25 parties in litigation. They will do exactly what is

1 needed for a long time by encouraging critical
2 behavioral changes.

3 First, shortened discovery will force
4 lawyers and parties to better focus at the outset of
5 the suit. Very important. Secondly, involvement of
6 judges will enhance their early understanding of the
7 focus of a suit, which is also critical. And third,
8 the rule changes will reduce in my view the got-ya
9 mentality that clogs the courts and impedes the
10 ability of litigants on both sides who seek justice
11 from finding justice.

12 Each of these reforms is needed now to get
13 our system working in the way it was intended. The
14 proposed rules do not do everything, but they're a
15 very good start. And I want to thank you for allowing
16 these remarks, and I also want to thank each of you
17 for taking time out of your lives to sit in these long
18 days that it takes to review these rules. It's an
19 important part of the process, and I want you to know
20 that we at Emerson are grateful to you for that.

21 JUDGE CAMPBELL: Thank you, Mr. Steeves.

22 Questions?

23 (No response.)

24 JUDGE CAMPBELL: All right. Thank you for
25 your comments.

1 Mr. Sellers?

2 MR. SELLERS: Mr. Chairman, members of the
3 committee, thank you for hearing from me today. I am
4 a partner in the Washington, D.C. law firm of Cohen
5 Milstein Sellers and Toll and have been practicing law
6 for more than 30 years, primarily civil rights law.

7 I come today to tell you that while I share
8 the committee's concerns about the costs of litigation
9 and the protracted nature of litigation, I believe the
10 changes for the most part that the committee is
11 recommending will not achieve the goals that it seeks
12 to achieve.

13 You've heard a good deal today, and I won't
14 repeat it, about the concerns from the civil rights
15 community, about the numerical limits on discovery,
16 about the proportionality rule, and about some of the
17 cost shifting that is proposed. I share those
18 concerns. I believe that there are a good deal of
19 self-imposed limits that parties who bring these cases
20 have on the discovery that they pursue. Many of us
21 handle cases on a contingent basis, as I do, and I can
22 assure you we are very careful about the discovery we
23 undertake, and I believe that the FJC's studies
24 confirm that most often parties self-police the
25 discovery that they undertake.

1 I find it somewhat curious that the
2 committee feels compelled to raise these proposed
3 changes now when there are some excellent pilot
4 studies that exist which might generate some of the
5 evidence with which further thought can be given to
6 particular limitations if the committee wishes to
7 proceed in that direction.

8 I am concerned, however, and I raise this
9 reluctantly at the end of a long day, but I think
10 there is a third way. There is a debate going on
11 whether discovery is too much or too little, and I
12 think that the issues that we confront about discovery
13 today are largely a product of a system that provides
14 a one-size-fits-all set of discovery limits and a use-
15 it-or-lose-it approach to discovery where those who
16 bring the case and those who defend the cases feel
17 very concerned about passing up any discovery for fear
18 that they may later believe it's necessary to prove
19 the case or to sustain their defenses.

20 The third way that I want to propose is a
21 modification of Rule 16. I believe that a much
22 earlier and more active involvement by the courts in
23 the management of discovery would help greatly. I
24 recognize the courts are empowered to do this. I cite
25 in my written comments, which I just submitted this

1 morning, some examples of courts that have adopted
2 rules of this sort, but there is no largescale
3 approach to this.

4 I think there is some value in having courts
5 be directed to hear from the parties early in the case
6 about what particular issues are pivotal to assessing
7 the value of the claims and the defenses and focus
8 discovery initially on what appears to be the pivotal
9 issues. And I give some examples in my written
10 remarks. I'll give you one or two here. There may be
11 a Daubert issue that's lurking there. There may be a
12 question about the viability of an economic model or
13 whether there are statistically significant
14 disparities that ultimately are evident from a body of
15 data.

16 Those go to the heart of the valuation of
17 these cases, and often you don't get to those issues
18 until months or years into litigation. Courts are
19 empowered -- and I suggest that a rule change might
20 actually direct them initially to stage discovery,
21 focusing on those matters that they believe after
22 hearing from the parties are especially central to one
23 side or the other or both of their particular
24 interests, and they are undoubtedly not the same in
25 terms of what discovery will be relevant to evaluating

1 the claims, and putting off the balance of discovery
2 until there is an opportunity to explore some initial
3 discovery that may be central, and then allowing the
4 parties to explore the possibility of a resolution of
5 the matter.

6 I think the other thing this does is it
7 permits courts to tailor the discovery limits if there
8 are limits of one sort or another to the particular
9 needs of a case. And I submit the one-size-fits-all
10 approach is either going to lead to, as there have
11 been debates for a decade or more, a couple of
12 decades, about there's too much discovery, there's too
13 little discovery. I've been sitting here for a couple
14 of hours. It seems to me that in large part that view
15 is determined by which side of the V you're on and
16 probably will be forever that divide.

17 But I suggest that the courts are empowered
18 and should be directed to be much more focused on the
19 particular needs of discovery in a particular case.
20 And I'll pause there.

21 JUDGE CAMPBELL: All right. Thank you.

22 Questions for Mr. Sellers?

23 MR. FOLSE: Do you not think that Rule 16
24 requires what you just described in its current form?

25 MR. SELLERS: Well, I don't think it

1 requires it, and in my 30 years-plus of legal
2 practice, I virtually have never seen it used that
3 way. And more often than not, courts advise the
4 parties to produce a Rule 16 plan, and the plan allows
5 the parties to go forward with discovery. And because
6 there are differences in tactics that parties use to
7 decide what sequence and the like of discovery, you
8 may never get to the issues on my side that really are
9 important for quite a while.

10 MR. FOLSE: If we directed, as you
11 described, judges to do what you say and judges don't
12 do what the rule might provide, as you suggested, what
13 would the remedy be?

14 MR. SELLERS: Well, I'm not sure I have a --
15 I think we'd have to convene another meeting to talk
16 about what to do with judges who don't follow the
17 rules. But I submit, by the way, that there are
18 countervailing advantages for the court's incentives
19 to do this, lest judges think you're just imposing
20 more work on us when we are already heavily burdened
21 with busy dockets. This could lead to fewer trials,
22 shorter cases for shorter litigation, less motion
23 practice. I think they will free up time on the other
24 end of the litigation. And so I would hope the
25 courts, besides feeling obliged to follow the rule,

1 would regard it as advantageous to do so.

2 JUDGE CAMPBELL: Judge Pratter.

3 JUDGE PRATTER: One observation and one
4 question. Having been part of this process, I assure
5 everybody I don't think I recall hearing that any of
6 these rules came up because the judges were feeling
7 burdened and that we had too much to do. So I don't
8 think the rules come from that concern.

9 My question is which of the pilot programs
10 do you recommend we focus on?

11 MR. SELLERS: I think there are two that are
12 particularly interesting. The complex litigation
13 program in the Southern District of New York, as I
14 read the protocol, actually has some components in it
15 that are similar to my recommendations, and I'd be
16 very interested in hearing after you've seen the
17 results. I believe it's due to conclude at the end of
18 2014.

19 There may be some very interesting
20 information collected about early intervention by
21 courts in managing discovery because I believe that
22 the protocol permits that in complex cases. I also
23 think that the protocols that are adopted, to the
24 extent they are, with respect to handling employment
25 cases and the early interchange of evidence would

1 likewise be very informative in assessing the extent
2 to which that adequately informs the parties so that
3 they have an early opportunity to assess the strengths
4 and weaknesses of their respective positions and
5 perhaps resolve the case earlier.

6 JUDGE CAMPBELL: Any other questions?

7 (No response.)

8 JUDGE CAMPBELL: All right. Thank you very
9 much, Mr. Sellers.

10 And thank you, everybody, for your comments.

11 I think I speak on behalf of everybody on the
12 committee that this has been a very valuable, very
13 informative day. We recognize that there are earnest
14 and honest beliefs shared on all sides of this issue.

15 I wish I could say everything is clear after today,
16 but obviously these are hard issues, and the things
17 we've learned today from you have been very valuable.

18 We will hold another hearing on January 9 in
19 Phoenix and one on February 7 in Dallas, and we
20 continue to look forward to written comments as well.

21 Thank you very much. We are adjourned.

22 (Whereupon, at 5:05 p.m., the Judicial
23 Conference Committee in the above-entitled matter was
24 adjourned.)

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REPORTER'S CERTIFICATE

CASE TITLE: Proposed Amendments to the Federal
Rules of Civil Procedure, Judicial
Conference Advisory Committee on
Civil Rules

HEARING DATE: November 7, 2013

LOCATION: Washington, D.C.

I hereby certify that the proceedings and
evidence are contained fully and accurately on the
tapes and notes reported by me at the hearing in the
above case before the Administrative Office of the
U.S. Courts.

Date: November 7, 2013

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