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## The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees

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### Cover Page Footnote

Professor of Law, St. Thomas University School of Law. I wish to thank Jeffrey Aaron for research assistance and Research Librarian Courtney Segota for her assistance in obtaining sources for this article.

THE ANTI-PLAINTIFF PENDING AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE AND THE PRO-  
DEFENDANT COMPOSITION OF THE FEDERAL RULEMAKING  
COMMITTEES

*Patricia W. Hatamyar Moore\**

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## I. INTRODUCTION

*One of the things that happened in the first couple of years that I was a reporter [for the Civil Rules Advisory Committee] was there appeared on the scene something called the Competitiveness Commission, which was led by Vice President Quayle on the appointment of President [George H.W.] Bush, and I attended a couple of their sessions, and one of the things that I was asked informally on such events was couldn’t we just get rid of Rules 26 through 37 [the discovery rules]. Wouldn’t that make the whole system a whole lot better if we just got rid of discovery, because it costs a whole lot of money, and it makes American business less profitable, and consequently we can’t compete as well in the international global market. And we were hearing a little about this sort of thing just a few minutes ago, an echo of that same notion.*

—Professor Paul Carrington, speaking to the Civil Rules Advisory

Committee in November 2013.<sup>1</sup>

For decades, the Civil Rules Advisory Committee (Advisory Committee) has garnered passage of amendments to the Federal Rules of Civil Procedure (FRCP) that have incrementally narrowed discovery in the service of the Advisory Committee's stated effort to combat the alleged "cost and delay" of civil litigation. More of the same are on their way to Congress now.<sup>2</sup>

It is time to state clearly what is going on: in the classical David-and-Goliath lawsuit brought by an individual person against an institutional defendant, these pending amendments hurt David and help Goliath more than any previous round of amendments to the FRCP. The individual-versus-institution case, not coincidentally, is the most common lawsuit filed in federal district court today, and its prevalence has only grown over the past twenty-five years.<sup>3</sup> Defense organizations drafted and tirelessly lobbied for most of the pending amendments, and they won.<sup>4</sup>

The Advisory Committee sought "early and active judicial case management,"<sup>5</sup> but settled for arbitrary reductions in a couple of

1. *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Judicial Conf. Advisory Comm. on Civil Rules*, 113th Cong. 56–57 (Nov. 7, 2013), transcript available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> (download *Civil Rules Public Hearing Transcript Washington DC*) [hereinafter *Nov. 2013 Hearing*].

2. AMENDMENTS ADOPTED BY THE SUPREME COURT – PENDING CONGRESSIONAL REVIEW, available at U.S. COURTS, <http://www.uscourts.gov/file/document/congress-materials> [hereinafter *Pending Amendments*]. The pending amendments were first published in August 2013. *Minutes of June 2013 Meeting of the Comm. on Rules of Practice & Procedure*, at 11, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2013>. The amendments were slightly modified after vociferous public comment, and then unanimously approved by the Advisory Committee in April 2014 and by the Committee on Rules of Practice and Procedure (commonly called the Standing Committee) in May 2014. *Memorandum from David G. Campbell to Jeffrey S. Sutton* (May 2, 2014), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014> [hereinafter *May 2014 Advisory Comm. Rep.*]; *Minutes of May 2014 Meeting of the Comm. on Rules of Practice & Procedure*, at 5–7, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-may-2014>. Without any discussion, the full Judicial Conference of the United States approved the amendments at its meeting in September 2014. 2014 Annual Report of the Administrative Office of the United States Courts, *Pending Rules Amendments*, available at <http://www.uscourts.gov/statistics-reports/recent-and-proposed-amendments-federal-rules-annual-report-2014>. After suggesting two changes in the proposed Advisory Committee Notes to Rule 4(m) and Rule 84, the Supreme Court approved the amendments and transmitted them to Congress on April 29, 2015. See *Memorandum from James C. Duff to Scott S. Harris*, April 2, 2015, in *Pending Amendments* [hereinafter *Duff Memorandum*]. Without congressional action, the amendments will take effect on December 1, 2015. See 28 U.S.C. § 2074(a).

3. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1181.

4. See, e.g., *Federal Rules of Civil Procedure: Background*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/federal-rules-of-civil-procedure.html> ("LCJ's advocacy for the currently pending package of amendments to the rules governing discovery began in 2010.").

5. *Memorandum from David G. Campbell to Jeffrey S. Sutton*, May 8, 2013, at 4, available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil->

deadlines. For no good reason, the amendments will reduce the length of time within which plaintiffs must effectuate service of process and grant defendants a corresponding gift of a reduction in the statute of limitations.<sup>6</sup> A scheduling conference with the judge is still not required.<sup>7</sup>

In addition, the amendments represent corporate defendants' victory in the thirty-year war to limit the scope of discovery in Rule 26(b)(1) by slicing out language that nearly every lawyer today learned in law school and enshrining "proportionality" as part of the definition of, rather than a limitation on, the scope of discovery.<sup>8</sup> The advent of e-discovery simply gave defendants a new verse to sing in the same 30-year-old tune about the burden of discovery.

The new limitations on discovery will give busy trial judges more reasons to deny requests to exceed the presumptive limits of ten depositions and twenty-five interrogatories.<sup>9</sup> The amendments will make it more difficult for a plaintiff such as Laura Zubulake, in her discrimination case that profoundly influenced the law of e-discovery, to obtain an adverse inference jury instruction as a sanction for the loss of electronic evidence by the defendant.<sup>10</sup> Perhaps most far-reaching of all, the amendments will simply wipe out a host of official forms that the original Advisory Committee promulgated with the FRCP in 1938, on the thin excuse that the Advisory Committee wants to "get out of the forms business."<sup>11</sup> In fact, many interpret the move as silently signaling ratification of the heightened pleading standard imposed on plaintiffs by the Supreme Court in *Twombly* and *Iqbal*.<sup>12</sup>

The amendments' mostly anti-plaintiff effect is evidenced by a stark split in the public reaction, with plaintiff's lawyers almost unanimously against most of the amendments and defendant's lawyers almost

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procedure-may-2013 [hereinafter *May 2013 Advisory Comm. Rep.*].

6. See *infra* Part II.C.1.

7. See *infra* Part II.A.4.

8. See *infra* Part II.C.2. The word "proportional" does not appear in the text of any of the current discovery rules. It is a shorthand used to encapsulate the cost/benefit considerations currently contained in FRCP 26(b)(2)(C).

9. See *infra* Part II.C.4.

10. See LAURA A. ZUBULAKE, ZUBULAKE'S E-DISCOVERY: THE UNTOLD STORY OF MY QUEST FOR JUSTICE (2012); *Zubulake v. UBS Warburg LLC* (*Zubulake V*), 229 F.R.D. 422, 437 (S.D.N.Y. 2004).

11. See *infra* Part II.C.6.

12. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *infra* notes 226–29 and accompanying text. One of the additions that the Supreme Court requested be made to the Advisory Committee Note to Rule 84 was a comment that the abrogation of all the forms was not intended to change the pleading standard. *Duff Memorandum, supra* note 2. The comment will likely have as much effect as a parent telling a child to "do as I say, not as I do."

unanimously in favor.<sup>13</sup> But the Advisory Committee seemed astoundingly indifferent to the polarized public reaction to the proposed amendments. One Advisory Committee member dismissed the stories told at the public hearings by plaintiffs' lawyers about their need for discovery as "Queen-For-A-Day issues," a reference to a 50-year-old daytime television show in which women tearfully told their real-life sob stories to vie for prizes.<sup>14</sup>

Given the makeup of the Advisory Committee and the Standing Committee, none of this is surprising. The members of both committees were all appointed by Chief Justice John Roberts, and except for a few tokens, they are ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers.<sup>15</sup> As long as Chief Justice Roberts has the power to make these appointments, this situation is unlikely to change.

This Article will begin in Part II by surveying the pending FRCP amendments, which will, in all likelihood, become effective on December 1, 2015. I divide my review into amendments that are not likely to have much practical effect (those addressed to "judicial management" and "cooperation"), amendments that disadvantage individual plaintiffs and advantage institutional defendants (most of the discovery amendments, the time to serve process, and the abrogation of the forms), and the one amendment that might slightly benefit plaintiffs (allowing earlier requests for documents). Part III provides an overview of government statistics on the federal courts, which the Advisory Committee failed to mention in all the years it has been considering these amendments, and compares those actual statistics with the so-called "empirical studies" commissioned to support these amendments. Other than the study by the Federal Judicial Center,<sup>16</sup> which the Advisory Committee largely downplayed and ignored, the flawed methodology of these "studies" begged the question of whether any of the judges on the Advisory Committee would have admitted them into evidence under the *Daubert* standard of Federal Rule of Evidence 702.<sup>17</sup>

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13. See Patricia W. Moore, *More Public Comments (Including Mine) on the Proposed FRCP Amendments*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (Jan. 31, 2014), <http://lawprofessors.typepad.com/civpro/2014/01/more-public-comments-including-mine-on-the-proposed-frcp-amendments.html>.

14. See *infra* Part IV.A.

15. See *infra* Part IV.B.

16. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009) [hereinafter FJC CASE-BASED REPORT].

17. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *codified in* FED. R. EVID. 702.

Part IV sketches the public reaction to the amendments, which was almost perfectly polarized between individual plaintiffs (against the amendments) and institutional defendants (for the amendments). The Advisory Committee's and Standing Committee's seeming indifference to the negative public reaction from plaintiffs' lawyers stems from their primary ideological orientation with the hard-right version of the modern Republican party, as evidenced by many of the committee members' affiliation with the Federalist Society and the defense-oriented Lawyers for Civil Justice (LCJ).<sup>18</sup> At present, the Chief Justice has the power to appoint all the members of the federal rules committees. There is no explicit constitutional,<sup>19</sup> statutory,<sup>20</sup> or rules authority for this unbridled power—it results from a long-forgotten unofficial “compromise.”<sup>21</sup> The Article concludes by forecasting future amendments sought by defense and business interests that may be pushed through unless the mechanism for appointment of federal rules committee members is changed.

## II. AN OVERVIEW OF THE PENDING AMENDMENTS AS APPROVED BY THE SUPREME COURT

The latest in the seemingly never-ending amendments curbing discovery began with the portentously-titled “Duke Conference,” an invitation-only gathering of about 200 federal judges, practicing lawyers, and legal academics at Duke University School of Law on May 10–11, 2010.<sup>22</sup> The Standing Committee requested the Advisory

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18. As to LCJ's name, think “War is Peace, Freedom is Slavery, Ignorance is Strength.”

19. Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1636 (2006) (“the part of the Constitution devoted to establishing the judicial branch makes no mention of the office of the Chief Justice”). For an argument that only the Supreme Court as a body, not the Chief Justice alone, may constitutionally make appointments of “inferior officers,” which may include members of committees such as the Civil Rules Advisory Committee, see James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. L. REV. 1125 (2013).

20. The Rules Enabling Act provides that the “Judicial Conference” may authorize the appointment of rules committees. 28 U.S.C. § 2073(b) (“The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title”). It does not specify who is to appoint members of those committees once established.

21. *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 686 (1995) (in what became known as the “Queen Mary Compromise,” the decision that “the Chief Justice, as Chair of the Judicial Conference, should appoint the committees” was made by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise on the *Queen Mary* to attend the 1957 American Bar Association Convention).

22. 2010 Civil Litigation Conference, U.S. COURTS,



Committee to sponsor the conference “to explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions.”<sup>23</sup> The dean of Duke Law School, David F. Levi, who welcomed the conference-goers in the initial session,<sup>24</sup> was formerly the Chief Judge of the Eastern District of California.<sup>25</sup> Dean Levi’s role in the Duke Conference was not an accident. Formerly the chair of the Advisory Committee and the Standing Committee, Dean Levi’s work to limit discovery stretches back to his days as a law clerk for Justice Lewis Powell in the early 1980s.<sup>26</sup>

On the hypothesis that civil litigation in federal court was subject to an unacceptable level of cost and delay, and that discovery was largely to blame, a number of so-called “empirical studies” were commissioned for the Duke Conference, including several conducted by the Federal Judicial Center.<sup>27</sup> The Committee gave the impression that it was writing on a clean slate, charting new territory in improving civil justice. Remarkably, it did not even mention the Civil Justice Reform Act of 1990 (CJRA),<sup>28</sup> which one scholar described as “the most ambitious effort to experiment with procedures for reducing expense and delay in civil litigation during the 200-year history of the federal courts.”<sup>29</sup>

The CJRA required each federal district court to implement a “civil justice delay and expense reduction plan,” the purposes of which were “to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”<sup>30</sup> To draft such a plan, each

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<http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last visited May 11, 2015). The U.S. Courts website contains the conference agenda and the conference panelists, but not a list of conference attendees. *See id.*

23. *Id.*

24. *Civil Litigation Conference*, DUKE LAW (May 10, 2010), <https://law.duke.edu/video/civil-litigation-conference-1/>.

25. *Faculty Profile of David F. Levi*, DUKE LAW, <https://law.duke.edu/fac/levi/> (last visited May 11, 2015).

26. *See* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 553 (2001) (describing former Judge Levi’s “key role” in the passage of the 2000 amendments to the FRCP, which limited the scope and other aspects of discovery). Judge Levi chaired the Discovery Subcommittee, begun in 1996, leading to the 2000 amendments. *Id.* Justice Powell “damn[ed] the 1980 Amendments as ‘tinkering’ and [repeatedly asserted] that parties seeking discovery were taking unfair advantage of defendants.” *Id.* at 553–54. *See also* S. Rep. 101–416 (Aug. 3, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6810–11 (describing Justice Powell’s sharp criticism of the discovery rules in 1980 as being “unfair to defendants”).

27. *See 2010 Civil Litigation Conference*, *supra* note 2.

28. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–82 until it was to sunset on Dec. 1, 1997).

29. Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 547 (1998).

30. 28 U.S.C. § 471.

district court appointed a committee of judges, attorneys, and academics to analyze their district's docket and write a report suggesting ways to decrease the time and expense of civil litigation. The end result, accomplished less than twenty years before the Duke Conference, was that "[a]ll ninety-four federal district courts undertook searching introspection of their civil and criminal caseloads and then adopted and applied measures that they believed would best conserve resources."<sup>31</sup>

Perhaps the Committee did not mention these ninety-four reports from around the country concerning exactly the same things to be discussed at the Duke Conference because, having already decided it wanted to restrict discovery further, it did not like some of the reports' conclusions. For example, the CJRA-mandated plan for the Northern District of Texas, which includes Dallas, concluded that the three "chief reasons for the delay in the civil docket" were a substantial increase in criminal cases, a shortage of judges, and an increase in the amount of trial time devoted to criminal cases.<sup>32</sup> A careful analysis of the federal district courts' caseload for the past twenty-five years shows that this is still true: the main reason for the delay in the *civil* docket is an increase in *criminal* cases.<sup>33</sup>

In connection with the Duke Conference's study of "cost and delay" in civil litigation, the Committee also did not mention that the CJRA required the Administrative Office of the United States Courts (AO) to maintain statistics on (among other things) the number of motions pending more than six months and the number of cases pending more than three years.<sup>34</sup> Nor did the Committee appear to consult the AO's caseload statistics, which show neither a rising civil docket nor a galloping case disposition time.<sup>35</sup> It does not even appear that much, if any, case law was researched to support or dispute certain assumptions that were made, such as whether judges and parties employ the

31. Tobias, *supra* note 29, at 547.

32. NORTHERN DISTRICT OF TEXAS, CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN (2002), at 3, available at <http://www.txnd.uscourts.gov/pdf/cjedrp.pdf> (last visited June 9, 2015). See also, e.g., EASTERN DISTRICT OF PENNSYLVANIA, CIVIL JUSTICE DELAY AND REDUCTION PLAN (1991), at 2, available at <https://www.paed.uscourts.gov/documents/cjraplan/cjraplan.pdf> (last visited June 10, 2015) (identifying judicial vacancies and an increase in criminal cases as the two main causes of delay in the civil docket).

33. Moore, *supra* note 3, at 1181.

34. 28 U.S.C. § 476. For recent examples of these semiannual reports, see *Civil Justice Reform Act Report*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report>. See also *infra* Part III.C.

35. Moore, *supra* note 3, at 1181; Judith Resnik, *The Privatization of Process: Requiem For and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1826 (2014).

“proportionality” principles of Rule 26(b)(2).<sup>36</sup>

Rather than doing any of that, it was apparently easier to ask several different organizations to conduct nonrandom opinion surveys of self-selected lawyers to give their overall impressions of discovery, and then to host 200 participants to listen to the results and brainstorm afresh for two days on the Duke campus.

The Committee later summarized what happened at the Duke Conference in separate reports to the Chief Justice and to the Standing Committee.<sup>37</sup> The report to the Chief Justice mentioned only a few possible rules changes, the first concerning pleading standards in light of *Twombly* and *Iqbal*.<sup>38</sup> As for possible rules amendments related to discovery, the report mentioned the problem of privilege logs, the extent of the parties’ preservation obligations, the culpability required for spoliation sanctions, the reworking of the 26(a)(1) initial disclosures,<sup>39</sup> and “ongoing and detailed judicial case-management.”<sup>40</sup> The report stated that some participants suggested “limiting the number of document requests and the number of requests for admission.”<sup>41</sup> Notably, the report specifically stated that the definition of the scope of discovery did *not* need to be changed.<sup>42</sup>

The proposed amendments to the FRCP that were first published for comment in August 2013 veered far from the points made in the report to the Chief Justice. Probably the most attention-grabbing of the

36. Compare, e.g., *May 2013 Advisory Comm. Rep.*, *supra* note 5, at 10 (asserting without citation that the concept of proportionality “is not invoked often enough to dampen excessive discovery demands”) with *Summary of Testimony and Comments, August 2013 Civil Rules Published for Comment*, at 74, following *May 2014 Advisory Comm. Rep.*, *supra* note 2 [hereinafter *Summary of Testimony and Comments*] (testimony of plaintiffs’ attorney Lea Malani Bays) (“Rule 26(b)(2)(B)(iii) is being utilized. It has been cited in more than 100 opinions in the last six months”).

37. ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, 111TH CONG. REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION (2010) [hereinafter REPORT TO THE CHIEF JUSTICE], available at <http://www.uscourts.gov/file/reporttothechiefjusticepdf>; *Memorandum from Mark R. Kravitz to Lee H. Rosenthal* (May 2010) [hereinafter *May 2010 Advisory Comm. Rep.*], available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2010>.

38. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 5–7. See also *May 2010 Advisory Comm. Rep.*, *supra* note 37, at 2–4.

39. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 7–9.

40. *Id.* at 10.

41. *Id.* at 9.

42. *Id.* at 8 (“In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended . . . But there was no demand at the [Duke] Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed”).

amendments as originally published for comment<sup>43</sup> were a proposed reduction in the presumptive number of permitted depositions from ten per side to five per side, a proposed reduction in the permitted length of a deposition from seven hours to six hours,<sup>44</sup> a proposed reduction in the presumptive number of permitted interrogatories from twenty-five to fifteen, and a proposed unprecedented limitation, to twenty-five, on requests for admission. Some in the academic community suspected that the proposed numerical reductions were a stalking horse designed to focus opposition away from the real prize of the general limitations on the scope of discovery.

The preliminary draft of the amendments generated an unprecedented volume of public comment. Over 2,300 comments were submitted,<sup>45</sup> and about 120 witnesses testified before the Advisory Committee over three days of public hearings.<sup>46</sup>

The Advisory Committee has continued the Duke Conference's mantra "that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management."<sup>47</sup> Set aside for now that the Duke Conference and the Advisory Committee began by assuming, rather than investigating, an unacceptable level of "cost and delay."<sup>48</sup> How do the proposed amendments link to the three "solutions" of cooperation, proportionality, and early judicial management?

#### A. Pending Amendments Supposedly Directed at "Judicial Management"

One of the three Duke "themes" was the need for "early and active

43. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL AND CRIMINAL PROCEDURE 267 (Aug. 2013), available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0001> (select "pdf") [hereinafter PRELIMINARY DRAFT].

44. *Id.* An earlier version of the proposal would have reduced the time to four hours, but the version as published for comment was six hours.

45. See *Comments, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002> (last visited May 11, 2015). Some of these comments are duplicates.

46. The hearings occurred on November 7, 2013, January 9, 2014, and February 7, 2014. Transcripts of the hearings are available for download on the federal judiciary's website, <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>.

47. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 3.

48. The assumption of, rather than the investigation or definition of, "cost and delay" has been a continuing feature of civil justice "reform" efforts. See, e.g., Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 ORE. L. REV. 1085, 1095 (2012).

judicial case management,”<sup>49</sup> a point on which lawyers for both plaintiffs and defendants agree. In fact, for at least forty years, “[p]roponents of discovery reform have been calling continuously for earlier and more resolute judicial management of discovery.”<sup>50</sup> But the only proposed rule changes addressed to “early and active” involvement by the judge actually do nothing to require such involvement.

### 1. More Items Listed in “Permitted Contents” of a Scheduling Order

The first change supposedly fostering “early and active judicial management” adds more items to the list in Rule 16(b)(3)(B) that includes the “permitted contents” of a scheduling order. Rule 16 currently requires the judge to issue a scheduling order early in the litigation.<sup>51</sup> The only items that the rules currently require the judge to include in the scheduling order are limits on “the time to join other parties, amend the pleadings, complete discovery, and file motions.”<sup>52</sup> The proposed amendments do not add any “required” items to the scheduling order.

Instead, the proposal would add items to the “permitted contents” of the scheduling order. Thus, the amended Rule 16 will suggest, but not require, that the judge may, if she wishes, include in the scheduling order the preservation of electronically stored information, the parties’ agreement regarding the nonwaiver of privilege under Federal Rule of Evidence 502, and a requirement that the parties seek a court conference before filing a discovery motion:

- (3) Contents of the Order. \* \* \*
- (B) Permitted Contents. The scheduling order may: \* \* \*
- (iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation

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49. *May 2013 Advisory Comm. Rep.*, *supra* note 5, at 4.

50. John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 511 (2000). *See, e.g.*, FED. R. CIV. P. 26 advisory comm. notes to 1980 amendments (“In the judgment of the Committee [discovery] abuse can best be prevented by intervention by the court as soon as abuse is threatened.”); FED. R. CIV. P. 26 advisory comm. notes to 2000 amendments (“The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center.”).

51. FED. R. CIV. P. 16(b)(1). Local rules may exempt certain categories of actions from the scheduling order requirement. *Id.*

52. FED. R. CIV. P. 16(b)(3)(A).

material after information is produced, including agreements reached under Federal Rule of Evidence 502;  
(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;<sup>53</sup>

There is nothing really wrong with any of this, but Rule 16 already allows the judge to include all these items, and many judges already do so. The existing six subparagraphs of Rule 16(b)(3)(B) already permit the scheduling order to “provide for disclosure or discovery of electronically stored information”; “to modify the extent of discovery”; to include no-privilege-waiver agreements; and to “include other appropriate matters.”<sup>54</sup> Thus, the existing rule fully covers all of the proposed additions.

Judge Paul Grimm, an Advisory Committee member, has a standard order on discovery that includes all these things and more.<sup>55</sup> In particular, Judge Grimm’s standard discovery order requires a pre-motion request for a conference on a discovery dispute.<sup>56</sup> Other judges also require pre-motion court conferences for greater efficiency.<sup>57</sup> The current rule presents no obstacle to a required pre-motion conference.<sup>58</sup>

53. *Pending Amendments*, *supra* note 2, at 51 (Rule 16(b)(3)(B)), unchanged from *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 18. Proposed deletions from the current rule are struck through; proposed additions to the current rule are underlined. The pending amendments include concomitant additions to Rule 26(f)(3), requiring the discovery plan to “state the parties’ views” on preservation of ESI and FRE 502, but not requiring any particular “view.” *See id.* at 21.

54. FED. R. CIV. P. 16(b)(3)(B).

55. *See* Paul W. Grimm, United States District Judge, *Discovery Order* (Jan. 29, 2013), <https://thesedonaconference.org/system/files/Judge%20Grimm%20Discovery%20Order.pdf>. Judge Grimm’s discovery order actually contains almost all of the proposed amendments, including some that were cut from the original proposals, like the reduction from 25 to 15 interrogatories.

56. *Id.* at 2. The standing order states in Paragraph 4:

Discovery Motions Prohibited Without Pre-Motion Conference with the Court.

a. No discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.

57. *See, e.g.*, ZUBULAKE, *supra* note 10 (2012) (describing Judge Shira Schiendlin’s use of the procedure in her case); *May 2011 Advisory Comm. Rep.*, at 59, available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2011> (“pre-discovery-motion conferences are required by local rule or standing order of at least one judge in 37 districts”).

58. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 19 (“the decision whether to require such conferences is left to the discretion of the judge in each case.”).

## 2. No More Scheduling Conferences by Mail?

The second proposed change to Rule 16(b) is almost silly:

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties’ report under Rule 26(f); or

(B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference ~~[or] by telephone, mail, or other means.~~<sup>59</sup>

The Advisory Committee explains that “[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication.”<sup>60</sup> The problem is that the change does nothing to require the judge to actually *have* a scheduling conference with the parties: the judge is still free to issue the scheduling order *without* conferencing with the parties.<sup>61</sup> If “direct simultaneous communication” (and “early and active judicial management”) is what is desired, a better change would be to replace the “or” at the end of 16(b)(1)(A) with “and.” In addition, despite the Advisory Committee Note suggesting that “[t]he conference may be held in person, by telephone, or by more sophisticated electronic means,”<sup>62</sup> the deletion of “by telephone, mail, or other means” from the text may lead some judges or parties to conclude that the conference, if held, must actually be held in person, which may ironically lead to fewer “direct simultaneous communication[s]” than occur at present.

## 3. Reduced Time to Issue Scheduling Order

The time within which the district court judge must issue a scheduling order in the case is tied to service of process on the defendant under

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59. *Id.* at 18. There appears to be a very slight error in the pending amendments’ transcription of Rule 16(b)(1)(B): it omits the word “or” that I have inserted in brackets in the quote in text. The current rule’s inclusion of the word “or” makes the phrase actually read: “a scheduling conference or by telephone, mail, or other means,” which sounds more sensible than “a scheduling conference by . . . mail.” See FEDERAL RULES OF CIVIL PROCEDURE WITH FORMS (Dec. 1, 2014), available at <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure> (last visited June 11, 2015).

60. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 19.

61. The Advisory Committee stated in its May 2014 report to the Standing Committee that “[t]he rule text now requires ‘a scheduling conference,’” *id.* at 14, but that is misleading out of context. Neither the current nor the proposed new Rule 16 require that the judge actually hold a scheduling conference. The report goes on to clarify this: “Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties’ report under Rule 26(f) without holding a conference.” *Id.*

62. FED. R. CIV. P. 16, advisory committee note to 1946 amendment.

Rule 4(m).<sup>63</sup> As discussed below in Part II.C.1, the time to serve process will be shortened by thirty days, from 120 to 90 days.<sup>64</sup> The time to issue the scheduling order has been correspondingly shortened by thirty days:

[16(b)](2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless the judge finds good cause for delay, the judge must issue it within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.<sup>65</sup>

The cumulative effect is that the scheduling order will potentially issue sixty days earlier than it does now. This is shown in Table 1 below.

Table 1 assumes that the complaint is filed on January 6, 2014. I have calculated deadlines under the current rules and under the proposed rules. Please note that many of these dates are under the parties' control, and therefore would be different than the dates I have calculated by strictly following the rules. For example, the plaintiff may be able to serve the defendant before the last possible date. The defendant may answer early, or obtain agreement from the plaintiff (or permission from the court) to answer late. The parties may stipulate to a different time for the initial disclosures. In addition, the court could set the scheduling conference earlier.

**Table 1: Comparison of Deadlines under Existing FRCP and Proposed FRCP (all dates are in 2014 and assume the complaint was filed January 6, 2014)**

	<i>Existing rules</i>	<i>Proposed rules</i>
<i>Defendant must be served.</i>	May 6	April 7
<i>Defendant responds to complaint.</i>	May 27	April 28
<i>Rule 34 requests can be "delivered" under proposed rules or "served" under existing rules.</i>	August 4	April 28
<i>26(f) conference must be held.</i>	August 4	June 6
<i>26(f) report and initial disclosures due.</i>	August 11	June 20

63. FED. R. CIV. P. 16(b)(2).

64. See *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 15. The Advisory Committee classifies the reduction of service time in pending Rule 4(m) as one of the changes addressing "early case management." See *id.* at 14–15. Because service of process is entirely the plaintiff's responsibility, with no apparent "management" by the judge, I have classified the proposed change to Rule 4(m) in this Article as an amendment that disadvantages plaintiffs in Part II.C.1 below.

65. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 18.



<i>Court holds scheduling conference.</i>	Not required. No exact date set by rules.	Not required. No exact date set by rules.
<i>Court must issue scheduling order.</i>	August 25	June 27
<i>Response to Rule 34 request due.</i>	September 3	July 7

As shown in Table 1, pending changes to Rules 26(d) and Rule 34 (discussed below in Section II.D) allow the parties to “deliver” (not serve) Rule 34 document requests twenty-one days after service of process on the defendant. The response to that Rule 34 request will not be due, however, until thirty days after the parties’ Rule 26(f) conference. The rationale for the change is that the parties may have a more productive 26(f) conference if they have actual document requests to discuss.<sup>66</sup>

Since the time for the parties’ Rule 26(f) conference is tied to the timing of the scheduling order under Rule 16(b),<sup>67</sup> the Rule 26(f) conference is also moved up by thirty days—maybe. A new provision allowing wiggle room for “good cause for delay” of the Rule 26(f) conference seems geared to accommodate institutional defendants: the Advisory Committee’s example of a reason for delay of the 26(f) conference is that “[l]itigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way.”<sup>68</sup>

In addition, the time for initial disclosures under Rule 26(a)(1)(A) is tied to Rule 26(f)<sup>69</sup> (which in turn is tied to Rule 16(b)), so theoretically the shortening of the time to issue a scheduling order also shortens the time to exchange initial disclosures. The same safety valve of a delay in the scheduling order for good cause would also necessarily affect the initial disclosures, or the parties could simply agree on a later date for the disclosures.

Finally, because the parties may not engage in formal discovery until after the Rule 26(f) conference,<sup>70</sup> and that conference may potentially occur thirty days earlier than at present, the parties may be able to engage in discovery thirty days earlier as well. To the extent that the plaintiff has no trouble in serving the defendant, the plaintiff might

66. See, e.g., *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 11, 25.

67. FED. R. CIV. P. 26(f)(1).

68. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 19.

69. FED. R. CIV. P. 26(a)(1)(C).

70. FED. R. CIV. P. 26(d)(1).

welcome a thirty-day shortening of the time before which no formal discovery (except for a Rule 34 request) may be served, as well as the time to receive the defendant's initial disclosures. But the pending amendments, for the first time, will allow the judge to delay the issuance of the scheduling order for "good cause,"<sup>71</sup> which may take the teeth out of the supposed thirty-day reduction.

#### 4. A Scheduling Conference Is Still Discretionary (and Still Unscheduled)

Many commenters on the proposed amendments favored making a scheduling conference under Rule 16(b) mandatory.<sup>72</sup> The pending amendments, however, continue to leave to the judge's discretion whether to hold a scheduling conference at all, and if so, when.

Giving the judge discretion to require a conference without specifying the time within which the conference must be held can lead "judicial haste that makes waste"<sup>73</sup> at best and arbitrary exercises of judicial power at worst. For example, in *Hall v. Wiley*,<sup>74</sup> the judge issued a paperless order on the day after the complaint was filed (and before the defendant had been served), requiring that a scheduling conference be held "twenty (20) days after the filing of the first responsive pleading by the last responding defendant, or within sixty (60) days after the filing of the complaint, whichever occurs first." The order directed that if the defendant had not been served within sixty days, plaintiffs were to file a motion for an extension of the time to hold the scheduling conference. The order warned that "[f]ailure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal," but did not specifically state that failure to move for an extension of time to hold the scheduling conference would result in dismissal.<sup>75</sup>

The plaintiffs were not able to effectuate service within sixty days because the defendant had moved to New York and they had not yet located his address. But the plaintiffs failed to move for an extension of the scheduling conference, probably reasoning that since the defendant had not been served, there could be no conference.

The court, *sua sponte*, with no prior notice to the plaintiffs other than the original paperless order, and without giving the plaintiffs a chance to respond, dismissed the case without prejudice approximately eighty-five

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71. See *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 17.

72. See *Summary of Testimony and Comments*, *supra* note 36, at 22-23.

73. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

74. No. 2:10-cv-14196-FJL (S.D. Fla).

75. *Id.*, Paperless Order (Aug. 4, 2010).

days after the filing of the complaint.<sup>76</sup> Arguably, this dismissal violated the spirit, if not the letter, of current Rule 4(m), which allows the plaintiff 120 days to serve. Moreover, the original paperless order did not give plaintiffs clear notice that the case would be dismissed if they did not move for an extension of time to have the scheduling conference when the defendant had not even been served.

The hapless plaintiffs then moved for an extension of time to serve the defendant (even though their 120 days had not expired), which the judge denied.<sup>77</sup> Undeterred, they finally served the defendant approximately 100 days after the filing of the complaint. Alas, the defendant moved to dismiss on the ground that the case had already been dismissed; the court denied this motion as moot because, yes indeed, the case had already been dismissed.<sup>78</sup>

Plaintiffs then moved to reopen the case, and defendant did not oppose, filing a response that stated that he would cooperate in filing a joint scheduling report. The court actually denied this uncontested motion to reopen the case, too, stating, “As soon as the Report is filed, this case will be re-opened.”<sup>79</sup>

The case was finally reopened seven and one-half months after the complaint was originally filed. Each side had to incur the expense of two unnecessary motions or filings due to the judge’s initial “gotcha” order. One cannot help but suspect that the primary reason for this judicial game-playing was to restart the clock on the time the case was pending.<sup>80</sup> If a case is closed, then the time the case is counted as pending does not begin again until the case is reopened.

To summarize the pending amendments supposedly addressing “early and active judicial management,” judges are not required to do anything more or anything differently than they are at present. There are a few new suggestions about what can be included in a scheduling order, making explicit what is already implicit and what some judges are already including. The date for issuing the scheduling order is shortened by as much as sixty days, but the burden of hurrying up is on the

76. *Id.*, Paperless Order (Oct. 28, 2010).

77. *Id.*, Paperless Order Denying Motion for Extension of Time to File Serve [sic] Defendant (Nov. 12, 2010).

78. *Id.*, Paperless Order Denying as Moot Defendant’s Motion to Dismiss (Dec. 14, 2010).

79. *Id.*, Paperless Order Denying Motion to Re-open Case (Jan. 11, 2011).

80. See ADMIN. OFF. OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, BANKRUPTCY APPEALS PENDING MORE THAN SIX MONTHS, SOCIAL SECURITY APPEAL CASES PENDING MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON MARCH 31, 2010 1, 57 (2010) (“The CJRA requires a report, by judicial officer, of cases pending for more than three years in the district court. A case becomes pending as of the date the case originally was filed in the district court or the date the case was reopened, whichever is later”).

plaintiff in serving process and the parties in holding the 26(f) meeting. The burden does not really fall on the judge, who usually has a pretty standard idea of what the scheduling order is going to say anyway.<sup>81</sup> The one change that might actually have produced more early judicial management was to require a scheduling conference, or at least make holding a scheduling conference the default position, giving the court discretion not to hold one in a particular case. But the Advisory Committee chose not to change the rule not requiring the conference, proposing only that if the judge does hold one, it should not be by mail.

*B. Cooperation: Aspirational Proposal that Lacks Enforcement Mechanism*

1. The Pending Amendment to Rule 1

The second of the three “themes” of the pending amendments was to “advanc[e] cooperation” among the parties.<sup>82</sup> The only rule change that supposedly addresses cooperation is an addition to Rule 1 that does not actually use any form of the word “cooperation”:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and administered,~~ and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.<sup>83</sup>

Rule 1 remained substantively unchanged from its adoption in 1938 until 1993, when the words “and administered” were inserted into the second sentence after the word “construed.” The Advisory Committee Notes explained in 1993 that the addition of those words was “to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. *As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.*”<sup>84</sup> Now, twenty years later, the Advisory Committee apparently feels that attorneys have snubbed this responsibility, and has added a reference to “the parties” in the text of the rule, rather than in the Committee Note.

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81. See, e.g., WESTERN DISTRICT OF TENNESSEE, STANDARD TRACK SCHEDULING ORDER, <https://www.tnwd.uscourts.gov/forms-and-applications.php#lr162> (choose Local Rule 16.2 Scheduling Orders).

82. *May 2013 Advisory Comm. Rep.*, *supra* note 5, at 4.

83. *May 2014 Advisory Comm. Report*, *supra* note 2, at 17.

84. FED. R. CIV. P. 1 advisory comm. notes to 1993 amendments (emphasis added).

The new pending Committee Note to Rule 1 is where the actual word “cooperate” appears:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so *the parties share the responsibility to employ the rules in the same way*. Most lawyers and parties *cooperate* to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—*cooperative and proportional* use of procedure.<sup>85</sup>

A later-revised version of the Committee Note added another paragraph:

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.<sup>86</sup>

This addition to the Note apparently attempts to address concerns that the change to Rule 1 could lead parties to move for sanctions for violating a duty to cooperate.<sup>87</sup> Although a mere statement in the Committee Note is not binding on courts if the rule change is adopted, the Committee’s intent that the change to Rule 1 creates no new sanctionable duty to cooperate is clear. Thus, the parties are re-urged to cooperate, but there is no enforcement mechanism, as several witnesses recommended.<sup>88</sup> Further, the Committee Note does not define or give an example of “cooperation,” stating only that it means “to discourage over-use, misuse, and abuse of procedural tools that increase cost and

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85. *May 2014 Advisory Comm. Report*, *supra* note 2, at 17 (emphasis added).

86. *Pending Amendments*, *supra* note 2, at Rule 1.

87. The Advisory Committee had earlier dismissed concerns that the rule change would prompt “ill-founded attempts to seek sanctions for violating a duty to cooperate” or “the strategic use of ‘Rule 1 motions.’” *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 16.

88. *See, e.g., Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Judicial Conf. Advisory Comm. on Civil Rules*, 113th Cong. 143 (Jan. 2014), available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> (download Civil Rules Public Hearing Transcript, Phoenix, AZ) [hereinafter *Jan. 2014 Hearing*] (statement of William Butterfield, plaintiffs’ attorney) (“Rule 1 has been tweaked to mention cooperation, but it provides no mechanism to require it. Meaningful cooperation as set forth in various local rules and pilot programs would, in my opinion, do more than anything else to curb discovery expenses.”); *id.* at 231 (statement of Dennis Canty, plaintiffs’ attorney) (“If you want to make changes to the rules to reduce the costs of eDiscovery, add sanctions for failure to cooperate.”); *id.* at 55–56 (statement of Henry Kelston) (“There is nothing in the amendments that requires or even incentivizes conduct that would reduce the overall cost of discovery. The concept of cooperation may get a brief nod in the notes to Rule 1, but no one really expects that to change conduct on the ground.”).

result in delay”—terms that are not further elaborated.

The pending Committee Note also links “proportional,” one of the other watchwords of the day, to “cooperation,” and admonishes lawyers that both are necessary for “effective advocacy.” That is debatable. Professor Paul Carrington, who was the Reporter for the Advisory Committee under Chief Justice Warren Burger, objected to the notion “that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side,”<sup>89</sup> and suggested that it impinged on the adversary system.<sup>90</sup>

No one disagrees with the basic notion of cooperation – at least, no one would publicly disagree with that notion. So will the seemingly-innocuous change to Rule 1 have any practical consequences, good or bad? Without a definition of cooperation or any mechanism to enforce it, the prospect of a beneficial effect appears dim. On the other hand, litigants will probably deploy new Rule 1, which is not limited to the discovery rules, in any number of unanticipated ways. For example, is filing a reflexive motion to dismiss or motion for summary judgment cooperative? Is opposing a motion to amend a pleading or a motion for extension of time cooperative? It seems likely that all these things, and more, will be argued under new Rule 1.

## 2. Evidence of Cooperation, or the Lack Thereof, Before the Advisory Committee

The discussion on cooperation during the hearings revealed a strange disconnect by the Committee between its belief in the necessity of reemphasizing cooperation in the notes to Rule 1, and its steadfast refusal to acknowledge that any opposing counsel or any federal judge would ever be anything but reasonable. Time and again in response to plaintiffs’ suggestions that limiting discovery would hurt their cases, the Committee members expressed Panglossian optimism that surely opposing counsel—and failing that, the judge—would see reason and allow plaintiffs what they needed.<sup>91</sup>

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89. *Nov. 2013 Hearing, supra* note 1, at 60.

90. *Id.* at 68–69.

91. *See, e.g., id.* at 179 (in response to a plaintiffs’ lawyer’s statement that the proposed reduction to six hours for a deposition would negatively impact her practice because she had to use translators, Judge Pratter asked, “Well, if your alternative was to speak to your opponent and say you understand that the plaintiff or the witnesses are not English speakers, we’re going to have to bring a translator, do you really think that you’re going to run into problems with opposing counsel, who is going to say, you know, five hours are five hours? I mean, really?”); *id.* at 187 (question of Judge Campbell) (“it seems to me that a limit of five depositions is a disaster only if you can’t get more when you need more, and to say that a presumptive limit is a disaster necessarily implies that judges won’t exceed it in cases where it should be exceeded.”); Public Hearing on Proposed Amendments to the

But illustrations of uncooperative behavior by defendants' counsel abounded.<sup>92</sup> Witnesses called defendants' initial disclosures "worthless" and asserted that defendants "dumped" millions of documents on them in response to more narrowly tailored requests.<sup>93</sup> Several lawyers mentioned that defendants' counsel responded to most discovery requests with "boilerplate objections,"<sup>94</sup> which one particularly candid defense lawyer conceded using.<sup>95</sup> Another witness cited a case in which the judge denied KPMG's motion for a protective order due to KPMG's "refusal to cooperate" with the plaintiffs and the magistrate judge in negotiating the scope of preservation of ESI.<sup>96</sup> While not mentioned at the hearings before the Committee, a Jones Day lawyer was recently sanctioned in Iowa for obstreperous conduct at depositions.<sup>97</sup>

Two attorneys at the defense firm of Thompson & Knight in Texas, testifying in favor of the pending amendments, asserted that they cooperated in discovery.<sup>98</sup> But at least one publicly available order

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Federal Rules of Civil Procedure Before the Judicial Conf. Advisory Comm. on Civil Rules, 113th Cong. 161 (Feb. 2014), *available at* <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> (download Civil Rules Public Hearing Transcript, Dallas, TX) [hereinafter *Feb. 2014 Hearing*] (in response to plaintiffs' counsel's assertion that the proposed move of "proportionality" to 26(b)(1) will cause a defendant to simply object on that ground, Mr. Barkett responded, "So the assumption in your conclusion is that a judge would allow you to get away with that?"); *Feb. 2014 Hearing*, at 306 (in response to plaintiffs' counsel's statement that it was a "fight" to get defendants' "policies and procedures" in discovery, Judge Koeltl responded that "presumably the policies and procedures are reduced to a manual, you know, the simplified situation, that would be easy for you to get.").

92. Of course, defense counsel also complained of uncooperative behavior by plaintiffs. Peter Strand, of Shook, Hardy & Bacon LLP—the same firm as Committee member John Barkett—stated:

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

*Nov. 2013 Hearing*, *supra* note 1, at 121–22. It was not made clear how a day-long deposition could cost a client \$100,000.00.

93. *Feb. 2014 Hearing*, *supra* note 91, at 86 (statement of Michael Weston).

94. *Id.* at 106 (statement of Mark Chalos); *id.* at 301 (statement of Rotkis) ("Every single interrogatory, request for production comes back to me with a boilerplate objection, a general objection, I have a meet and confer, they never have any authority. This drags the process out.").

95. *Jan. 2014 Hearing*, *supra* note 88, at 40.

96. *Id.* at 230–31 (citing *Pippins v. KPMG LLP*, 279 F.R.D. 245, 254 (S.D.N.Y. 2012)).

97. *See generally* *Security Nat'l Bank of Sioux City v. Abbott Laboratories*, 299 F.R.D. (N.D. Iowa 2014). Jones Day is the former law firm of Advisory Committee member Professor Robert Klonoff and Standing Committee chair Judge Jeffrey Sutton.

98. *Feb. 2014 Hearing*, *supra* note 91, at 175 (testimony of John Martin) ("I think all of us would prefer to resolve discovery disputes beforehand [before involving the judge]."); *id.* at 341–42 (testimony of Jennifer Knight) ("If they want to take more, then stipulations of the parties, the agreement, or they still may seek leave of the Court. Which again, in my experience, any time I have had a case where we needed more than the ten [depositions] that are currently allowed, we have been

involving those attorneys does not reveal such a cooperative spirit. Thompson & Knight once refused to make sixty-five boxes of documents available to its opponent for more than the two days to which its opponent had earlier agreed. When the opponent (who traveled to Los Angeles to review the documents) was unable to complete the review in two days, Thompson & Knight apparently refused to extend the two-day period, prompting the opponent to file a motion to compel. The magistrate ordered Thompson & Knight to produce the documents again.<sup>99</sup> Admittedly without knowing the whole story, one could reasonably conclude that failing to allow out-of-town counsel a third day of document review does not sound terribly cooperative.

None of the members of the Advisory Committee challenged defense witnesses who claimed to be cooperative in discovery, even though plaintiff-oriented speakers claimed, “Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery.”<sup>100</sup> Committee members were quick to credit defense assertions that discovery “abuse” by plaintiffs forced defendants into extortionate settlements,<sup>101</sup> but never asked defendants’ lawyers whether defense obstruction of discovery prevented meritorious claims from going forward or resulted in unfairly low settlements to plaintiffs.<sup>102</sup>

Ford Motor Company provided a particularly good example of a defense witness practically crying out for a cross-examination (or even mildly skeptical questioning) that never came. Ford’s publicly-filed comments complained that plaintiffs “commonly used [discovery] against Ford in ways that are not just, fair, or efficient . . .”<sup>103</sup> Later, at

able to reach agreement.”).

99. *Malibu Consulting Corp. v. Funair Corp.*, No. SA-06-CA-0735, 2007 WL 3996302, at \*2 (W.D. Tex. Nov. 14, 2007). Inexplicably, the magistrate “denied” the motion to compel, although she ordered that the documents be produced again. It appears that discovery in the case was quite contentious; Thompson & Knight had earlier won its own motion to compel. See *Malibu Consulting Corp. v. Funair Corp.*, No. SA-06-CA-0735, 2007 WL 2787982 (W.D. Tex. Sept. 22, 2007).

100. *Feb. 2014 Hearing*, *supra* note 91, at 265 (remarks of Stuart A. Ollanik).

101. See *Jan. 2014 Hearing*, *supra* note 88, at 21 (Judge Campbell questioning plaintiffs’ employment lawyer Joseph Garrison).

102. See, e.g., *How Corporations Abuse Our Civil Justice System*, CENTER FOR JUSTICE & DEMOCRACY, <http://centerjd.org/content/fact-sheet-discovery-abuse-how-corporations-abuse-our-civil-justice-system> (last visited May 13, 2015) (citing numerous cases in which corporations were sanctioned for discovery abuse; for example, “between 1998 and 2000 there were 52 sanctions against [Wal-Mart], whose behavior courts have characterized as ‘corrupt’ and ‘nefarious’”); David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, PUBLIC CITIZEN (July 1997), [http://www.citizen.org/congress/article\\_redirect.cfm?ID=918](http://www.citizen.org/congress/article_redirect.cfm?ID=918); *Green v. Blitz, U.S.A., Inc.*, No. 2:07-cv-372 (TJW) LEXIS 20353 (E.D. Tex., Mar. 1, 2011) (Shook, Hardy & Bacon, the law firm of Advisory Committee member John Barkett, was one of several law firms for defendant in case sanctioning defendant for destroying documents), *order vacated pursuant to settlement*, *Green v. Blitz U.S.A., Inc.*, 2014 WL 2591344 (E.D. Tex., Jun. 10, 2014).

103. Doug Lampe, *Ford Motor Company Comment to Report of the Advisory Committee on Civil*



the February 2014 hearing, Ford's assistant general counsel Donald Lough asserted:

We . . . expend disproportionate resources opposing discovery motions that seek to keep us from juries through sanctions that limit evidence, that strike witnesses, and even strike pleadings in some cases.

We are very proud of our record. We have been sanctioned very rarely.<sup>104</sup>

The Committee members had no questions for Mr. Lough.<sup>105</sup> Perhaps they were chilled from commenting by the fact that Shook, Hardy & Bacon, the law firm of Committee member John Barkett, frequently represents Ford Motor Company.<sup>106</sup>

Setting aside Mr. Lough's fictional notion that Ford is fighting to get before a jury, many others have described Ford's behavior in discovery far less charitably. For example, one publicly-filed comment disputed Ford's representation of sterling behavior in discovery, documenting numerous instances of Ford being sanctioned for discovery abuse.<sup>107</sup> And this commenter's list named only a fraction of the courts that have sanctioned or chastised Ford for discovery abuse over the years.<sup>108</sup>

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*Rules* (Nov. 22, 2013), available at <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0343> ("Discovery in Ford's cases has been commonly used against Ford in ways that are not just, fair, or efficient to the resolution of disputes but instead to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation.").

104. *Feb. 2014 Hearing*, *supra* note 91, at 250.

105. *Id.* at 254.

106. *E.g.*, *Sansoe v. Ford Motor Co.*, No. C 13-5043 PJH, 2014 LEXIS 74052 (N.D. Cal. May 29, 2014); *Dixon v. Ford Motor Co.*, 433 Md. 137, 70 A.3d 328 (Md. Ct. App. 2013); *Childress v. Ford Motor Co.*, No. 04-5020-CV-SW-RED, 2005 WL 5989804 (W.D. Mo. June 20, 2005); *Bro v. Ford Motor Co.*, 04-0638-CV-W-HFS, 2005 WL 3190334 (W.D. Mo. Nov. 29, 2005). Victor E. Schwartz, one of the architects of "tort reform" and General Counsel for the American Tort Reform Association, is a partner at Shook Hardy & Bacon. *Victor E. Schwartz*, SHOOK, HARDY & BACON, [http://www.shb.com/attorney\\_detail.aspx?id=16](http://www.shb.com/attorney_detail.aspx?id=16) (last visited May 12, 2015).

107. Larry E. Coben, The Attorneys Information Exchange Group, *Comments Concerning the Proposed Amendments to the Federal Rules of Civil Procedure* (Jan. 3, 2014), available at <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0384> (citing eight cases from around the country from 1998 to 2012 in which courts had found that Ford abused discovery).

108. *See, e.g.*, *Ford Motor Co. v. Tennin*, 960 So.2d 379, 398 (Miss. 2007) (Diaz, J. dissenting) (stating that "Ford has become notorious for its foot-dragging and sandbagging during discovery, and it has an extensive history of abusing the discovery process," citing eight other cases as examples); *Tunnell v. Ford Motor Co.*, No. 4:03CV074, 2006 WL 910012, at \*10 (W.D. Va. April 7, 2006) (recommending sanctions against Ford and stating, "[t]he plaintiff in this case has been required time and again to move the court to require Ford to comply with its discovery obligations under the Federal Rules of Civil Procedure, and twice has uncovered documents outside of this case bearing on the issues in this case of which Ford was aware, yet chose not to produce."); *Wiitala v. Ford Motor Co.*, No. 214444, 2001 WL 1179610 (Mich. App. Oct. 5, 2001) (affirming award of discovery sanctions against Ford).

Getting back to the overall issue of cooperation, a plaintiffs' lawyer testified, "There are genuine cooperators, there are pretend cooperators and then there are parties that don't even pretend to cooperate."<sup>109</sup> Without any mechanism to enforce an undefined notion of "cooperation," it seems doubtful that the change to Rule 1 will incentivize the "pretend cooperators" and those "that don't even pretend to cooperate" to change. As the Committee itself recognized, there is a limit to what rules can accomplish.<sup>110</sup> And even the rules that currently allow for sanctions are only rarely enforced.<sup>111</sup>

### *C. Pending Amendments That Disadvantage Plaintiffs and Advantage Defendants*

#### 1. Rule 4(m): Time to Serve Process

The pending change to Rule 4(m) is:

(m) Time Limit for Service. If a defendant is not served within ~~120~~ 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

The current 120-day allowance has been in the rules since 1983, when it was added to account for the transfer of responsibility for serving process from the U.S. Marshal to the plaintiff.<sup>112</sup> The Committee originally proposed a reduction of the time from 120 days to sixty days, but after public comment, it split the difference at ninety days. It found "particularly persuasive" the comment that the proposed reduction to sixty days would eliminate, as a practical matter, the plaintiff's option to request waiver of service under Rule 4(d).<sup>113</sup> In addition, public

109. *Jan. 2014 Hearing*, *supra* note 88, at 61 (testimony of Henry Kelston of Milberg LLP).

110. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 5 ("what we're seeing is the limits of rules").

111. *See, e.g.,* Lindsey D. Blanchard, *Rule 37(a)'s Loser-Pays "Mandate": More Bark Than Bite*, 42 U. MEM. L. REV. 109, 122–26 (2011).

112. *See* Act of Jan. 12, 1983, Pub. L. 97–462, Jan. 12, 1983, 96 Stat. 2527 (amending the Federal Rules of Civil Procedure).

113. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 15. This is because plaintiff must allow defendant thirty days—sixty if defendant is outside the US—to return the waiver of service. If

comments offered many “reasons why 60 days is not enough time to serve process,” including an evasive defendant, a multitude of defendants, or a pro se plaintiff.<sup>114</sup>

It is unclear who first generated the idea of reducing the time to serve process. It was not the focus of any of the panelists at the Duke Conference,<sup>115</sup> nor did the Advisory Committee mention reducing the time to serve process in either its report to the Chief Justice or to the Standing Committee about the Duke Conference.<sup>116</sup>

The only justification asserted for the reduction in time to serve process was that it “will reduce delay at the beginning of litigation.”<sup>117</sup> But neither plaintiffs nor defendants complained about delay at the *beginning* of litigation: plaintiffs complained about delay caused by motion practice<sup>118</sup> and obstructive tactics in discovery, and defendants complained about delay caused by overuse of discovery and excessive burdens in preserving electronically stored information.<sup>119</sup> And there is one source of delay both sides agreed upon: there was “wide frustration in overall delays by judges in ruling on motions.”<sup>120</sup>

The written comments on the proposed amendment to Rule 4(m) were 7–1 against the proposal.<sup>121</sup> Even a representative of the Illinois

defendant has not waived service at the end of that period, plaintiff must formally serve process. *See* FED. R. CIV. P. 4(d)(1)(F).

114. *Id.*

115. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 13–16.

116. *Id.* at 1–12; *May 2010 Advisory Comm. Rep.*, *supra* note 37, at 7–17.

117. *Id.* at 17.

118. *Feb. 2014 Hearing*, *supra* note 91, at 106 (“In practice we see in our cases right out of the gate a 12(b)(6) motion in almost every case challenging under Iqbal and Twombly. . . . We see motions for summary judgment, motions to strike class allegations, Daubert motions, renewed motions for summary judgment, motions to decertify class actions.”). *See also Jan. 2014 Hearing*, *supra* note 88, at 161 (testimony of Kathryn Dickson) (“The single worst development has been Rule 56 and the interpretation of Rule 56. That’s the 800-pound gorilla in this room, and that’s what’s driving cost. The first 15 years of my practice I never had a summary judgment motion filed because I choose my cases carefully and develop them well. Then in the ‘90s, they started coming and in the last ten years, in every single employment case I have, there’s a summary judgment motion. That’s where the cost is.”); *Feb. 2014 Hearing*, *supra* note 91, at 19 (testimony of Don Slavik) (“[O]ver 30 plus years I have seen a decline in jury trials, and I know why. It’s because of the motion practice and the expense. We have put in Daubert, as well as a whole other layer of expense and time. We added Twombly and Iqbal, another layer of expense and time. Please don’t add another layer of expense and time by putting in these rules which will lead to further litigation and motion practice.”).

119. *See, e.g., Nov. 2013 Hearing*, *supra* note 1, at 125 (testimony of Dan Troy, senior vice president and general counsel for GlaxoSmithKline).

120. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 10. *See also Nov. 2013 Hearing*, *supra* note 1, at 238 (testimony of Nicholas Woodfield) (“In the last couple of years, . . . I have waited 18 months for a motion to dismiss ruling, and I have waited three years for a summary judgment decision where we had to mandamus the D.C. Circuit to get a decision on the summary judgment”).

121. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 9–16 (summarizing about 55 comments against the amendment and 8 comments in favor).

Association of *Defense Trial Counsel* opposed the change.<sup>122</sup> In addition to detailing some of the difficulties encountered in effectuating service, commenters also noted that even if the dismissal was without prejudice, the plaintiff would incur costs to refile, and predicted an increase in motion practice as plaintiffs would need to move for extensions more frequently.

At the public hearings on the proposed amendments, one plaintiff's lawyer opined that Rule 4(m) was not broken and that there was no need to fix it: that "it's always in plaintiff's interest to get the summons and complaints served as soon as possible."<sup>123</sup> Another plaintiff's lawyer stated that in certain cases with a quick statute of limitations (like the ninety days after receipt of a right-to-sue letter from the Equal Employment Opportunity Commission) or the mandatory involvement of the federal government (as in False Claims Act cases), it was desirable to file the complaint but wait to serve process until greater factual development had occurred.<sup>124</sup> This lawyer also did not shy away from offering his "suspicion" that the Committee, which is made up mostly of federal judges, was proposing the time reduction in Rule 4(m) simply to shorten their case disposition times.<sup>125</sup> The AO publishes the number of cases pending more than three years for each individual judge by name.<sup>126</sup> As a result, judges have some incentive to reduce their case disposition times.

Besides the obvious effect of cutting the plaintiff's time to serve process by 25%, a second, less-noticed result of the thirty-day reduction in time will be to reduce the statute of limitations period on any defendant which plaintiff attempts to add in an amended complaint filed after the running of the statute of limitations. Rule 15(c)(1)(C) allows a claim against a newly-added defendant to relate back to the date of the original complaint (and thus avoid the bar of the statute of limitations) if the new defendant received notice of the action "within the period provided by Rule 4(m)."<sup>127</sup> (It is a bit more complicated than that, but that is the gist of it.)

Thus, for example, assume that plaintiff filed a complaint against Defendant A on February 1, the statute of limitations ran on March 1, and the plaintiff moved to amend her complaint to add a claim against new Defendant B on August 1. The new claim would relate back to

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122. *Id.* at 14.

123. *Nov. 2013 Hearing, supra* note 1, at 184.

124. *Id.* at 235–38.

125. *Id.* at 238.

126. *See infra* Part III.C.

127. FED. R. CIV. P. 15(c)(1)(C). For clarity, I have simplified the requirements of the rule here in ways that do not affect the underlying analysis.

February 1 if Defendant B had received notice of the action by approximately June 1 (February 1 plus the 120-day period for service currently allowed by Rule 4(m).) Under the proposed amendment reducing the 4(m) period to ninety days, plaintiff will only be able to avoid the bar of the statute of limitations if Defendant B received notice of the action by approximately May 1 (February 1 plus ninety days).

The Committee briefly noted the relationship between Rule 4(m) and Rule 15(c)(1)(C), stating cryptically that “[t]his relationship has in fact been considered throughout the development of this proposal.”<sup>128</sup> However, it failed to explain the rationale for this windfall to defendants.<sup>129</sup>

What of the possibility, stated in Rule 4(m), of obtaining an extension of the time to serve process? It turns out that courts frequently deny plaintiffs’ requests for such time extensions.<sup>130</sup> The denials are common even when the running of the statute of limitations means that a dismissal purportedly “without prejudice” actually operates as a dismissal with prejudice.<sup>131</sup> This result occurs despite a 1993 Advisory Committee Note to the contrary that “[r]elief [for a time extension] may be justified, for example, if the applicable statute of limitations would bar the refiled action . . . .”<sup>132</sup>

The Advisory Committee Note to the pending amendment to Rule 4(m) in the transmission to the Supreme Court stated:

Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in

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128. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 15.

129. *See id.*, at 18 (the Committee’s entire comment on this is that “[s]hortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.”).

130. *See, e.g.*, Eric C. Surette, *Recognition and Application of Court’s Discretion, Absent Showing of Good Cause, to Extend Time for, or Excuse Late, Service of Process Under Fed. R. Civ. P. 4(m)*, 54 A.L.R. FED. 2D 255 (originally published 2011) (citing numerous cases denying plaintiff’s motion for an extension of time to serve process beyond 120 days); Richard J. Link, *Efforts of Plaintiff or Plaintiff’s Agent for Service of Process as Constituting or Supporting Finding of “Good Cause,” Under Rule 4(j) of Federal Rules of Civil Procedure, for Failure to Timely Serve Process upon Defendant*, 111 A.L.R. FED. 503 (originally published 1993) (same); Richard J. Link, *Conduct of Defendant or Defendant’s Attorney, Other than Express Waiver of Service of Process, that Induces Plaintiff to Forgo Service of Process as Constituting or Supporting Finding of “Good Cause,” Under Rule 4(j) of Federal Rules of Civil Procedure, for Plaintiff’s Failure to Timely Serve Process*, 108 A.L.R. FED. 887 (originally published 1992) (same). Current Rule 4(m) was previously numbered 4(j).

131. *E.g.*, *Bills v. Shelby County Gov’t*, No. 13–2853–STA–cgc, 2014 U.S. Dist. LEXIS 79385 (W.D. Tenn. June 11, 2014).

132. FED. R. CIV. P. 4, advisory comm. notes to 1993 amendments.

forma pauperis action.<sup>133</sup>

The Supreme Court requested the Committee to remove the words “for good cause” in the first sentence, and this has been done.<sup>134</sup> The public record does not reveal the Court’s reason, but it may be in tacit recognition that the first sentence of Rule 4(m) appears to allow a court to order an extension of time to serve even without good cause.<sup>135</sup> Notably, even after this change, the Committee Note still does not include the running of the statute of limitations as a reason, good or otherwise, for an extension. Based on the large number of reported cases in which courts denied plaintiff’s request for an extension, the Committee’s apparent optimism that courts will grant more extensions in the future does not appear well-founded. The actual standard for granting an extension as stated in the text of the rule will not change, and courts are not bound by a Committee note.

## 2. Rule 26(b)—Narrowing (Once Again) the Scope of Discovery

The pending limitations of the scope of discovery supposedly follow the third theme of the Duke Conference: “proportionality.” However, the Advisory Committee’s contemporaneous reports of the Duke Conference stated plainly that “there was no demand at the Conference for a change to the [26(b)(1)] rule language [on scope]; there is no clear case for present reform.”<sup>136</sup> Despite the Duke Conference’s lack of mandate to change the scope of discovery, the pending amendments will do just that by overhauling Rule 26(b) in four ways:<sup>137</sup>

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133. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 17–18.

134. *Duff Memorandum*, *supra* note 2.

135. Invertebrate Court watchers may wonder if the Court’s request to change the Committee Note signals how it would have ruled in *Chen v. Mayor & City Council of Baltimore, Maryland*, No. 13-10400, in which the Court granted certiorari to resolve a split in the circuits as to “[w]hether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause.” Order, Nov. 7, 2014. The writ of certiorari was dismissed after the petitioner failed to timely file a brief on the merits. Order, Jan. 9, 2015. See SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/chen-v-mayor-and-city-council-of-baltimore-maryland/>.

136. REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 8. In addition, the first report to the Standing Committee about the Duke Conference simply stated, without further elaboration, “Bolder suggestions ask for some narrowing in the scope of discovery as described in amended Rule 26(b)(1). These suggestions rely in part on the view that the 2000 distinction between ‘claims or defenses’ discovery and ‘subject-matter’ discovery has not had any noticeable effect in controlling discovery.” *May 2010 Advisory Comm. Rep.*, *supra* note 37, at 14.

137. The pending amendment to 26(b) is:

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of

- They will make so-called “proportionality” an element defining the general scope of discovery, rather than a court-imposed limitation on discovery that is otherwise within the general scope.
- They eliminate the court’s ability to broaden the general scope of discovery to “any matter relevant to the subject matter involved in the action.”
- They delete as “clutter” a statement, which has been in 26(b) since 1946,<sup>138</sup> that the scope of permissible inquiry includes information about the existence and location of documents and the identity of witnesses; and
- They rephrase, as misunderstood, another phrase that has been in Rule 26(b) since 1946: that relevant information sought in discovery does not need to be admissible in evidence if it “appears reasonably calculated to lead to the discovery of admissible evidence.”

The source of the changes to Rule 26(b)(1) can be traced not to consensus at the Duke Conference, but to a “white paper” released by leading defense-oriented organizations a week before the Duke Conference. The defense groups proposed an amendment to Rule

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~~the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

~~(2) Limitations on Frequency and Extent.~~

~~\* \* \*~~

~~(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: \* \* \*~~

~~(iii) the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

138. In 1946, Rule 26(b) addressed only the scope of depositions, and provided: “26(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” 5 F.R.D. 433, 453; *Hickman v. Taylor*, 329 U.S. 495, 503 (1947).

26(b)(1) that provided in its entirety: “Scope in General. The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).”<sup>139</sup> The defense groups’ pre-Duke proposal is very similar to the version now pending before Congress: it moved proportionality into the scope of discovery, and it eliminated “subject matter” discovery, the “reasonably calculated” language, and the “existence and location of documents” language.

As might be expected, given its birth in the organized defense bar, the proposed contraction of discovery under Rule 26(b) incited the most passionate public opposition. Plaintiff’s lawyers almost unanimously opposed, and defendant’s lawyers almost unanimously favored, the changes.<sup>140</sup> The reason for the split is obvious: plaintiffs need discovery far more than defendants. Plaintiffs bear the burden of proof at trial, and they usually have less access to the relevant information than defendants. The combined effect of these four changes, just as the defense organizations intended, will be to significantly limit discovery.

#### *a. Proportionality and the “Burden” Issue*

The Advisory Committee has repeatedly asserted that the courts and parties have not sufficiently applied the “proportionality” concept as it is

139. LAWYERS FOR CIVIL JUSTICE, DRI – THE VOICE OF THE DEFENSE BAR, FEDERATION OF DEFENSE & CORPORATE COUNSEL, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE 23 (2010), *available at* <http://www.uscourts.gov/file/document/lawyers-civil-justice-et-al-reshaping-civil-rules-2010>.

140. In addition, virtually all of the US law professors who teach Civil Procedure opposed these changes. The Committee ignored all academic input. *See* LETTER OF 171 LAW PROFESSORS URGING REJECTION OF CHANGING FEDERAL RULES TO LIMIT DISCOVERY AND ELIMINATE FORMS (2014), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-2078>; BETH THORNBURG, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2014), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0499>; HELEN HIRSHKOFF ET AL., COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2014), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0622>; SUZETTE M. MALVEAUX, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2014), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-1650>; PATRICIA W. MOORE, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2014), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0491>; STEPHEN C. YEAZELL, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2013), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0342>; PAUL CARRINGTON, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2013), *available at* <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0366>.



currently located in subsection 26(b)(2)(C).<sup>141</sup> This assertion appears to be based upon anecdotal impressions rather than a review of case law.<sup>142</sup>

If anything, the FJC's closed-case study prepared for the Duke Conference<sup>143</sup> indicates that lawyers have internalized the concept of proportionality in discovery. They were asked, "On a scale of 1 to 7, with 1 being too little, 4 being just the right amount, and 7 being too much, how much information did the disclosure and discovery generated by the parties in the named case yield?" Only 11% of defendants' attorneys and 7% of plaintiffs' attorneys said that discovery had yielded "too much" information. About 89% of defendants' attorneys and 93% of plaintiffs' attorneys said that "just the right amount" of information or even "too little" information had been discovered in the closed case.<sup>144</sup> The FJC also found that the ratio of discovery costs in the case to the attorneys' estimate of their clients' stakes in the case was surprisingly small: "in half of cases with some reported discovery, plaintiff attorneys reported that their clients' discovery costs represented no more than 1.6% of the clients' stakes in the case, and defendant attorneys reported that their clients' discovery costs represented no more than 3.3% of their clients' stakes."<sup>145</sup>

The FJC's findings cannot reasonably be interpreted as an overall failure of lawyers and judges to apply proportionality. About 90% of all attorneys surveyed—not just plaintiffs' attorneys—believed that discovery had yielded "just the right amount" or even "too little"

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141. See, e.g., *May 2013 Advisory Comm. Rep.*, *supra* note 5, at 10 ("Although the rule now directs that the court 'must' limit discovery, on its own and without motion, it cannot be said to have realized the hopes of its authors. . . . The problem is not with the rule text but with its implementation—it is not invoked often enough to dampen excessive discovery demands"); *May 2011 Advisory Comm. Rep.*, *supra* note 57, at 60 ("all too often courts address discovery disputes without seeming to mention proportionality").

142. See, e.g., *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1193–95 (10th Cir. 2009); *Hake v. Carroll Cnty.*, No. WDQ-13-1312, 2014 WL 3974173, at \*2 (D. Md. Aug. 14, 2014) ("the Federal Rules require that 'all permissible discovery must be measured against the yardstick of proportionality.'"); *Quintana v. Claire's Boutiques, Inc.*, No. 5:13-cv-00368-PSG, 2014 WL 234219 (N.D. Cal., Jan. 21, 2014); *Norfolk Southern Railway Co. v. Pittsburgh & West Virginia Railroad*, No. 2:11-cv-1588, 2013 WL 6628624 (W.D. Pa., Dec. 17, 2013); *Raza v. City of New York*, 998 F. Supp. 2d 70 (E.D.N.Y. Nov. 22, 2013); *Ewald v. Royal Norwegian Embassy*, No. 11-CV-2166, 2013 WL 6094600, at \*7 (D. Minn. Nov. 20, 2013); *Fisher v. Fisher*, No. WDQ-11-1038, 2012 WL 2050785, at \*7 (D. Md. June 5, 2012) ("In light of the cost-benefit balancing factors stated in Fed.R.Civ.P. 26(b)(2)(C), which direct the Court to 'limit the frequency or extent of discovery otherwise allowed' if, inter alia, 'the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive,' the parties are directed as follows . . ."); *Swanson v. ALZA Corp.*, No. 12-04579-PJH(KAW), 2013 WL 5538908, at \*2 (N.D. Cal. Oct. 7, 2013) ("The Northern District Guidelines advocate for the proportionality set forth in Rule 26(b)(2)(C) and 26(g)(1)(B)(iii).").

143. See generally FJC CASE-BASED REPORT, *supra* note 16.

144. *Id.* at 27.

145. *Id.* at 47.

information. And the average attorney obtained that information at a cost that was dwarfed by the stakes in the litigation.

During the public hearings on the proposed amendments, the Advisory Committee quibbled endlessly with plaintiffs' lawyers who opined that the proposed move of "proportionality" from 26(b)(2)(C) up to 26(b)(1) changed the scope of discovery and shifted the burden of proving proportionality from the producing party to the requesting party.<sup>146</sup> In their statements, the Committee members stubbornly ignored and denied, as a simple matter of statutory construction, the different functions of 26(b)(1) and 26(b)(2). The title of Rule 26(b) overall is "Discovery Scope and Limits." The title of subsection 26(b)(1) is "Scope in General." The title of subsection 26(b)(2) is "Limitations on Frequency and Extent."

In other words, subsection 26(b)(1) currently has two elements defining the party-initiated "scope in general": the requested information must be, first, nonprivileged and second, relevant to any party's claim or defense. Subsection 26(b)(2) currently allows the court, on motion of the producing party or *sua sponte*, to limit "discovery otherwise allowed by these rules" (*i.e.*, nonprivileged and relevant to any party's claim or defense) if the discovery is not proportional in accordance with the factors of subsection (b)(2)(C)(iii).

The draft of Committee notes that accompanied the proposed amendments for publication in May 2013 clearly recognized this elementary statutory construction: "The scope of discovery is changed in several ways. *Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case.*"<sup>147</sup> Later Committee notes fudged this sentence.<sup>148</sup>

The pending amendment to 26(b)(1) will add a third element defining the party-initiated scope of discovery: now, the requested information will need to be, first, nonprivileged, second, relevant to any party's claim or defense, and third, "proportional to the needs of the case." Neither the producing party nor the court will need to bring up proportionality to limit otherwise nonprivileged, relevant discovery. It is crystal clear that proportionality will limit, for the first time, the defined scope of discovery "in general."

The Committee's unflinching answer to those who noticed the obvious effect of this change was to deny its importance.<sup>149</sup> Committee

146. See, e.g., *Jan. 2014 Hearing*, *supra* note 88, at 33, 208, 252, 272.

147. *May 2013 Advisory Comm. Rep.*, *supra* note 5, at 22.

148. See, e.g., *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 21 ("Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1).").

149. See, e.g., *Nov. 2013 Hearing*, *supra* note 1, at 266–67, *Jan. 2014 Hearing*, *supra* note 88, at

members asserted that current Rule 26(g)(1)(B)(iii) already requires the requesting party to certify that “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry: . . . (iii) [it is] neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.” But Rule 26(g) does not define the “scope in general” of discovery; that function is fulfilled by 26(b)(1). Moreover, the requesting party’s 26(g) certification contains the express qualification that the request is not disproportional “to the best of the person’s knowledge, information, and belief formed after reasonable inquiry.” And in order for the court to impose sanctions on the requesting party, the certification must have been violated “without substantial justification.”<sup>150</sup> Those sanctions may only be incurred upon motion or sua sponte by the court.<sup>151</sup> These are significant limitations.

The Committee also insists that putting proportionality into 26(b)(1) simply “restores” the place it occupied in the 1983 version.<sup>152</sup> But one suspects that the Committee’s ability to analyze statutes is better than that. The 1983 version provided:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .

The frequency or extent of use of the discovery methods set forth in subdivision (a) *shall be limited by the court* if it determines that: . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. *The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).*<sup>153</sup>

The proportionality factors in the second paragraph of the 1983 version of 26(b)(1) were not part of the first paragraph’s scope of

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24, 29, 48, 62–63, 155; *Feb. 2014 Hearing*, *supra* note 91, at 52.

150. FED. R. CIV. P. 26(g)(3).

151. *Id.*

152. “The present amendment *restores* the proportionality factors to their original place in defining the scope of discovery.” *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 23 (emphasis added).

153. FED. R. CIV. P. 26(b)(1) advisory comm. notes to 1983 amendments (emphasis added).

discovery “in general.” Rather, the court on motion or *sua sponte* could “limit” the “frequency or extent of the use of the discovery methods” if the discovery sought was not proportional. The Advisory Committee’s note to the 1983 amendments to Rule 26(b)(1), which added the proportionality concepts, made this clear:

Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to *matters that are otherwise proper subjects of inquiry*. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c).<sup>154</sup>

Proportionality has never defined the general scope of discovery, and the statement that the amendments will simply “restore” proportionality to its former place is disingenuous.

The effect of including proportionality into the initial scope of discovery will likely be to place the burden on the party moving to compel to show that its discovery request was proportional. As an analogy, the current case law places the burden to show “relevance” under Rule 26(b)(1) on the requesting party, and if that burden is met, then the opposing party has the burden to show that “the burden and expense of the discovery sought outweighs its likely benefit” under 26(b)(2)(iii).<sup>155</sup>

Plaintiffs’ lawyers repeatedly asserted during the public hearings that the natural reading of moving proportionality was to change the burden of proof on a motion to compel. The Advisory Committee later attempted to mollify plaintiffs’ lawyers by adding the following pending committee note:

Restoring [sic] the proportionality calculation to 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing *all* proportionality considerations.<sup>156</sup>

This comment does nothing to help the party seeking discovery. It repeats the inaccurate implication that the proportionality element has

154. FED. R. CIV. P. 26, advisory comm. notes to 1983 amendments (emphasis added).

155. *E.g.*, *Sills v. Bendix Commercial Vehicle Sys., LLC*, No. 1:04-CV-00149, 2005 LEXIS 3392 (N.D. Ind. Mar. 3, 2005) (granting plaintiff’s motion to compel).

156. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 23 (emphasis added).

merely been “restored” to the scope of discovery. And by negative implication, it places on the party seeking discovery the burden of addressing *some*—though not “all”—of the proportionality considerations. More generally, it is puzzling why the Committee thinks putting an “explanation” in the Advisory Committee Notes will carry the day when key language (all of which dates back to 1983) has been deleted from, changed, or moved in the text.<sup>157</sup>

*b. The Demise of “Relevant to the Subject Matter Involved in the Action”*

The Advisory Committee Note that was initially proposed for publication in 2013 did not shed much light on the reason for eliminating court-ordered discovery of matters relevant to the subject matter involved in the action. The Note stated only:

The proposed amendment deletes the “subject matter involved in the action” from the scope of discovery. Discovery should be limited to the parties’ claims or defenses. If discovery of information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate.

The newly-revised Committee Note, released in 2014 after the public hearings and comments, says a bit more:

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party’s claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.<sup>158</sup>

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157. Justice Scalia, the textualist hero of the Federalist Society (with which many of the Committee members are associated), has repeatedly declined to rely on Advisory Committee Notes for interpretation of a federal rule. *E.g.*, *Black v. United States*, 561 U.S. 465, 474–75 (2010) (Scalia, J. concurring) (“I join the Court’s opinion with two exceptions. First, I do not join in its reliance on the Notes of the Advisory Committee in determining the meaning of Federal Rule of Criminal Procedure 30(d). The Committee’s view is not authoritative.”); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 557 (2010) (Scalia, J. concurring) (“I join the Court’s opinion except for its reliance on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C). The Advisory Committee’s insights into the proper interpretation of a Rule’s text are useful to the same extent as any scholarly commentary. But the Committee’s intentions have no effect on the Rule’s meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls.”).

158. The note continues at length without ever explaining the need for this particular change. *See May 2014 Advisory Comm. Rep.*, *supra* note 2, at 24–25.

The Committee does not identify who “informed” it that “this language is rarely invoked,” but an examination of case law contradicts this assertion. Even after the 2000 amendment that introduced the distinction between “relevant to the parties’ claims and defenses” and “relevant to the subject matter,” courts have routinely granted motions to compel based on the “relevant to the subject matter” language.<sup>159</sup> Moreover, even if a court does not specifically rely on the “relevant to the subject matter” language in granting a motion to compel, courts almost always explicitly recognize the current difference between “party-initiated discovery,” which must be relevant to the parties’ claims and defenses, and “court-ordered discovery,” which for “good cause” can extend all the way to “the subject matter involved in the action.”<sup>160</sup>

The fact that the “subject matter” provision is currently in the rule signals that, however one defines it, there is something that is broader than relevance to the claims or defenses, and the court can order it discovered for good cause. In other words, the deletion removes the anchoring effect of a possibility of discovery broader than relevance to the parties’ claims or defenses.<sup>161</sup>

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159. *E.g.*, *Freres v. Xyngular Corp.*, 2:13-cv-400-DAK-PMW, 2014 WL 4249974, at \*5 (D. Utah Aug. 27, 2014) (“Plaintiff takes a very narrow view of what type of information is relevant in this lawsuit. The court rejected Plaintiff’s narrow stance on discovery in the two orders ruling on those motions, and the court rejects it again here. The court has determined that good cause exists to allow the deposition of Nerium because the information sought by Defendant through that deposition is, at minimum, relevant to the subject matter of this case.”); *Bertrang v. Wisconsin Cent., Ltd.*, No. 14-0133 (SRN/JJG), 2014 WL 4199710, at \*367 (D. Minn. Aug. 22, 2014) (“Although questions about this topic may not be directly relevant to Plaintiff’s claim, the Court may permit discovery of “any matter relevant to the subject matter involved in the action,” Fed.R.Civ.P. 26(b)(1) . . . [T]he Court is persuaded that the topic is reasonably calculated to lead to the discovery of admissible evidence . . .”); *Janis v. Nelson*, No. CR 09-5019-KES, 2009 WL 5216898, at \*5 (D.S.D. Dec. 30, 2009) (“Even if these discovery requests seek information beyond plaintiffs’ claims, such information is relevant to the subject matter of this case and good cause exists for allowing the discovery. See Fed.R.Civ.P. 26(b)(1)”); *Humphreys v. Regents of Univ. of Cal.*, No. C 04-03808 SI, 2006 WL 870963 (N.D. Cal. Apr. 3, 2006) (granting plaintiff’s motion to compel because she showed that “the information requested is ‘relevant to the subject matter involved in the action’” under 26(b)(1)).

160. *E.g.*, *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009) (“This change [the 2000 amendment to 26(b)(1)] implemented a two-tiered discovery process; the first tier being attorney-managed discovery of information relevant to any claim or defense of a party, and the second being court-managed discovery that can include information relevant to the subject matter of the action.”).

161. *See, e.g.*, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 119–28 (2011) (describing psychological phenomenon of “anchoring”).

- c. *Deleting “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter”*

In a rule that is currently 3,649 words long, the best argument the Advisory Committee can come up with to justify deleting these particular twenty-eight words is that they “clutter” the rule. These words have been in the rule since 1946. Apparently after sixty-eight years, “[d]iscovery of such matters is so deeply entrenched in practice” that spelling it out “is no longer necessary,” according to the Committee.

As a Civil Procedure teacher for over twenty years, I can virtually guarantee that law students and new lawyers will not so easily intuit, without those words in the rule, what is so obvious to the Committee. In addition, the Committee’s implication that this deletion will have no effect is contrary to basic principles of statutory interpretation, which require that courts “construe statutes, where possible, so as to avoid rendering superfluous any parts thereof,”<sup>162</sup> and that “when Congress alters the words of a statute, it must intend to change the statute’s meaning.”<sup>163</sup> It defies the very nature of lawyers to pretend that deleting something from a statute that has been there for sixty-eight years will not be interpreted as, or at least argued to be, meaningful.

The latest Advisory Committee Note attempts to address the concern that deletion of this time-honored phrase will invite “ill-founded attempts to draw negative inferences from the deletion”.<sup>164</sup>

The discovery identified in these examples [for example, discovery of the location of documents] should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party’s information systems and other information resources.<sup>165</sup>

More likely than a “cluttered” rule, the probable explanation for deleting this phrase is that it has been revitalized by the rapid growth of e-discovery, and large organizations dislike having to explain their systems for preserving and locating electronically stored information to plaintiffs. Consequently, in a discovery dispute that is left to the judge’s

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162. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

163. *United States v. Wilson*, 503 U.S. 329, 336 (1992).

164. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 9.

165. *Id.* at 24.

discretion, any rule-based argument against such a line of inquiry is one more salvo. If this amendment takes effect, counsel for large responding institutions may immediately begin to argue that a 30(b)(6) deposition going to ESI location and custodians will not be “proportional to the needs of the case.”

*d. No More “Reasonably Calculated to Lead to the Discovery of Admissible Evidence”*

The Committee alleges that “the ‘reasonably calculated’ phrase has continued to create problems” because it “has been used by some, incorrectly, to define the scope of discovery.”<sup>166</sup> “Preliminary research,” claimed the Committee, “has uncovered hundreds if not thousands of cases that explore this phrase; many of them seem to show that courts also think it defines the scope of discovery.”<sup>167</sup>

Perhaps the reason that so many courts and lawyers think the phrase defines the scope of discovery is because it illustrates what the scope includes. It appears within a section titled “*Scope in General*,” and it states, “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>168</sup> The sentence merely explains that if something is otherwise within the scope of discovery (currently, if it is relevant and nonprivileged), then just because it may be inadmissible in evidence does not remove it from the scope of discovery. Of the “thousands of cases that explore this phrase,” the Committee does not identify a single one in which the court relied on the “reasonably calculated” language to order discovery that was *not* “relevant to the claims and defenses” of the parties.

Nonetheless, the amended rule still contains the basic concept of the discarded sentence. It has been rephrased: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

### 3. Rule 26(c): Shifting the Expenses of Production to the Requesting Party

With the proposed amendment to Rule 26(c), the Committee is taking another step down the road to perhaps the biggest prize for large

166. *Id.* at 25.

167. CIVIL RULES ADVISORY COMMITTEE, MINUTES 9 (April 11–12, 2013), <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2013>.

168. FED. R. CIV. P. 26(b)(1).



institutional defendants: shifting to plaintiffs the defendants' cost of responding to discovery (sometimes called the "requester-pays" rule). Currently, the default rule is that each party bears its own costs of responding to the other side's discovery requests.

The newly proposed rule will add "the allocation of expenses" as a provision that a court may include in a protective order. Make no mistake, though: the euphemism "allocation of expenses" means "shifting of expenses to the requesting party," who will normally be the plaintiff.

The pending amendment is:

26(c) Protective Orders.

(1) In General. \* \* \* The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

\* \* \* \* \*

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; . . .

The accompanying pending Committee Note states:

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

The requester-pays idea has been tirelessly promoted for years by the Federalist Society and its ally, "Lawyers for Civil Justice," as well as other defense groups.<sup>169</sup> The infiltration of the federal rulemaking apparatus by the Federalist Society and LCJ is detailed below in Part

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169. See, e.g., *Cost Allocation*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/cost-allocation.html> (last visited June 16, 2015), where LCJ states:

LCJ strongly supports amending the FRCP to require each party to pay the cost of the discovery it seeks. This so-called "requester pays" rule would preserve the purpose of discovery—to permit parties to access information that will enable fact finders to determine the outcome of civil litigation—while aligning well-proven economic incentives with the reality of modern litigation. Today's system undermines the fact-finding purpose in a significant fraction of cases, instead providing a mechanism for undue economic pressure that can overwhelm the search for truth and force parties to settle claims for reasons other than the merits. A "requester pays" default rule would be a self-executing restraint against runaway discovery requests, placing the cost-benefit decision with the party in the best position to limit those costs—the requesting party.

## IV.B.

It is true that the proposed amendment to Rule 26(c) only states explicitly what courts are already doing, based on their implicit power in the present rule. And the Committee, in an attempt to calm plaintiffs' fears, added in the Committee Note a statement that cost-shifting should not become the norm. But I suspect that we have not seen the last of this: LCJ will continue its efforts to make cost-shifting the "default rule."

#### 4. Rules 30, 31, and 33: Subjecting the Number of Permitted Depositions and Interrogatories to "Proportionality"

In the published amendments, the Committee originally proposed to halve the allowed number of depositions from ten to five; reduce the allowed duration of a deposition from seven hours to six; reduce the allowed number of interrogatories from twenty-five to fifteen; and limit requests to admit for the first time ever to twenty-five.<sup>170</sup> After what the Committee called "fierce resistance,"<sup>171</sup> it withdrew these reductions in presumptive limits. These were the only proposed amendments that were completely abandoned after the public comment period.

But because "proportionality" will be moved from the "limits" on discovery in 26(b)(2) to the "scope" of discovery in 26(b)(1), the Committee has snuck a heightened emphasis on proportionality into Rules 30, 31, and 33 by cross-referencing the new 26(b)(1).<sup>172</sup> For example, here is the pending amendment to Rule 30:

#### **Rule 30. Depositions by Oral Examination**

##### **(a) When a Deposition May Be Taken. \* \* \***

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

170. See PRELIMINARY DRAFT, *supra* note 43, at 267–69.

171. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 12. The Committee's early enthusiasm for the proposed new numerical limits knew no rational bounds. It stubbornly refused to acknowledge the anchoring effect of the reduction on negotiations and motions to compel. See *Nov. 2013 Hearing*, *supra* note 1, at 232–33 (plaintiff's attorney's difficulty in negotiating additional depositions); *Feb. 2014 Hearing*, *supra* note 91, at 213 (remarks of Megan Jones) (telling Committee "limits are meaningful. They affect negotiations," and that it was "not the case in practice" that one could easily obtain the judge's permission to exceed the limits). The Committee's stated rationale for the reduction in depositions from ten to five was that the FJC estimates "that 78% or 79% of [studied] cases had 10 or fewer depositions." PRELIMINARY DRAFT, *supra* note 43, at 267. To recommend a reduction on that ground is as illogical as decreeing that because the height of American men at the 85th percentile is 6'1", production of ready-made clothing for men over 6'1" should cease, and all such tall men should order custom-made clothing, if they wanted their clothing to fit.

172. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 27–28.

- (A) if the parties have not stipulated to the deposition and:  
 (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants.

\* \* \*

**(d) Duration; Sanction; Motion to Terminate or Limit.**

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.<sup>173</sup>

With “proportionality” now part of the scope of discovery under 26(b)(1), the cross-references in Rule 30, 31, and 33 will hand parties resisting discovery another argument against increasing the presumptive number of depositions and interrogatories.

## 5. Rule 37(e): Preservation of ESI

The current version of Rule 37(e), adopted in 2006, provides a narrow safe harbor that prohibits sanctions for the loss of information due to “the routine, good-faith operation of an electronic information system,” such as document-destruction policies adopted without regard to particular litigation. The pending amendment to Rule 37(e) omits the existing explicit safe harbor and overhauls not only the current rule, but the earlier published-for-comment version of the proposal:<sup>174</sup>

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

\* \* \*

**(e) Failure to Preserve Provide Electronically Stored Information.**  
~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional~~

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173. *Id.* at 27 (“Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).”).

174. The version of the proposal to amend Rule 37(e) that was published for comment in August 2013 was completely different from—and much more favorable to a party requesting discovery than—the currently pending amendment. See PRELIMINARY DRAFT, *supra* note 43, at 314–17.

discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.<sup>175</sup>

Notice how many obstacles a party seeking electronically stored information (ESI) would have to surmount to obtain sanctions for the failure of the responding party to preserve ESI. First, the court will have to find that the duty to preserve was triggered before the information was lost. Second, the court will have to find that the responding party failed to take reasonable steps to preserve the ESI. Third, the court will have to find that the lost ESI “cannot be restored or replaced through additional discovery.” By definition, the ESI is lost, so it is unclear to me how the seeking party would know with certainty that “additional discovery” could restore or replace the missing information.

At that point, the court will have found that (1) the responding party failed to take reasonable steps to preserve (2) irreplaceable ESI (3) after a duty to preserve had been triggered. Still, the court is not required to impose any curative measures or sanctions on the responding party without additional findings. The court “may” take one of two paths:

if it makes the additional finding that the seeking party was “prejudiced” from the loss of the ESI, the court *may* order “measures no greater than necessary to cure the prejudice,”

**OR**

if it makes the additional finding that the responding party “acted with the intent to deprive another party of the information’s use in the litigation,” it *may* order more serious sanctions, such as an adverse inference jury instruction or default judgment.

In the draft of Rule 37(e) that was published for comment in August 2013, the drafters allowed the court to order both “curative measures” and “sanctions.”<sup>176</sup> In the draft that was approved, it appears that the court may order *either* curative measures *or* sanctions.

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175. PENDING AMENDMENTS, *supra* note 2, at 81–82.

176. PRELIMINARY DRAFT, *supra* note 43, at 314–15.

As to sanctions, Lawyers for Civil Justice, like many others, advocated a national and uniform spoliation sanction approach in light of the different *mens rea* requirements adopted by different courts across the country, including negligence, gross negligence, and willfulness.<sup>177</sup> A uniform standard would indeed be useful, but a specific “intent to deprive another party of the information’s use in the litigation” is the toughest standard to prove that the Advisory Committee could have adopted, and the very standard that LCJ advocated.<sup>178</sup>

Note also that new Rule 37(e) does not include a contempt finding in its list of potential sanctions. Thus, there is a textual argument that the amendment to Rule 37(e) eliminates the possibility that a party could be held in contempt for intentionally disobeying a court order to preserve ESI. New 37(e) encompasses ESI that “should have been preserved,” and the Committee Note states that “[t]he duty to preserve may in some instances be triggered or clarified by a court order in the case.”<sup>179</sup> The contempt provision in Rule 37(b)(2) is available if a party “fails to obey an order to *provide* or *permit* discovery,”<sup>180</sup> which arguably does not include an order to *preserve* ESI. So it could be argued that Rule 37, as amended, does not allow a contempt finding even for intentional violation of a preservation order.<sup>181</sup>

## 6. Rule 84 and Abrogation of the Forms Following the FRCP

The pending abrogation of Rule 84 and all thirty-six of the official forms following the FRCP<sup>182</sup> may be the most far-ranging amendment of all:

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177. See, e.g., LAWYERS FOR CIVIL JUSTICE ET AL., COMMENT, THE TIME IS NOW: THE URGENT NEED FOR DISCOVERY RULE REFORMS 23 (2011), available at [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_the\\_time\\_is\\_now\\_the\\_urgent\\_need\\_for\\_e-discovery\\_rule\\_reforms\\_103111.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_the_time_is_now_the_urgent_need_for_e-discovery_rule_reforms_103111.pdf) (“The Second Circuit allows sanctions to be awarded for mere negligence, while the Fifth Circuit does not.”).

178. LAWYERS FOR CIVIL JUSTICE, FEDERAL RULES OF CIVIL PROCEDURE: BACKGROUND, <http://www.lfcj.com/federal-rules-of-civil-procedure.html> (“The FRCP should . . . [limit] the imposition of spoliation sanctions only to instances where willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence and the destruction results in actual prejudice to another party”).

179. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 49.

180. FED. R. CIV. P. 37(b)(2) (emphasis added).

181. In contrast, the draft of Rule 37(e) published for comment in August 2013 allowed a court in some instances “to impose any sanction listed in Rule 37(b)(2)(A),” which includes a contempt finding. PRELIMINARY DRAFT, *supra* note 43, at 315.

182. Under the pending amendments, the only official forms to be retained in any format would be Forms 5 and 6, relating to waiver of service of process. These forms would now be referred to in FRCP 4(d) and, slightly revised, appended to FRCP 4.

**Rule 84. Forms****[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015).]**

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

**APPENDIX OF FORMS****[Abrogated [(Apr. \_\_, 2015, eff. Dec. 1, 2015).]**

As with many of the proposed amendments, this one seemingly came out of nowhere. It was not the subject of any presentation at the Duke Conference, nor was it mentioned to the Chief Justice as having been discussed at the Duke Conference.<sup>183</sup> The idea of abrogating the official forms was not mentioned in any of the voluminous “empirical research” produced for the Duke Conference.<sup>184</sup>

In fact, the opposite occurred: the development of standard forms as a way to streamline civil litigation was repeatedly suggested.<sup>185</sup> Indeed, the Advisory Committee characterized the forms in 2011 as “venerable, familiar, and often useful.”<sup>186</sup>

So what happened? Why did the Committee ultimately advocate sweeping away dozens of familiar forms? Judge Campbell tried to explain during the hearings:

The motivation on the part of the Committee, if I can dare to try to characterize what we are all thinking, but I think it’s accurate, is to get us out of the forms business. In part because many of the forms are outdated. We don’t do a good job, and, in fact, it would be very difficult to do a good job of keeping them current through the full Rules Enabling Act process. Not all of the rules committees, as you know, run their forms through the Enabling Act process. And our thought has been it’s going to be virtually impossible to stay on top of that. We haven’t done a good job. They are outdated. Nobody uses them. Let’s just get out of the forms business and leave it to other

183. See REPORT TO THE CHIEF JUSTICE, *supra* note 37.

184. See, e.g., SPECIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, CIVIL PROCEDURE IN THE 21ST CENTURY: SOME PROPOSALS (2010); FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009).

185. REPORT TO CHIEF JUSTICE, *supra* note 37, at 10–11 (“These efforts [judicial and legal education] will be supported by the development of effective and readily available materials for lawyers, litigants, and judges to use in a variety of cases. Such materials can include pattern interrogatories and production requests for specific categories of litigation.”). See also Dec. 2010 Advisory Comm. Rep., at 14, available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-december-2010>; May 2011 Advisory Comm. Rep., *supra* note 57, at 59 (“A group of lawyers who typically represent plaintiffs or defendants has been formed to develop a protocol of initial discovery requests that will be accepted without objection.”).

186. May 2011 Advisory Comm. Rep., *supra* note 57, at 55.

entities to propose forms.<sup>187</sup>

The Advisory Committee wants out of the “forms business,” after promulgating forms since the adoption of the FRCP? In 1946, the Committee wrote:

The . . . forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement.<sup>188</sup>

Just eight years ago, in 2007, the Committee added six brand-new official forms (Forms 1 through 6) and stylistically revised all the rest of the decades-old forms. And the bankruptcy rules advisory committee proposed numerous new forms at the same time these civil rules proposals were first published.<sup>189</sup> Moreover, the ostensible humility exhibited in the assertion that “we [the Committee] don’t do a good job” of maintaining the forms is belied by the fact that almost all the Committee members formerly practiced or currently practice at huge, well-known law firms that undoubtedly maintain reams of forms for use by their attorneys.<sup>190</sup>

The assertion by Judge Campbell and other Committee members that “[n]obody uses the forms”<sup>191</sup> was apparently supported only by unspecified “informal inquiries.”<sup>192</sup> But the assertion is belied by federal courts’ continued reliance on the forms as guideposts for pleading.<sup>193</sup>

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187. *Jan. 2014 Hearing, supra* note 88, at 119–20.

188. FED. R. CIV. P. 84, advisory committee note to 1946 amendment.

189. PRELIMINARY DRAFT, *supra* note 43, at 6. Bankruptcy rules amendments, however, do not go through the full Rules Enabling Act process.

190. *See infra* Part IV.B.

191. *Jan. 2014 Hearing, supra* note 88, at 120.

192. *May 2013 Advisory Comm. Rep., supra* note 5, at 68 (“the Rule 84 Subcommittee was formed to study Rule 84 and Rule 84 forms. It gathered information about the general use of the forms by informal inquiries that confirmed the initial impressions of Subcommittee members. Lawyers do not much use these forms . . .”).

193. *E.g., Garcia-Catalan v. United States*, 734 F.3d 100, 104 (1st Cir. 2013) (“the appellant’s complaint is plainly modeled on Form 11 of the Appendix to the Federal Rules of Civil Procedure. The complaint disclosed the date, time, and place of the alleged tort, and it delineated both the nature of the dangerous condition at the commissary and the resulting injuries to the appellant. At least two courts of appeals have concluded that the standard announced in *Twombly* and *Iqbal* does not undermine the viability of the federal forms as long as there are sufficient facts alleged in the complaint to make the claim plausible.”); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 687 (7th Cir. 2012) (“Form 15 is a complaint for conversion of property, which is the closest analog to plaintiffs’ claims here. Rule 15 requires a statement of jurisdiction and then an allegation that: ‘On date, at place, the defendant converted to the defendant’s own use property owned by the plaintiff. The property converted consists

In truth, the seeds of the forms' destruction were sown in a 2011 Committee report:

The form complaints have gained prominence in the wake of the *Twombly* and *Iqbal* decision. . . . Rule 84 commits the courts to the proposition that these Forms Suffice. Lower courts, however, are often puzzled about the contrast between this much "simplicity and brevity" and the seeming elevated levels of contextual pleading described by the Supreme Court.<sup>194</sup>

It appears that the easiest way for the Committee to resolve the puzzling contrast between the form complaints<sup>195</sup> and *Twombly/Iqbal* was to eliminate all of the forms. Many interpret the Committee's abrogation of the forms as the final nail in the coffin of notice pleading and a *sub silentio* ratification of *Twombly* and *Iqbal*. Over 100 law professors joined in a public comment opposing the abrogation of the forms for just this reason.<sup>196</sup> It is likely that the primary reason the Committee abrogated the forms was to eliminate plaintiffs' inconvenient argument that *Twombly* cited Form 11, the form that demonstrates how to plead a negligence claim, approvingly.<sup>197</sup>

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of describe.' With the addition of allegation of the value of the property and a demand for relief, the complaint is sufficient."); *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) ("As incorporated by Rule 84, Form 13 makes clear that an allegation in any negligence claim that the defendant acted as plaintiff's 'employer' satisfies Rule 8(a)(2)'s notice pleading requirement for this element. Here, consistent with Form 13, *Hamilton* alleged that he was 'employed' by the Palms."); *Harris v. Rand*, 682 F.3d 846, 850–51 (9th Cir. 2012) ("Consistent with Rule 8 and § 1332(c)(1), Form 7(a) in the Appendix of Forms to the Federal Rules of Civil Procedure sets out a proposed format for alleging diversity. . . . Form 7(a) requires more than just a recitation of the legal conclusion that the parties are diverse. It requires the assertion of facts regarding the location of a party's principal place of business. Those factual allegations are entitled to a presumption of truth under *Twombly* and *Iqbal*."). *See also*, e.g., *Villa v. Ally Fin., Inc.*, No. 1:13CV953, 2014 WL 800450, at \*4 n.3 (M.D.N.C. Feb. 28, 2014) ("Form 30 of the Federal Rules of Civil Procedure encourages pleading an affirmative defense based on the statute of limitations as follows: 'The plaintiff's claim is barred by the statute of limitations because it arose more than \_\_\_\_ years before this action was commenced.'").

194. *May 2011 Advisory Comm. Rep.*, *supra* note 57, at 55. *See also* Dec. 2011 Advisory Comm. Rep., at 13, available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-december-2011> ("The *Twombly* and *Iqbal* decisions create serious tensions with the form pleadings included with the Civil Rules.").

195. *See Illustrative Civil Rules Forms*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/illustrative-civil-rules-forms> (forms 10–21) (last visited May 13, 2015).

196. JONATHAN SIEGEL, COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2014), available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0493> (comment filed on behalf of 110 law professors opposing abrogation of the forms). *See also* Brooke Coleman, Comment (Feb. 7, 2014), available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0654> (arguing that abrogation of the forms requires separate publication and opportunity for public comment, else it violates the Rules Enabling Act),

197. Form 11 breezily states in its entirety (other than its statement of jurisdiction and damages),



But the problem with abrogating the forms extends well beyond the sufficiency of pleading a claim for relief. The forms also illustrate numerous other essential steps in federal procedure, from how to properly plead the existence of federal subject matter jurisdiction to what a judgment looks like.<sup>198</sup> These forms are helpful to pro se litigants, as well as new lawyers and small-firm practitioners who lack the experience or resources to access the extensive collection of forms available to large-firm practitioners.

*D. Rule 34: The Only Proposed Rule Change That Might Benefit Plaintiffs*

Two of the pending changes to Rule 34 were about the only amendments that most plaintiffs' lawyers favored.<sup>199</sup> First, the parties will be able to deliver document requests earlier. Currently, parties are not allowed to serve formal discovery requests, including document requests under Rule 34, until after the lawyers' Rule 26(f) conference.<sup>200</sup> The amended rule shortens the waiting period for "delivering" document requests, which will now be able to be delivered twenty-one days after the defendant has been served with process – potentially more than three months earlier than document requests are currently allowed to be served.<sup>201</sup> Theoretically, this will allow a more fruitful discussion at the 26(f) conference, when the document request will be deemed to be "served," making the responses due thirty days thereafter. As noted above, however, the court will have discretion to put off the Rule 26(f) conference, and thereby put off the due date for the responses to the document requests.<sup>202</sup>

The second change to Rule 34 that may help plaintiffs is that the parties will be subject to greater specificity in responding and objecting

"On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."

198. FED. R. CIV. P., Form 7 (subject matter jurisdiction); Forms 70 & 71 (judgment). Other forms include how to write a caption and a signature block (Forms 1 and 2); how to note a party's death or state reasons for omitting a party under Rule 19(a) (Forms 8 and 9); how to answer and move to dismiss (Forms 30, 31, and 40); how to bring in a third-party defendant or intervene (Forms 41 and 42); how to request the production of documents or admissions under Rule 36 (Forms 50 and 51); how to report on the parties' 26(f) meeting (Form 52); and how to consent to a magistrate (Forms 80, 81, and 82).

199. See, e.g., *Summary of Testimony and Comments*, *supra* note 36, at 42, 74, 115.

200. FED. R. CIV. P. 26(d)(2). Currently, the court may order earlier discovery. *Id.* The pending rule will also allow the parties to stipulate to earlier discovery. *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 32.

201. The amended Rule 34(b)(2)(A) will read, "The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court."

202. See *supra* notes 70–71 and accompanying text.

to a document request. The pending amendments to Rule 34(b)(2)(B) and (C) read:

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request ~~with specificity~~, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later another reasonable time stated in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. \* \* \*

This amendment attempts to respond to the concern, mainly expressed by plaintiffs' attorneys, that defendants responding to document requests often include boilerplate objections and fail to indicate whether they are withholding responsive documents.<sup>203</sup> Although some commenters expressed doubt that the amendment would have any practical effect,<sup>204</sup> it is at least a morsel of recognition of plaintiffs' side of the discovery wars.

### III. THE MOUNTAIN OF MANUFACTURED "EMPIRICAL SUPPORT" FOR THE AMENDMENTS VERSUS THE MOUNTAIN OF REAL, EXISTING EMPIRICAL DATA THAT WASN'T EXAMINED

#### A. *The Opinion Surveys*

When accused of lacking an empirical basis showing that discovery is currently "not proportional" to the case, the Committee has two reflexive answers. The first is that the FJC study showed that 25% of lawyers surveyed think that discovery is disproportional.<sup>205</sup> The second is that the "empirical research" prepared for the Duke Conference, other than the FJC study, shows high levels of dissatisfaction with discovery.<sup>206</sup> Neither of these answers is accurate.

First, as stated earlier, the FJC study actually found that about 90% of

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203. See, e.g., *Summary of Testimony and Comments*, *supra* note 36, at 156, 160.

204. See, e.g., *id.* at 34, 90.

205. E.g., *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 6.

206. E.g., *id.* at 6–7.

all attorneys believed that discovery had yielded “just the right amount” or even “too little” information.<sup>207</sup> Second, most of the other so-called “empirical research” conducted for the Duke Conference consisted of opinion surveys, not studies of actual case files. This is problematic because people’s perceptions are subject to a variety of psychological biases that distort objective reality.<sup>208</sup> Had the opinion surveys (other than the FJC study) conducted for the Duke Conference been the subject of a *Daubert* motion to strike, it is likely that the judges on the Committee would found the surveys unreliable and inadmissible. For example, Committee member Judge Pratter stated in an opinion on the requirements for a reliable and admissible opinion survey:

A court must consider several factors when determining whether [an opinion] survey meets applicable standards:

A proper universe must be examined and a representative sample must be chosen; the persons conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques. Just as important, the survey must be conducted independently of the attorneys involved in the litigation. The interviewers or sample designers should, of course, be trained, and ideally should be unaware of the purposes of the survey or the litigation. A fortiori, the respondents should be similarly unaware.<sup>209</sup>

Almost none of these conditions for a reliable survey was present in the opinion surveys conducted by the American Bar Association, the American College of Trial Lawyers, and other lawyers’ organizations.<sup>210</sup> The FJC’s study was by far the best-designed and most probative,<sup>211</sup> because it randomly selected attorneys of record on all cases that closed in the last quarter of 2008.<sup>212</sup> To study whether litigation was “too expensive,” the FJC asked those attorneys to focus on the actual costs in the case that had just closed, rather than asking them about their overall impressionistic beliefs about discovery, as did the other studies.

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207. See *supra* notes 144-45 and accompanying text.

208. E.g., KAHNEMAN, *supra* note 161. See also Reda, *supra* note 48, at 1101 n. 46 (“The data presented were mostly attorney opinion surveys that provided data on what beliefs attorneys have about the civil procedural system. It generally did not collect data that could provide information on how the system actually operates.”).

209. *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 319–20 (E.D. Pa. 2007) (internal citation omitted).

210. See *2010 Civil Litigation Conference*, *supra* note 22.

211. See Reda, *supra* note 48, at 1110 (“the closed-case study methodology goes some way to alleviating the flaws of attorney opinion surveys”).

212. See generally FJC CASE-BASED REPORT, *supra* note 16.

The FJC found that plaintiffs' attorneys (1,033 of them) estimated a median of \$15,000 in total litigation costs in the closed case, if at least one type of discovery had occurred.<sup>213</sup> Plaintiffs' attorneys then estimated that discovery costs accounted for 20% of those total litigation costs.<sup>214</sup> Defendants' attorneys (945 of them) estimated a median of \$20,000 in total litigation costs in the closed case (again if at least one type of discovery had occurred),<sup>215</sup> of which 27% was attributable to discovery costs.<sup>216</sup>

Thus, referring to actual closed cases rather than subjective impressions, attorneys reported discovery costs per case (in cases that had had any discovery) of about \$3,000 for plaintiffs (20% of \$15,000) and \$5,400 for defendants (27% of \$20,000). Without minimizing what is surely a substantial amount of money to some litigants, an American today can barely get good legal representation in a contested divorce for this amount of money. How much lower is the "right" amount for a federal case, according to the proponents of change?<sup>217</sup>

Moreover, the FJC found that defendants' median litigation costs had actually decreased (when adjusted for inflation) since its previous similar study in 1997.<sup>218</sup> In addition, the percentage of total litigation costs attributable to discovery costs has substantially decreased since 1997 (from 50% to 20% for plaintiffs and from 50% to 27% for defendants).<sup>219</sup>

When relying on surveys other than the FJC study, the Committee failed to recognize their methodological problems, such as the subjective way that questions were posed. When lawyers are asked whether discovery "costs too much" or is "disproportional" to the stakes in the litigation, different lawyers perceive these concepts very differently. Because most David-and-Goliath cases involve an asymmetry of information (defendant has all the information, plaintiff has little or none), defendants' counsel tends to think that "too much" discovery arises when plaintiffs ask for things, and plaintiffs' counsel tends to think that discovery "costs too much" when defendants fight

213. *Id.* at 35–36.

214. *Id.* at 38.

215. *Id.* at 36–37.

216. *Id.* at 38–39.

217. *See id.* at 776 ("[T]he question should be put to the authors of the LCJ [Lawyers for Civil Justice] report to specify what the appropriate outlay for litigation would be, if, as the LCJ argues, the reported costs are too high.")

218. *Id.* at 36 (internal citation omitted). Defendants' costs had risen since 1997, though, at the 95th percentile. *Id.*

219. *Id.* at 37.

production.<sup>220</sup>

Stepping back, why do opinion surveys on real-world discovery need to be done to the exclusion of traditional legal research? Each federal judge has funding for at least two full-time law clerks, who are normally recent graduates of top law schools with experience on the editorial board of their law review. Most non-judicial Advisory Committee members practice at large law firms with plenty of law clerks or associates available for research. Some of the naked assumptions that the Committee made, such as courts failing to consider proportionality in discovery, would have been easily researchable by such law clerks.<sup>221</sup>

Even the FJC could not simply consult case files to determine the answers to some of these questions, such as how many depositions, for example, were actually taken in cases. This is because the rules prohibit discovery materials such as depositions and interrogatories from being filed in court.<sup>222</sup> So the FRCP prevent some of the most pertinent information about the “cost and delay” associated with civil discovery – real court files – from containing that information.

### B. Government Caseload Statistics

A more objective and reliable measure of “delay” in civil litigation than attorney opinions is case disposition time, one of the multitude of government caseload statistics maintained by the AO. The AO’s statistics show that the median disposition time for a civil case (from case filing to final disposition) has maintained stability for twenty-five years, from seven months in 1986 to a still-brisk 8.5 months in 2013, a difference of about forty-five days.<sup>223</sup>

Moreover, the federal district courts’ civil caseload has hardly

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220. See, e.g., *Jan. 2014 Hearing*, *supra* note 88, at 166 (statement of Kathryn Dickson) (“What the plaintiffs were complaining about [when one of the studies reported plaintiffs’ dissatisfaction with discovery] is the endless meet and confers, the number of times we have to go in on motions to compel, the number of times we have to move to quash overbroad subpoenas for every employer your client’s ever worked for, for every medical record since they were born. Those things cost us money and time. That’s what the plaintiffs were complaining about, not that . . . there’s too much discovery.”).

221. Many other questions could have been researched and would have informed the policy debate: Who files motions to compel discovery more often, plaintiffs or defendants? Does the success rate on motions to compel vary depending on whether the movant is plaintiff or defendant? Do courts distinguish between discovery that seeks information “relevant to the claims and defenses” and information that is “relevant to the subject matter of the action”? Have parties resisting discovery argued that “information about the existence and location of documents” should not be discoverable? How often do parties move for leave to exceed ten depositions or 25 interrogatories, and how often does the judge deny the motion? How often do courts cite to the official FRCP forms?

222. FED. R. CIV. P. 5. Discovery materials may be filed when they are attached to a pertinent motion, such as a motion to compel or a motion for summary judgment.

223. Moore, *supra* note 3, at 1199.

changed in twenty-seven years. The raw number of civil filings in federal district court has increased only 12% since 1986 to 2013.<sup>224</sup> During the same time period, real disposable personal income per capita in the United States grew about 56%, and the United States population grew about 32%.<sup>225</sup>

In addition, the number of filled (not vacant) federal district court, senior judge, and full-time magistrate judge positions increased 28% from 1986 to 2013.<sup>226</sup> The average district court judge in 2013 had about the same civil caseload as the average district court judge had in 1986. Unweighted civil filings per authorized district court judgeship declined 10% since 1986, from 445 in 1986 to 400 in 2013.<sup>227</sup> Weighted civil filings per authorized district court judgeship went from 408 in 1986 to 432 in 2013, an increase of only 6%.<sup>228</sup> This is true even though the AO changed its weighting system in 2004 to give more weight to civil cases and less weight to criminal cases.<sup>229</sup> Moreover, the AO's figures for weighted and unweighted civil filings per authorized judgeship include only district court judges in the denominator, and ignore the increasingly heavy work of senior judges and magistrate judges.<sup>230</sup>

True, the *total* number of cases per authorized judgeship since 1986 has risen, but *criminal* filings, not civil filings, have been entirely responsible for that increase.<sup>231</sup> But it is difficult to find any recognition by the Advisory Committee of the adverse effect of the federal criminal docket on federal civil litigation.

### *C. Data and Information Compiled Under the Civil Justice Reform Act of 1990*

*The Federal courts are suffering today under the scourge of two related and worsening plagues. First, the costs of civil litigation, and delays that contribute to those costs, are high and are increasing; they limit access to the courts to only those who can afford to pay the*

224. *Id.* at 1187.

225. *Id.*

226. *Id.* at 1188.

227. *Id.* at 1190.

228. *Id.* at 1193.

229. FED. JUDICIAL CENTER, 2003-2004 DISTRICT COURT CASE-WEIGHTING STUDY 4-6 (2005), available at [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_1=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/665](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/665) (select "2003-2004 District Court Case-Weighting Study").

230. Moore, *supra* note 3, at 1189-90.

231. *Id.* at 1181. See also *supra* notes 32-33 and accompanying text.

*rising expenses; and they undermine the ability of American corporations to compete both domestically and abroad. Second, the Federal courts have a scarcity of resources, particularly Article III judges. This is especially true in jurisdictions that have high drug-related caseloads.*

Although one could be forgiven for thinking that the quotation above was uttered in support of the recently-proposed amendments, it was actually written in 1990 in connection with the CJRA.<sup>232</sup> The sentiments expressed today in favor of “discovery reform” are almost exactly the same as in 1990.<sup>233</sup> But from the Advisory Committee’s commentary on the new amendments, one would think that the “cost and delay” of civil litigation had never been studied before.

In fact, the idea that United States courts are subject to unacceptable costs and delays goes back to at least the 1950s<sup>234</sup> and has continued unabated to the present day.<sup>235</sup> Indeed, concern with the so-called “cost and delay” of dispute resolution has been expressed since the dawn of recorded history: in the book of *Exodus*, Moses’ father-in-law advised him to appoint more judges to reduce Moses’ caseload, because the people “stood around him from morning till evening.”<sup>236</sup>

One of the CJRA’s innovations was to require all active and senior district court judges and all magistrate judges to report, twice a year, how many fully-briefed motions have been pending before them without

232. S. Rep. 101-416, *supra* note 26, at 6804.

233. *Compare, e.g., id.* at 6808 (“The Civil Justice Reform Act addresses the dual problems of cost and delay in Federal civil litigation”) with *May 2014 Advisory Comm. Rep.*, *supra* note 2, at 3 (“the disposition of civil actions could be improved, reducing cost and delay”); *compare* S. Rep. 101-416, *supra* note 26, at 6808 (“For the middle class of this country . . . the courthouse door is rapidly being slammed shut”) (internal citations and quotation marks omitted) with PRELIMINARY DRAFT, *supra* note 43, at 268 (“The proposed amendments aim to decrease the cost of civil litigation, making it more accessible for average citizens”); *compare* S. Rep. 101-416, *supra* note 26, at 6808 (“Costs of discovery can be so high that they force settlements that would not occur”) with *Jan. 2014 Hearing*, *supra* note 88, at 81 (statement of David Howard, corporate vice president and deputy general counsel of Microsoft Corp.) (“We have overpaid in cases to settle, to avoid the burden and expensive discovery”).

234. *E.g.*, HANS ZEISEL, HARRY KALVEN, JR. & BERNARD BUCHHOLZ, *DELAY IN THE COURT* (1959); A. LEO LEVIN & EDWARD A. WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA* (1961); Albert Conway, *Congested Calendars—and Why*, 6 *BUFF. L. REV.* 1 (1956-57).

235. *See generally, e.g.*, AMERICAN BAR ASS’N, *ATTACKING LITIGATION COSTS AND DELAY: PROJECT REPORTS AND RESEARCH FINDINGS* (1984); AMERICAN BAR ASS’N, *ATTACKING LITIGATION COSTS AND DELAY: ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY* (1984); STEVEN FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977); JANE ADLER ET AL., *THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS* (1982); BARRY MAHONEY ET AL., *CHANGING TIMES IN TRIAL COURTS* (1988); THOMAS CHURCH, JR., ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

236. *Exodus* 18:13-18 (New International Version).

a ruling for more than six months.<sup>237</sup> The CJRA recognized that judges, as well as litigants, bore responsibility for case “delay”: “A significant problem in Federal litigation is the undue delay often associated with the resolution of motions.”<sup>238</sup> After the CJRA reporting requirements went into effect, many districts reported declines in their old motions backlog when the judges helped each other out, used visiting judges to hear the heavy docket of criminal cases, and hired more law clerks.<sup>239</sup>

Figure 1 below graphs the number of motions pending more than six months in civil cases in September of each year from 1991 (the first year of required reporting under the CJRA) to 2013. The number fell from 13,083 motions pending in September 1991 to 5,476 motions in September 2013. Bear in mind that in this same time period, the total number of federal civil cases filed rose from 210,424 (in 1991) to 284,604 (in 2013).

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237. However, the definition of how long a motion is “pending” appears to allow some room for manipulation by a district court judge:

A motion becomes pending 30 days after the date it was filed or was referred to a magistrate judge, whichever is later. If no decision on a motion has been filed within six months after the date the motion became pending, and the motion has not been referred to a magistrate judge, the motion shall be reported as pending for more than six months before the presiding judicial officer. If a motion is referred to a magistrate judge, the magistrate judge must file a report and make a recommendation for or dispose of the motion within six months after the date the motion became pending, or else the motion shall be reported as pending for both the district judge and the magistrate judge.

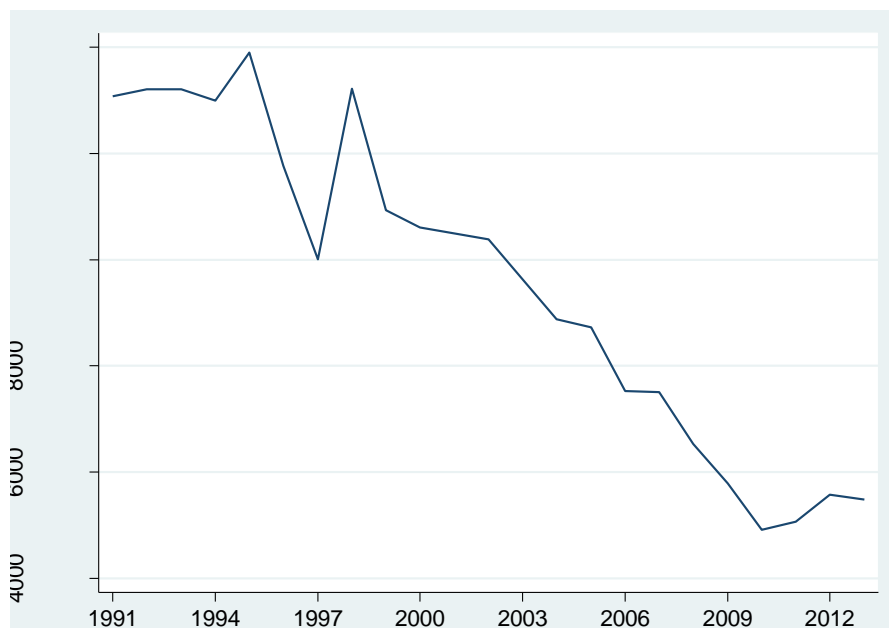
ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON MARCH 31, 1995 79 (1995) [hereinafter MARCH 1995 REPORT].

238. S. Rep. 101–416, *supra* note 26, at 6829.

239. *E.g.*, MARCH 1995 REPORT, *supra* note 237, at 5; ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON SEPTEMBER 30, 1995 4 (1995) [hereinafter SEPTEMBER 1995 REPORT].



**Figure 1: Fully briefed motions pending more than six months in federal civil cases, 1991–2013**



Source: Reports prepared by the Administrative Office of the United States Courts each year, as mandated by the Civil Justice Reform Act of 1990. (See, e.g., MARCH 1995 REPORT, *supra* note 237.) The reports are prepared each March and September, but Figure 1 uses only the reports for September.

In a similar vein, the CJRA requires judges to semi-annually report the number of bench trials completed but still awaiting decision for more than six months. This figure also decreased after the reporting requirement began, from 221 such trials in September 1991<sup>240</sup> to 73 such trials in September 2013.<sup>241</sup>

Finally, the CJRA requires judges to report the number and type of cases pending before them more than three years.<sup>242</sup> Again, after the CJRA reporting requirements went into effect, many districts reported declines in their backlog of old cases when judicial vacancies were filled, districts emphasized “better overall case management,” case

240. MARCH 1995 REPORT, *supra* note 237, at 3.

241. ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON SEPTEMBER 30, 2013 3 (2013).

242. S. Rep. 101–416, *supra* note 26, at 6830 (“A related problem is the increase in the number of civil cases that are more than 3 years old. . . . According to the Administrative Office of the United States Courts, the percentage of civil cases more than 3 years old has risen in 5 years from 6.3 percent of the total in 1984 to 9.2 percent in 1989. This represents an increase of 46 percent.”).

reporting glitches were fixed, and senior judges made special efforts.<sup>243</sup>

Besides reporting how many cases before them have been pending more than three years, the judges since 1998 have used codes to “explain their reasons for delays” and to indicate the nature of suit in these matters.<sup>244</sup> There are twenty-nine codes indicating various reasons for delay.<sup>245</sup> Of particular relevance to the debate about the role of discovery in delay of civil cases, Code G is for “extensive discovery involved.” Code AA is “Multidistrict Litigation case” (MDL). There is no explanation of how the codes might overlap.

In fourteen of twenty-five reports prepared by the AO from 1998 to 2013 in compliance with the CJRA,<sup>246</sup> the number one reason judges gave for delay was “MDL.” Where “MDL” was not the number one reason, it was the number two reason in nine additional reports, and the number three reason in another report. The second most common reason overall for delay was “complexity of case,” listed as the number one reason in seven reports, the number two reason in ten other reports, and the number three reason in six additional reports.

The code for “extensive discovery involved” (Code G) only made the top three reasons for delay in one report out of twenty-five (that for September 2000, where it was the number two reason). In eleven of the twenty-five reports, the code for “extensive discovery involved” was not mentioned at all, and in the other thirteen reports, it was mentioned in 4% or less of the pending old cases.

Clearly, multidistrict litigation accounts for the overwhelming number of cases pending more than three years.<sup>247</sup> But the relationship between MDL cases and discovery problems was largely unexplored by the Advisory Committee in the development of the pending amendments. Only one speaker at the public hearings specifically

243. *E.g.*, MARCH 1995 REPORT, *supra* note 237, at 7; SEPTEMBER 1995 REPORT, *supra* note 239, at 6; ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON MARCH 31, 1996 6 (1996).

244. ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS ON MARCH 30, 1998 3 (1998) [hereinafter MARCH 1998 REPORT].

245. *Id.* at 68.

246. Despite extensive searching, we have not been able to find all of the CJRA reports, which are supposed to be publicly available.

247. *See, e.g.*, MARCH 1998 REPORT, *supra* note 244, at 7 (“During the past four CJRA reporting periods, the bulk of the three-year-old cases consisted of large numbers of pending breast implant cases (under MDL Docket Number 926) assigned to a single judge in the Northern District of Alabama. For the March 31, 1998, reporting period, this judge reported 9,300 three-year-old cases (46 percent of the national total).”).

attacked MDLs as “carte blanche for unfettered discovery.”<sup>248</sup> At times, speakers spoke of particular MDLs, such as Deepwater Horizon, without any express appreciation that the rules changes would affect MDLs and non-MDLs alike.<sup>249</sup>

Since 1998, when reporting more-than-three-year-old cases under the CJRA, judges have also used codes for nature of suit.<sup>250</sup> Without fail, the number one type of case pending more than three years is personal injury—suits that are largely consolidated in MDLs. The number two type of case pending more than three years is uniformly listed as prisoner petitions. The number three type of more-than-three-year-old case has unchangeably been civil rights.

The Advisory Committee rejected the suggestion that it abandon the longstanding insistence on rules trans-substantivity (applying the same rules to all sizes and shapes of cases). But it failed to observe (explicitly, at least) the dominance of MDL cases when proposing changes to the rules: what may be appropriate for an MDL may not be appropriate for a smaller, single case. Moreover, the second most common type of long-pending case, prisoner petitions, rarely have any discovery at all. Civil rights suits, the third most common type of long-pending case, rely heavily on discovery to uncover enough evidence to survive the *de rigueur* 12(b)(6) motion and summary judgment motion. It is those cases that will suffer most the fallout of the new rules.

In retrospect, the CJRA—despised as it was by many in academia and the federal judiciary<sup>251</sup>—contained several advantageous provisions missing from the latest FRCP amendments. First, it put its money where its mouth was: it added sixty-six district court judgeships and eleven circuit court judgeships. Of course, only Congress has the ability to add judgeships, and in today’s political climate, the authorization of new federal judgeships seems unlikely. Second, the CJRA suggested that local task forces adopt measures such as the imposition of firm trial dates, two-tiered discovery, and differentiated case management “tracks.” Many commenters to the pending FRCP amendments continued to suggest these things,<sup>252</sup> but the Advisory Committee rejected them. Third, the CJRA was realistic in its recognition that the explosion of the criminal docket, caused by draconian drug laws, had negatively impacted the pace of civil litigation. The Advisory

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248. *Feb. 2014 Hearing, supra* note 91, at 33.

249. *E.g., id.* at 181.

250. *E.g., MARCH 1998 REPORT, supra* note 244, at 70.

251. The CJRA was passed over the opposition of the Judicial Conference.

252. *E.g., Jan. 2014 Hearing, supra* note 88, at 144–45 (statement of William Butterfield) (“phased” discovery); *Summary of Testimony and Comments, supra* note 36, at 37, 38, 86, 203 (suggesting that the transsubstantivity of the FRCP be abandoned).

Committee has not mentioned the criminal docket, which has continued to expand since 1990.<sup>253</sup>

IV. POLARIZED PUBLIC REACTION TO THE AMENDMENTS, AND WHY  
NEITHER THE ADVISORY COMMITTEE NOR THE STANDING  
COMMITTEE APPEARS TO CARE

A. “*Queen for a Day*”: *The Flavor of the Public Hearings*

The speakers during three days of public hearings before the Advisory Committee were almost perfectly polarized in their reaction to the proposed amendments: plaintiffs’ lawyers and legal academics against,<sup>254</sup> defense lawyers and corporate representatives in favor. The written comments filed with the Committee mirrored this polarized reaction between plaintiffs and defendants.<sup>255</sup> A couple of plaintiffs’ lawyers told the Committee it should take this polarization as facial evidence of the lack of even-handed effect of the proposed changes.<sup>256</sup> Another plaintiff’s lawyer stated that he felt the train had left the station, meaning that the Committee had already decided to adopt the amendments despite the written comments or public hearings.<sup>257</sup>

The Committee has attempted to paint the picture that there is bipartisan support for the pending amendments. For example, the Committee’s initial report claimed that the Duke Conference had showcased “a wide array of views.”<sup>258</sup> I have been unable to find a list of the invited attendees, but defense speakers on panels at the Duke Conference outnumbered plaintiffs’ speakers almost two-to-one.<sup>259</sup> Judge Pratter took umbrage when a plaintiff’s lawyer suggested that it was “transparent” that the proposed changes favored one side over another, but the lawyer was only stating the obvious.<sup>260</sup>

253. Moore, *supra* note 3, at 1181.

254. The only academic who testified in favor of the proposed amendments, Professor William Hubbard, was paid for the research he conducted and reported on by the Civil Justice Reform Group, a defense-supported organization. *Id.* at 222.

255. See Patricia W. Moore, *The Plaintiffs’ Bar Speaks: Will the Advisory Committee Listen?*, CIVIL PROCEDURE & FED. CTS. BLOG (Jan. 1, 2014), <http://lawprofessors.typepad.com/civpro/2014/01/the-plaintiffs-bar-speaks-will-the-advisory-committee-listen.html>.

256. *Feb. 2014 Hearing*, *supra* note 91, at 79–80.

257. *Id.* at 25.

258. *May 2010 Advisory Comm. Rep.*, *supra* note 37, at 1.

259. See REPORT TO THE CHIEF JUSTICE, *supra* note 37, at 19–23.

260. *Feb. 2014 Hearing*, *supra* note 91, at 302–03.

No less than ten members of “DRI--The Voice of the Defense Bar”<sup>261</sup> spoke to the Committee during the three days of hearings.<sup>262</sup> At least six members of the defense-oriented Lawyers for Civil Justice also spoke,<sup>263</sup> as well as a professor paid by the industry-supported Civil Justice Reform Group,<sup>264</sup> a member of the International Association of Defense Counsel,<sup>265</sup> and a partner at Shook, Hardy & Bacon, the same defense law firm as Committee member John Barkett.<sup>266</sup> Representatives of civil rights and consumer public interest organizations spoke also, but there was not more than one speaker from any one such organization.

To some degree, both sides seemed to follow some sort of script.<sup>267</sup> Defendants’ corporate counsel would typically assert that thousands of their employees were subject to a litigation hold of some sort, that hundreds of millions of pages were being preserved all over the globe, that the whole thing was costing them tens of millions of dollars, and yet only 0.001% of all those pages were ever used at trial.<sup>268</sup> Defense-

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261. *About DRI*, DRI, <http://www.dri.org/About> (describing itself “the leading organization of defense attorneys and in-house counsel.”) (last visited May 16, 2015).

262. *Nov. 2013 Hearing*, *supra* note 1, at 6, 22, 49, 119; *Jan. 2014 Hearing*, *supra* note 88, at 236, 266; *Feb. 2014 Hearing*, *supra* note 91, at 7, 68, 173, 201.

263. *Nov. 2013 Hearing*, *supra* note 1, at 18, 158, 191, 245; *Feb. 2014 Hearing*, *supra* note 91, at 33, 68.

264. *Feb. 2014 Hearing*, *supra* note 91, at 221. Professor William Hubbard was paid to conduct survey research on corporations’ preservation expenses. But in response to a question by Committee member Elizabeth Cabraser (the only true plaintiffs’ lawyer on the Committee), Professor Hubbard admitted that his data did not distinguish between ESI preserved for potential litigation (which the rules changes might affect) and ESI preserved for regulatory or business requirements (which the businesses would have to preserve regardless of what the FRCP say). *Id.* at 227–28.

265. *Jan. 2014 Hearing*, *supra* note 88, at 134.

266. *Nov. 2013 Hearing*, *supra* note 1, at 119.

267. Both sides were urged by their affiliated organizations to submit comments and to speak at the hearings. *See, e.g., Feb. 2014 Hearing*, *supra* note 91, at 57.

268. *See, e.g., Nov. 2013 Hearing*, *supra* note 1, at 262–64 (remarks of Malini Moorthy) (“In connection with the hormone therapy preservation order, we estimate that Wyeth and Pfizer spent nearly \$40 million to buy and store the 1.2 million backup tapes that were preserved. . . . There was no need to go to the backup tapes because in the same litigation Pfizer collected millions and millions of documents from its live data environment, which included retrieving data from more than 170 custodians and more than 75 centralized information systems. From those collection efforts, Pfizer produced approximately 2.5 million documents, representing more than 25 million pages. Of those 2.5 million documents, we estimate that only about 400 company documents were marked as exhibits in the 23 trials that have taken place in the litigation to date.”); *Jan. 2014 Hearing*, *supra* note 88, at 28 (remarks of Timothy Pratt) (“Since 2005, my company [Boston Scientific] has preserved 107 terabytes of data, in just the last year, we have preserved 35 terabytes of data, including 90 million messages. Roughly half of our U.S. employees are subject to litigation holds. We pay our outside discovery vendor approximately \$32 million to process, host and provide our document review tool since 2005. And it’s averaging \$5 million a year right now to that outside discovery vendor. . . . The requesting party often gets millions of documents that have absolutely no bearing on the lawsuit so they are not used. Estimates vary but my best guesstimate is far less than one percent of all produced documents are used for any reason in litigation.”). Very similar narratives were presented by representatives from other notable entities. *See*

oriented speakers also seemed to be parroting the term “gotcha game” to describe how corporations would be sanctioned for failure to preserve information.<sup>269</sup> Plaintiffs’ counsel, on the other hand, would typically describe one particular case he or she had handled in which (a) more depositions were needed than the current or proposed limit to survive summary judgment; (b) broader discovery was needed than is postulated to occur if the scope of discovery is narrowed in 26(b)(1);<sup>270</sup> and/or (c) defense counsel were not cooperative.

During the testimony of one plaintiffs’ lawyer, Judge Gene E.K. Pratter, a member of the Advisory Committee, made what first appeared to be a merely bizarre comment. The witness, Jennie Lee Anderson, objected to moving the “proportionality” language in Rule 26(b). She supported, however, the proposed changes to Rule 34 that will require more specific objections and allow earlier service of requests for production. She explained:

In almost every class action that I have litigated, discovery works this way: I receive the initial disclosures, which are virtually meaningless. And I serve discovery. I get responses back from the defendants which include two to three pages of objections for each request . . . and not a single document produced. Then I spend months . . . meeting and conferring with the defendants begging them to please tell me what do you mean by expensive? What is your estimated cost? How many documents are you talking about?

Real-life examples are so absurd, you are going to find them hard to believe. Recently in an antitrust case we were disputing whether certain hard copy documents need to be reviewed. And I asked them to just tell me how many documents are we talking about. Are you talking about a Redweld, or are we talking about five rooms of documents? The response to that query was it’s not a Redweld, it’s more than a Redweld. Not helpful.

During the questioning that followed Ms. Anderson’s statement, Judge Pratter commented:

I don’t see how there would be a different result to your circumstance

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*id.* at 80 (Microsoft); *id.* at 92 (Bayer); *Feb. 2014 Hearing, supra* note 91, at 113–14 (General Electric); *id.* at 123 (Eli Lilly); *id.* at 187 (Shell Oil); *id.* at 250 (Ford Motor).

269. *E.g., id.* at 316 (“The result of the current state of the rules is a gotcha game that is frequently—it’s not only at our corporate clients, but also at their in-house and outside counsel, and that results in . . . over preservation.”); *id.* at 36 (“gotcha mentality”); *id.* at 92 (“they used their requests for admission process in a way to play gotcha”); *id.* at 116 (“[sanctions create] very strong incentives to gin up sideshow litigation and gotcha games”); *Jan. 2014 Hearing, supra* note 88, at 178 (“eDiscovery oftentimes morphs into improper gotcha tactics”).

270. *E.g., Jan. 2014 Hearing, supra* note 88, at 152.

about the snarky response from the defense saying it's not a Redweld, it's more than a Redweld. [Presumably, Judge Pratter meant that the result would still, even under the proposed amendments, be that the judge in the case would order the production if the defendant provided no further information about cost and burden.]

...

Frankly, I think that's part of the problem with some of the—you're too young to remember this—some of the Queen-For-A-Day issues that we've been hearing or the examples we've been hearing. And that's a good example. I don't see it being a different outcome [if the pending amendments are passed].

In one sense, Judge Pratter's comment was typical: throughout the three days of public hearings, Committee members repeatedly evinced disbelief that any federal judge would ever be anything but reasonable, and steadfastly refused to recognize that any shift in the rules would shift the parties' negotiating power. And the reference to the old daytime television show "Queen for a Day" may have simply struck many observers, especially those "too young to remember," as quaint or even incomprehensible.

But the reference to "Queen for a Day" illustrates the attitude, unconscious or not, that some of the Committee members have about plaintiffs. The show, which aired from 1956 to 1964,<sup>271</sup> was described on [TV.com](http://www.tv.com) as follows:

"Do YOU want to be Queen for a Day?!" Host [Jack] Bailey would bellow out those words before each program, to which the audience would reply en masse, "YES!" Four women, each having a sob story to tell, told Bailey why they believed they should be crowned the show's "Queen for a Day." Usually, each contestant asked for a merchandise prize such as a washer and dryer. After all four sad stories were told, the audience chose the winner by applause (determined via the "applause meter"). The winner was awarded her prizes and was bedecked in a sable-trimmed red velvet robe and jeweled crown.<sup>272</sup>

Wikipedia quoted a blogger who called the show "one of the most ghastly shows ever produced" and "tasteless, demeaning to women, demeaning to anyone who watched it, cheap, insulting and utterly degrading to the human spirit."<sup>273</sup> Is that what Judge Pratter thought of

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271. It was briefly revived in 1969–1970.

272. *Queen for a Day*, TV.COM, <http://www.tv.com/shows/queen-for-a-day/> (last visited May 15, 2015).

273. *Queen for a Day*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Queen\\_for\\_a\\_Day](http://en.wikipedia.org/wiki/Queen_for_a_Day) (last visited

all those plaintiff's lawyers' specific examples of problematic cases—maudlin “sob stories” told by women so desperate they were willing to debase themselves on national television for consumer trinkets?

Judge Pratter was appointed to the federal district court by George W. Bush in 2004. She formerly practiced law at Duane Morris, a large defense firm. At the time she was confirmed as a district judge, she was a member of the Federalist Society, Defense Research Institute, Pennsylvania Defense Institute, and the St. Thomas More Society. President Bush later nominated Judge Pratter to the Court of Appeals for the Third Circuit, but withdrew her name after civil rights groups opposed her nomination because of her “seemingly dismissive and even hostile attitude to the rights of the disabled and those claiming discrimination in employment.”<sup>274</sup>

As detailed in the next section, Judge Pratter's background is typical of the members of the Advisory Committee and the Standing Committee.

*B. The Ideological, Demographic, and Experiential Biases of Chief Justice Roberts' Advisory Committee and Standing Committee*

At the end of the 1978 version of the movie *Invasion of the Body Snatchers*, Donald Sutherland, recently having transformed from human to alien “pod person,” betrays one of the last remaining humans by screaming the pods' “human alert” sound.<sup>275</sup> This movie came to mind as I was researching the background of the members of the Advisory Committee and the Standing Committee. I may be the last human to realize this, but the Federalist Society has body-snatched the federal rulemaking apparatus.

The members and the chairpersons of the Advisory Committee, the Standing Committee, and other federal rules committees are appointed by Chief Justice John Roberts.<sup>276</sup> Theoretically, the committee

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May 15, 2015).

274. *Civil Rights Groups Oppose Pratter Nomination*, THE LEADERSHIP CONFERENCE (Feb. 14, 2008), <http://www.civilrights.org/judiciary/nominees/pratter/civil-rights-groups-oppose.html> (last visited June 19, 2015). Judge Pratter's alleged inability to discern gender discrimination is not uncommon in highly successful professional women. See SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 163 (2013) (“Other research suggests that once a woman achieves success, particularly in a gender-biased context, her capacity to see gender discrimination is reduced.”) (citation omitted).

275. *INVASION OF THE BODY SNATCHERS* (Monogram Pictures 1987); see also Monogram Pictures, YOUTUBE, <https://www.youtube.com/watch?v=GESTsLJZhzo> (providing a video clip of the scream).

276. Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009).



members' terms are limited to two terms of three years each,<sup>277</sup> but the Chief Justice frequently reappoints the members again despite that aspirational rule.<sup>278</sup> Many scholars have questioned the wisdom, let alone the democratic nature, of allocating such unfettered power to one unelected individual.<sup>279</sup>

One searches in vain for anything in the Rules Enabling Act that gives the Chief Justice of the United States this power. Section 2073 provides that the Judicial Conference, not the Chief Justice, shall appoint the members of the rules committees.<sup>280</sup> The delegation to the Chief Justice of this power came as a result of a compromise reached in the 1950s aboard the *Queen Mary*.<sup>281</sup>

During his confirmation hearings, Chief Justice Roberts could not recall whether he had ever been a member of the Federalist Society, but he spoke at the Federalist Society's 25th Anniversary Gala on November 15, 2007.<sup>282</sup> It is no secret that the Federalist Society has had a key role in reshaping the federal judiciary over the past thirty years.<sup>283</sup> Now it has control of the federal rulemaking process. Table 2 below shows the five chairpersons of the Rules Advisory Committees (Civil Procedure, Evidence, Appellate, Bankruptcy, and Criminal) and the Chair of the Standing Committee at this writing:

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277. *Committee Membership Selection*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/committe-membership-selection.aspx> (last visited May 15, 2015).

278. Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 JOURNAL OF LAW & COURTS 301, 309 (2014).

279. See, e.g., Resnik & Dilg, *supra* note 19, at 1584–87; Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1567 (2006) (noting that the Chief Justice's administrative powers are not constrained, as are his adjudicatory powers, by the norms of collective decision-making and reason-giving).

280. 28 U.S.C. § 2073(b).

281. See *supra* note 21; Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, U. Penn. Law School, Public Law and Legal Theory Research Paper Series Research Paper No. 14-26, at 7.

282. *About Us*, FEDERALIST SOC'Y, <http://www.fed-soc.org/aboutus/> (last visited May 15, 2015).

283. See, e.g., SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 156 (2009) (“Certainly the effort in the Reagan administration—aided by the newly formed Federalist Society—to nominate candidates with conservative, ideological records attests to the use of nominations by presidents to pursue a policy agenda.”); JOHN W. DEAN, *BROKEN GOVERNMENT: HOW REPUBLICAN RULE DESTROYED THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* 146 (2007) (Lee Liberman, co-founder of the Federalist Society, was President George H.W. Bush’s “judicial ‘Rasputin,’” promoting Clarence Thomas as replacement for retiring Justice Thurgood Marshall); *id.* at 151 (lawyers from the Federalist Society worked with the White House during Thomas’ confirmation hearing to “comb[] for anything and everything to discredit” Anita Hill, who alleged Thomas had sexually harassed her).

**Table 2: Chairpersons of Federal Advisory Committees on Rules of Practice and Procedure**

<i>Member</i>	<i>Federal judge type</i>	<i>Chair of this Committee</i>	<i>Appointed by this president</i>	<i>Known affiliation with Federalist Society or LCJ?</i>	<i>Former law practice (not exhaustive)</i>
Jeffrey S. Sutton	Appeals	Standing	G.W. Bush	Yes	Jones Day
Steven M. Colloton	Appeals	Appellate	G.W. Bush	Yes	Kenneth Starr
Eugene R. Wedoff	Bankruptcy	Bankruptcy	N/A	No	Jenner & Block
David G. Campbell	District	Civil	G.W. Bush	Yes	Osborn Maledon
Reena Raggi	Appeals	Criminal	G.W. Bush	Yes	Windels Marx
Sidney A. Fitzwater	District	Evidence	Reagan	No	Vinson & Elkins

As shown in Table 2, at least four of the six chairpersons of the federal rules advisory committees and the Standing Committee are affiliated with the Federalist Society. A fifth, Judge Fitzwater, has been described as one of the country's "most conservative judges."<sup>284</sup> In addition, Judge Sutton clerked for Justice Scalia, and Judge Campbell clerked for Justice Rehnquist.

All of the chairpersons are white, and five of six are male. Before becoming a judge, five of six practiced law with large law firms that represent mostly corporations and mostly, in litigation, are on the defense side. The sixth, Judge Colloton, spent some time working for Independent Counsel Kenneth Starr.

The Chair of the Standing Committee, Judge Jeffrey S. Sutton of the Sixth Circuit, practiced law at the Jones Day law firm, where he represented such entities as Wal-Mart,<sup>285</sup> the Ohio Chamber of

284. LEADERSHIP CONF. ON CIVIL RIGHTS EDUC. FUND, TURNING RIGHT: JUDICIAL SELECTION AND THE POLITICS OF POWER (2004), available at [http://www.civilrights.org/publications/turning-right/judges\\_report.pdf](http://www.civilrights.org/publications/turning-right/judges_report.pdf).

285. *Davis v. Wal-Mart Stores, Inc.*, 2001-Ohio-1593, 93 Ohio St. 3d 488, 496, 756 N.E.2d 657, 658.

Commerce,<sup>286</sup> and tobacco companies.<sup>287</sup> Judge Sutton has moderated at least five Federalist Society panels with titles such as “Is There Any Remaining Limit to Federal Power?”<sup>288</sup> He spoke at Lawyers for Civil Justice’s Membership Meeting in May 2013, which focused on the economic impact of litigation costs.<sup>289</sup> Among the other guest speakers at that meeting was Kaspar J. Stoffelmayr, general counsel of Bayer Corporation, who also spoke in the public hearings before the Advisory Committee.<sup>290</sup>

Table 3 below lists, at this writing, the members of the Civil Rules Advisory Committee itself:

**Table 3: Members of Civil Rules Advisory Committee**

<i>Member</i>	<i>Current Position</i>	<i>Appointed by this president (if presidential appointment required)</i>	<i>Known Affiliation with Federalist Society or LCJ?</i>	<i>Current or former law firm (not exhaustive)</i>	<i>Clerked for this Supreme Court Justice</i>
John M. Barkett	Private practice—defense			Shook Hardy <sup>291</sup>	
Elizabeth Cabraser	Private practice—plaintiff			Lieff Cabraser	
David G. Campbell (Chair)	Federal District Judge	G.W. Bush	Yes	Osborn Maledon	Rehnquist

286. *Ricker v. John Deere Ins. Co.*, 2000-Ohio-321, 88 Ohio St. 3d 1229, 1230, 725 N.E.2d 281.

287. *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 105 (2d Cir. 2001).

288. *Is There Any Remaining Limit to Federal Power? – Event Audio/Video*, THE FEDERALIST SOC’Y (Nov. 18, 2010), <http://www.fed-soc.org/multimedia/detail/is-there-any-remaining-limit-to-federal-power-event-audiovideo> (featuring John C. Eastman, Kenneth T. Cuccinelli, Jeffrey Rosen, and Jeffrey S. Sutton).

289. *Lawyers For Civil Justice; Standing For Fairness And Meaningful Reform In U.S. Civil Litigation*, METROPOLITAN CORPORATE COUNSEL, June 2013, at 1, 31, available at <http://www.metrocorpocounsel.com/pdf/2013/June/25.pdf>.

290. *Jan. 2014 Hearing*, *supra* note 88, at 3 (Kaspar Stoffelmayr testified at the January 9, 2014 public hearing before the Advisory Committee in Phoenix, Arizona).

291. Shook Hardy’s web site states, “SHB has defeated class certification in over 90 cases—in nearly every jurisdiction in the United States and abroad—involving an enormous range of products, environmental challenges, and theories of recovery.” *Class Action and Complex Litigation*, SHOOK, HARDY & BACON L.L.P., [http://www.shb.com/practice\\_areas.aspx?id=46](http://www.shb.com/practice_areas.aspx?id=46) (last visited May 15, 2015).

<i>Member</i>	<i>Current Position</i>	<i>Appointed by this president (if presidential appointment required)</i>	<i>Known Affiliation with Federalist Society or LCJ?</i>	<i>Current or former law firm (not exhaustive)</i>	<i>Clerked for this Supreme Court Justice</i>
Stuart F. Delery	U.S. Assistant Attorney General	Obama		Wilmer Hale <sup>292</sup>	White, O'Connor
Paul S. Diamond	Federal District Judge	G.W. Bush		Dilworth Paxson	
Robert Michael Dow, Jr.	Federal District Judge	G.W. Bush		Mayer Brown <sup>293</sup>	
Parker C. Folse	Private practice—plaintiff and defense			Susman Godfrey	Rehnquist
Paul W. Grimm	Federal District Judge	Obama	Yes	Jordan Coyne	
Peter D. Keisler	Private practice—defense		Yes	Sidley Austin	Kennedy
Robert H. Klonoff	Professor of Law			Jones Day <sup>294</sup>	
John G. Koeltl	Federal District Judge	Clinton		Debevoise & Plimpton	Stewart

292. WilmerHale's web site boasts, "We have compiled a remarkable record of resolving antitrust claims through summary disposition, at trial, and on appeal against both private and government plaintiffs in the United States." WILMERHALE, <http://www.wilmerhale.com/litigation/antitrust/> (last visited May 15, 2015).

293. Mayer Brown's web site quotes *The American Lawyer*: "Mayer Brown impressed us with its range of far-reaching victories," one of which was the firm's Supreme Court win in *AT&T Mobility v. Concepcion*, which upheld the enforceability of a mandatory arbitration clause in a consumer contract. "We've seen some sweeping pro-business US Supreme Court rulings of late, but there's a good argument that no decision will have more impact on the business community." *Litigation and Dispute Resolution*, MAYER BROWN, <http://www.mayerbrown.com/experience/Litigation-Dispute-Resolution/> (last visited May 15, 2015).

294. Professor Klonoff was also Assistant to the Solicitor General of the United States (1986–1988) and an Assistant United States Attorney (Criminal Division, District of Columbia) (1983–1986), during the Reagan administration. ROBERT H. KLONOFF, CURRICULUM VITAE (2015), available at <http://law.lclark.edu/live/files/5260-robert-klonoff-cv>.

<i>Member</i>	<i>Current Position</i>	<i>Appointed by this president (if presidential appointment required)</i>	<i>Known Affiliation with Federalist Society or LCJ?</i>	<i>Current or former law firm (not exhaustive)</i>	<i>Clerked for this Supreme Court Justice</i>
Scott M. Matheson, Jr.	Federal Appeals Judge	Obama		Williams & Connolly	
David E. Nahmias	State court judge	G.W. Bush*	Yes	Hogan & Hartson	Scalia
Solomon Oliver, Jr.	Federal District Judge	Clinton			
Gene E.K. Pratter	Federal District Judge	G.W. Bush	Yes	Duane Morris	

\*Judge Nahmias, currently on the Supreme Court of Georgia, was nominated by President George W. Bush to be the United States Attorney for the Northern District of Georgia.

As shown in Table 3, thirteen of the fifteen members of the Advisory Committee had at least one of the following characteristics: they were appointed by a Republican president, clerked for a Republican-appointed Supreme Court justice, work or worked for a defense-oriented, large corporate law firm, and/or are affiliated with the Federalist Society or Lawyers for Civil Justice.<sup>295</sup> The other two are “tokens,” Judge Oliver as the token African-American and Ms. Cabraser as the token “real” plaintiff’s lawyer (and the token non-Federalist Society woman).

Some committee members’ current or former firms claim to represent both plaintiffs and defendants, but upon closer examination, the plaintiffs represented are large corporations, in such actions as patent infringement cases,<sup>296</sup> breach of a noncompete agreement,<sup>297</sup> or a “multibillion-dollar breach of contract action against six banks.”<sup>298</sup>

295. See also Burbank & Farhang, *supra* note 281, at 12 (compiling data showing that from 1960–2013 “there was a substantial shift away from plaintiff and toward defense representation” on the Advisory Committee).

296. E.g., *Parker C. Folse—Notable Representation*, Susman Godfrey L.L.P., <http://www.susmangodfrey.com/Attorneys/Parker-C-Folse/#Pane7> (Mr. Folse is an Advisory Committee member) (last visited May 15, 2015).

297. See *Employment Litigation*, DEBEVOISE & PLIMPTON, <http://www.debevoise.com/employment-litigation-practice-areas/> (last visited May 15, 2015).

298. *Commercial Litigation*, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., <http://www.khhte.com/practices-Commercial-Litigation.html> (former law firm of Judge Neil M.

Committee member Robert Michael Dow, for example, represented Illinois Bell Telephone Company as a plaintiff.<sup>299</sup>

Of the fifteen members of the Advisory Committee, twelve are white males (as are the two Reporters for the Committee and the Liaison to the Standing Committee), two are white females, and one is an African-American male. Of the federal judge members, four were appointed by Democratic presidents (two Clinton and two Obama) and four were appointed by Republican presidents (all George W. Bush), including the Chair of the Advisory Committee. Although that lineup looks well-balanced, the Bush-appointed judges include the Committee chair. Judge Grimm, although appointed by Obama, has spoken at LCJ meetings.<sup>300</sup> Moreover, the “liaison” from the Civil Rules Advisory Committee to the Standing Committee is Neil Gorsuch, a Federalist Society member, George W. Bush appointee, and former clerk for Justice White.

Table 4 shows that the members of the Standing Committee have characteristics and backgrounds similar to those of the Civil Rules Advisory Committee:

**Table 4: Members of Committee on Practice and Procedure (Standing Committee)**

<i>Member</i>	<i>Current position</i>	<i>Appointed by this President (if presidential appointment required)</i>	<i>Known Affiliation with Federalist Society or LCJ?</i>	<i>Current or former law firm (not exhaustive)</i>	<i>Clerked for (Supreme Court only)</i>
James M. Cole	U.S. Deputy Attorney General	Obama		Bryan Cave	
Dean C. Colson	Private practice—plaintiff			Colson Hicks	Rehnquist
Roy T. Englert, Jr.	Private practice—defense			Robbins, Russell	

Gorsuch) (last visited May 15, 2015).

299. Ill. Bell Tel. Co. v. Village of Itasca, 503 F. Supp. 2d 928 (N.D. Ill. 2007).

300. See, e.g., *Join LCJ*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/join-lcj.html> (“Speakers from recent conferences have included . . . Judge Paul W. Grimm”) (last visited June 19, 2015); *Lawyers For Civil Justice (LCJ), Goals And Achievements*, METROPOLITAN CORPORATE COUNSEL, <http://www.metrocorpocounsel.com/articles/20628/lawyers-civil-justice-lcj-goals-and-achievements> (last visited June 19, 2015) (reporting that Judge Grimm was a confirmed speaker at LCJ’s November 2012 program).

<i>Member</i>	<i>Current position</i>	<i>Appointed by this President (if presidential appointment required)</i>	<i>Known Affiliation with Federalist Society or LCJ?</i>	<i>Current or former law firm (not exhaustive)</i>	<i>Clerked for (Supreme Court only)</i>
Gregory G. Garre	Private practice—defense		Yes		Rehnquist
Neil Gorsuch	Federal Appeals Judge	G.W. Bush	Yes	Kellogg, Huber	White
Susan Graber	Federal Appeals Judge	Clinton		Stoel Rives	
Wallace B. Jefferson	State court judge*			Crofts, Calloway	
David F. Levi	Dean, Duke Law School	G.W. Bush**			Powell
Patrick J. Schiltz	Federal District Judge	G.W. Bush			Scalia
Amy St. Eve	Federal District Judge	G.W. Bush		Davis Polk	
Jeffrey S. Sutton (Chair)	Federal Appeals Judge	G.W. Bush	Yes	Jones Day	Scalia
Larry D. Thompson	Corporate counsel		Yes	King & Spalding	
Richard C. Wesley	Federal Appeals Judge	G.W. Bush		Harris Beach	
Jack Zouhary	Federal District Judge	G.W. Bush		Robison Curphey	

\*Justice Jefferson was appointed Chief Justice of the Texas Supreme Court in 2004 by Governor Rick Perry.<sup>301</sup>

\*\*Dean Levi was formerly a federal district judge appointed by President George W. Bush.

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301. *Alumnus Wallace B. Jefferson, '88, Appointed First African American Chief Justice of Texas Supreme Court*, UNIV. TEX. AUSTIN SCH. L. (Sept. 14, 2004), [http://www.utexas.edu/law/news/2004/091404\\_jefferson.html](http://www.utexas.edu/law/news/2004/091404_jefferson.html).

Of the eight current or former federal judges on the Standing Committee, seven were appointed by George W. Bush. Other members have ties to the latter Bush administration or to the U.S. Chamber of Commerce.<sup>302</sup>

Other than Elizabeth Cabraser, it appears that no member of the Advisory or Standing Committee has represented plaintiffs on a contingency fee basis. Thus, although several speakers emphasized the point,<sup>303</sup> the Committee members have not personally experienced the reality that plaintiffs' attorneys on a contingent fee have no economic incentive to spend any more time or effort than necessary to develop the case in discovery.

*C. The Agenda and Remarkable Success of the Federalist Society and Its Affiliates*

One of the Federalist Society's officers wrote a book outlining his call to "break the left's stranglehold on the courts" by appointing "good conservative" judges like Samuel Alito.<sup>304</sup> A recent study of the Federalist Society asserts, "Every single federal judge appointed by President G.H.W. Bush or President George W. Bush was either a member or approved by members of the [Federalist] Society,"<sup>305</sup> including the Society's most prominent appointees, Supreme Court Justices Roberts, Alito, Scalia, and Thomas. Not coincidentally, the Federalist Society has been a champion of the types of civil justice "reforms" exemplified in the pending FRCP amendments:

Although The Federalist Society professes to take no official stand on controversial legal policy issues, the organization coordinates its activities with other conservative groups in favor of tort reform. The Lawyers for Civil Justice, a pro-tort reform alliance, hosted a meeting for industry and defense bar leaders including the "United States

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302. Roy T. Englert, Jr., a Standing Committee Member, was a member of the Constitutional & Administrative Law Advisory Committee of the U.S. Chamber Litigation Center, which is the litigation arm of the U.S. Chamber of Commerce, from 2002 to 2010. U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/> (last visited May 15, 2015). Standing Committee member Gregory G. Garre was in the Solicitor General's office throughout the George W. Bush administration. Gregory G. Garre, LATHAM & WATKINS LLP, <https://www.lw.com/people/gregory-garre> (last visited May 15, 2015). Larry D. Thompson was deputy Attorney General of the United States under George W. Bush (2001–2003), and also a U.S. Attorney appointed by Ronald Reagan.

303. *Jan. 2014 Hearing, supra* note 88, at 22, 152–53, 298; *Feb. 2014 Hearing, supra* note 91, at 49, 217, 297.

304. MARK W. SMITH, *DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT'S STRANGLEHOLD ON THE COURTS* 3–4, 120 (2006).

305. MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* 2 (2013).



Chamber of Commerce, Federalist Society, Defense Research Institute, [and the] American Tort Reform Association” to “improve the coordination among several groups already addressing . . . issues” such as tort reform.<sup>306</sup>

What Jeffrey Toobin has called “the full Federalist Society agenda” initially held “that the justices should interpret the Constitution according to the original intent of the framers, that Congress had repeatedly passed laws that infringed on executive power and violated the Constitution, and that the crown jewels of liberal jurisprudence—from *Miranda* to *Roe [v. Wade]* should be overruled.”<sup>307</sup> By the late 1980s, however, the Federalist Society’s agenda had grown to encompass so-called “civil justice reform” or “tort reform.”<sup>308</sup>

Co-founders of the Federalist Society gave birth to big business’ anti-litigation agenda and steadily moved it front and center in the national debate. David McIntosh, a co-founder of the Federalist Society at the University of Chicago (Justice Scalia was the faculty advisor), joined Vice President Dan Quayle’s Council on Competitiveness, which in 1991 issued one of the first reports condemning civil litigation and linking it to dwindling competitiveness of American business abroad.<sup>309</sup> This report, *Agenda for Civil Justice Reform in America*, advanced the now-familiar procedural mechanisms advocated by tort reformers to limit lawsuits, such as limits on punitive damages, loser-pays, and employment of contract provisions mandating ADR.<sup>310</sup> The Federalist Society coordinates its tort reform efforts through defense-oriented lobbying groups such as LCJ, DRI, and the American Tort Reform Association.<sup>311</sup>

As with the term “justice,” the term “reform” is in the eyes of the beholder. These so-called “reforms” use changes in procedural rules to erect barriers to filing and maintaining lawsuits and to lower the cost of lawsuits for the (mostly) business entities defending them—in other words, procedural changes exactly like the amendments now recently pushed through by the Advisory Committee and Standing Committee.

LCJ calls itself “a partnership of corporations and defense

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306. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System As A Battleground of Social Theory*, 68 BROOK. L. REV. 1, 78 (2002) (footnotes omitted).

307. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 25 (2008).

308. See generally AVERY & MCLAUGHLIN, *supra* note 305, at 81–83.

309. See, e.g., *id.*; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 387 (1992).

310. AVERY & MCLAUGHLIN, *supra* note 305, at 81–83.

311. *Id.* at 83 (citation omitted).

attorneys.”<sup>312</sup> LCJ’s top priorities for this round of changes to the FRCP<sup>313</sup> were restricting the scope of discovery and imposing a forgiving sanctions standard for failure to preserve ESI; these changes are enshrined in the pending amendments.<sup>314</sup> LCJ also lobbied strongly for further restrictions on pleading, asserting “Rule 8 imposes no meaningful hurdle to instigation of a civil action . . .”<sup>315</sup> Although the Committee ultimately decided not to amend Rule 8 itself, its abrogation of the bare-bones Forms took a step in that direction.

The pending amendments also give a nod to another of LCJ’s priorities for the FRCP – the “requester pays” discovery rule obliquely mentioned in amended Rule 26(c). LCJ continues to lobby to strengthen the “requester pays” rule by making it the default position in civil litigation.<sup>316</sup>

## V. CONCLUSION

With Chief Justice Roberts in control of the federal rules advisory committees for the foreseeable future—possibly decades—the future of discovery will likely hold further restrictions on the ability to obtain information. The judges on the Advisory Committee are not obliged to be impartial in evaluating procedural rules changes; they are only obliged to follow the Rules Enabling Act process of publication and comment.

Many of the pending amendments can be traced to LCJ’s and other defense groups’ lobbying efforts.<sup>317</sup> The only item on the discovery-related wish list of corporate and defense-oriented organizations that was not fully achieved with the currently pending amendments was a default rule that the requesting party (normally plaintiff) should pay the costs of responding to discovery requests incurred by the responding party (normally the defendant). These well-funded organizations will not rest until that ultimate prize is enshrined in the rules.

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312. LAWYERS FOR CIVIL JUSTICE, DEFENSE TRIAL LAWYERS SUPPORTING CIVIL JUSTICE REFORM 1 (2005), available at <http://www.legalreforminthenews.com/Reports/LCJ%20Brochure2.pdf>.

313. Separately, LCJ is also vigorously lobbying for changes to Rule 23, the class action rule. See, e.g., *Class Actions*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/class-actions.html>.

314. See *Federal Rules of Civil Procedure*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/federal-rules-of-civil-procedure.html>.

315. LAWYERS FOR CIVIL JUSTICE, DRI – THE VOICE OF THE DEFENSE BAR, FEDERATION OF DEFENSE & CORPORATE COUNSEL, & INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, COMMENT SUPPLEMENTING THE WHITE PAPER SUBMITTED TO THE 2010 LITIGATION CONFERENCE 9 (2010), [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_supplementing\\_white\\_paper\\_060810.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_supplementing_white_paper_060810.pdf).

316. See, e.g., *Cost Allocation*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/cost-allocation.html>.

317. See, e.g., *supra* note 139 and accompanying text.