CENTER FOR
CONSTITUTIONAL LITIGATION
A PROFESSIONAL CORPORATION

PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE

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BACKGROUND INFORMATION

The Advisory Committee on Civil Rules ("Advisory Committee"), which studies the operation and effect of the rules that govern procedure in civil litigation in federal courts, proposed amendments to a large number of those rules last year. The proposed rule amendments, which would apply to all civil suits filed in federal court, cover a wide range of topics, including time for service of the summons and complaint, scheduling conferences, discovery, and sanctions for failure to preserve discoverable information. If adopted, they would significantly change practice and procedure in federal cases.

Many of the proposed amendments were developed in response to issues that were discussed at a conference held at Duke Law School in May 2010 ("Duke Conference"). A subcommittee of the Advisory Committee, the Duke Subcommittee, released sketches of proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 of the Federal Rules of Civil Procedure in late 2012. These "rule sketches" were discussed at the January 2013 meeting of the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee").

In between January and April 2013, the chairs of the Standing Committee, the Civil Rules Advisory Committee and the Duke Subcommittee heard from hundreds of attorneys on the "rule sketches." The overwhelmingly majority of the comments opposed most of the draft rules, especially the proposed changes to the scope of discovery and the presumptive limits on discovery devices.

Despite the early commentary opposing the "rule sketches," the Advisory Committee recommended that draft rules be published, and the Standing Committee approved them for publication. While the draft rules made some modifications from the initial rule sketches, many of the draft rules remained unchanged. They were published on August 15, 2013, along with proposed amendments to Rules 6, 37(e), 55, 84, and Appendix of Forms.

After the proposed amendments were published, the Advisory Committee received more than 2,300 additional comments on the proposals and heard testimony from more than 120 witnesses at three public hearings around the country. More than 1,000 comments were submitted in the last week of the public comment period, after the final public hearing. The number of comments and witnesses far surpassed the public commentary on previous amendments, even those that were considered controversial at the time. The various subcommittees of the Advisory Committee began deliberating and reaching tentative conclusions immediately after the final public hearing, before the public comment period closed. The subcommittees reported their recommendations before the Reporter to the Advisory Committee completed summaries of the comments. The proposed amendments were discussed at the Advisory Committee Meeting on April 10th and 11th in Portland, Oregon. The Advisory Committee recommended adoption of several draft amendments, some of which were revised from the versions that were published.

Attorneys at the Center for Constitutional Litigation, P.C. ("CCL"), attended each of the public hearings and read the transcripts, and reviewed each of the more than 2,300 comments filed on the proposed amendments. CCL assessed the types of people and organizations that submitted comments, as well as how many of them commented, which proposals they opposed or supported and why. Based on this review, CCL has prepared the following report, providing an estimate of the numbers of comments and testimony on the proposals,[1] and summarizing the comments and testimony on the proposed amendments.[2]

SUMMARY BY THE NUMBERS

WHO COMMENTED AND TESTIFIED?

- More than 1,000 written comments and testimony of almost 50 witnesses came from attorneys and organizations that represent individuals and small businesses in a wide variety of litigation against larger entities such as corporations, governments, and their insurers. These attorneys and organizations included:
    - the organized plaintiffs' bar, including the American Association for Justice, its leaders, sections and litigation groups, and state trial lawyers associations;
    - the National Employment Lawyers Association and its state affiliates;
    - civil rights organizations like the NAACP Legal Defense Fund, the Lawyers' Committee for Civil Rights Under Law, MALDEF, and Legal Momentum;
    - legal aid groups and non-profit organizations that provide legal services to civil litigants who are impoverished, elderly, or disabled;
    - non-profit organizations that provide legal services to incarcerated and institutionalized individuals;
    - non-profit organizations and law firms who represent consumers;
    - non-profit organizations that litigate environmental law and environmental justice issues; and
    - hundreds of individual attorneys and law firms.

[1] Because of the sheer volume of comments and the short timeframe, a precise empirical measurement was not possible, and this Report does not purport to be an empirical study. Rather, CCL tracked the comments to note trends in general terms rather than precise ones.

[2] In this preliminary draft, CCL summarizes several proposed amendments, but not all of them. Later drafts of this Report will include discussion of more of the proposals.

- More than 375 separate written comments and testimony of more than 55 witnesses came from corporations, their legal counsel, and organizations that represent their interests, including:
    - Altria, Ford, General Electric, Johnson & Johnson, Microsoft, Merck, Pfizer, GlaxoSmithKline, and hundreds of other corporations that submitted comments of their own or signed onto written comments;
    - the organized defense bar, including Lawyers for Civil Justice and DRI;
    - the U.S. Chamber of Commerce Institute for Legal Reform, the Washington Legal Foundation, the International Association of Defense Counsel, the Association of Corporate Counsel; and
    - more than 200 individual attorneys and law firms.
- Several dozen separate comments were filed by legal academics, including two former reporters of the Advisory Committee on Civil Rules. Two of the written comments from legal academics were each signed by more than 100 law professors. Almost a dozen legal academics testified at the public hearings.
- Attorneys that represent governments and government agencies also submitted written comments, including:
    - the Department of Justice, Civil Division;
    - the U.S. Equal Employment Opportunity Commission;
    - the U.S. Commodity Futures Trading Commission;
    - the Cities of New York, New York, Phoenix, Arizona, Chicago, Illinois, and Houston, Texas, and the International Municipal Lawyers Association; and
    - the attorneys general of Arizona and Washington State.
- Fewer than 20 bar associations or their sections filed written comments. Some individual members of the leadership of a few bar associations also submitted written comments and testimony, although they did not represent the views of the bar associations of which they were a part.
- More than a dozen current and former federal judges submitted written comments, as did the Federal Magistrate Judges Association.
- Almost 30 individual members of Congress submitted written comments, including members of the House and Senate Judiciary Committees, and members of the Congressional Black Caucus.

- More than 700 written comments were not readily categorized ("uncategorized comments"). These written comments lacked enough specific information saying whether the author was an attorney or litigant, or whether they represented a certain type of party. While the comments expressed certain viewpoints, if the author did not specify whether he or she was an attorney, academic, judge, layperson, etc., they were left uncategorized.

WHAT POSITIONS DID THE COMMENTS AND WITNESSES TAKE?

General Comments

The majority of general comments—more than 800 of them—expressed general opposition to the proposed amendments or to the proposed discovery rule amendments.

- Several hundred of these comments expressed general opposition, but focused their discussion on specific proposals.

- Almost 500 of these written comments simply expressed general opposition without focusing on any specific proposal.

- The number of comments expressing opposition to the proposed amendments in general or to the discovery proposals specifically, outnumbered the number of comments filed in support of any specific proposed amendment.

- Generalized opposition to the proposals came from organizations and attorneys who represent individuals and small businesses in a wide variety of civil litigation against corporations, governments, and their insurers.

- A large number of comments expressing opposition to the proposals in general or to the discovery proposals specifically came from uncategorized comments.

- Generalized opposition to the proposals also came from several legal academics, many of whom write and teach civil procedure at the nation's law schools.

- A couple of federal judges also opposed the proposed amendments across the board.

Rule 4(m)—Time For Service

More than 90% of the written comments on the proposed amendments to Rule 4(m) opposed them.

- More than 350 written comments addressed this specific proposal.

- Opposition to this proposal came from across the spectrum, including plaintiffs' attorneys and organizations, attorneys who represent plaintiffs and defendants, legal service providers who assist *pro se* and *in forma pauperis* litigants, the Department of Justice, the U.S. Commodity Futures Trading Commission, federal judges and the Federal Magistrate

Judges Association, legal academics, members of Congress, the Cities of New York, Chicago, and Houston, and the Illinois Association of Defense Trial Counsel.

Rule 26(b)(1)—The Scope of Discovery

The majority of the written comments on the proposed changes to the scope of discovery in Rule 26(b)(1) opposed them.

- Hundreds of written comments generally opposed all of the proposed changes to the scope of discovery.
    - Most of these comments expressed opposition to the proposed amendments to Rule 26 or Rule 26(b)(1), but also discussed one or more particular amendments to the rule.
    - Some of these comments simply voiced generalized opposition to the amendments to Rule 26 or Rule 26(b)(1) without commenting on any specific amendment to Rule 26(b)(1).
    - Most of these comments came from attorneys and organizations that represent individuals and small businesses against larger entities in civil litigation.
    - A large number of uncategorized comments also generally opposed the amendments to Rule 26 or 26(b)(1).
    - 4 out of 5 current and former federal judges who commented generally on the proposed amendments to Rule 26(b)(1) opposed them across the board.
    - Several members of Congress also opposed the proposed changes to the scope of discovery across the board.

Adding "Proportionality" to the Scope of Discovery

Two-thirds of the written comments and a majority of the testimony on the proposed transposition of the cost-benefit "proportionality" analysis from Rule 26(b)(2)(C)(iii) into the scope of discovery in Rule 26(b)(1) opposed the amendment.

- This proposed amendment was specifically addressed by more than 1,000 separate written comments and more than 60 witnesses at the public hearings.
- This amendment was specifically opposed by two former reporters for the Civil Rules Advisory Committee, Paul Carrington and Arthur Miller; Professor Miller was the reporter for the committee at the time the concept of "proportionality" was first referenced in the rule.

- This specific amendment was also opposed by 9 active and retired federal judges—a large majority of the individual federal judges that commented on this proposal.

- A large group of law professors—more than 175—also opposed this specific proposal. The overwhelming majority of legal academics who commented and/or testified on this specific proposal opposed it.

- More than 475 separate written comments opposing this proposal came from attorneys and organizations who represent individuals and small businesses in a wide range of civil litigation against larger entities.

- More than 125 separate uncategorized comments also opposed this specific proposal.

- A few bar associations specifically opposed this proposed amendment, as did several attorneys who represent plaintiffs and defendants, and a couple of attorneys who work for a corporate defense firm.

- Every member of Congress who submitted comments opposed this proposal.

Deleting "Reasonably Calculated" Language

The comments that specifically addressed the proposed deletion of the penultimate sentence of Rule 26(b)(1) which says: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." were about evenly divided.

- More than 400 separate written comments addressed this specific proposal.

- Approximately 20 witnesses testified about this specific proposal, and the majority of them supported it.

- Most of the support for this proposal came from corporations, governments, their counsel, and organizations that represent their interests.

- The Department of Justice originally opposed this proposal, but later wrote comments in support of it with a suggested revision to the Committee Note.

- Opposition to the proposal largely came from attorneys and organizations that represent individuals and small businesses against larger entities, more than 40 uncategorized comments, and the U.S. Equal Employment Opportunity Commission.

- The vast majority of judges and academics who commented on this proposal opposed it.

- Very few bar associations commented on this specific proposal, but those that did were about evenly divided.

Removing Availability of Discovery Relevant to the "Subject Matter"

The majority of comments and testimony on the proposed deletion of the sentence permitting the court to allow discovery of information "relevant to the subject matter of the action" upon a showing of good cause supported it.

- Around 250 comments discussed this proposal, and about 10 witnesses testified on this specific proposal.

- Most of the support for this proposal came from corporations, their legal counsel, and organizations that represent their interests. It was also supported by more than two dozen uncategorized comments and several bar associations.

- The proposal was opposed by attorneys and organizations that represent individuals and small businesses against larger entities, and more than a dozen uncategorized comments.

- The strongest opposition to this proposal appeared to come from legal academics and from federal judges, including two former members of the Civil Rules Advisory Committee and the Federal Magistrate Judges Association.

Deleting Language Illustrating Types of Discoverable Information

Although the proposed deletion of part of Rule 26(b)(1) that describes certain types of information that are encompassed in the scope of discovery elicited very little commentary, the majority of the comments and all of the testimony on this amendment opposed it.

- Approximately 20 written comments and 2 witnesses addressed this specific proposal.

- Two-thirds of the comments on this proposed amendment opposed it, as did both witnesses who testified about it.

- Opponents to the deletion of this language included 2 federal judges, a legal academic, attorneys who represent plaintiffs and defendants, including the Department of Justice, attorneys who represent individuals and small businesses against larger entities, and an attorney who works on eDiscovery issues.

Rule 26(c)(2)(B)—Cost-Allocation in Protective Orders

The majority of comments on the proposed amendment to Rule 26(c)(1)(B) opposed it.

- Almost 200 written comments addressed this specific proposal, and 6 witnesses addressed it in testimony. The majority of the witnesses supported the proposed amendment, but about 60% of the written comments opposed it.

- Opposition to the proposal came largely from attorneys who represent individuals and small businesses against larger entities, as well from the uncategorized comments.

- Two federal judges opposed it, while the Federal Magistrate Judges Association supported it.

- Fewer than ten law professors commented on this specific proposal and a slight majority of them opposed it.

- Support for this proposal came largely from corporations, their legal counsel, and the organizations that represent their interests, as well as government entities and a majority of the very few bar associations to comment on this specific proposal.

Rules 30, 31, 33, and 36—Presumptive Numerical Limits

The overwhelming majority of comments and testimony on the proposed numerical limits on discovery devices in Rules 30, 31, 33, and 36 opposed them.

- Each of the proposed amendments to these rules garnered a high volume of written comments.

- More than 1,100 written comments addressed the proposed amendment to Rule 30(a)—the most written commentary on any of the proposed amendments. Almost 90% of these comments opposed the proposal.

- Opposition to these proposals came from a wide swath of the legal community, including attorneys and organizations that represent individuals and small businesses against larger entities in a wide variety of civil litigation, organizations of plaintiffs' lawyers, bar associations, legal academics, current and former federal judges, hundreds of uncategorized comments, members of Congress, the U.S. Commodity Futures Trading Commission, the U.S. Equal Employment Opportunity Commission, and the Department of Justice.

Rule 37(e)—Sanctions for Failure to Preserve Discoverable Information

The published draft of Rule 37(e) was supported by slightly more than 10% of the almost 700 written comments on it, and 8 of the 48 witnesses who testified about it.

- The majority of the comments and testimony on the proposed draft of Rule 37(e) came from corporations, their counsel and organizations that represent their interests. They supported the goal of the draft rule, but not the substance of the draft.

- Approximately 250 comments and 15 witnesses opposed the proposed draft rule entirely.

Proposed Abrogation of Rule 84 and Most Forms

Three-quarters of the written comments and all of the testimony on Rule 84 opposed the proposed abrogation of the Rule and most of the Official Forms.

- The majority of the opposition came from legal academics, including two written comments signed by more than 100 legal academics each.

- Opposition also came from attorneys who work with pro se litigants and those litigants who are incarcerated, some plaintiffs' attorneys, and the Illinois Association of Defense Trial Counsel.

Support for Some Proposals

The majority of comments and testimony on the proposed amendments to Rules 16(b) and 34(b) expressed support. There was also support for the proposed amendment to Rule 26(d)(2).

REPORT

At the April meeting of the Advisory Committee on Civil Rules, the Advisory Committee unanimously approved the recommendations of the Duke Subcommittee, the Discovery Subcommittee, and the Rule 84 Subcommittee that certain amendments to the Federal Rules of Civil Procedure be adopted. With the exception of the Discovery Subcommittee, the draft amendments approved by the Advisory Committee are in the Agenda Book for the Spring meeting of the Civil Rules Advisory Committee that was released on Friday, March 21, 2014.[3] The Advisory Committee also approved the recommendation in the Duke Subcommittee report that several of the proposed amendments that generated the most commentary and controversy be withdrawn.[4] The Discovery Subcommittee presented and the Advisory Committee approved a different draft of Rule 37(e) than the version that was published and the version that was in the Agenda Book.[5] CCL has limited its Preliminary Report to a summary of the commentary on some of the rule amendments that the Advisory Committee recommends be adopted.

The proposed amendments to Rules 26(b)(1), 26(c)(1)(B), 4(m), and 84 were each strongly opposed by the majority of the commentary on them. The number of comments on some of these proposals was enormous, while other proposals generated fewer written comments and even less testimony. But each of them provoked a sharp divide in the commentary. Many times this divide was between corporations, their counsel, organizations that represent their interests,

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[3] *See* Agenda Book for the April 10-11, 2014 Meeting of the Advisory Committee on Civil Rules, at 109-13 *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf

[4] Agenda Book for the April 10-11, 2014 Meeting of the Advisory Committee on Civil Rules, at 79, 89-90 (recommending that the Committee withdraw proposed amendments to Rule 30, 31, 33, and 36 that would have imposed new or lower numerical limits on the presumptive number of discovery requests and devices, as well as the time for deposition by oral examination). A large majority of comments opposed the proposed presumptive limits on the discovery devices in proposed Rules 30, 31, 33, and 36.

[5] There was little support for the published version of draft Rule 37(e), as written, in the written commentary and the live testimony.

and attorneys for governmental parties on one side, and attorneys for individuals and small businesses, who litigate cases against these larger entities, on the other. Some of these proposals also generated a lot of opposition from legal scholars, including two former reporters for the Advisory Committee, and some proposals were sharply criticized by current and former members of the federal bench, including a former member of the Advisory Committee. Several members of Congress also voiced opposition to some of the proposals. Thus, the divide in the commentary is not simply one between plaintiffs' attorneys and defendants and their counsel.

This preliminary report discusses the general commentary on the proposed amendments, as well as the specific commentary on the published versions of the proposed amendments to Rules 26(b)(1), 26(c)(1)(B), 4(m), and the proposed abrogation of Rule 84 and most of the Official Forms. This preliminary report does not respond to the reports published in April or the recommendations of the subcommittees adopted by the Advisory Committee in Portland.

I. GENERAL COMMENTS

Consideration of the specific proposed amendments would be incomplete without consideration of the hundreds of more general comments on the proposed amendments.

There were hundreds of generalized comments on the proposed rule amendments. While many of these more general comments tended to focus on the proposed changes to the rules of discovery, not all of them focused on the discovery proposals exclusively. Hundreds of written comments voiced general support for or opposition to the proposed amendments without specifically opposing or supporting any particular proposed amendment. Almost 90% of these general comments opposed the proposed amendments or the discovery amendments across the board. Hundreds of additional written comments expressed general support of or general opposition to the proposed amendments, but specifically supported or opposed at least one specific proposed amendment. The overwhelming majority of these comments, too, expressed general opposition to the proposed amendments to the rules of discovery or to all of the proposed amendments across the board. **Taken together, the number of written comments—more than 800[6]—that expressed general opposition to the proposed amendments outnumbered the number of comments submitted in support of any specific proposed amendment.**

Generalized opposition to the proposals came from organizations and attorneys who represent individuals and small businesses in a wide variety of civil litigation against corporations, governments, and their insurers. A large number of comments expressing opposition to the proposals in general or to the discovery proposals in particular came from uncategorized comments. Generalized opposition to the proposals also came from several legal academics. A couple of federal judges also opposed the proposed amendments across the board.

[6] This calculation estimates only the number of written comments and does not count the number of signatories to each comment. Some comments both in favor of and opposing the amendments and each specific proposal were signed by more than one person or entity. Some of these comments are specifically discussed in the context of the draft rules that they support or oppose.

While many of these comments were very general, simply voicing opposition, there were a number of written comments, largely by legal academics, that challenged the basis for the proposed amendments. For instance, Professor Patricia Moore submitted a detailed, 8-page comment challenging the assertion that federal civil litigation "takes too long and costs too much,"[7] which was the proffered basis for many of the proposed amendments.[8] She offered four observations: (1) the most objective and reliable measure of "cost" available to the Advisory Committee in the 2009 study by the Federal Judicial Center shows neither out-of-control costs nor an increase in costs over time;[9] (2) the statistics maintained by the Administrative Office of the Courts show that the median disposition time for federal civil cases has maintained stability for twenty-five years;[10] (3) lawyers and judges are well aware of the concept of "proportionality" in discovery, and apply it frequently; and (4) federal courts are widely perceived to favor defendants, and the adoption of the proposals will intensify that perception because they favor defendants.[11] Professor Moore questioned how the Advisory Committee could interpret the FJC findings as a mandate for restricting discovery or as a failure to apply "proportionality." Citing the FJC 2009 Report, she pointed out that "[a]bout 90% of all attorneys surveyed—not just plaintiffs' attorneys—believed that discovery had yielded 'just the right amount' or even 'too little' information."[12]

Professor Moore's assertions were echoed by many others who pointed to the 2009 FJC Report showing that the rules of discovery work well in most cases, and that change is not needed.[13] Like Professor Moore, some opponents also cited other government statistics and

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[7] Comment of Professor Patricia W. Moore, St. Thomas Univ. School of Law, USC-RULES-CV-2013-0002-0491 (Jan. 31, 2014). All comments may be found searching their comment number on the Regulations website, *at* http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-CV-2013-0002-0002.

[8] Committee on Rules of Practice and Procedure of the Federal Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (August 2013) (hereinafter "Proposed Amendments") at 270, *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0002-0001.

[9] Moore, cmt. 0491, at 2-3 (citing Emery G. Lee & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center, Oct. 2009) (hereinafter "FJC 2009 Report")).

[10] Moore, cmt. 0491, at 3-5 (citing 1986 Annual Report of the Director of the Administrative Office of the United States Courts; Judicial Business of the United States Courts: 2012).

[11] Moore, cmt. 0491, at 6-8 (citing FJC 2009 Report).

[12] Moore, cmt. 0491, at 6.

[13] *E.g.*, Comment of Brett Nomberg, Brand Brand Nomberg & Rosenbaum LLP, USC-RULES-CV-2013-0002-1023 (Feb. 12, 2014), at 5; Comment of Professor Beth Thornburg, SMU, Dedman School of Law, USC-RULES-CV-2013-0002-0499 (Feb. 1, 2014); Comment of Professor Danya Shocair Reda, New York Univ. School of Law, USC-RULES-CV-2013-0002-2222 (Feb. 18, 2014); Comment of Professor Stephen B. Burbank, Univ. of Pennsylvania Law School, USC-RULES-CV-2013-0002-0729 (Feb. 10, 2014); Comment of Professor Stephen Yeazell, UCLA School of Law, USC-RULES-CV-2013-0002-0342 (Nov. 22, 2013), at 1.

reports to show that the proposed amendments lack an empirical basis.[14] Some of the opponents also criticized the opinion surveys performed by the Lawyers for Civil Justice, the American Bar Association Section of Litigation, and others as providing an unsound basis for reform of the Civil Rules.[15]

Professors, judges, and others who voiced general opposition to the proposed amendments also argued that they will not solve the concerns that sparked the proposals, namely the costs in high-stakes, complex litigation where there is contentious adversary behavior.[16] Moreover, they argued that the proposed amendments would create a host of new problems, including increased costs and delays, in a much larger number of cases.[17] Some critics of the proposals also argued that the proposed amendments ignore the problems of discovery avoidance and under-discovery,[18] and minimize the benefits of discovery and of civil litigation.[19] The concerns raised in the more general comments were also raised by many of the witnesses and the written comments on specific proposed amendments.

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[14] *E.g.*, Nomberg, cmt. 1023, at 5.

[15] *E.g.*, Nomberg, cmt. 1023, at 4; Reda, cmt. 2222 (opinion surveys are out of step with the hard data); *see also* Comment of Burton LeBlanc, American Association for Justice ("AAJ"), USC-RULES-CV-2013-0002-0372 (Dec. 19, 2013), at 27-31; Testimony of Dennis Canty, Kaiser Gornick, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Phoenix, January 9, 2014) (hereinafter "January Hearing"), at 225-32, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/ rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf; Comment of Senator Christopher A. Coons, et al., on behalf of 5 members of the Senate Judiciary Committee, USC-RULES-CV-2013-0002-0392 (Jan. 8, 2014), at 2.

[16] *E.g.*, Thornburg, cmt. 0499, at 2; Comment of Judge James Carr, U.S. District Court, Northern District of Ohio, USC-RULES-CV-2013-0002-0854 (Feb. 12, 2014), at 2. *See also* Comment of Prof. Helen Hershkoff, et al., on behalf of 6 civil procedure law professors, USC-RULES-CV-2013-0002-0622 (Feb. 5, 2014), at 4; Testimony of Joseph Sellers, Cohen Milstein Sellers & Toll PLLC, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Washington, D.C., Nov. 7, 2013) (hereinafter "November Hearing"), at 307-13, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf; Coons, cmt. 0392, at 2.

[17] *E.g.*, Carr, cmt. 0854, at 2; Judge Donald Molloy, U.S. District Court, District of Montana, USC-RULES-CV-2013-0002-1368 (Feb. 14, 2014), at 2; Thornburg, cmt. 0499, at 5-8; Burbank, cmt. 0729, at 15; Comment of Professor Suzettte Malveaux, The Catholic Univ. Columbus School of Law, USC-RULES-CV-2013-0002-1650 (Feb. 15, 2014), at 3. *See also* Coons, cmt. 0392, at 3.

[18] *E.g.*, Testimony of Professor Danya Shocair Reda, New York Univ. School of Law, Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Dallas, Feb. 7, 2014) (hereinafter "February Hearing"), at 349-55, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf; Comment of Stuart Ollanick, Public Justice PC and the Public Justice Foundation, USC-RULES-CV-2013-0002-1164 (Feb. 13, 2014).

[19] *E.g.*, Burbank, cmt. 0729, at 12-15; *see also* Thornburg, cmt. 0499, at 2.

Fewer witnesses and comments voiced general support for the proposed amendments. Many of the comments in support focused on particular proposed amendments. The general support for the proposals tended to come from corporations, their legal counsel, and organizations that represent their interests. For example, the Washington Legal Foundation argued in testimony that the *status quo* is completely unacceptable.[20] Comments and witnesses who offered general support argued that the civil justice system is in serious need of repair because it takes too long and costs too much,[21] often citing to one or two surveys on litigation costs.[22] Many of them argued that the Civil Rules have not kept up with the explosion of electronically stored information ("ESI") that is created and maintained by businesses.[23] These comments sometimes offered anecdotal or internal company information regarding the amount of ESI preserved and the costs of such preservation.[24] The assertions made in support of the proposed amendments generally were also raised by many comments that supported particular proposals.

II. PROPOSED REDEFINITION OF THE SCOPE OF DISCOVERY: RULE 26(b)(1)

The Advisory Committee has proposed a large number of substantive changes to the definition of the scope of discovery. Because of the number of substantive changes proposed to Rule 26(b)(1), we have broken the proposal out into its four separate substantive parts to examine and analyze the comments and testimony on each of them. The following examination of the comments on each of the four proposed substantive amendments to Rule 26(b)(1) focus only on those comments and testimony that specifically supported or opposed each separate proposal. But first a note about the general comments on the amendments to Rule 26(b)(1).

Several hundred comments expressed general support of or opposition to Rule 26 or Rule 26(b)(1). Many of these comments objected to or supported the proposed changes, but focused

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[20] Testimony of Cory Andrews, Washington Legal Foundation, November Hearing, at 42-70.

[21] Comment of Rebecca Kourlis, on behalf of the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers Task Force on Discovery ("IAALS & ACTL"), USC-RULES-CV-2013-0002-0473 (Jan. 28, 2014), at 1.

[22] IAALS & ACTL, cmt. 0473, at 1 n.1; Comment of William W. Large, Florida Justice Reform Institute, USC-RULES-CV-2013-0002-0634 (Feb. 6, 2014) (citing Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for Advancement of the Am. Legal Sys., Interim Report (including 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers) on the Joint Project 1 (2008), *at* http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf); Comment of Bruce Kuhlik, Merck & Co., Inc., USC-RULES-CV-2013-0002-1073 (Feb. 13, 2014) (citing Lawyers for Civil Justice, Litigation Cost Surveys for Major Companies (2010)).

[23] *E.g.*, Testimony of David M. Howard, Microsoft Corp., January Hearing, at 78-88; Merck & Co., cmt. 1073.

[24] Testimony of Robert L. Levy, ExxonMobil Corp., November Hearing, at 158-68; Microsoft Corp., January Hearing, at 79-83; Comment of Alex Dahl, Lawyers for Civil Justice, USC-RULES-CV-2013-0002-0540 (Feb. 4, 2014) (hereinafter "LCJ Supp.") (summarizing testimony and comments on this subject).

on one or two specific proposed amendments to the rule. The majority of these written comments generally opposed the proposed amendments to Rule 26(b)(1) or Rule 26.

Many of the comments in opposition to the proposed changes to Rule 26(b)(1) (or just to Rule 26) stated their opposition very generally. They argued that changing the definition of the scope of discovery is ill advised because the standards are decades old, and well-understood by litigants and courts.[25] But the concerns raised by many of the comments that generally opposed the proposed amendments, discussed *supra* II., were also raised in opposition to the proposed amendments to Rule 26(b)(1). A number of comments that generally opposed the amendments to Rule 26(b)(1) argued that there is no empirical basis for the amendments, and that the proposed rule is likely to create a number of problems for more ordinary cases while failing to address the problem of discovery costs in complex, high-stakes litigation where there is contentious adversary conduct.[26] Some also echoed the assertion that broad discovery and civil litigation have benefits that are ignored by the arguments in favor of the proposed amendments.[27] Numerous comments provided examples of cases where information learned under the current definition of the scope of discovery led not only to the resolution of the claims, but also changed industry standards, benefiting many more people.[28]

A. Adding Proportionality to the Scope of Discovery by Transposing Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis

Under current Rule 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." The scope of discovery and the number of discovery requests permitted are subject to limitation by the court under current Rule 26(b)(2).

A proposed amendment to Rule 26(b)(1) incorporates and rearranges the text of current Rule 26(b)(2)(C)(iii) into the definition of what information is discoverable. The published proposal would thus redefine the scope of discovery to extend to

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[25] *E.g.*, Comment of Bruce B. Elfvin, Elfvin & Besser, USC-RULES-CV-2013-0002-0020 (Feb. 13, 2013), at 2; Comment of Shehnaz M. Bhujwala, Khorrami LLP, USC-RULES-CV-2013-0002-0051 (Feb. 22, 2013), at 2.

[26] *E.g.*, Comment of Henry Kelston, Milberg LLP, USC-RULES-CV-2013-0002-1708 (Feb. 16, 2014), at 2-3; Coons, cmt. 0392.

[27] *E.g.*, Comment of Michael Hugo, AAJ Section on Toxic, Environmental, and Pharmaceutical Torts, USC-RULES-CV-2013-0002-2178 (Feb. 18, 2014); Testimony of Larry E. Coben, Attorneys Information Exchange Group ("AIEG"), January Hearing, at 169-77; Comment of William Rossbach, Rossbach Hart PC, USC-RULES-CV-2013-0002-2216 (Feb. 18, 2014).

[28] *E.g.*, Testimony of Patrick M. Regan, Regan Zambri Long & Bertram, November Hearing, at 278-87; Rossbach, cmt. 2216; AAJ Section on Toxic, Environmental, and Pharmaceutical Torts, cmt. 2178; AIEG, January Hearing, at 171-77; Ollanick, cmt. 1164.

> any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, 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.[29]

The Committee Note states that this amendment "limit[s] the scope of discovery," and "must be observed by the parties without court order."[30]

The Advisory Committee has called this particular amendment one of the two "most important" proposals "to promote responsible use of discovery proportional to the needs of the case."[31] While the Advisory Committee notes that this so-called "proportionality" limitation on discovery is already a part of the rule, it states that "it cannot be said to have realized the hopes of its authors," indicating that the problem is not with the text of Rule 26(b)(2)(C)(iii), but with its implementation—"it is not invoked often enough to dampen excessive discovery demands."[32] The Advisory Committee cites to surveys that "indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior. The number of these cases and the burdens they impose present serious problems. These problems have not yet been solved."[33]

This proposed amendment generated more than one thousand separate written comments, and was specifically addressed by more than sixty of the witnesses who testified at the public hearings on the proposed amendments, generating more testimony than any other single proposal.

1. The Opposition to the Proposal

More than two-thirds of the written comments on this specific proposal opposed it. More than half of the witnesses who testified on this specific proposal also opposed it.

A large number of the comments opposing the proposal came from attorneys and organizations of attorneys who represent plaintiffs in civil litigation, including a large number of legal aid organizations, civil rights organizations, consumer rights organizations, employment rights groups, environmental justice organizations, the U.S. Commodity Futures Trading Commission, as well as attorneys who represent individuals and small businesses in wide variety of civil litigation against larger entities like corporations and governments. A majority of the

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29 Proposed Amendments, at 289.

30 *Id.* at 296.

31 *Id.* at 264.

32 *Id.* at 265.

33 *Id.*

uncategorized comments specifically opposed this proposal. A number of attorneys who represent clients as both plaintiffs and defendants also opposed the proposal,[34] as did a couple of defense attorneys.[35]

These opponents were joined in their opposition by the majority of federal judges[36] and academics[37] who commented on this proposal. Among them, former members of and former

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[34] Comment of Darpana Sheth, Institute for Justice, USC-RULES-CV-2013-0002-2092 (Feb. 18, 2014); Comment of Jonathan Scruggs, Alliance Defending Freedom, USC-RULES-CV-2013-0002-0323 (Nov. 4, 2013); Comment of Bryan Wood, Law Office of J. Bryan Wood, USC-RULES-CV-2013-0002-2112 (Feb. 18, 2014); Comment of Edward Allred, USC-RULES-CV-2013-0002-1456 (Feb. 14, 2014); Comment of John Burke, Thomas Braum Bernard Burke, USC-RULES-CV-2013-0002-1408 (Feb. 14, 2014); Comment of Elise E. Singer, Fine Kaplan & Black, USC-RULES-CV-2013-0002-0135 (May 21, 2013); Comment of Robert B. Fitzpatrick, Robert B. Fitzpatrick PLLC, USC-RULES-CV-2013-0002-0252 (Feb. 28, 2013); Comment of Dan Modarski, USC-RULES-CV-2013-0002-0585 (Feb. 4, 2014); Comment of Lon McClintock, McClintock Law Office PC, USC-RULES-CV-2013-0002-0631 (Feb. 6, 2014); Comment of Jon M. Steele, Runft & Steele Law Offices PLLC, USC-RULES-CV-2013-0002-1140 (Feb. 13, 2014); Comment of Brian Wojtalewicz, USC-RULES-CV-2013-0002-1155 (Feb. 13, 2014); Comment of John Pucheu, Pucheu & Robinson LLP, USC-RULES-CV-2013-0002-1778 (Feb. 17, 2014); Comment of Carlo Sabatini, Sabatini Law Firm LLC, USC-RULES-CV-2013-0002-2032 (Feb. 18, 2014); Comment of Novlette R. Kidd, Fagenson & Puglisi, USC-RULES-CV-2013-0002-2220 (Feb. 18, 2014).

[35] Comment of Thomas M. O'Rourke, Cozen O'Connor, USC-RULES-CV-2013-0002-0461 (Jan. 28, 2014) (enclosing Thomas G. Wilkinson, Jr. & Thomas M. O'Rourke, *Narrowing the Scope of Federal Discovery: The Proposed Amendments to the Federal Rules of Civil Procedure*, Pennsylvania Bar Ass'n Federal Practice Committee (Nov. 2013), arguing that adding proportionality to the scope of discovery may generate inequitable results, unpredictable and wide-ranging interpretations and encourage early and expensive motion practice over the basic parameters of discovery. The authors suggest that the other proposed changes to Rule 26(b)(1) limiting the scope of discovery may encourage litigants to invoke Rule 26(b)(2)(C)(iii) more often).

[36] Comment of Judge Shira A. Scheindlin, U.S. District Court, Southern District of New York, USC-RULES-CV-2013-0002-0398 (Jan. 12, 2014); Comment of Judge Jay C. Zainey, U.S. District Court, Eastern District of Louisiana, USC-RULES-CV-2013-0002-0657 (Feb. 7, 2014); Comment of Judge Michael Simon, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-1703 (Feb. 16, 2014); Comment of Magistrate Judge Dennis Hubel, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-1572 (Feb. 14, 2014); Comment of Judge J. Leon Holmes, U.S. District Court, Eastern District of Arkansas, USC-RULES-CV-2013-0002-0307 (Oct. 22, 2013); Comment of Judge Anna J. Brown, U.S. District Court, District of Oregon, USC-RULES-CV-2013-0002-0934 filed Feb. 12, 2014); Carr, cmt. 0854. *See also* Comment of Hon. William Royal Ferguson (Ret.), Univ. of N. Texas, Dallas College of Law, USC-RULES-CV-2013-0002-1199 (Feb. 13, 2014); Comment of Hon. Nancy Gertner (Ret.), Harvard Law School, on behalf of Legal Momentum, USC-RULES-CV-2013-0002-1220 (Feb. 13, 2014).

[37] *See, e.g.*, Comment of Professor Arthur Miller, New York Univ. School of Law, USC-RULES-CV-2013-0002-0386 (Jan. 6, 2014); Comment of Professor Alan Morrison, George Washington Univ. Law School, USC-RULES-CV-2013-0002-0383 (Jan. 2, 2014); Comment of Professor Paul Carrington, Duke Univ. School of Law, USC-RULES-CV-2013-0002-0366 (Dec. 16, 2013); Hershkoff, cmt. 0622;

reporters for the Advisory Committee on Civil Rules specifically opposed this proposal, including Arthur Miller, the Reporter for the Advisory Committee when the concept of "proportionality" was added to Rule 26 in 1983. Several members of the United States Congress also commented on this particular proposal, and all of them opposed it.[38]

Those who oppose this particular proposal asserted a variety of reasons for their opposition. One of the primary reasons cited for opposing the proposal is that it is not supported by any empirical evidence.[39] Many who oppose this proposal cite the study by the Federal Judicial Center showing that discovery is proportional in the vast majority of cases under the current rules.[40] Some dispute the assertion that proportionality is not applied in most cases, asserting that it is regularly addressed by the parties at the outset of litigation,[41] and that legal research reveals numerous cases applying the current rule.[42] They argue that the reason Rule 26(b)(2)(C)(iii) is not invoked more often is because lawyers have internalized the concept of

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Comment of Professor Suja Thomas, Univ. of Illinois at Urbana-Champaign College of Law, USC-RULES-CV-2013-0002-1185 (Feb. 13, 2014); Comment of Professor Andrew Popper, American Univ. Washington College of Law, USC-RULES-CV-2013-0002-0813 (Feb. 11, 2014); Comment of Professor David Oppenheimer, Univ. of California Berkeley Law, USC-RULES-CV-2013-0002-1307 (Feb. 14, 2014); Comment of Professor Craig Futterman, Univ. of Chicago School of Law, USC-RULES-CV-2013-0002-0952 (Feb. 12, 2014); Comment of Professor Joel Hesch, Liberty Univ. School of Law, USC-RULES-CV-2013-0002-0749 (Feb. 10, 2014). *See also* Comment of Judith Resnik, et al., on behalf of 171 Law Professors, USC-RULES-CV-2013-0002-2078 (Feb. 18, 2014).

[38] Comment of Representative Earl Peter Blumenaur, et al., on behalf of the Oregon Congressional Delegation, USC-RULES-CV-2013-0002-0479 (Jan. 29, 2014); Comment of Representative John Conyers, Jr., et al., on behalf of 12 House Judiciary Committee members, USC-RULES-CV-2013-0002-1127 (Feb. 13, 2014); Comment of Representative Marcia Fudge, et al., on behalf of 4 members of the Congressional Black Caucus, USC-RULES-CV-2013-0002-2109 (Feb. 18, 2014); Comment of Senators Ron Wyden & Jeff Merkley, USC-RULES-CV-2013-0002-1025 (Feb. 12, 2014); Comment of Senator Charles Shumer, USC-RULES-CV-2013-0002-1376 (Feb. 14, 2014); Comment of Representative Peter Welch, USC-RULES-CV-2013-0002-0405 (Jan. 15, 2014).

[39] Ollanick, cmt. 1164; Miller, cmt. 0386; Hershkoff, cmt. 0622; Testimony of Professor Arthur Miller, New York Univ. School of Law, January Hearing, at 36-45; Moore, cmt. 0491; AAJ, cmt. 0372; Kelston, cmt. 1708; Testimony of Johnathan Smith, NAACP-Legal Defense and Education Fund, November Hearing, at 268-73; Comment of Margaret A. Harris, Butler & Harris, USC-RULES-CV-2013-0002-2195 (Feb. 18, 2014), at 2-3; Comment of Jon Greenbaum, Lawyers' Committee for Civil Rights Under Law, USC-RULES-CV-2013-0002-1914 (Feb. 18, 2014), at 5-6; Comment of Barry Weprin, National Association of Shareholder and Consumer Attorneys, USC-RULES-CV-2013-0002-0417 (Jan. 17, 2014), at 4 (hereinafter "NASCAT Supp.").

[40] Miller, cmt. 0386; Hershkoff, cmt. 0622; Testimony of Prof. Suja Thomas, Univ. of Illinois at Urbana-Champaign College of Law, February Hearing, at 95-104; Canty, January Hearing, at 225-32.

[41] Testimony of Jennie Lee Anderson, Andrus Anderson LLP, January Hearing, at 271-83; Comment of Lea Malani Bays, Robbins Geller Rudman & Dowd LLP, USC-RULES-CV-201-1614 (Feb. 14, 2014).

[42] *E.g.*, Moore, cmt. 0491.

proportionality in discovery,[43] resulting in proportional discovery in the vast majority of cases.[44] Several written comments and witnesses stated that they do not oppose the concept of proportionality in discovery, but they argued that there are already sufficient safeguards in the current rule that work to ensure that discovery is not disproportionate.[45] They express concern that the Advisory Committee is proposing to redefine the scope of discovery without a demonstrated need.[46] One bar association called the amendment "an excessive response to an undocumented issue."[47]

Those who oppose this proposal are concerned that it makes the cost-benefit analysis of proportionality a co-equal to relevance in the scope of discovery, whereas it is now a limit on the scope of discoverable, relevant information.[48] They assert that it converts the scope of discovery from its longstanding single principle that embraces anything that is relevant to a claim or defense of a party (or, prior to 2000, to the subject matter) to one that effectively allows discovery of only the relevant evidence that is "proportional to the needs of the case."[49] They argue that this will be interpreted to impose a more restrictive scope of discovery across the board.[50] They assert that while this limit currently must be observed by the parties under Rule 26(g), the rule does not currently impose on the requesting party a requirement that it first demonstrate that the discovery sought is proportional to the needs of the case before being entitled to that information.[51]

Additionally, although the factors proposed to be incorporated into the scope of discovery currently operate as a limitation on the scope of discoverable information, the term

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43 *E.g.*, Moore, cmt. 0491.

44 Hershkoff, cmt. 0622.

45 Testimony of Ralph Dewsnup, Utah Association for Justice, February Hearing, at 23-32; Testimony of J. Bernard Alexander, Alexander Krakow & Glick, February Hearing, at 272-80. *See also* Comment of Daniel Garrie, Law & Forensics LLC, USC-RULES-CV-2013-0002-0281 (Sept. 20, 2013); Hershkoff, cmt. 0622; Comment of William Fedullo, Philadelphia Bar Association, USC-RULES-CV-2013-0002-0995 (Feb. 12, 2014); Comment of Ross Pulkabrek, USC-RULES-CV-2013-0002-1527 (Feb. 14, 2014); NASCAT Supp., cmt. 0417; Comment of Steven Skalet, Mehri & Skalet PLLC, USC-RULES-CV-2013-0002-2130 (Feb. 18, 2014).

46 Miller, cmt. 0386.

47 Philadelphia Bar Ass'n, cmt. 0995.

48 Miller, January Hearing, at 39; Comment of Salvatore Graziano, National Association of Shareholder & Consumer Attorneys, USC-RULES-CV-2013-0002-0173 (Mar. 1, 2013) (hereinafter "NASCAT").

49 Miller, cmt. 0386.

50 Miller, cmt. 0386; Hershkoff, cmt. 0622.

51 Burbank, cmt. 0729; Institute for Justice, cmt. 2092; AAJ, cmt. 0372.

"proportional" is not a standard in the current rule,[52] rather the standard is "whether the burden of the proposed discovery outweighs its likely benefit," which the proposal turns into a *factor* in the "proportionality" test.[53] Under the current rule, "the needs of the case" is a separate factor to be considered by the court,[54] and the current rule requires a court finding that the likely benefit of discovery is outweighed by the burden of producing it.[55]

Professor Arthur Miller wrote and testified that the provision in the 1983 version of the rule upon which the proposed amendment is based "was designed to have limited application."[56] It was not expected to raise an issue in more than a small number of cases and was intended to be "a modest exception to the basic and fundamental principle that all parties should have access to anything relevant to the 'subject matter' of the action."[57] He further testified that the text of the rule creating limitations on the scope of discovery was based on the impressions of the Committee and undocumented assumptions about discovery practice, not empirical evidence.[58] He maintained that moving the text from Rule 26(b)(2)(C)(iii) into the scope of discovery in 26(b)(1) "is not merely a neutral or benign relocation."[59] Other opponents of this amendment agreed that it is not a simple rearranging of the text of the current rule.[60]

Critics are concerned that the proposed rule permits parties to make a unilateral determination about the proportionality of discovery and refuse to provide discovery based on a boilerplate objection,[61] forcing the requesting party to move to compel, creating more disputes

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[52] Comment of Rebecca Kourlis, IAALS, USC-RULES-CV-2013-0002-0489 (Jan. 30, 2014); Philadelphia Bar Ass'n, cmt. 0995; Comment of Norman Siegel, Stueve Siegel Hanson LLP, USC-RULES-CV-2013-0002-1883 (Feb. 17, 2014).

[53] Institute for Justice, cmt. 2092; Zainey, cmt. 0657; Miller, cmt. 0386.

[54] Institute for Justice, cmt. 2092.

[55] *E.g.*, AAJ, cmt. 0372; Comment of Jerome Wesevich, on behalf of Texas RioGrande Legal Aid and 14 other legal aid societies, USC-RULES-CV-2013-0002-1411 (Feb. 11, 2014), at 5 (hereinafter "Texas RioGrande Legal Aid, et al.").

[56] Miller, cmt. 0386; *see also* Miller, January Hearing, at 38.

[57] Miller, cmt. 0386.

[58] Miller, January Hearing, at 38; *see also* Miller, cmt. 0386.

[59] Miller, cmt. 0386.

[60] Harris, cmt. 2195; Thornburg, cmt. 0499; Institute for Justice, cmt. 2092.

[61] Scheindlin, cmt. 0398; Ferguson, cmt. 1199; Institute for Justice, cmt. 2092; Comment of Michael Slack, AAJ Aviation Law Section, USC-RULES-CV-2013-0002-0266 (Aug. 30, 2013); AAJ, cmt. 0372; Comment of Professor Emeritus Louis Jacobs, Mortiz College of Law, USC-RULES-CV-2013-0002-0421 (Jan. 19, 2014); Comment of Herbert Eisenberg, National Employment Lawyers Ass'n/New York, USC-RULES-CV-2013-0002-0535 (Feb. 4, 2014); Comment of W. Bryan Smith, Tennessee Association for Justice, USC-RULES-CV-2013-0002-1123 (Feb. 13, 2014); Comment of Jocelyn Larkin, on behalf of Impact Fund and 20 other legal non-profit organizations, USC-RULES-CV-2013-0002-1413 (Feb. 14, 2014) (hereinafter "Impact Fund, et al. Supp."); Thomas, cmt. 1185; Utah

and more motion practice that will impose greater costs on the courts and the parties before any of them have sufficient information about the facts of the case, decrease cooperation, and delay discovery and the litigation as a whole.[62] Some critics of the proposed amendment predict that it will turn every discovery request into a mini-trial.[63] They argue that these increased transaction costs alone will prevent some parties from securing discovery that is central to their claims or defenses.[64]

A large number of the critics of this proposed amendment highlight a potential problem created by its text. Under the current rule, the requesting party must demonstrate that the discovery is relevant to the claims or defenses, *i.e.*, that it is within the scope of discovery, and the burden of demonstrating that discovery should be limited by the court is on the party opposing discovery.[65] The majority of comments and testimony in opposition to the proposal express deep concern that the proposed rule, as written, will be interpreted to place the burden on the requesting party to demonstrate that the discovery requested is *both* relevant to the claims or defenses *and* proportional to the needs of the case.[66] These comments and witnesses argue that

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Ass'n for Justice, February Hearing, at 28; Testimony of Megan Jones, COSAL, February Hearing, at 212-21.

At least two witnesses who do work for both plaintiffs and defendants testified at the hearing in Dallas that that is precisely what they would do when defending a case. *See* Testimony of John W. Griffin, Marek Griffin & Knaupp, February Hearing, at 57-68; Testimony of Michael C. Smith, Texas Trial Lawyers Association, February Hearing, at 154-63 (hereinafter "TTLA"). *See also* Comment of Michael C. Smith, Texas Trial Lawyers Association, USC-RULES-CV-2013-0002-0639 (Feb. 6, 2014). One attorney from Colorado commented that is precisely his experience under the comparable "proportionality" rule in Colorado's Pilot Project for business cases in the Denver-metro area. *See* Pulkabrek, cmt. 1527.

62 *E.g.*, Scheindlin, cmt. 0398; Wood, cmt. 2112; Jacobs, cmt. 0421; Testimony of Mark P. Chalos, Tennessee Association for Justice, February Hearing, at 104-11; TTLA, February Hearing, at 156-58; AAJ, cmt. 0372; Tennessee Ass'n for Justice, cmt. 1123; Skalet, cmt. 2130; Comment of Ariana Tadler, Milberg LLP, USC-RULES-CV-2013-0002-2173 (Feb. 18, 2014).

63 *See, e.g.*, Comment of Megan Jones, COSAL, USC-RULES-CV-2013-0002-2223 (Feb. 18, 2014), at 5; Hershkoff, cmt. 0622; Comment of John H. Hickey, AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, USC-RULES-CV-2013-0002-0410 (Jan. 16, 2014); Impact Fund, et al. Supp., cmt. 1413; Comment of Beth White, West Virginia Association for Justice, USC-RULES-CV-2014-1994 (Feb. 18, 2014); Comment of J. Douglas Richards, Cohen Milstein Sellers & Toll PLLC, USC-RULES-CV-2013-0002-2142 (Feb. 18, 2014).

64 *E.g.*, Burbank, cmt. 0729.

65 AAJ, cmt. 0372; Zainey, cmt. 0657; NASCAT Supp., cmt. 0417.

66 Scheindlin, cmt. 0398; Zainey, cmt. 0657; Gertner/Legal Momentum, cmt. 1220; Hershkoff, cmt. 0622; Institute for Justice, cmt. 2092; AAJ, cmt. 0372; Comment of Larry E. Coben, AIEG, USC-RULES-CV-2013-0002-0384 (Jan. 3, 2014); NASCAT Supp., cmt. 0417; Tennessee Ass'n for Justice, cmt. 1123; Impact Fund, et al. Supp., cmt. 1413; Bays, cmt. 1614; Comment of William Butterfield, Huasfeld LLP, USC-RULES-CV-2013-0002-2034 (Feb. 18, 2014); Tadler, cmt. 2173; Rossbach, cmt.

proving the discovery is proportional will be especially problematic in asymmetric cases, where most of the relevant information about the facts of case and the "proportionality" factors is in the hands of the party opposing discovery.[67] Several of these comments and witnesses argued that adding "proportionality" to the scope of discovery will undermine substantive federal laws that depend on "private attorneys general" for enforcement.[68] They argue that it will be virtually impossible to prove that the discovery sought is proportional without the discovery.[69]

A large number of the comments opposing this proposal express concern about the "proportionality" test itself, and the lack of guidance about how it is to be applied.[70] These comments argued that the test and its factors are vague,[71] nebulous,[72] abstract[73] and subjective,[74] and that they are weighted to favor large corporate entities and high-wage earners.[75] They argue that the "proportionality" test is incapable of principled application,[76] and they will lead to

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2216. *See also* Miller, cmt. 0386 (arguing that the Committee Note makes clear that the proponent of discovery must show that it is relevant and proportional); Thornburg, cmt. 0499.

[67] Institute for Justice, cmt. 2092; Burbank, cmt. 0729; Ollanick, cmt. 1164; Testimony of David A. Rosen, Rose Klein & Marias LLP, February Hearing, at 262-65; Miller, cmt. 0386; AAJ, cmt. 0372; AIEG, cmt. 0384; NASCAT Supp., cmt. 0417; Tennessee Ass'n for Justice, cmt. 1123.

[68] *E.g.*, Comment of Wade Henderson, Leadership Conference on Civil and Human Rights, USC-RULES-CV-2013-0002-0330 (Nov. 7, 2013); Comment of Peter J. Neufeld et al., on behalf of 7 civil rights litigators, USC-RULES-CV-2013-0002-0226 (Feb. 28, 2013); Comment of Eric Cramer, COSAL, USC-RULES-CV-2013-0002-0140 (Mar. 22, 1013); Comment of Ira Rheingold, National Association of Consumer Advocates & National Consumer Law Center, USC-RULES-CV-2013-0002-1913 (Feb. 18, 2014); Comment of Joanne S. Faulkner, USC-RULES-CV-2013-0002-0357 (Dec. 10, 2013); Testimony of Susan M. Rotkis, Consumer Litigation Associates PC, February Hearing, at 296-307.

[69] Griffin, February Hearing, at 60-61; Ollanick, cmt. 1164; Scheindlin, cmt. 0398.

[70] Scheindlin, cmt. 0398; Singer, cmt. 135; Texas RioGrande Legal Aid, et al., cmt. 1411.

[71] Pulkabrek, cmt. 1527 (commenting based on experience under Colorado Pilot Project, which uses a "proportionality" standard for discovery); AAJ Aviation Law Section, cmt. 0266; West Virginia Ass'n for Justice, cmt. 1994.

[72] Comment of Thomas Sobol, et al., Hagens Berman Sobol Shapiro LLP, USC-RULES-CV-2013-0002-0205 (Mar. 1, 2013); AAJ, cmt. 0372; West Virginia Ass'n for Justice, cmt. 1994.

[73] Comment of Richard T. Seymour, Law Office of Richard T. Seymour PLLC, USC-RULES-CV-2013-0002-2209 (Feb. 18, 2014).

[74] Wood, cmt. 2112; Pulkabrek, cmt. 1527; AAJ Aviation Law Section, cmt. 0266; Butterfield, cmt. 2034.

[75] *See, e.g.*, Wood, cmt. 2112; Comment of Victor M. Glasberg, Victor M. Glasberg & Associates, USC-RULES-CV-2013-0002-0525 (Feb. 3, 2014); Skalet, cmt. 2130.

[76] *E.g.*, Holmes, cmt. 0307; West Virginia Ass'n for Justice, cmt. 1994.

unpredictable[77] and inconsistent[78] results that will be virtually unreviewable by a court of appeals.[79]

There was significant concern about limiting discovery in cases based on "the amount in controversy," especially in federal question cases, where the case is in federal court because of a congressional determination that certain rights should be protected by federal law regardless of the amount in controversy.[80] Critics of the proposed amendment also argued that "the amount in controversy" is subjective and constantly in dispute.[81] Some of those who opposed this proposal argued that it is "fundamentally inconsistent with the rule of law and the principle that the courts are open to the least among us."[82] They argue the "proportionality" test creates classes of litigants, based on their resources and the amount in controversy, providing less discovery to (and thus less protection of the rights of) those with fewer resources and low or no monetary damages.[83] Even though the proposed amendment includes consideration of the importance of the issues at stake in the action, there is concern that this factor is subjective[84] and will invite a merits determination before any discovery is had,[85] and will be inconsistently applied.[86]

There was also concern that consideration of "the parties' resources" will insulate wrongdoers who lose money or go bankrupt because of their misdeeds,[87] and does not clearly define "resources."[88] There was concern that "the importance of the discovery in resolving the

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77 Miller, cmt. 0386; Philadelphia Bar, cmt. 0995; Wood, cmt. 2112.

78 AAJ Aviation Law Section, cmt. 0266; AIEG, cmt. 0384; Texas RioGrande Legal Aid, et al., cmt. 1411.

79 Seymour, cmt. 2209.

80 AAJ, cmt. 0372; AIEG, cmt. 0384; Texas RioGrande Legal Aid, et al., cmt. 1411; Lawyers' Committee for Civil Rights Under Law, cmt. 1914; Skalet, cmt. 2130; Seymour, cmt. 2209.

81 Scheindlin, cmt. 0398; AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, cmt. 2173; Tennessee Ass'n for Justice, cmt. 1123.

82 Fitzpatrick, cmt. 0252.

83 NASCAT, cmt. 0173; AIEG, cmt. 0384; Jacobs, cmt. 0421; Glasberg, cmt. 0525; Comment of Steve Garner, Strong Garner Bauer PC, USC-RULES-CV-2013-0002-0916 (Feb. 12, 2014); Lawyers' Committee for Civil Rights Under Law, cmt. 1914; Seymour, cmt. 2209.

84 Wood, cmt. 2112; AAJ, cmt. 0372; AAJ Motor Vehicle Collision, Highway, and Premises Liability Section, cmt. 2173; Comment of Joseph Garrison, Garrison Levin-Epstein Richardson Fitzgerald & Pirrotti, USC-RULES-CV-2013-0002-1147 (Feb. 14, 2014); Impact Fund, et al. Supp., cmt. 1413; West Virginia Ass'n for Justice, cmt. 1994; Skalet, cmt. 2130.

85 Impact Fund, et al. Supp., cmt. 1413; Richards, cmt. 2142.

86 *E.g.*, Skalet, cmt. 2130, at 3.

87 Garner, cmt. 0916; Comment of Jonathan Marcus, U.S. Commodity Futures Trading Commission ("CFTC"), USC-RULES-CV-2013-0002-1366 (Feb. 14, 2014).

88 Garner, cmt. 0916; West Virginia Ass'n for Justice, cmt. 1994.

issue" is not sufficiently clear about what "issue" the discovery must be important to,[89] and is a factor that is particularly hard to know or demonstrate before seeing the discovery.[90] Finally, many commenters argued that the question of "whether the burden or expense of discovery outweighs its likely benefit," which is the current standard under Rule 26(b)(2)(C)(iii), will also be difficult to know or show early in the litigation, before discovery occurs.[91] This factor was criticized as giving protection to large entities who create a lot of information that is relevant to the claims against them,[92] and protecting litigants who maintain archives of ESI in outdated formats that make search and collection expensive.[93]

2. Support for the Proposal

Less than one-third of the written comments that specifically addressed this proposal supported it. Approximately 30 witnesses testified in favor of this specific proposal.

The comments and testimony in support of the proposal came in large part from corporations, their legal counsel, and the organizations that represent their interests.[94] They were joined by other attorneys who frequently represent governments, their agencies and agents as defendants in civil litigation,[95] as well as a minority of judges and academics, and a minority of the uncategorized comments. Some bar groups and some individual members of bar groups also supported the proposal. While the U.S. Equal Employment Opportunity Commission (ordinarily a plaintiff in federal civil litigation) and the NYS Bar Association Section expressed support for proportionality, they both expressed reservations about it and their support for the proposal was tentative and cautious.[96]

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89 Morrison, cmt. 0383.

90 AAJ, cmt. 0372; West Virginia Ass'n for Justice, cmt. 1994; Skalet, cmt. 2130.

91 AAJ, cmt. 0372.

92 Garner, cmt. 0916.

93 AAJ, cmt. 0372; Law & Forensics LLC, cmt. 0281; *See also* Bays, cmt. 1614.

94 *See* Testimony of Michael J. Harrington, Eli Lilly & Co., February Hearing, at 125 ("[T]he proposed rules enjoy overwhelming and widespread support in the corporate community and by general counsels.").

95 Comment of Stuart Delery, U.S. Department of Justice, Civil Division ("DOJ"), USC-RULES-CV-2013-0002-0459 (Jan. 28, 2014); Comment of Noah G. Purcell, Washington State Attorney General's Office, USC-RULES-CV-2013-0002-0677 (Feb. 10, 2014); Testimony of Tom Horne, Attorney General of Arizona, January Hearing, at 232-35; Comments Lawrence Kahn, on behalf of the City of New York Law Department, City of Chicago, City of Houston, and the International Municipal Lawyers Ass'n, USC-RULES-CV-2013-0002-1554 (Feb. 14, 2014) (hereinafter "New York Law Department et al.").

96 Testimony of P. David Lopez, U.S. Equal Employment Opportunity Commission, January Hearing, at 68-78; Testimony of Michael C. Rakower, New York State Bar Association Commercial and Federal Litigation Section, November Hearing, at 287-92; Comment of Gregory K. Arenson, New York

Those who expressed support for the amendment did so because they believe the scope of discovery under the current rule is "overly broad"[97] and "anything goes,"[98] and is "a fundamental cause of the high costs and burdens of modern discovery"[99] Their concerns were primarily with the costs of preserving electronically stored information ("ESI"), but also with the costs of collecting, reviewing, and producing ESI.[100] Many of the comments in support of this proposal made general assertions that the costs of discovery drive parties to settle claims regardless of their merit[101] and is used as a tactic to harass and extort.[102] Many of them relied heavily on a

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State Bar Association Commercial and Federal Litigation Section ("NYS Bar Section"), USC-RULES-CV-2013-0002-0303 (Oct. 25, 2013).

97 Comment of Cory Andrews, Washington Legal Foundation, USC-RULES-CV-2013-0002-0285 (Oct. 7, 2013); Comment of Edward Miller, Boehringer Ingelheim, USC-RULES-CV-2013-0002-0399 (Jan. 13, 2014); Comment of Vickie Turner, Wilson Turner Kosmo LLP. USC-RULES-CV-2013-0002-0450 (Jan. 24, 2014).

98 Comment of John Beisner, Skadden Arps Slate Meagher & Flom LLP, USC-RULES-CV-2013-0002-0382 (Jan. 2, 2014), Comment of U.S. Chamber Institute for Legal Reform ("ILR"), USC-RULES-CV-2013-0002-0328 (Nov. 7, 2013).

99 E. Miller, cmt. 0399; Comment of Alex Dahl, Lawyers for Civil Justice ("LCJ"), USC-RULES-CV-2013-0002-0267 (Aug. 30, 2013); Comment of J. Mitchell Smith, International Association of Defense Counsel ("IADC"), USC-RULES-CV-2013-0002-0390 (Jan. 7, 2014).

100 Comment of David Howard, Microsoft Corp., USC-RULES-CV-2013-0002-1222 (Feb. 14, 2014); Comment of Eric Hemmendinger, Shawe Rosenthal LLP, USC-RULES-CV-2013-0002-0351 (Dec. 4, 2013); Comment of Malini Morrthy, Pfizer Inc., USC-RULES-CV-2013-0002-0327 (Nov. 7, 2013); NYS Bar Section, cmt. 0303; Comment of Nina Gussack, Pepper Hamilton LLP, USC-RULES-CV-2013-0002-0388 (Jan. 6, 2014); IAALS & ACTL, cmt. 0473; Washington State Attorney General's Office, cmt. 0677; Comment of Mark S. Stewart, Ballard Spahr LLP, USC-RULES-CV-2013-0002-0412 (Jan. 16, 2014); Comment of Donald Bunnin, Allergan Inc. USC-RULES-CV-2013-0002-0436 (Jan. 22, 2014); LCJ Supp., cmt. 0540 (summarizing testimony and comments on this subject); Comment of Michael Klein, Altria & Philip Morris USA, USC-RULES-CV-2013-0002-0684 (Feb. 7, 2014); Comment of John A. Barbour, Buchanan Ingersoll & Rooney P.C., USC-RULES-CV-2013-0002-1070 (Feb. 13, 2014); Merck & Co., cmt. 1073; Comment of Dante Stella, Dykema Gossett PLLC, USC-RULES-CV-2013-0002-1585 (Feb. 14, 2014); Comment of Michael Lackey, Mayer Brown LLP, USC-RULES-CV-2013-0002-2182 (Feb. 18, 2014); ILR, cmt. 0328; Comment of Corey Goldsand, Cardinal Health Inc. USC-RULES-CV-2013-0002-1410 (Feb. 14, 2014); Comment of John R. Kouris, Defense Research Institute ("DRI"), USC-RULES-CV-2013-0002-0404 (Jan. 15, 2014); New York Law Department, et al., cmt. 1554; Eli Lilly & Co., February Hearing, at 122-24; Testimony of Thomas Kelly, Pfizer Inc., February Hearing, at 164-72; Testimony of David Werner, Shell Oil Co., February Hearing, at 185-93.

101 Comment of Ralph Spooner, USC-RULES-CV-2013-0002-0423 (Jan. 20, 214); Comment of Kaspar Stoffelmayr, Bayer Corp., USC-RULES-CV-2013-0002-0309 (Oct. 25, 2013); Comment of Joseph Goldstein, USC-RULES-CV-2013-0002-0478 (Jan. 29, 2014); Comment of Bradford Berenson, General Electric Co., USC-RULES-CV-2013-0002-0599 (Feb. 5, 2014); Testimony of Dan Troy, GlaxoSmithKline, November Hearing, at 123-35; Testimony of Jack B. McCowan, Jr., Gordon & Rees LLP, November Hearing, at 6-14; Testimony of John C.S. Pierce, Butler Pappas Weihmuller Katz Craig, November Hearing, at 22-26; Testimony of David R. Cohen, Reed Smith LLP, November Hearing, at 32-

report on litigation costs of Fortune 200 companies.[103] Some of them relied on Nicholas M Pace and Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (RAND 2012),[104] which was based on information provided by eight very large companies. Many companies provided internal company information about the amount of ESI they preserve and how much they spend on preservation, as well as collection, review, and production of ESI.[105] This internal company data, however, was limited, in that the examples generally did not provide information about the stakes involved in the litigation that the companies were party to, whether the information preserved would have been preserved for another purpose or for the companies' own claims or defenses, or whether information learned in discovery led to settlement of valid claims, saving the companies trial costs.

Those who support this proposed amendment believe that this particular change in the scope of discovery has the potential to reduce the amount of discovery and the burden on parties responding to discovery requests,[106] by cabining purportedly "excessive discovery" and indirectly reducing the burden of "over-preservation."[107] They contend that the provisions currently in Rule 26(b)(2)(C) have failed to achieve their purpose and are commonly ignored by

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42; DRI, cmt. 0404; Comment of David R. Cohen, Reed Smith LLP, USC-RULES-CV-2013-0002-2174 (Feb. 18, 2014); Testimony of Bradford Berenson, General Electric Co., February Hearing, at 112-20.

[102] Comment of JoAnne Deaton, Rhodes Hieronymus PLLC, USC-RULES-CV-2013-0002-0460 (Jan. 28, 2014); Hemmendinger, cmt. 0351; Florida Justice Reform Institute, cmt. 0634; GlaxoSmithKline, November Hearing, at 133.

[103] LCJ, Litigation Cost Surveys for Major Companies (2010) (cited by Merck & Co., cmt. 1073; Comment of Richard T. Fulton, Alston & Bird LLP, USC-RULES-CV-2013-0002-1145 (Feb. 14 2014); Comment of Steven Weinstein, Farmers Inc., USC-RULES-CV-2013-0002-1259 (Feb. 14, 2014); Comment of Edward Collins, Allstate Insurance Co., USC-RULES-CV-2013-0002-1446 (Feb. 14, 2014); Cohen, cmt. 2174; Comment of Michael Drew, Jones Walker LLP, USC-RULES-CV-2013-0002-1903 (Feb. 18, 2014); Comment of Michael M. Walker, Avnet Inc., USC-RULES-CV-2013-0002-2259 (Feb. 21, 2014)).

[104] Comment of Evan Stolove, Fannie Mae, USC-RULES-CV-2013-0002-1360 (Feb. 14, 2014); Drew, cmt. 1903.

[105] Altria, cmt. 0684; Comment of Pamela Davis, Google Inc., USC-RULES-CV-2013-0002-0922 (Feb. 12, 2014); Microsoft Corp., cmt. 1222; Comment of Joseph Braunreuther, Johnson & Johnson, USC-RULES-CV-2013-0002-1474 (Feb. 14, 2014); Comment of Debra K. Broussard, Anadarko Petroleum Co., USC-RULES-CV-2013-0002-2240 (Feb. 19, 2014); Comment of Dan Troy, GlaxoSmithKline, USC-RULES-CV-2013-0002-2128 (Feb. 18, 2014); LCJ Supp., cmt. 0540; Comment of Thomas Kelly, Pfizer Inc., USC-RULES-CV-2013-0002-1491 (Feb. 14, 2014); Comment of Peter Oesterling, Nationwide Mutual Insurance Co., USC-RULES-CV-2013-0002-1457 (Feb. 14, 2014); Cardinal Health, cmt. 1410; Testimony of Timothy A. Pratt, on behalf of Federation of Defense and Corporate Counsel, January Hearing, at 26-36; Testimony of Steven J. Twist, Services Group of America, January Hearing, at 243-50.

[106] Pfizer, cmt. 0327.

[107] Comment of Kenneth Withers, Steering Committee of Working Group 1 of The Sedona Conference ("Sedona WG1"), USC-RULES-CV-2013-0002-0346 (Nov. 25, 2014); Altria, cmt. 0684.

the parties and by judges.[108] Several of the comments in support of this proposed amendment believe that it, and potentially other proposed amendments, will rectify an "imbalance" of the "asymmetrical costs and burdens" of discovery,[109] especially in cases where access to relevant information is asymmetrical, and thus the burden of producing discovery is asymmetrical.[110]

Some of those who support the proposal assert that it simply rearranges the text to make proportionality more prominent and will just force the parties and the courts to discuss and consider proportionality at the outset of discovery, while developing discovery tailored to the needs of each case.[111] Some comments support the rule because it puts the proportionality analysis in the hands of the parties, "ensuring the producing party has the ability to resist 'fishing expeditions.'"[112] Some supporters, including the association of Federal Magistrate Judges who will frequently be called upon to rule on proportionality, expressly advocate or believe that the rule should be interpreted to place the burden of showing that the discovery sought is proportional on the requesting party.[113] Others argue that the proposed amendment will not change the rule or its application either in substance or in practice,[114] but some argue that even if it did, putting the burden on the requesting party is justified by the costs and burdens of electronic discovery.[115] At least some who support the proposal think that incorporating the

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[108] ILR, cmt. 0328; Bayer, cmt. 0309; Washington Legal Foundation, cmt. 0285; Testimony of Jonathan M. Redgrave, Redgrave LLP, November Hearing, at 70-83; LCJ, cmt. 0267; Comment of David Kessler, Fulbright & Jaworski LLP, USC-RULES-CV-2013-0002-0407 (Jan. 15, 2014); Testimony of Donald J. Lough, Ford Motor Co., February Hearing, at 248-54.

[109] Comment of Mark Behrens, Shook Hardy & Bacon LLP, USC-RULES-CV-2013-0002-0314 (Oct. 29, 2013); Comment of Robert DeBerardine, Sanofi, USC-RULES-CV-2013-0002-0681 (Feb. 10, 2014); Comment of David Royster, Zimmer, Inc., USC-RULES-CV-2013-0002-1324 (Feb. 14, 2014); Allstate Insurance Co., cmt. 1446.

[110] Cohen, cmt. 2174; Gussack, cmt. 0388; Testimony of Kaspar J. Stoffelmayr, Bayer Corp., January Hearing, at 88-96; Microsoft Corp., cmt. 1222; Stella, cmt. 1585; Testimony of Paul Weiner, Littler Mendleson PC, January Hearing, at 177-86.

[111] Testimony of Marc E. Williams, Lawyers for Civil Justice, November Hearing, at 245; Kessler, cmt. 0407; Testimony of J. Michael Weston, Defense Research Institute ("DRI"), February Hearing, at 89-93; DOJ, cmt. 0459.

[112] Merck & Co., cmt. 1073.

[113] *E.g.*, Comment of Federal Magistrate Judges Association, USC-RULES-CV-2013-0002-0615 (Feb. 7, 2014); Comment of Philip J. Favro, USC-RULES-CV-2013-0002-0298 (Oct. 25, 2013); Fannie Mae, cmt. 1360.

[114] Testimony of Alexander R. Dahl, Lawyers for Civil Justice, November Hearing, at 191-98; Testimony of John Beisner, Skadden Arps, January Hearing, at 61-67; Pfizer, February Hearing, at 167-68; Ford Motor Co., February Hearing, at 252.

[115] *E.g.*, Comment of Rex Darrell Berry, Berry & Block LLP, USC-RULES-CV-2013-0002-0669 (Feb. 7, 2014); Comment of David T. Bellaire, Financial Services Institute, USC-RULES-CV-2013-0002-1101 (Feb. 13, 2014); Comment of Steven V. Gold, Manufacturers Alliance for Productivity and Innovation, USC-RULES-CV-2013-0002-1487 (Feb. 18, 2014).

"proportionality" factors from Rule 26(b)(2)(C)(iii) into the scope is likely to increase the frequency of objections to discovery based on lack of proportionality and increase satellite litigation regarding application of the proportionality requirement,[116] while others doubt this result.[117] Several comments and witnesses argue that the opposition to this proposal are the best evidence of the need for it.[118]

3. Bar Associations Exemplify the Lack of Consensus on "Proportionality"

Very few cross-sectional bar associations commented on the proposed rule amendments at all, and even fewer commented on this specific proposal. Only about 15 cross-sectional bar associations submitted comments, and a little more than half of them supported this particular proposal.[119] Four bar associations or sections thereof opposed this proposal,[120] and others offered no comments on it.[121] Several of these organizations that expressed support as a group also noted that a minority of their members opposed the proposal or included the dissenting views of some

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[116] Comment of Magistrate Judge Craig B. Shaffer, U.S. District Court, District of Colorado, USC-RULES-CV-2013-0002-0289 (Oct. 15, 2013), at 189-97; NYS Bar Section, cmt. 0303; New York State Bar Ass'n Commercial and Federal Litigation Section, November Hearing, at 287-92; Ford Motor Co., February Hearing, at 253; Merck & Co., cmt. 1073.

[117] *E.g.*, Testimony of John H. Martin, Thompson & Knight LLP, February Hearing, at 175; Cohen, cmt. 2174.

[118] Testimony of Gilbert S. Keteltas, Baker Hostetler, February Hearing, at 254-55; LCJ Supp., cmt. 0540.

[119] Comment of Peter J. Mancuso, Nassau County Bar Association, USC-RULES-CV-2013-0002-0487 (Jan. 31, 2014); NYS Bar Section, cmt. 0303; IAALS & ACTL, cmt. 0473; Federal Courts Committee of the NYCLA, USC-RULES-CV-2013-0002-2072 (Feb. 18, 2014); Comment of Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, USC-RULES-CV-2013-0002-0355 (Dec. 7, 2013); Comment of Association of the Bar of the City of New York, USC-RULES-CV-2013-0002-1054 (Feb. 12, 2014); Comment of Pennsylvania Bar Association, USC-RULES-CV-2013-0002-0350 (Dec. 3, 2013); Comment of State Bar of Michigan Committee on United States Courts, USC-RULES-CV-2013-0002-1290 (Feb. 14, 2014).

[120] Litigation Section, Los Angeles County Bar Association, USC-RULES-CV-2013-0002-0475 (Jan. 29, 2014); Los Angeles County Bar Association Antitrust & Unfair Business Practices Section, USC-RULES-CV-2013-0002-0462 (Jan. 28, 2014); Philadelphia Bar, cmt. 0995; Comment of Tennessee Bar Association, USC-RULES-CV-2013-0002-2015 (Feb. 18, 2014).

[121] Comment of State Bar of California Committee on Federal Courts, USC-RULES-CV-2013-0002-1552 (Feb. 14, 2014); Comment of Federal Bar Council, USC-RULES-CV-2013-0002-2241 (Feb. 19, 2014); Comment of Federal Litigation Section of the Federal Bar Association, USC-RULES-CV-2013-0002-1109 (Feb. 13, 2014).

of their members,[122] and a couple of them proposed comments to add to the Committee Note to address the concerns of their members.[123]

Neither the American Bar Association nor its sections endorsed or opposed this (or any) specific proposal.[124] While certain "individual members of the Leadership of the ABA Section of Litigation" filed comments and sent a representative to testify in support of this specific proposal, only one signatory on each of their two written comments regularly represents individual plaintiffs in civil litigation. As a longstanding member of the ABA Section of Litigation noted in his comments, neither the ABA nor the Section of Litigation supports or opposes the proposed amendment.[125] He wrote, "The lack of consensus on these divisive proposals speaks louder than the comments submitted by [the individual members of the Leadership of ABA Section of Litigation]."[126]

Other cross-sectional bar groups and their members also submitted conflicting comments. While the Institute for the Advancement of the American Legal System ("IAALS") as an entity submitted comments in favor of this proposal,[127] when IAALS reported on a forum that it held on the proposed amendments, the cross-sectional group that attended could not reach a consensus in support of this proposed amendment.[128] While the Steering Committee of Working Group 1 of The Sedona Conference submitted comments in support of this proposal,[129] both the current chair of that working group and the chair emeritus of that group testified that the group itself could not reach consensus,[130] and that the Steering Committee itself could not really reach consensus.[131]

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122 *See* Federal Courts Committee of the NYCLA, cmt. 2072; NYS Bar Section, cmt. 0303; Ass'n of the Bar of the City of New York, cmt. 1054.

123 Pennsylvania Bar Ass'n, cmt. 0350; Ass'n of the Bar of the City of New York, cmt. 1054.

124 Comment of Todd A. Smith, Powers Rogers & Smith PC, USC-RULES-CV-2013-0002-2214 (Feb. 18, 2014); Comment of William R. Bay, on behalf of 32 members of the leadership of the ABA Section of Litigation, USC-RULES-CV-2013-0002-0141 (Mar. 13, 2013); Comment of Don Bivens, on behalf of 23 members of the leadership of the ABA Section of Litigation, USC-RULES-CV-2013-0002-0673 (Feb. 10, 2014); *see also* Comment of Michael Reed, on behalf of 5 members of the ABA Standing Committee on Federal Judicial Improvements, USC-RULES-CV-2013-0002-0409 (Jan. 16, 2014).

125 Smith, cmt. 2214.

126 Smith, cmt. 2214, at 2

127 IAALS & ACTL, cmt. 0473.

128 IAALS, cmt. 0489.

129 Sedona WG1, cmt. 0346.

130 Testimony of Ariana Tadler, Milberg LLP, February Hearing, at 331-32; *See also* Sedona WG1, cmt. 0346, at 2; Testimony of Conor Crowley, Sedona Conference Working Group on Electronic Document Retention and Production, February Hearing, at 281.

131 Tadler, February Hearing, at 332.

Notably, two members of that very steering committee filed comments opposing this specific proposal.[132]

4. Proposed Alternatives

A number of the opponents to this proposal have proposed alternatives to incorporating "proportionality" into the definition of the scope of discovery. Professor Arthur Miller and the Center for Constitutional Litigation, P.C., suggested that explicit consideration of proportionality of discovery be incorporated into Rule 16 for the parties and the courts to address at the scheduling conference.[133] Others suggested that the "proportionality" factors could be incorporated into the items for discussion at the Rule 26(f) conference.[134] Several comments and witnesses argued that the Committee should await the results of several pilot projects throughout the country aimed at reducing litigation costs before recommending a major rule change of this sort.[135]

5. Proposed Amendments

Several written comments and witnesses suggested additional amendments if the Advisory Committee recommends that "proportionality" be incorporated into the definition of the scope of discovery. For instance, Professor Suja Thomas suggested an amendment to Rule 37(a)(1) to state that the party opposing production bears the burden of showing that the discovery should not be produced.[136] The Center for Constitutional Litigation, P.C., and the Institute for Justice suggested that the rule incorporate language similar to that contained in Rule 26(b)(2)(B) to explicitly put the burden of showing why the discovery sought is not proportional to the needs of the case.[137] These comments and testimony urge explicit rule text regarding burden on proportionality because Supreme Court precedent suggests that the Committee Notes do not carry much, if any, weight.[138] Other comments also requested that language be added to the text of the rule to clarify who has the burden of showing that discovery is proportional/disproportionate,[139] and some urged that language clarifying that the propounding

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132 Butterfield, cmt. 2034; Tadler, cmt. 2173.

133 Comment of Andre M. Mura, Center for Constitutional Litigation PC ("CCL"), USC-RULES-CV-2013-0002-1535 (Feb. 14, 2014); Miller, cmt. 0386.

134 Hershkoff, cmt. 0622.

135 *E.g.*, Lawyers' Committee for Civil Rights Under Law, cmt. 1914; Garrison, cmt. 1147; Sellers, November Hearing, at 308.

136 Thomas, cmt. 1185.

137 CCL, cmt. 1535; Institute for Justice, cmt. 2092.

138 Thomas, cmt. 1185; CCL, cmt. 1535.

139 Zainey, cmt. 0657; Scheindlin, cmt. 0398; Thornburg, cmt. 0499; Testimony of Lea Malani Bays, Robbins Geller Rudman & Dowd LLP, January Hearing, at 283-96; Anderson, January Hearing, at 280-81.

party does not shoulder the burden to demonstrate proportionality should at least be included in the Committee Note.[140]

A couple of comments suggested that the proposed rule be revised to eliminate the words "proportional to," and substitute the words "consistent with" the needs of the case.[141] Several comments suggested moving "the amount in controversy" lower on the list of factors to be considered or deleting it altogether.[142] Others suggested the rule be modified to account for potential windfalls to businesses and entities who maintain archives of ESI in outdated formats, saying that they should not be protected from costs of discovery of their own making.[143]

Even those who support the proposal have advocated various changes to the text of the published proposal. At least one comment suggested that the rule include language that clearly allows judges to order additional discovery or restrict discovery as a case progresses.[144] A few supporters advocated eliminating "the parties' resources" from the factors to be considered.[145] At least one witness suggested eliminating "the amount in controversy" or not listing it as the first factor to be considered.[146]

The Department of Justice, Civil Division, recommended the addition of text to the Committee Note clarifying that the placement of the "proportionality" text in Rule 26(b)(1) does not modify the scope of permissible discovery.[147] Critics of the proposed amendment requested a similar amendment.[148] DOJ also proposed the addition of language to the Committee Note saying that in applying the "proportionality" factors, the parties and the court will continue to recognize that review of factors such as the amount in controversy and the parties' resources must be balanced against other factors, including the importance of the issues, which takes into account considerations of the public interest and, in appropriate cases, the impact of discovery on the public fisc.[149] The New York State Bar Association Commercial and Federal Litigation Section

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140 Butterfield, cmt. 2034; Jacobs, cmt. 0421, at 3-4.

141 *E.g.*, IAALS, cmt. 0489.

142 *E.g.*, IAALS, cmt. 0489; Testimony of Joseph D. Garrison, National Employment Lawyers Association, January Hearing, at 21-22.

143 Law & Forensics LLC, cmt. 0281. *See also* Bays, cmt. 1614.

144 Comment of Mark Harrington, Guidance Software, USC-RULES-CV-2013-0002-1519 (Feb. 14, 2014), at 2.

145 Keteltas, February Hearing, at 258-59; Comment of Edward Rippey, Covington & Burling LLP, USC-RULES-CV-2013-0002-1157 (Feb. 13, 2014), at 2.

146 Testimony of Maja Eaton, February Hearing, at 36.

147 DOJ, cmt. 0459.

148 *E.g.*, Comment of Matthew Lango, National Employment Lawyers Association of Illinois, USC-RULES-CV-2013-0002-0635 (Feb. 6, 2014), at 11; Comment of Rebecca Cappy, National Employment Lawyers Association, USC-RULES-CV-2013-0002- 0304 (Mar. 1, 2013), at 11-12.

149 DOJ, cmt. 0459.

also suggested that the Committee Note be amended to clarify that existing case law interpreting and applying Rule 26(b)(2)(C)(iii) would apply to the "proportional" language proposed to be added to Rule 26(b)(1).[150]

The Association of the Bar of the City of New York suggests numerous revisions to the Committee Note to address the concerns of its members who oppose the proposal, including: that the Committee Note make explicit that the addition of "proportionality" to the scope of discovery is not intended to alter or address existing law on the question of which party should bear the burden on any issue that may arise in a discovery dispute; adding language to the Committee Note to make explicit that the purpose of adding "proportionality" to the scope is not to tilt the playing field in favor of or against any set of parties, and to make the point that, properly applied, proportionality may protect large corporations as well as individuals from disproportionate discovery burdens; adding language to the Committee Note stating that adding "proportionality" to the scope is not intended to effectuate an across-the-board reduction in the scope of discovery, and in many cases will have no impact at all; reemphasizing in the Note that "proportionality" involves the consideration of many factors, and not simply the amount in controversy; and clarifying that a determination based on proportionality at the outset of litigation is subject to reconsideration later in the litigation.[151]

Professor Morrison argued that "proportionality," if it is to be incorporated into 26(b)(1), should exist in its own sentence, after the sentence defining the scope of discovery as information "relevant to a claim or defense of any party." The new sentence "should be directed to judges passing on an objection that a discovery request is unduly burdensome."[152] It should list the factors to be considered and it should be clear that the burden of showing that a request is disproportionately burdensome should be on the objecting party. Professor Morrison also suggests that the factors be further clarified, as they appear to be duplicative, confusing and unclear.[153]

A significant number of those who wrote or testified in support of the proposal argued that the rule should be even narrower, limiting the scope of discovery to relevant *and material* information.[154]

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150 NYS Bar Section, cmt. 0303, at 26.

151 Ass'n of the Bar of the City of New York, cmt. 1054.

152 Morrison, cmt. 0383

153 *Id.*

154 *E.g.*, LCJ, cmt. 0267; IADC, cmt. 0390; Stewart, cmt. 0412; Altria, cmt. 0684; Fulton, cmt. 1145; Covington & Burling LLP, cmt. 1157; Comment of Michael Harrington, Eli Lilly & Co., USC-RULES-CV-2013-0002-1264 (Feb. 14, 2014); Comment of Timothy Pratt, Boston Scientific Corp., USC-RULES-CV-2013-0002-1389 (Feb. 14, 2014).

B. Eliminating discovery relevant to the "subject matter"

In 2000, the definition of the scope of discovery was limited from nonprivileged matter that is relevant to "the subject matter" of the action to only that nonprivileged matter relevant to "any party's claim or defense." However, "the subject matter" of the action defined the scope of discovery for 62 years, and the revised rule allowed courts to order discovery of any matter relevant to the subject matter involved in the action "[f]or good cause."

A proposed amendment to Rule 26(b)(1) removes "the subject matter involved in the action" from the scope of discovery. The Advisory Committee states, "Discovery should be limited to the parties' claims or defenses," and the Committee Note to the rule states "Proportional discovery relevant to any party's claim or defense suffices."[155] The Advisory Committee Report and the Committee Note suggest that if any of that discovery supports new claims or defenses, amendment of the pleadings may be allowed.

This specific proposal elicited far fewer comments than the proposal to add "proportionality" to the scope of discovery. Approximately 10% of the written comments addressed this specific proposal. Approximately ten witnesses addressed this specific proposal in their testimony. Of the comments that specifically addressed this specific proposal, approximately two-thirds supported the proposal. Eight of the ten witnesses who specifically addressed this proposal expressed support.

There were a variety of reasons offered for supporting this proposed amendment. Some supporters argued that the provision allowing discovery of information relevant to the "subject matter" is rarely relied upon,[156] and that parties rarely, if ever, actually need discovery of such information.[157] They believe that if discovery focuses on the claims and defenses, the parties won't engage in unnecessary discovery.[158] Although the current rule already limits discovery to the claims and defenses of the parties, those who support this proposed amendment assert that the availability of discovery of information relevant to "the subject matter" "has been a driving force behind the explosion in the scope of discovery."[159] They lament the current rule that "permits discovery of any information relevant to 'the subject matter involved in the action,'"[160] a standard they say is "overbroad,"[161] "amorphous,"[162] "ill-defined and troublesome,"[163] and "a

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155 Proposed Amendments at 297.

156 Ass'n of the Bar of the City of New York, cmt. 1054.

157 Philadelphia Bar, cmt. 0995; *See also* Kessler, cmt. 0407.

158 Philadelphia Bar, cmt. 0995; Ass'n of the Bar of the City of New York, cmt. 1054; Merck & Co., cmt. 1073.

159 Merck & Co., cmt. 1073 (internal quotation and citation omitted); *See also* IADC, cmt. 0390.

160 ILR, cmt. 0328.

161 IADC, cmt. 0390.

162 LCJ, cmt. 0267; Fulton, cmt. 1145.

source of indeterminacy."[164] They support the proposal because it "provides a clearer standard of relevance,"[165] and would "simplify the discovery process."[166] Supporters believe that this proposed amendment would reduce the amount of information subject to discovery,[167] and would thus reduce the costs of discovery[168] and reduce "over-preservation"[169]

Opponents of this proposal think that the Committee's justification for the abrogation of language that has been a part of the scope of discovery for more than seventy-five years is inadequate.[170] As with the proposal to add "proportionality" to the definition of the scope of discovery, opponents to this proposed amendment cite the lack of any empiric justification that the proposal is needed,[171] or assert it will produce more good than harm.[172]

Several comments point out that under the current rule, parties generally don't have to parse whether the discovery sought is relevant to the subject matter or more strictly to the claims and defenses, as there is little incentive to fight over this distinction.[173] They argue removing this "safety valve" will give defendants and contentious parties the incentive to press the relevance point much harder, forcing judges to decide relevance more often, often at an early stage of the litigation when relatively little is known about the basis of the claims and defenses.[174] They assert that this amendment will create incentives for defendants to decline to produce discovery on grounds of relevance, thereby imposing costs and delays on the plaintiffs, even if the discovery is ruled to be relevant by the court.[175] Opponents argue that the proposed abrogation of

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163 LCJ, cmt. 0267.

164 Zimmer, cmt. 1324.

165 Fannie Mae, cmt. 1360.

166 DOJ, cmt. 0459. DOJ explains that even though it vigorously opposed the 2000 amendment to the rule changing the scope of discovery from the "subject matter" to the claims and defenses, "the explosion of information resulting from new technology and the resulting prominence of electronic discovery" and intervening developments in civil litigation have convinced DOJ that eliminating discovery relevant to the "subject matter" is "a reasonable decision."

167 Cohen, cmt. 2174; LCJ, cmt. 0267.

168 LCJ, cmt. 0267.

169 Sedona WG1, cmt. 0346.

170 Burbank, cmt. 0729; Miller, cmt. 0386; Scheindlin, cmt. 0398; Hershkoff, cmt. 0622.

171 Miller, cmt. 0386; Advisory Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, cmt. 0355; Scheindlin, cmt. 0398; NASCAT Supp., cmt. 0417; Hershkoff, cmt. 0622.

172 Hershkoff, cmt. 0622.

173 NASCAT Supp., cmt. 0417; Federal Magistrate Judges Ass'n, cmt. 0615; Miller, cmt. 0386.

174 Morrison, cmt. 0383; Miller, cmt. 0386; Skalet, cmt. 2130; Hershkoff, cmt. 0622; Federal Magistrate Judges Ass'n, cmt. 0615. *See also* Thornburg, cmt. 0499.

175 Morrison, cmt. 0383; Miller, cmt. 0386; Hershkoff, cmt. 0622.

this language will result in fact pleading,[176] and will invite parties to file pleadings that go beyond the claims and defenses they are interested in pursuing.[177]

Opponents of this proposal also argue that it eliminates a tool necessary to address the problem of information asymmetry,[178] and will unreasonably preclude discovery of closely related claims where a plaintiff may not have sufficient evidence or information at the outset of the litigation to allege the alternative claim.[179] At least one comment argued that judges in complex matters, such as class actions, should retain the ability to permit discovery of relevant information needed to meet the standard for class certification.[180]

Suggested amendments

The Association of the Bar of the City of New York suggested that the Committee Note make clear that amendment of the pleadings should be freely given when justice so requires, in accordance with Rule 15, when information supporting new claims and defenses has been revealed in discovery.[181] Professor Alan Morrison suggests that the remaining text of the rule be amended to allow for discovery that "may be" relevant to a claim or defense of any party to reduce the ability of defendants to resist discovery, increase the ability of plaintiffs to obtain reasonable discovery, and relieve district judges from having to rule on relevance of every discovery request.[182]

C. Deleting "reasonably calculated" language

The penultimate sentence of Rule 26(b)(1) states: "Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This text has been a part of the rule since 1946, and was recently amended in 2000 to add the first word, "relevant," to make clear that only relevant information is discoverable. A proposed amendment to Rule 26(b)(1) deletes this sentence in its entirety, and replaces it with the following sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

The Advisory Committee's Report on the proposals says that "many cases continue to cite the 'reasonably calculated' language as though it defines the scope of discovery, and judges

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176 Comment of Michael Leizerman, AAJ Trucking Litigation Group, USC-RULES-CV-2013-0002-1651 (Feb. 15 2014).

177 NASCAT Supp., cmt. 0417.

178 Hershkoff, cmt. 0622.

179 *E.g.*, Seymour, cmt. 2209.

180 Comment of Lyndsey Marcelino, National Center for Youth Law, USC-RULES-CV-2013-0002-0292 (Oct. 15, 2013).

181 Ass'n of the Bar of the City of New York, cmt. 1054.

182 Morrison, cmt. 0383.

often hear lawyers argue that this sentence sets a broad standard for appropriate discovery."[183] The Committee Note states that

> Discovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence.

The Advisory Committee's proposed new language is intended to carry forward the purpose of allowing discovery of inadmissible but relevant (and now-proportional) information, but also "overcome the inertia that has thwarted this purpose."[184]

More than 400 separate written comments supported or opposed this specific proposal. They were about evenly divided. About 20 witnesses addressed this specific proposal in their testimony and the majority of them supported it. As with the two amendments to Rule 26(b)(1) discussed above, there was a divide between corporations, governments, their counsel and organizations who supported the proposal, and attorneys and organizations that represent individuals and small businesses against larger entities who opposed the proposal. A number of attorneys who represent both plaintiffs and defendants opposed this proposal, as did a slight majority of the uncategorized comments. The majority of judges and academics who commented on this proposal opposed it. Very few bar associations commented on this specific proposal, and they were about evenly divided. One bar group filed comments both in support of and opposing this proposal without explaining the reasons it changed its position.[185]

Many of those who support the proposed deletion of the "reasonably calculated" language say that it is too broad[186] and blame it for the "over-discovery problem"[187] or an "over-preservation" problem.[188] They argue that the sentence is the "tail wagging the dog," and leads to

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183 Proposed Amendments at 266.

184 *Id.*

185 *Compare* Comment of Vincent Chang, Federal Courts Committee of NYCLA, USC-RULES-CV-2013-0002-0139 (Mar. 25, 2013), *and* Federal Courts Committee of the NYCLA, cmt. 2072.

186 Testimony of Andrew B. Cooke, Flaherty Sensabaugh Bonasso PLLC, January Hearing, at 324; Comment of Robert Levy on behalf of 309 Companies, USC-RULES-CV-2013-0002-1269 (Feb. 14, 2014); Beisner, cmt. 0382.

187 Ford Motor Co., February Hearing, at 250; Altria, cmt. 0684; McCowan, November Hearing, at 9-10.

188 Pratt, January Hearing, at 29-30.

"fishing expeditions."[189] Many of those who support this amendment simply agree with the Advisory Committee's Report and restate it.[190]

Many of those who oppose this proposal understand the sentence with the "reasonably calculated" language to be the current standard for the scope of discovery.[191] Notably, the Department of Justice initially questioned why the Committee would propose to change this "long-standing and well-known aspect of the rule, which expresses an important principle defining the appropriate scope of discovery."[192] Others who opposed this proposal also question the purpose of the deletion of this language.[193] As with several of the other proposed amendments, the opponents assert that there is no documented problem with the current language of the rule.[194] They point out that there is no empirical evidence that the language has had the effect hypothesized by the Committee.[195] They argue that the assertions made by the Advisory Committee and by supporters of the proposed amendment simply ignore the text of the rule which limits discovery to relevant information.[196]

Many of those who oppose the deletion of this language argue that deleting the sentence and replacing it with a new one upends more than sixty years of legal precedent interpreting and applying this language,[197] and simply invites a more restrictive definition of the scope of discovery.[198] They criticize the language that the Committee proposes to replace the "reasonably calculated" language with, asserting that the proposed new sentence is vague and incapable of

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189 Testimony of Quentin Urquhart, International Association of Defense Counsel, January Hearing, at 137; DRI, cmt. 0404; Cohen, cmt. 2174.

190 IADC, cmt. 0390; DRI, cmt. 0404; Comment of Rita Maimbourg, Tucker Ellis LLP, USC-RULES-CV-2013-0002-1117 (Feb. 13, 2014); Philadelphia Bar, cmt. 0995; Ford Motor Co., February Hearing.

191 *See, e.g.*, Brown, cmt. 0934; Comment of Donald Slavik, AAJ Products Liability Section, USC-RULES-CV-2013-0002-0403 (Jan. 14, 2014); Comment of Gerald Acker, Michigan Association for Justice, USC-RULES-CV-2013-0002-0445 (Jan. 24 2014); Nomberg, cmt. 1023.

192 *See* DOJ Comment of Feb. 6, 2013, attached to cmt. 0459.

193 Miller, cmt. 0386; Zainey, cmt. 0657.

194 Hershkoff, cmt. 0622; *See also* 171 Professors, cmt. 2078.

195 Hershkoff, cmt. 0622; Scheindlin, cmt. 0398; Zainey, cmt. 0657; Comment of Patrick McArdle, Grossman Roth & Partridge, USC-RULES-CV-2013-0002-1524 (Feb. 14, 2014).

196 Hershkoff, cmt. 0622; Scheindlin, cmt. 0398.

197 O'Rourke, cmt. 0461; Zainey, cmt. 0657; Comment of Della Barnett, on behalf of Impact Fund and 5 other legal non-profit organizations, USC-RULES-CV-2013-0002-0244 (Feb. 28, 2013) (hereinafter "Impact Fund, et al."); AAJ, cmt. 0372. *See also* Comment of Texas RioGrande Legal Aid, Inc., et al., cmt. 1411 (stating that more than 9,400 federal court opinions discuss the interpretation of this language).

198 AAJ, cmt. 0372; AIEG, cmt. 0384.

principled application.[199] They assert that the proposed amendment would do nothing to assist the parties or the courts in avoiding and resolving discovery disputes,[200] and runs the risk of creating wasteful satellite litigation over the amendment's purpose and effect,[201] which would undermine the stated goal of reducing unnecessary costs and delays.[202]

The Equal Employment Opportunity Commission also opposes this proposed amendment because it the current text contains limiting language that does not appear in the sentence the Committee proposes to substitute for it. The proposed amendment eliminates a limitation on discovery of inadmissible information to information that could lead to admissible evidence. Without the "reasonably calculated" language, the EEOC argues, all inadmissible information would be discoverable as long as it is relevant, regardless of whether the discovery is reasonably calculated to lead to the discovery of admissible evidence.[203] At least one other organization echoed this concern.[204]

Suggested alternatives/amendments

A couple of attorneys at Cozen O'Connor suggested that an alternative would be to retain the "reasonably calculated" language, but highlight the fact that all discovery sought must be relevant. Thus the rule could be amended to provide "This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence."[205] The Department of Justice has suggested that language be added to the Committee Note to clarify that the deletion is not intended to alter the definition of relevant discovery.[206]

D. Removing language that describes types of discoverable information

Currently, the scope of discovery specifically includes discovery of "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who may know of any discoverable matter."[207] A proposal deletes this language from the rule. The Advisory Committee Report states that

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199 Comment of Jennifer Wagner, USC-RULES-CV-2013-0002-2039 (Feb. 18, 2014); West Virginia Ass'n for Justice, cmt. 1994.

200 Impact Fund, et al., cmt. 0244.

201 Hershkoff, cmt. 0622; Ollanick, cmt. 1164; Impact Fund, et al., cmt. 0244; AAJ, cmt. 0372.

202 Hershkoff, cmt. 0622.

203 Comment of P. David Lopez, U.S. Equal Employment Opportunity Commission, USC-RULES-CV-2013-0002-0146 (Mar. 4, 2013).

204 AAJ, cmt. 0372.

205 O'Rourke, cmt. 0461.

206 DOJ, cmt. 0459.

207 Fed. R. Civ. P. 26(b)(1).

"[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples."[208] There is no mention of this proposed amendment in the Committee Note accompanying the proposed text of Rule 26(b)(1) that was published in August 2013.

In comparison with the other proposed amendments to Rule 26(b)(1), this proposal generated very little commentary. Fewer than twenty written comments addressed this specific proposal. Only a handful of comments supported the proposal. A majority of the comments on this proposal opposed it. Two witnesses at the public hearings testified about this specific proposal, and both of them opposed it.

Comments filed in support of this proposal agree with the Committee's assessment that discovery of the information described is widely and routinely accepted in practice, and there is no need to include such details in the rule.[209] Other comments disagreed, saying that practitioners often do not find it manifest or obvious that a party can engage in discovery of meta-information.[210]

Those who oppose the proposal see no value in deleting this language,[211] and argue that its deletion will have unintended consequences. They are concerned that the deletion of this language will be interpreted by parties to litigation and courts as a substantive change that means this information is not discoverable under the proposed revised rule.[212] This concern was perhaps inadvertently supported by a couple of comments in favor of this proposal, which stated that this amendment will inhibit discovery on discovery,[213] and limit the burden of the producing party.[214] The concern expressed by opponents to the proposal was reinforced by other comments and

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208 Proposed Amendments at 266.

209 Ass'n of the Bar of the City of New York, cmt. 1054; Philadelphia Bar, cmt. 0995; NYS Bar Section, cmt. 0303.

210 Comment of Professor Andrew Pardieck, Southern Illinois Univ. School of Law, USC-RULES-CV-2013-0002-1930 (Feb. 18, 2014); Comment of Craig Ball, USC-RULES-CV-2013-0002-1700 (Feb. 16, 2014); Comment of Michael Harris, Collins McMahon & Harris PLLC, USC-RULES-CV-2013-0002-1945 (Feb. 18, 2014). Bays, January Hearing, at 288; Testimony of William F. Hamilton, Bryan Univ. & Univ. of Florida Law School, January Hearing, at 218-24.

211 Skalet, cmt. 2130; DOJ, cmt. 0459; Zainey, cmt. 0657; Comment of John Midgley, Columbia Legal Services, USC-RULES-CV-2013-0002-1594 (Feb. 14, 2014); Scheindlin, cmt. 0398.

212 Bays, January Hearing, at 288; Hamilton, January Hearing, at 223-24; Kelston, cmt. 1708; Comment of Cynthia Mitchell, Merkel & Cocke PA, USC-RULES-CV-2013-0002-2212 (Feb. 18, 2013); Skalet, cmt. 2130; Comment of Vicki Slater, Council of State Trial Lawyer Presidents, USC-RULES-CV-2013-0002-1690 (Feb. 16, 2014); Scheindlin, cmt. 0398.

213 Stella, cmt. 1585.

214 Federal Courts Committee of the NYCLA, cmt. 2072

testimony lamenting discovery on discovery, and arguing that it shouldn't be allowed.[215] Several comments argued that discovery on discovery, which may not be strictly relevant to the claims and defenses in an action, is essential.[216] They argue it would be a mistake to delete the only language in the rule that recognizes and protects the right to explore this information.[217]

Suggested amendments

A few of those who oppose the proposal asked that, if the amendment to the text of the rule goes forward, the Committee Note should be amended to include the explanation for its deletion from the Advisory Committee's Report.[218] Several comments that expressed support for the deletion of this language also suggest that the Committee Note be revised to explain that the deletion is not intended to be a substantive change, but is intended to simply remove clutter.[219]

III. Explicit Authorization of Cost Allocation in Protective Orders: Rule 26(c)(1)(B)

Another part of the "proportionality" proposals would amend Rule 26(c)(1)(B) to add "an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery."[220] The Advisory Committee's Report and the Committee Note recognize that this authority is included in the current Rule 26(c), and is being exercised with increasing frequency.[221] The amendment of the rule is intended "to forestall the temptation some parties may feel to contest this authority."[222] The Report also notes that the Advisory Committee will begin to focus on proposals to change the presumption that the responding party pays the costs of responding to discovery requests, but that it will be some time before it determines whether any broader recommendations might be made.[223]

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215 Testimony of Jeana M. Littrell, FedEx, November Hearing, at 16; Cooke, January Hearing, at 325-36; Behrens, cmt. 0314; Comment of Doug Lampe, Ford Motor Co., USC-RULES-CV-2013-0002-0343 (Nov. 22, 2013).

216 Ball, cmt. 1700; Kelston, cmt. 1708; Council of State Trial Lawyer Presidents, cmt. 1690; Scheindlin, cmt. 0398.

217 Ball, cmt. 1700; Pardieck, cmt. 1930.

218 DOJ, cmt. 0459; Hamilton, January Hearing, at 224; Kelston, cmt. 1708.

219 Bivens, et al., cmt. 0673; Ass'n of the Bar of the City of New York, cmt. 1054; NYS Bar Section, cmt. 0303.

220 Proposed Amendments, at 266.

221 *Id.* at 266, 298.

222 *Id.* at 298.

223 *Id.* at 266.

Almost 200 written comments specifically supported or opposed this proposal.[224] Of those comments, more than half of them opposed the proposal. Only six witnesses testified about this specific proposal, and all but one of them supported it.

As with the proposed addition of a "proportionality" requirement to the definition of the scope of discovery, the support for this proposal came largely from corporations, their legal counsel, and the organizations that represent their interests. Opposition to the proposal came largely from attorneys who represent individuals and small businesses against large entities, as well as plaintiffs' lawyers' associations, and uncategorized comments. Two federal judges voiced opposition to it, while the Federal Magistrate Judges Association supports it. Fewer than ten law professors commented on this specific proposal and a slight majority of them opposed it. Of the few bar associations to comment on this specific proposal, the majority of them supported it.

Some who support this amendment do so because they do not think it is a substantive change.[225] The Department of Justice supports the proposal. Even though it recognizes that the authority already exists, the Department asserts that "expressing the authority in the Rule will clarify any uncertainty."[226] Many of those who oppose the amendment argue that it is unnecessary. [227] They note that this authority is well-recognized by the courts, including the U.S. Supreme Court,[228] and that cost-shifting for discovery of ESI is already available under Rule 26(b)(2)(B).[229]

Those on both sides of this debate agree on one thing: they believe that the proposed amendment would encourage judges to use the authority to allocate costs more often. [230] Several

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224 This includes written comments that generally opposed amendments to Rule 26 without specifying which subsection(s) of Rule 26. A smaller number of comments actually discussed the proposed amendment to Rule 26(c)(2)(B) in any detail.

225 Philadelphia Bar, cmt. 0995.

226 DOJ, cmt. 0459.

227 Comment of Larry A. Tawwater, American Association for Justice, USC-RULES-CV-2013-0002-1461 (Feb. 14, 2014) (hereinafter "AAJ Supp."); NASCAT, cmt. 0173; Bays, cmt. 1614; Comment of Joseph Sellers, Cohen Milstein, USC-RULES-CV-2013-0002-0325 (Nov. 6, 2013); Comment of Joleen Youngers, Almanzar & Yungers PA, USC-RULES-CV-2013-0002-0154 (Mar. 1, 2013).

228 AAJ Supp., cmt. 1461.

229 NASCAT, cmt. 0173.

230 LCJ, cmt. 0267; Behrens, cmt. 0314; New York Law Department, et al., cmt. 1554; Cardinal Health, cmt. 1410; Comment of Erin Sheehan, American Intellectual Property Law Association, USC-RULES-CV-2013-0002-1990 (Feb. 18, 2014); Comment of Daniel Pariser, et al., Arnold & Porter, USC-RULES-CV-2013-0002-1615 (Feb. 14, 2014); Bays, cmt. 1614; Sellers, cmt. 0325; Comment of Mark Morse, USC-RULES-CV-2013-0002-1432(Feb. 14, 2014).

comments expressed the belief that cost-shifting in discovery, which is not commonplace now, could become routine under this proposed amendment.[231]

Corporations and their counsel and organizations believe this is a good thing because it reduces the costs and burdens of discovery on parties who possess a lot of relevant information,[232] particularly in cases where the access to relevant information is asymmetrical, and thus the costs of discovery are asymmetrical. [233] They say it will "level the playing field."[234] One corporation said the proposed amendment to Rule 26(c)(1)(B) "may be the most important and have the greatest impact of all the proposed amendments to the Rules," if it is "properly and routinely applied by courts."[235] Several of those who support this proposed amendment see it as "an important first step" toward a "requester pays" system of discovery, which they strongly advocate.[236] Some supporters simply call this proposed amendment a "requester pays" rule.[237]

Those who oppose this proposal argue that it undermines the longstanding policy that the costs of production of discovery should be borne by the producing party.[238] They argue that its practical effect will be to invite a wave of new motion practice by parties and third-parties to re-allocate their discovery costs.[239] They argue that such additional motion practice, in itself, will unnecessarily delay production of discoverable information.[240] Some opponents argue that even before motion practice, the practical effect of the proposed amendment will be to encourage resistant responding parties to withhold discovery based on a proportionality objection under the proposed amendment to Rule 26(b)(1), and make discovery conditional on the payment of the

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231 Scheindlin, cmt. 0398; NASCAT, cmt. 0173; AAJ Supp., cmt. 1461; Allergan Inc., cmt. 0436; Seymour, cmt. 2209.

232 Comment of Wendy Curtis, Orrick Herrington & Sutcliffe LLP, USC-RULES-CV-2013-0002-0864 (Feb. 12, 2014); Sanofi, cmt. 0681.

233 Sanofi, cmt. 0681; Behrens, cmt. 0314; LCJ, cmt. 0267; Turner, cmt. 0450.

234 *E.g.*, Behrens, cmt. 0314.

235 Allergan Inc., cmt. 0436.

236 *See, e.g.*, LCJ, cmt. 0267, GlaxoSmithKline, cmt. 2128; Comment of Hon. Jon Kyl & Prof. E. Donald Elliott, USC-RULES-CV-2013-0002-0630 (Feb. 6. 2014); Comment of Linda Kelly, National Association of Manufacturers, USC-RULES-CV-2013-0002-1295 (Feb. 14, 2014); Comment of Michael J. Boorman, Huff Powel Bailey, USC-RULES-CV-2013-0002-2336 (Feb. 12, 2014). *See also* ILR, cmt. 0328; Comment of Melissa Kimmel, PhRMA, USC-RULES-CV-2013-0002-1213 (Feb. 13, 2015); Beisner, cmt. 0382.

237 Comment of David Zeilstra, Hub Group Inc., USC-RULES-CV-2013-0002-1266 (Feb. 12, 2014); Financial Services Institute, cmt. 1101; Testimony of Jon Kyl, Covington & Burling, January Hearing, at 48.

238 Thornburg, cmt. 0499.

239 NASCAT, cmt. 0173; Butterfield, cmt. 2034; Seymour, cmt. 2209.

240 Butterfield, cmt. 2034; Tennessee Ass'n for Justice, cmt. 1123.

costs of collecting, reviewing and producing the discovery by the requesting party.[241] Additionally, the opponents believe that the proposed amendment would incentivize responding parties to inflate their discovery costs in an effort to avoid producing relevant evidence.[242] They assert that stipulated protective orders will become a thing of the past,[243] and parties will not be able to get discovery unless they can pay for it.[244] They project that the end result will be that the courthouse doors will close to all but the wealthiest litigants.[245]

Suggested amendments

A few who supported this proposal also suggested additional amendments to the rule. Professor Morrison suggested that the Committee clarify that expenses should not be routinely assessed, but be available only where the losing party was unreasonable in either making an objection or pursuing a request.[246] A section of the New York State Bar Association urged the Committee to add text to the rule or to the Committee Note saying that the proposed amendment is not intended to alter the American rule on attorneys' fees and does not authorize the court to allocate attorneys' fees in connection with the disclosure of discovery.[247] In commenting on this proposed amendment, both the IAALS and the ACTL asserted that "[t]he cost of preserving, collecting, and reviewing ESI should generally be borne by the producing party, consistent with the historical approach in America."[248]

Some of those who opposed the proposal made similar suggestions to Professor Morrison's and the NYS Bar Association section. Several comments argued that cost-shifting should only be considered in exceptional circumstances,[249] and that exceptions to the rule that the producing party pays for the costs of discovery should be both narrow and clearly defined.[250] They suggest that any rule should contain restrictions and offer guidance about when such orders are appropriate.[251] Several comments suggested that language should be added to the rule text or to the Committee Note saying that "expenses" do not include attorneys' fees,[252] and that the

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241 Tennessee Ass'n for Justice, cmt. 1123; Seymour, cmt. 2209; Ollanick, cmt. 1164; Comment of Nimish Desai, USC-RULES-CV-2013-0002-1340 (Feb. 14, 2014).

242 NASCAT, cmt. 0173; Sellers, cmt. 0325.

243 Rossbach, cmt. 2216.

244 AAJ, cmt. 0372, Scheindlin, cmt. 0398; Ollanick, cmt. 1164.

245 AAJ, cmt. 0372; Seymour, cmt. 2209; Butterfield, cmt. 2034.

246 Morrison, cmt. 0383.

247 NYS Bar Section, cmt. 0303.

248 IAALS & ACTL, cmt. 0473.

249 *See, e.g.*, Bays, cmt. 1614.

250 Butterfield, cmt. 2034.

251 Butterfield, cmt. 2034.

252 AAJ Supp., cmt. 1461.

amendment does not change the presumption that the responding party bears the costs of producing discovery.[253] One comment suggested the addition of language to the rule that requires the consideration of the parties' relative resources and the intent of the party seeking a protective order before the court can re-allocate discovery costs.[254] Some argued that if any such language is added, the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources,[255] or should exempt certain types of cases altogether.[256]

On the other end of the spectrum, some of those who support the proposed amendment advocated adding examples to the Committee Note demonstrating when judges should use the authority to allocate costs of discovery to the requester, including when the requester "second-guesses an administrative agency" by suing over the safety of a drug or chemical regulated by the federal government, or presents "implausible claims or defenses."[257] There were also a couple of comments that asked the Committee to add preservation to Rule 26(c).[258]

IV. Reduced Time for Service: Rule 4(m)

The Advisory Committee proposed to revise Rule 4(m) to shorten the time to serve the summons and complaint from 120 days to 60 days. This would, in the Committee's words, "get the action moving in half the time."[259] This proposal responded, according to the Committee, "to the commonly expressed view that four months to serve the summons and complaint is too long."[260] Anticipating that, in certain cases, four months might not be long enough, the revised Rule retained language authorizing a court to extend the time if the plaintiff shows good cause for the failure to serve within the proposed 60-day period.[261] Also, the last sentence of the proposed Rule 4(m) indicated that it does not apply to service in a foreign country under 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A), which governs condemnation proceedings.[262]

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253 AAJ, cmt. 0372; AAJ Supp., cmt. 1461; Tennessee Ass'n for Justice, February Hearing, at 107.

254 AAJ Supp., cmt. 1461.

255 Sellers, cmt. 0325.

256 Comment of Francisco Rodriguez, New Jersey Association for Justice, USC-RULES-CV-2013-0002-1520 (Feb. 14, 2014); Comment of John Relman, Relman Dane & Colfax PLLC, USC-RULES-CV-2013-0002-1547 (Feb. 14, 2014).

257 Kyl & Elliott, cmt. 0630.

258 *See* Sedona WG1, cmt. 0346; LCJ Supp., cmt. 0540; Altria, cmt. 0684.

259 Proposed Amendments, at 261.

260 *Id*.

261 *See id*. at 282.

262 *Id*.

The Committee received more than 380 comments concerning this proposal. The public response was overwhelmingly opposed to the proposal: More than 350 comments opposed shortening the existing 120-day time period; only 30 favored the proposal.

Of the comments in opposition, 240 were submitted by plaintiffs' attorneys or organizations comprised primarily of plaintiffs' attorneys. The few members of the federal bench who commented on this specific proposal also opposed it, including a sitting federal district court judge, the Federal Magistrate Judges Association and Chief U.S. Magistrate Judge for the District of Idaho on behalf of the Local Rules Advisory Committee for the District of Idaho. There were also comments from a couple of attorneys or groups who represent defendants, as well as several comments from attorneys who represent both plaintiffs and defendants, and more than 90 uncategorized comments—all opposed to the proposal. In addition, a couple of bar associations, a couple of law professors, and several members of Congress also opposed the proposal.

The commentary opposing the proposal sounded a familiar theme: that a 60-day period for service was too short for certain categories of cases. Examples given included admiralty cases;[263] cases alleging fraudulent activity;[264] trucking litigation;[265] cases against foreign corporate entities;[266] cases against individuals who are difficult to locate or who evade service,[267] such as in tax enforcement cases;[268] cases in which there are multiple defendants;[269] and cases involving *pro se* plaintiffs or where the Marshal's Service is directed to accomplish service for *in forma pauperis* plaintiffs.[270] This commentary recognized that the proposed Rule permits additional time upon a showing of good cause, but lamented the increase in motions practice that would follow from a shortened time period. This increased motions practice, the commentary noted, would impose additional costs solely on plaintiffs.[271]

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263 *E.g.*, Comment of Charles D. Naylor, AAJ Admiralty Law Section, USC-RULES-CV-2013-0002-1210 (Feb. 14, 2014); Comment of Jonathan Gilzean, USC-RULES-CV-2013-0002-1937 (Feb. 18, 2014).

264 CFTC, cmt. 1366.

265 *E.g.*, AAJ Trucking Litigation Group, cmt. 1651, at 1-2; Comment of James Ludlow, USC-RULES-CV-2013-0002-1889 (Feb. 17, 2014).

266 AAJ Aviation Law Section, cmt. 0266.

267 CFTC, cmt. 1366; New York Law Department, et al., cmt. 1554.

268 *E.g.*, DOJ, cmt. 0459, at 5-6.

269 *Id.*

270 *E.g.*, Federal Magistrate Judges Ass'n, cmt. 0615; Comment of Catherine Carr, Community Legal Services, Inc., of Philadelphia, USC-RULES-CV-2013-0002-1357 (Feb. 14, 2014); Comment of Jeanette Zelhof, on behalf of LEAP, USC-RULES-CV-2013-0002-1512 (Feb. 14, 2014).

271 AAJ, cmt. 0372; Comment of Brian Murphy, USC-RULES-CV-2013-0002-1987 (Feb. 18, 2014).

Several of these comments, as well as comments by members of the judiciary, expressed the view that a 60-day time frame would not provide any commensurate benefit for the court or defendants,[272] and would not accomplish the Committee's goal of getting the action moving in half the time.[273] Relatedly, many questioned the Committee's statement that there exists a "commonly expressed view" that four months to serve the summons and complaint is too long.[274] For instance, one federal judge noted that this statement lacked any attribution, openly questioned whether there was any empirical support for it, and suggested that, in his view, the proposal would not move cases more quickly to trial but would increase costs.[275] Other commentary noted that shortening the time under Rule 4(m) would also shorten the time permitted under Rule 15(c)(1)(C) for notice of an action for purposes of relation back of an amendment adding or changing a party against whom a claim is made.[276]

The Department of Justice, though it recognized the Committee's concern with the current 120-day rule, nonetheless opposed the reduction, largely for the reasons expressed above. It did, however, add an additional point: that "an unintended consequence of shortening the 120-day period will be to discourage plaintiffs from attempting to use the Rule 4(d)(1)(F) and (d)(3) provisions for waiver of service—thereby inadvertently resulting in an increase in litigation-related costs."[277] This point was echoed by several other comments.[278]

Of the 30 comments favoring the proposal, half of them came from attorneys who represent defendants or organizations of defense counsel, while several others came from bar associations and a handful of plaintiffs' attorneys. These comments echoed the Committee's statement that four months to effect service is too long. According to this commentary, the reduction in time would not affect access to courts because courts could simply extend the time upon a showing of good cause.[279] This commentary did not identify any empirical support for the Committee's statement that the current time period is "too long."

While the Department of Justice recommended that the Committee not reduce the time period at all, it asked the Committee to consider, in the alternative, allowing for 90 days for

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272 Zainey, cmt. 0657.

273 Comment of Aleen R. Tiffany, Illinois Association of Defense Trial Counsel ("IDC"), USC-RULES-CV-2013-0002-1335 (Feb. 14, 2014).

274 *E.g.*, Morrison, cmt. 0383.

275 Zainey, cmt. 0657.

276 Morrison, cmt. 0383.

277 DOJ, cmt. 0459

278 *E.g.*, Comment of Perry Weitz, Weitz & Luxenberg, USC-RULES-CV-2013-0002-0278 (Sept. 17, 2013); Comment of Trevor Rockstad, AAJ Darvon/Darvocet Litigation Group, USC-RULES-CV-2013-0002-0297 (Oct. 24, 2013); Comment of Thomas Foley, Jr., Foley Law Firm, USC-RULES-CV-2013-0002-0682 (Feb. 7, 2014).

279 Federal Courts Committee of the NYCLA, cmt. 2072, at 4.

service.[280] The Federal Magistrate Judges Association also recommended that the time for service not be reduced to fewer than 90 days.[281] Some commenters argued that the Committee Note should be amended to explicitly state that extensions of time for "good cause" should be "liberally granted for the sake of better overall efficiency" and that the proposed change isn't intended to change courts' current discretion to grant extensions even absent good cause.[282]

V. Abrogation of Rule 84 and Most Official Forms

The Committee published a proposal to abrogate Rule 84 and most of the Official Forms. It offered several reasons for this proposal. First, it believed the forms were hardly ever used.[283] Second, it thought that updating the forms would take considerable work, and that there were many alternative sources for forms, including from the Administrative Office of the U.S. Courts.[284] Third, it thought the forms were in tension with emerging pleading standards, as discussed in two recent Supreme Court decisions, *Twombly v. Bell Atlantic*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).[285] Rewriting the forms, the Committee believed, would be a "precarious undertaking," and in any event, it thought such an undertaking might not be worthwhile if in fact few attorneys used the forms.[286]

Although few comments focused on this proposal, the comments filed were largely disapproving. By our count, the Committee received a total of 34 comments on the abrogation of the forms, with 26 opposed and 8 in favor. Several comments asserted that the forms still serve their original useful function[287] and argued that there was no benefit to discontinuing their inclusion now.[288] Attorneys who work with *pro se* litigants, and those litigants who are incarcerated argued that these litigants use and need the forms, and many of them do not have access to the internet to access other sources of example pleadings.[289] Several comments argued that forms available to litigants from alternative sources are not an adequate substitute because

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280 DOJ, cmt. 0459, at 6.

281 Federal Magistrate Judges Ass'n, cmt. 0615.

282 *E.g.*, NYS Bar Section, cmt. 0303.

283 Proposed Amendments, at 276.

284 *Id.*

285 *Id.* at 276-77.

286 *Id.* at 277.

287 IDC, cmt. 1335; Comment of Gwen D'Souza, Maryland Employment Lawyers Association, USC-RULES-CV-2013-0002-0660 (Feb. 7, 2014); Comment of Professor John Leubsdorf, Rutgers Law School, USC-RULES-CV-2013-0002-1219 (Feb. 13, 2014).

288 IDC, cmt. 1335.

289 Columbia Legal Services, cmt. 1594; Pennsylvania Institutional Law Project (1434); Comment of Arthur M. Read, Friends of Farmworkers, Inc., USC-RULES-CV-2013-0002-1560 (Feb. 14, 2014); Texas RioGrande Legal Aid, et al., cmt. 1411; Oppenheimer, cmt. 1307.

they are not necessarily legally sufficient.[290] Some argued that there is no pressing need to abrogate the forms now, and that the Committee should table the abrogation of Rule 84 and most of the Forms until a later date.[291]

Most focused on the abrogation of Form 11, which provides an authoritative example of a well-pleaded complaint under Rule 8. A handful of comments discussed Form 18 for patent litigation; at least one comment expressed the view that the existing Form 18 is problematic,[292] but another commentator thought any problems created by Form 18 were miniscule.[293] A few bar associations weighed in, with one noting its support,[294] and another noting that its membership was divided for and against.[295]

These simple totals, however, obscure the depth of opposition to the proposal, in particular from the academic community. For example, 109 legal academics joined Professor Jonathan Siegel's letter opposing the abrogation of Rule 84 and the forms.[296] And 171 law professors joined a letter filed by six other academics, which also opposed abrogation of Rule 84.[297]

These professors were highly critical of this proposal. Some professors argued that there was no empirical support for the Committee's statement that no one uses the forms.[298] Other professors contended that retaining official forms was worthwhile because the forms exist "to indicate to judges how simple and brief pleadings can be."[299] One professor indicated the forms were helpful to *pro se* litigants or novice practitioners, and that Rule 84 was among the very few rules that encouraged simplicity and brevity.[300] That same professor expressed the concern that,

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290 *E.g.*, Texas RioGrande Legal Aid, et al., cmt. 1411.

291 Comment of Prof. A. Benjamin Spencer, Washington & Lee Univ. School of Law, USC-RULES-CV-2013-0002-0453 (Jan. 27, 2014); Comment of Elise E. Singer, Fine Kaplan & Black RPC, USC-RULES-CV-2013-0002-0648 (Feb. 7, 2014).

292 *E.g.*, Washington Legal Foundation, cmt. 0285.

293 TTLA, February Hearing, at 163-64.

294 NYS Bar Section, cmt. 0303.

295 Philadelphia Bar, cmt. 0995.

296 Comment of Prof. Jonathan Siegel, on behalf of 110 Legal Academics, USC-RULES-CV-2013-0002-0493 (Jan. 31, 2014). *See also* Thornburg, cmt. 0499; Testimony of Prof. Brooke Coleman, Seattle Univ. School of Law, January Hearing, at 115-18; Testimony of Reda, February Hearing, at 354-55.

297 Hershkoff, cmt. 0622. One professor, however, agreed that the forms were outdated and had served their original purpose, but nonetheless thought they were useful reminders of how to interpret the pleading rules. Morrison, cmt. 0383.

298 Hershkoff, cmt. 0622.

299 Siegel, et al., cmt. 0493.

300 Spencer, cmt. 0453. *See also* Columbia Legal Services, cmt. 1594.

with so many proposals open to public comment at the same time, practitioners may not have understood the implications of abrogating the forms.[301]

The academic community, moreover, disagreed with the Committee's suggestion that abrogating the forms was somehow the best way to reconcile the existing forms with the pleading standards discussed in *Iqbal* and *Twobly*. One concern expressed was that abandoning the forms would foreclose reform of the pleading rules themselves, or would be viewed as a "stealth-like signal" that the Committee was approving *Iqbal* and *Twombly*.[302] Another, related concern was that any tension between the forms and pleading standards suggested not a problem with the forms, but with the Supreme Court's understanding of pleading standards.[303] A final concern, raised by Professor Brooke Coleman, was that abrogation of Rule 84 and the forms violates the Rules Enabling Act of 1934. According to Professor Coleman, because the forms are inextricably linked to the Rules, they cannot be eliminated or amended without making a change to the Rules to which they correspond.[304]

CONCLUSION

The proposed amendments to the Federal Rules of Civil Procedure generated more comments and more testimony than any previous set of proposed amendments, even those that were considered controversial at the time they were proposed. The commentary opposing the proposed amendments generally, and specifically opposing some of the proposed amendments that the Advisory Committee recommends be adopted, heavily outweighed the comments in support of the proposals. There was also a deep divide in the commentary, with corporations, their counsel and organizations that represent their interests, and governmental bodies largely supporting the proposed amendments, and virtually every other type of commenter, including current and former federal judges and a large number of legal academics, largely opposing the proposals. Very few cross-sectional bar associations weighed in on the proposals, and there was no consensus among the few that did.

The purpose of a notice and comment period is generally to guide policymakers on effects, data, expert opinions, and facts that may not have been considered in drafting new rules. Rules are changed only if the policymaking body concludes that its proposed solution will accomplish the goals or solve the problems identified. That task now falls to the Standing Committee and then the Judicial Conference of the United States.

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301 *Id.*

302 Miller, cmt. 0386.

303 Siegel, et al., cmt. 0493.

304 Coleman, January Hearing, at 118-24.