



Summary of the Preliminary Report on the Public Commentary on the Proposed Amendments to the Federal Rules of Civil Procedure (Corrected)

THE COMMENTS BY THE NUMBERS

More than 2,300 public comments were submitted, and more than 120 witnesses testified at three public hearings on the proposed amendments to Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and Appendix of Forms of the Federal Rules of Civil Procedure that were published on August 15, 2013. Attorneys at the Center for Constitutional Litigation, P.C. (“CCL”) attended all three public hearings, reviewed the transcripts, and reviewed all of the written comments 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. CCL is preparing a summary of the comments on the proposed amendments, which describes the substantive arguments and statements in support of and in opposition to the proposed amendments, separate from this document. Below is a brief summary of our estimates of the number of written comments and witnesses who testified, and which proposals they addressed.

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.

- 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. Fewer than 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, NY, Phoenix, Arizona, Chicago, Illinois & 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 they did not specify that the author represents plaintiffs, defendants, both, or that they are academics or judges, they were left uncategorized.

WHAT POSITIONS DID THE COMMENTS & WITNESSES TAKE?

General Comments

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

- Several hundred of these comment 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 even 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 added to the rule.
- This specific amendment was also opposed by 9 current and former 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 number of 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 vast 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.
- 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, and they 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 only 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 only 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.

- Fewer than 200 written comments addressed this specific proposal, and only 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 few bar associations to comment on this specific proposal.

Rules 30, 31, 33 & 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 only 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).

There was an unprecedented amount of written commentary and testimony on the proposed amendments to the Civil Rules, far surpassing the amount of commentary on previous controversial rules proposals. Most of the written commentary opposed most or all of the proposals, detailing the lack of empirical support for the changes drafted and questioning both their need and effectiveness in addressing the concerns that generated the draft amendments. The substance of the comments on the proposals will be summarized in the forthcoming Report on the Comments on Proposed Civil Rules Amendments.